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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE 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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ATTORNEYS FOR RESPONDENT

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where you were?

A On the four-lane of Number Eight.

Q All right. Did you turn around on the four-lane to Plum Branch and cut on back?

A No, I was already headed in a north direction. I turned onto Jefferson Street --

Q Okay.

A -- and turned onto Greenfield, and turned to 378.

Q And that was your route?

A Yes.

Q And went on out to Little River?

A Yes.

Q All right. And I reviewed, I think you got there a little ahead of everybody else?

A Actually, I was behind Melissa.

Q Is that a thing where maybe she didn't call in? The report seems to suggest that she got there I think a little after you, that you got there first?

A She was in the road in front of me.

Q Yes, sir.

A And I caught up with her.

Q Uh-huh.

A And then Deputy Moore caught up with me.

Q Now, why would it take three deputies to go down there? Why were all three of y'all going there?

A We weren't doing anything else, and that's our job.

Q All right. So there was no urgency to the point that you needed to send three. It was just there wasn't a whole lot going on at --

A There was nothing else going on.

Q -- 4:00 in the morning?

A Yes.

Q All right. So y'all get a call to go down to -- was it Presidential Drive?

A Yes.

Q All right. And how long have you known Joe Worley here?

A Till that night, I don't think I've ever seen him.

Q All right. And what about his mother, Ms. Barbara Worley, did you know her?

A I don't believe I did.

Q Or the father?

A Don't believe I did.

Q And during how many years -- you're not sure how many years you were here before you went to

Iraq?

A I want to say seven, but without checking the record, I wouldn't be a hundred percent sure.

Q You don't recall any calls down there to go check on Joe Worley or check on Mary Worley for disturbances, domestic violence, or any of that kind of stuff about him, do you?

A No, not particularly about him.

Q Are the people down there generally pretty good people on that area down there? Do you know Mr. Stevens? Do you know him?

A In Presidential Drive, in that area, I don't think I've ever had a call in that area.

Q Okay.

A Other areas of that subdivision, I have been on calls.

Q Okay. I believe the people that live around there is Mr. Herbert Anderson. Do you know the Andersons?

A I know of them.

Q Okay. And then Mr. Bill Stevens over at the Capital Bank in Greenwood, any of his family?

A I know of them.

Q Okay. The Worleys and, of course, then the Sheffields, is that correct?

A Yes.

Q So when you got there, did you have any reason to believe that based on history that that would be a problem to go down there, there may be a problem in going?

A That particular time of the year in McCormick County, I really and truly thought it was somebody shooting at the deer.

Q Okay. And you will agree with me that there are deer poachers in that area. I've had the pleasure of representing one of the neighbors up in where it's not been developed.

A I would not say in that area.

Q Right.

A I'd say this entire county.

Q The entire county, poachers are bad?

A Yes.

Q With spotlight, they use the lights and that kind of thing here?

A I've never caught one.

Q Okay.

A So I couldn't tell you what they were doing.

Q Y'all have a pretty active DNR here, don't you?

A Yes, we do.
Q Now, so that's what you kind of had in mind, that's probably what it was, somebody had shot at a deer?
A Yes.
Q Okay. It's not uncommon in that area for somebody --
A I'm not saying in that area. I have not ever responded in that area --
Q Okay.
A -- to a deer poaching, but it would not be unlikely.
Q Because right around that bank, isn't there some houses, and then it's probably about a mile of undeveloped just land right there before you get to the next development, right down that road?
A Probably.
Q Right there on the right as you're coming down, before you get to the houses.
A Right next to the granite sign.
Q There are probably four or five lots in there that are undeveloped?
A Yes.
Q Okay, all right. So after having got the call, you got there or Melissa got there, you got

there and then Nick Moore got there?

A We were all -- it's not like I got there five minutes before Melissa got there. Minutes -- I mean, we were there together. I could see her car, and I could see his car in my rear-view mirror. We were right there together.

Q I'm just saying y'all called in dispatch within about six minutes of each other. But you were there, so you got --

A I had no idea what time they called dispatch.

Q All right. So you get there, and who's in charge of the three of you?

A There was no supervisor over one of us. I've been doing it long enough, Nick's been in law enforcement long enough, we kind of know what we need to do.

Q Okay. And are you the -- would you be the senior officer there with experience, or who would be the senior officer?

A I'm not sure how many years Nick would have prior to coming to McCormick.

Q Do y'all have some type of chain of command circumstance, practice, or procedure that in these situations, if three officers arrive, who is

in charge and who is not?

A It's not a written rule. It's just a courtesy thing. The first officer on the scene is usually in charge of it.

Q All right. So if Melissa got there first, would she be in charge?

A Yes.

Q Okay. Was Melissa in charge of this situation?

A Melissa didn't get to the Worley residence first. I did.

Q Okay. So you got to the Worley residence first?

A I got to the property first.

Q Okay. And where did you pull your car?

A Behind a vehicle that was parked in the yard.

Q Behind a vehicle parked in the yard, okay. Where at?

A In the road.

Q In which direction was it pointing?

A Toward the lake.

Q Toward the lake. And what kind of car was it that you parked in front of?

A Some type of SUV. I couldn't tell you

exactly -- Ford or Toyota, I believe.

Q I've seen the photographs after that evening, and I don't recall seeing an SUV out there parked along the driveway or in the driveway of the Worleys' residence. What color was this SUV?

A I couldn't tell you.

Q Isn't it true that one of you actually pulled down into the Stevens' yard?

A Actually, there were two people pulled into the Stevens' yard, and I was not one of them.

Q All right. So we had two cars that pulled into the Stevens' yard?

A Yes.

Q Okay. And then where was your car at?

A In the Worleys' yard.

Q All right. And you say you parked behind an SUV?

A Yes.

Q And you don't recall the color of the SUV?

A No, I do not.

Q All right. So you parked -- why did you park behind -- in the Worleys' yard behind an SUV, and the other folks went over to the Stevens'?

A Melissa was in front of me. We were actually given the incorrect numerics, but we were

given the Worleys' last name.

Q Okay.

A And I saw on a piece of wood, driftwood or something, a piece of plank or wood or something, it had "Worley" written on it.

Q I've got you.

A And I immediately turned into that driveway.

Q She was ahead of you, so she went --

A She went past me.

Q I've got you. She drove past you. And those driveways, as I understand it, maybe have a little picket fence between the two?

A Further down, closer to the residence, they do. But up toward the front, I think there wasn't.

Q You don't recall there being a fence between the two?

A No, not toward the front of the driveways.

Q All right. So you say two cars went over there, and you went down there?

A Yes.

Q And then where did y'all meet up?

A Came around to the back of the residence -- of the Worley residence.

Q Okay.

A And I saw a figure in the -- later found to be the Sheffields' residence. And I walked over onto their property to talk to the complainant.

Q Did you tell that to the other two officers, that you were going to walk over there and talk with them?

A Yes.

Q All right. At that time, had y'all decided to try to set up any type of perimeter or anything like that on Mr. Worley's property -- or anything, any kind of practice or procedure to avoid a threat or anything like that?

A As I said earlier, I figured it was somebody shooting at a deer. There was no need for anything like that.

Q All right. You assumed that's what it was?

A I believed it would be something simple like that.

Q And if it were so simple as shooting at a fox, that wouldn't shock you either, would it?

A No, it would not.

Q Okay. Y'all have got a good bit of rabid foxes and raccoons and stuff like that found in

McCormick County year after year, don't you?
A Not that I'm aware of.
Q Really?
A There may be one or two cases, but it's not like an outbreak.
Q Have you read the actual reports?
A No.
Q Okay.
A But the ones that I've really looked at, there's maybe one or two cases a year.
Q Now, after you headed over to the Sheffields', is that correct?
A Yes.
Q Did you instruct the other two officers, Nick Moore and Melissa, what to do, or not?
A No, I didn't.
Q Okay. And because you were there on the Worley property first and although you were in command, you didn't tell them what to do or not to do?
A No.
Q All right. So who would -- they just did what they wanted to do?
A We did what we knew needed to be done.
Q All right. And what was that?

A I talked to the complaints. Deputy Moore went to the residence. They knocked on the door.

Q Okay.

A And Deputy McAllister stood between the two of us.

Q Okay. And there was no light on at the time?

A When Deputy Moore went to the residence, there was no light on in the front.

Q Okay. And while you were talking -- how long would you say you were at the Sheffields' talking to the Sheffields?

A No more than three minutes.

Q All right. And during that three minutes, did you say Moore across the road was knocking on the door and maybe ringing the bell, and maybe announcing "Sheriff's Office"?

A He was definitely announcing "Sheriff's Office."

Q Okay. And do you have any idea of the acoustics inside of that house as to whether or not if you're in that back bedroom, you could hear somebody announce "Sheriff's Office"?

A I wouldn't have a clue. I've never in the residence.

Q And nobody has done any type of acoustical study or anything like that you're aware of?

A Not that I'm aware of.

Q All right. Now, after Mr. Moore knocked on the door with Melissa between the two of you -- so she wasn't up there against the door. She was kind of at the back of the residence, kind of between the two of y'all?

A More of a line.

Q Okay. After that, what happened?

A A light came on in front of the residence -- well, Deputy Moore was walking back toward us so he got no response.

Q Okay.

A A light came on. I informed the Sheffields that they needed to go back inside while we talked with them.

Q Okay.

A As we were turning to walk toward the front of the residence, the light went out.

Q Okay.

A We got to the front of the residence, myself on one side of the door and Deputy Moore on the other side. Deputy McAllister stood off to the -- if you're looking at the lake, it would have been

the right side of the porch. And we were knocking.

Q And when you say "We were knocking," now, had all three of you gotten up to the corner of the house at that time?

A Yes, I was on one side of the front side of the front door. Deputy Moore was on the other side of the front door. Deputy McAllister was standing in the grass off to the right.

Q Okay.

A Myself and Deputy Moore were knocking and ringing the door bell.

Q Okay. Then what happened?

A Somebody yelled, "Who is it?" We informed them "the Sheriff's Department," and we heard "I don't give a fuck." I heard the sliding glass door opening.

Q Okay.

A I started walking backwards.

Q Okay.

A I saw your client, Mr. Worley, standing in front of the two windows.

Q The door windows, you mean?

A No, the windows.

Q Windows, okay.

A Coming out the sliding glass door, he had

went to his right.

Q Okay.

A I saw, standing like this, the metal, wood -- metal, wood -- immediately recognized it as a weapon.

Q Okay.

A I yelled "Gun." I'm pulling my gun. We're yelling "Sheriff's Department, drop the gun." The lights come in, and I hit the ground face first.

Q All right, let me ask you about this, the lights come in. Have you accounted for the flash of the gun? Obviously, a 30.06 at night is going to let out a pretty big light. Did you see the flash?

A Actually, I did not even hear it strike.

Q All right. So you didn't hear it or see the flash?

A No.

Q All right. How far did you get your gun up -- after you hollered "Gun -- Sheriff's Department," how far did you get your gun up towards Mr. Worley before you got hit?

A I couldn't tell you. It just happened so fast right then.

Q If we look at that --

A It was probably at least in this area

somewhere.

Q You would agree with me, just being a person who owns guns, weapons, and firearms, that in order for that bullet to hit you, that gun had to be pointed at Mr. Worley?

A It would have been somewhere in this area. As exactly if it was way up here or right here, I couldn't tell you exactly.

Q Did you have it on his body?

A I couldn't see him.

Q Why did you pull your gun if you couldn't see?

A Because he had a gun, we had already identified ourselves as Sheriff's Department, and he said he didn't give a fuck.

Q So why didn't you put up your hands and say, "Whoa, whoa, whoa, wait a minute. Wait a minute. Hey, calm down. Look, I see you've got a gun"?

A That would be like bringing empty hands to a gunfight.

Q Okay. So you considered it a gunfight?

A Once I saw the weapon.

Q Okay.

A And he had already said he didn't give a

fuck who we were.

Q Okay.

A It was time for me to go to my weapon.

Q All right. Let me ask you this question. You'd agree that you made prior inconsistent statements about what happened out there that night. You'd agree with that, wouldn't you?

A No.

Q Well, you would agree that after your wife did help give a statement about what happened after that night on the 20th of November, you also brought a lawsuit, and you made some claims in a lawsuit about negligence on Mr. Worley's part.

And in addition to that, when you the Solicitor's Office or Sheriff Reid had the Federal ATF look at it, you gave a statement to them, too, didn't you?

A I did speak with an ATF agent.

Q Well, the Solicitor's Office has provided me, of course, a copy of that. And if we go back through your statements, they're not consistent about what happened. Is that because you were in shock?

A At the time, I was actually shot?

Q Yes.

A I knew exactly what was going on. I realized that I had been hit, and I realized that I needed to get out of the line of fire.

Q Where were you standing when you were hit?

A In front of the residence.

Q Where at in front of the residence?

A Somewhere in the -- after going back out, it was a clean-out drain, I guess, for a septic tank and a cross-tie.

Q Is that where you really believe you were?

A Yes.

Q Do you have any idea how a piece of your gun butt or the gun that's broke off there was found right in front of the flower bed?

A I don't know what flower bed. Which one are you referring to?

Q If you're looking right out that sliding glass door, there's a flower bed right out there in front of it, 20 feet or so out.

A Where the rocks are at?

Q Uh-huh.

A I wouldn't doubt it was out there.

Q You wouldn't doubt that that's where you got shot?

A I would doubt that. I wouldn't doubt that

a piece of the gun flew that far away. He hit the whole side of my gun.

Q Okay. But it blew the gun out. It blew it into your hand, right?

A Not all of it.

Q I understand. Some of it or most of it went into your hand, a lot of it, didn't it?

A I have no idea.

Q Did you look at the evidence that was found at that big area, the eight-foot area of Bo Willis Road that was picked up by one of the officers out there that night?

A I've seen pieces of shrapnel and plastic and the bullets out of my gun.

Q Plastic from your gun?

A Yes.

Q Okay. How did all those get deposited in that area if you got shot over here in a different location?

A I'm going to look at the areas. I think you and I are talking about two different areas.

Q Well, you're talking about over at the cross-tie, right?

A The cross-tie to where the clean-out drains are.

Q Okay. There's two, there's a clean-out drain, there's a cross-tie in that drain, and then there's the bushes in the little flower bed.

A I was standing in the area of the cross-tie and clean-out drain.

Q Okay. After getting shot, did you turn around? Did it spin you around?

A It knocked me flat on my face.

Q Okay. Did it spin you there?

A Yes.

Q You were on your face, so you were down for a second or so?

A Yes.

Q All right. Do you agree with me that if Mr. Worley had intended to kill you, he would have killed you right there on the spot?

A No, I do not agree with that.

Q Why couldn't he have killed you right there on the spot? Why couldn't he have killed you if he's got an automatic loaded rifle, he's got another one, and it's an automatic?

A He obviously didn't know the safety was out on the gun.

Q Well, obviously, the safety was off when he shot you. He didn't have to change the safety in

order to get another loaded, did he?

A And I was face-down on the ground. He may have thought I was dead. I don't know what was going through his mind.

Q All right. Then you got up. One report says you said you were crawling, and another report says you were running. Which was it?

A My report said I was crawling?

Q Yes, sir. Yes, sir, the one you gave to the federal investigator. Do you recall that?

A Maybe like crawl back on my hands and knees, but actually crawling off, no.

Q Okay.

A I yelled I had been hit, because I realized I had been shot.

Q You had been hit, okay. You yelled that "I've been hit."

A And Deputy Moore yelled to me to come to him.

Q Okay. And where was Deputy Moore at that time?

A Right at the -- he was almost up under the opposite side.

Q Okay. And in order to come towards Moore, you agree you had to also come towards Mr. Worley?

A Yes.

Q So you came toward Mr. Worley again, and he fired another shot, didn't he?

A There was a shot fired as I was running. I don't know if he was shooting toward myself or one of the other deputies.

Q You do agree you were running?

A Oh, I most definitely was running for my life.

Q I understand. And the bullet, where did the bullet hit, do you know?

A I have no idea.

Q It didn't hit you?

A No.

Q All right. And from where Joe was, how could you see any other officers there?

A Deputy Moore saw him.

Q I understand Deputy Moore saw him. I understand that's what Deputy Moore might say. But did Deputy Moore have his gun on Joe?

A He had drawn his weapon, I do know that.

Q If he had his gun on Joe, wouldn't it be procedure to shoot him if he shot you?

A Depends on if he had a fair shot. There was a by-standing person. And if there were

bystanders in the background, he did not know what was back there.

Q So it was okay for him to let you get shot?

A I didn't say that. But I realize with my job, that I may have to give my life to do the duty of my job, and I will do it.

Q Okay.

A And other deputy says the same thing.

Q All right. Let me ask you this. Did you have the right to go ahead and shoot Mr. Worley when he didn't put his gun down?

A I did not see his weapon pointed in my direction because the lights came on and blinded me.

Q Well, when you did see it, where was it?

A I did not see his weapon pointed toward me because the lights came on and blinded me. But as long as his weapon is not pointed toward myself or anyone else, I could not have shot him.

Q Where did the lights come from?

A I couldn't say.

Q Well, I just want to make sure I understand. There was one light on that was the spotlight that was on the porch, right?

A And it came on.

Q Did you see any other lights on in the house when you stepped out to see Mr. Worley?

A No, I did not.

Q You identified him. You said he had salt-and-pepper hair.

A I did not see any lights on inside the residence.

Q But even without that, you identified him as being a person with salt-and-pepper hair, a person who had a long gun in his hand, a gun you believed to be a shotgun.

A Yes, I did.

Q That's fine. But you said you saw the butt, and you saw the base of the gun.

A It was not like this. It was more like this.

Q Okay. This position, did you say?

A Right.

Q All right. And you clearly say in your report it was not pointed at you.

A No, it wasn't when I saw it.

Q And it was not pointed at any of the other officers.

A Not when I saw it.

Q All right. Now, how many seconds between

the time you say you saw it and you saw this light?

A There's no way to answer that.

Q Well, in your report, you said, "As I drew my gun and as I was blinded by the light, I was hit."

A Yes.

Q Well, isn't it true that when you aimed your gun at Mr. Worley, the flash that you saw that blinded you was the muzzle flash of that .06?

A If that had --

Q There was no light there.

A If that had been so, I would have seen the gun pointed in my direction.

Q Where was the light? Who cut on a light all of a sudden?

A I don't know, because I asked the other ones if there was a motion sensor there.

Q There wasn't.

A I didn't know if I walked in front of the motion sensor, maybe Deputy Moore, Deputy McAllister, one us walked in front of a motion sensor. I did not.

Q What light came on, then?

A The light on the corner. It's kind a -- like a bush there.

Q It was already on.
A No, it wasn't.
Q Which one are you talking about now -- the one facing the house around the back from the lake to the house. The one that was on is the one on the left. Are you saying now that the one on the right came on?
A No, I'm saying the one that would have been at the left top corner --
Q Yes, sir.
A -- was off, and then it came on.
Q I understand that.
A And that would be the only --
Q When you walked out there.
A No. I walked out because I heard a sliding glass door.
Q Okay.
A And I walked backwards.
Q Okay.
A I saw him standing -- if you were facing the lake, he would have been to the right side of the sliding glass doors. I saw the gun. We were yelling "Gun, Sheriff's Department, drop the gun." I'm coming up with my gun. The light comes on and blinds me -- or a light comes on and blinds me.

Q All right. But you don't know what light blinded you?

A Whatever light was in that corner right there. It was on his property.

Q It was already on, wasn't it?

A No.

Q Well, hold on. Are you trying to tell me, sir, that you were able to see -- I mean, all the other statements are that the light was on, and that's why they came back down there to knock on the door, the last time. The light had to be on.

A No, it didn't. It came on, and then it immediately turned back off.

Q Okay.

A We go to the residence. We hear someone yell from the upper level of the home, "Who is it?" "Sheriff's Department, Sheriff's Office." And his reply is, "I don't give a fuck."

Q Okay.

A I hear the sliding glass door open up.

Q Okay.

A I walk backwards. I see a man standing there with a gun. I yelled, "Gun." Nick Moore and I both are yelling, "Sheriff's Department, drop the gun." A light comes on and blinds me. I get shot.

Q You still haven't accounted for the muzzle flash. When did you see the muzzle flash?

A I did not see a muzzle flash.

Q Well, you know there was one there.

A I didn't see the bullet, but I know it was there.

Q Right, that's what I'm saying. You know that there was a muzzle flash.

A I may have -- the light was too bright and blinding me, and I didn't see it. I don't remember seeing the muzzle flash. I do not remember hearing the shot.

Q All right. I'm going to let you go through it. You've got a copy of your statement.

Gentlemen, that's Bates stamped pages 28 to 272.

Beg the Court's indulgence, Your Honor.

THE COURT: Yes, sir.

Q Officer Rushton, do you recognize that document?

A Yes, this is one that my wife typed shortly after I got out of the hospital.

Q Okay. And I believe that's the one dated 11/20/09?

A Yes.
Q And it was witnessed by Mr. Collier?
A Yes.
Q Okay. I'd like to go over this with you. Let's start to the point where -- about six, seven, or eight lines -- "I told Deputy McAllister."
A Okay.
Q Why don't you read each of those sentences, and let's talk about each one of them at a time.
A "I told Deputy McAllister I was going to speak with the neighbors to see if they were the complainants."
Q Did you do that?
A Yes.
Q All right, go ahead.
A "While speaking with the neighbors, they informed me that they were the ones that called and made the complaints."
Q Okay. You confirmed that with them, that they had called in the complaint.
A "They informed me that suspect comes up on Thursdays or Fridays, and he's always coming outside in the early morning hours, yelling and discharging what they believe to be a firearm."

Q Okay. So was it a deer situation at that point, or did you think --

A No.

Q So you thought he might be discharging a firearm on the weekends. Okay, go ahead.

A "At this time, I noticed that lights came on in front of the residence."

Q And whose residence are you speaking of then?

A The Worleys.

Q And which light are you talking about?

A It would have been somewhere in the front of the residence, facing the lake, because it's kind of a weird setup, the house.

Q And from where you were at, at the Sheffields, you could see that a light came on, correct?

A A light.

Q Go ahead.

A Okay. "As I was walking back, the light went off."

Q Okay.

A "I returned to the front right corner of the house with Deputies McAllister and Moore."

Q Okay.

A "Deputy Moore rang the doorbell and I announced, 'Sheriff's Department."

Q Go ahead. Is the light on at this time or off?

A It's off.

Q Go ahead.

A "A few seconds later, I heard what sounded like sliding glass doors open on the deck."

Q Go ahead.

A "As I was stepping back to see if anyone was coming out of the residence, I saw a middle-aged white male with salt-and-pepper hair and beard standing on the balcony, holding what I thought was a shotgun."

Q Okay.

A "I could clearly see the wooden stock and wooden arm of a weapon. At this time, it was not pointed at myself or the other deputies, but pointed upward."

Q All right, stop right there. Did you have a warrant for Mr. Worley?

A No.

Q Had a crime been committed in front of you?

A No.

Q Did Mr. Worley threaten to shoot you, or did he threaten to shoot any of the members of your team?

A No.

Q Did he threaten to shoot anybody in the house?

A Not that I knew of.

Q In some of your reports, you said you aimed your gun at him because he failed to obey your authority and your orders.

A I never said that part.

Q You didn't? At a bond hearing for Mr. Worley on Thursday, December 3, 2009, did you recall saying "As we yelled at him to drop the gun and that we were from the Sheriff's Department, his total disregard for our authority and safety, as well as his profanity laced responses, indicated that he had no intention of complying with our lawful demands in any way." Is that your statement?

A That's not saying he's doing it directly toward me. He was doing it in general toward law enforcement's authority.

Q Let me ask you this. Do you believe as a law enforcement officer you have authority to tell a man on his balcony at 4:00 in the morning, who you

say you identified yourself to, to order that he put down his gun?

A Four o'clock in the morning?

Q Yes, sir -- 4:30 in the morning.

A Or 4:30, more or less. He knew we were law enforcement officers. We identified ourselves, and he let us know he didn't care.

Q Suppose he didn't? Suppose he did, let's ask that? Suppose he did know you were law enforcement. Do you have authority to make a man, his house, order him to put his gun down at 4:30 in the morning, even if you are law enforcement?

A If he wasn't breaking the law, he wouldn't have a problem with it.

Q Okay. So that gave you the right to pull that pistol and point it at him to kill him, is that correct? Is that your position under the law?

A If he was pointing it or has a gun in my presence --

Q Yes, sir.

A -- I can pull my gun out to protect myself.

Q I've got no problem with you pulling your gun out. I've got a problem with you pointing it and aiming it at him. That's the problem I've got.

A We already had a complaint at the residence of discharging a weapon.

Q Okay.

A We had no idea if he had or had not committed a crime.

Q Okay. Don't you think you ought to do that before you threaten to kill by putting a loaded Glock 40-caliber duty weapon and point it in his face after telling him to drop his weapon?

A And he didn't drop the weapon. We didn't know what he was doing.

Q Suppose he just decided he didn't want to drop his weapon, he was in his house.

A Well, I'm not saying that he's --

Q I'm not going to stipulate that he heard you. But let's suppose for a minute. I want to know do you believe that you can tell a person to put down their gun in their own house at 4:30 in the morning.

If they don't drop their gun -- they're not pointing it at you, they've just got it up in the air like this -- have you got a right to make them drop it?

A Anybody would try to.

Q You've got the right to make him drop it

if he didn't want to, though?

A I can't make him drop it.

Q Okay. But you're going to go ahead and aim at his head and not even fire?

A And, yes, to protect myself.

Q Okay. And the entrance of that gun, the bullet, is pretty clear that you had it aimed right at him. You aren't going to aim it just in the air?

A It was in his general direction. But as I stated, I don't know exactly where I had it.

Q Now, let me ask you this question. In your lawsuit, you allege negligence?

A Right.

Q He made a mistake. You understand what I'm talking about? You're suing him for negligence that he made a mistake. Do you know the difference between a mistake and an intentional act?

A It was intentional.

Q It was intentional, it wasn't a mistake. Is that what you're telling me?

A We identified ourselves.

Q I'm asking you, was it a mistake? You allege in your lawsuit -- let me let you read that to me. In your lawsuit, paragraph 12 of your complaint -- I'm sorry, paragraph 11. Would you

review that for me? Would you read to us what paragraph 11 says?

A "That while the plaintiff, Robert E. Rushton, was investigating this reported disturbance, the defendant, Joe Ross Worley, suddenly and without prior warning fired two shots at the plaintiff, Robert E. Rushton, with a 30.06 rifle, with one of the shots striking him and badly injuring his right hand."

Q Okay. Is that the way it happened?

A He didn't warn me he was going to shoot me.

Q Okay. And did you warn him that you were going to aim the gun at him?

A I did not warn him.

Q Did you say, "If you don't put that gun down, I'm going to shoot you"?

A No, I did not.

Q So y'all didn't really have a whole lot of time to be talking. Once you said "Gun," according to the other officers, shot, bam.

A Yes.

Q Shot. As soon as you said "Gun," he shot you?

A I had a fraction of a second to get my gun

up.

Q Okay. You do agree that the heading for the first cause of action is "negligence as to defendant Joe Ross Worley," saying that it was negligence.

A Yes.

Q Which means accidentally. So you're not -- you don't agree with this complaint that he was reacting, that he didn't recognize you as an officer, thought you were something other than officer. You got shot as a result of your not having proper attire on to identify yourself with?

A I had my badge properly displayed.

Q All right. And you didn't have the badge like you've got it right there now, up on your shirt. It was down here on a belt, is that correct?

A Yes. But he could see my gun and see my badge.

Q How do you know that?

A I was right in front of him.

Q Had you begun to turn around?

A And I stepped toward him with hands out.

Q Did you turn around?

A I'm sorry.

Q Did you turn around to shoot?

A My gun?
Q Did you point? How do you shoot? Do you shoot square, or do you shoot at angle?
A I step back with my right leg.
Q Your body too, like this?
A No, it would have been bladed.
Q Bladed, okay. If you're bladed, where is your belt? Where is this? If you're bladed to him, where is your badge?
A My badge would have been pointing toward him, because I carried it the same place it is right now.
Q Well, is that where it was on your --
A Yes, I've always carried my badge right there.
Q Okay. Did you shoot him from this direction, from the right, or did you shoot him from the left?
A It would be my left that would have been pointing toward him. I dropped my leg backwards, and then I fired.
Q You shot this away -- to your left?
A I shot like this.
Q I notice you come up with both hands.
A Right.

Q Did you use both hands that night?
A I don't recall. I could have dropped my flashlight. I could have shined my flashlight.
Q Well, there's a different police procedure on that. Let me ask you while you're standing there about that. Let's talk about that just a moment. There are two ways to shoot when you've got a flashlight, is that correct? There are several ways it's been taught, but there's two ways you're supposed to shoot with a flashlight?
A Yes, ever which is more comfortable.
Q Which is more comfortable with you? Show me.
A I can shoot both ways.
Q Well, give me -- show the Court the ways to shoot with a --
A The different ways?
Q Yes, the different ways.
A Pull your flashlight out to one side.
Q With the other arm?
A Yes.
Q With the other arm pointing towards the subject?
A Yes.
Q Okay.

A Or a lot of officers prefer to shoot like this with the support from their left arm.

Q Okay. And it's possible that you dropped the flashlight?

A I dropped it that night, but, I mean --

Q It was dropped somewhere, is that right?

A Yes.

Q Do you know whether you dropped it before you were shot, or do you think you dropped it after you were shot?

A I don't know.

Q Okay. Now, when you talked to the -- let's go ahead and let's finish up your statement there. We want to get back to that. Talk to me a little bit about your statement there.

A It gives a description of Mr. Worley.

Q Now, yes, you got the description. Read that again. What did you say you saw?

A "I could clearly see the wooden stock and wooden arm of a weapon."

Q Go ahead.

A "At this time, it was not pointed at myself or the other deputies but went upward."

Q Okay.

A "I immediately yelled "Gun," letting the

other deputies know."

Q Okay.

A "Deputy Moore and myself ordered the suspect to put the gun down, or we would shoot."

Q Okay.

A Right.

Q Okay.

A "As we continued to yell, 'Put the gun down, Sheriff's Department,' I started to draw my duty weapon."

Q Okay.

A "The suspect moved, and I was blinded by the floodlights on the upper deck."

Q Let me ask you a question. Do you know now that your people sent people out there -- and you were out there as I understand -- an electrician, to see where he would have had to have been. He'd have to go inside the house to cuts the light on, wouldn't he?

A On the -- if he turned the lights on, yes, but I didn't see him turn the lights on.

Q How could another light have come on?

A Someone else could have turned it on.

Q Someone else could have turned it on.

A There was a -- his mother was there.

Q So now you're saying the mother turned the light on?
A I don't know who turned the lights on.
Q Go ahead and read on.
A "As it happened, I heard a gunshot and was hit in the right hand and was knocked to the ground."
Q As what happened? You wrote that.
A As I got shot?
Q Pardon?
A As I got shot?
Q I don't know. I'm asking out --
A That's when I heard a gunshot. It's in this here statement. I think I've already mentioned that.
Q In that one, you're saying that you heard it? Is it possible that you saw it -- saw the flash?
A I have played this night over in my head thousands of times.
Q Officer --
A I don't remember seeing the gunshot.
Q You don't remember seeing the gunshot?
A No, I didn't.
Q Go ahead, then.

A "I yelled that I had been hit. Deputy Moore started yelling at me to come to him. As I was getting off the ground and started running toward Deputy Moore, the suspect then discharged another round."

Q Okay.

A "Deputy Moore led me to the back of the residence, out of the line of fire. We then heard something that we thought was the suspect coming out of the residence. Deputy Moore then got me to the patrol car as Deputy McAllister covered us."

Q All right, thank you. Did you have an occasion to speak to a Bureau of Alcohol, Tobacco, and Firearms agent, Shawn Stallo, on June 9, 2010?

A I believe that was his name.

Q Tell me how that interview occurred.

A I believe -- I'm not real sure if the Solicitor's Office or Investigator Collier contacted me. But I spoke to the agent here at the courthouse about the incident.

Q About the incident?

A Yes.

Q And he's a federal officer?

A Yes.

Q You know the importance of giving a true

and correct statement to him?

A Yes.

Q All right. And if we go back through and we look at the statement that he says -- can we go down to the narrative where it gets to the point where it's talking about law, approaching the rear, go in the residence.

A Okay.

Q Let's kind of go through that and talk about the statement that you made there.

THE COURT: Before we get into this, let's take a break, if you don't mind.

During the break, you cannot discuss your testimony with anybody.

We'll be at ease for ten minutes.

(Whereupon, court was in recess, after which the following proceedings were had.)

THE COURT: All right, are both sides ready?

MR. GARRETT: Yes, sir.

THE COURT: You may continue.

Q Officer Rushton, we were reviewing the statement made by Officer Stallo. We'll pick up from there and talk about the section that goes "While approaching."

A "While approaching the rear of the Worley residence, Deputy Rushton could hear someone" --

THE COURT: Back up and talk into this mike.

A "While approaching the rear of the Worley residence, Deputy Rushton could hear someone walking on the second-story deck above. Deputy Rushton" --

THE COURT: Hold on.

Q Let me ask you this. Did you tell Officer Stallo that before you got to the back of the Worley residence that you heard someone walking on the second-story deck above before the door opened?

A I do not recall that. These are his words, not mine.

Q I understand. But this is a statement he said that in response to an interview, you essentially stated the following. Is that correct?

A Essentially?

Q Yes.

A But not word for word.
Q I understand. My question is, did you tell Stallo under any circumstances that Mr. Worley was already out on his deck when y'all got back to his house?
A No --
Q Did that happen or not?
A No, I did not.
Q All right. So if Stallo put that down there, that was a mistake?
A Yes, it was.
Q So that sentence is a mistake?
A Yes, it is.
Q All right, let's go on from there.
A "Deputy Rushton witnessed Worley walking on the second-story deck with a long gun in his hand. Deputy Rushton drew his firearm and yelled at Worley that he was from the Sheriff's Department."
Q All right, stop. Here he says -- did you tell Officer Stallo that you drew your gun and then yelled at Worley that you were from the Sheriff's Department?
A I do not recall saying that.
Q You were at this interview?
A Yes, I was. But as I said, these are his

words, not mine.

Q Okay.

A He was not in there dictating word for word what I said.

Q All right. And then Worley responded -- after you say "Rushton drew his firearm and yelled at Worley that he was from the Sheriff's Department, Worley responded 'I don't give a fuck.' Deputy Rushton became blinded by a floodlight shining from the back of Worley's residence." Is that true?

A No, he yelled "I don't give a fuck" prior to me ever seeing him. And the floodlights would have been -- like I said, when you come in off the driveway, that's actually the rear of the house. So the floodlights would have been by his house, toward the lake.

Q All right. And let's look at the next paragraph. Go ahead.

A "Deputy Rushton was trying to observe Worley and was suddenly shot in the hand, causing him to drop his duty weapon."

Q Is that true?

A Yes.

Q Okay, go ahead.

A "Deputy Rushton fell to the ground and

immediately heard a second shot but was not struck."

Q Go ahead.

A "Deputy Rushton then heard Worley yell, 'I'm going to get you, you son of a bitch.'"

Q Okay. I notice in your testimony in your earlier statement, you didn't say anything about all of that.

A About?

Q About this statement, "I'm going to get you, you son of a bitch."

A I may have not said that.

Q Sir?

A I may have not said it in the statement. That doesn't mean it's not true.

Q Did you tell Stallo that he made that statement when you described these events that happened, yes or no?

A I believe what was said was when we heard him coming out of the residence, he yelled, "Where you at, you son of a bitches?"

Q Okay, son of a bitches?

A Yes.

Q Where did you put that at? In which statement did you put that? I've got all of your statements. I've got your statement from the bond

hearing. I've got your lawsuit. I've got your written statement made by your wife. I've got this statement. I'm going to hand you those statements that you made. Do you have any other statements?

A It may have been omitted from the statement.

Q Okay. So you're wanting to add it today?

A I said it all along, except for it's apparently not in the statement. And not necessarily would it have been in a bond hearing statement. My attorneys planned the lawsuit and worded it for me.

Q Okay.

A And this statement is one that my wife did type for me.

Q Is the same thing about the son of a bitches in that?

A No, and it was omitted.

Q Okay.

A Not intentionally omitted.

Q Did you at any time prior to this hearing today move to identify or tell the Solicitor's Office or Sheriff Reid or Sperrier, the chief deputy over there, "Hey, man, I left some stuff out of that statement. You know, it was just five days after I

got shot. I need to go ahead and finish it"?

A I have the one that's -- the Solicitor's Office has a statement, but I did not realize it was not in this statement.

Q All right. So there are some statements out there that you informed the Solicitor's Office about that have not been provided to the defense. Is that what you're telling us?

A I have no idea what you were or were not provided.

Q Well, I've given you the three -- the four items that I have that are statements that were made by you, in your name.

A And apparently at some point you were informed --

Q What are you talking about?

A It says that.

Q Says what?

A Right here. So at some point, you did know about it.

Q That's at a different time.

A But you're saying you weren't informed, but you have this.

Q It doesn't say "son of a bitches." It says "son of a bitch."

A As I just said, this is his words, not mine.

Q Okay. So you told Officer Stallo that it was "son of a bitches," plural, meaning that he was going to get more than one person. Is that what you're telling me?

A It could have been "son of a bitch." I mean, I had just had my hand blown off.

Q Okay.

A I wasn't paying a whole lot of attention to his words.

Q I understand. But you understand words are important if you're under oath and you're making bogus statements.

A It could have "bitch," or it could have been "bitches."

Q All right.

A I'm really not sure.

Q All right.

MR. GARRETT: Can I mark this up as evidence, his statements, for purposes of this -- I'd like to put them all in as one exhibit.

THE COURT: Show it to the Solicitor.

MR. MYERS: No objection.

THE COURT: Mark that into evidence,

please.

COURT REPORTER: Defendant's Three A.

(Defendant's Exhibit Three A, Statements of R. E. Rushton; complaint letter 3/1/11 to Clerk of Court; summons letter 6/10/10 to Clerk of Court; answer filed 6/10/10, were marked for identification.)

Q Officer Rushton, have you had an opportunity to review the statements of the other officers who were with you that evening?

A I have briefly looked at them.

Q When did you do that?

A It's been a while that I actually sat down and read them.

Q Do you agree that there's a lot of inconsistencies between what you said in your statement and what the other officers who were there say in their statement about what happened?

A Yes, I'll agree that some things are not exactly the same.

Q Okay.

A But a different person's point of view, you're not going to get the same results.

Q If Nick Moore in his statement to Stallo basically says that when you pulled your gun, then

immediately there was a shot, and you fell - he says you say you pulled your gun, said "Sheriff's Office," and you fell. And there's not "Put the gun down," nothing about a gun, nothing about "Put the gun down." Do you have any idea why Nick Moore would say something different about what happened out there that night?

A. He could have been focusing his attention on something else. It's speculation. I can't --

Q Well, I mean, he's y'all's partner. He's your partner with you that night, right?

A When I yelled "Gun," he could have been focusing his attention on Mr. Worley at the time.

Q And if he says immediately a shot rang out?

A You'd have to ask him.

Q I want to talk to you just a little about procedures, if I can. Are all gun calls and shot fired calls -- are they always regarded as high-risk calls by police officers in your training?

A They should be, but they're not.

Q Was this?

A Initially, no.

Q Were you trained as an officer to avoid placing yourself in unnecessary danger on such

calls?

A You try not to place yourself in unnecessary danger, but at times, you can't help it.

Q You try to make sure everyone at the location knew that you were a police officer?

A There's no way that anyone there didn't hear us, we yelled so loud.

Q All right. Were you trained that unless shots were being fired first, seek information from the caller if at all possible?

A I did.

Q What information did you gather from the Shepherds?

A Shepherds?

Q I'm sorry, the Sheffields.

A With briefly speaking with them, that the Worleys, Joe in particular, would come up on Thursdays or Fridays. Apparently, he had done this quite a few times, gone out in the early morning hours, loud profanity, discharging the weapons. They had spoke with Ms. Worley's mother in attempts to get him to stop doing it, and they failed.

Q Okay. To your knowledge, did they ever speak with Joe directly about this?

A I have no idea.

Q And then did they tell you that on occasion back in September, they had notified law enforcement about the problem, about Mr. Worley?

A They did mention something about they had talked to a deputy before.

Q Okay. And do you have knowledge or did you look into it to see whether or not the deputy had actually talked with Mr. Worley?

A I don't believe he did.

Q Did you try to ask him, "Well, is the man mentally unstable?" or some problem with mental or drunk, just disorderly, or any of that stuff?

A No. Once we saw the lights come on at the front of the residence --

Q Okay.

A -- they were asked to go back inside their residence.

Q All right. Were you trying to maintain cover and not to expose yourself while involved with such calls approaching a house on a shots fired situation?

A There is a difference between concealment and cover.

Q Okay.

A And depending on the situation, different

situations dictate your actions.

Q Have you been trained both to conceal yourself and cover yourself under both scenarios?

A If possible.

Q If possible.

A At that particular time, it wasn't possible.

Q Why was it not possible?

A There was nothing there to hide behind.

Q Okay. Why didn't you ask dispatch to locate the Worleys by phone, call them, and ask Mr. Worley to step out and say that the deputies on scene would like to talk with him? Wouldn't that have been a lot safer?

A Also, if he had intentions of harming someone, we would make ourselves a target.

Q Do what?

A We had no idea, once we found out from the Sheffields that he had discharged weapons and things in the early morning hours or at night. I'm not going to call somebody and say, "Yes, I'm outside. Come shoot me."

Q Did you have any reason to believe that Joe Worley had anything police officers to shoot a police officer?

A I don't know.
Q I mean, do you have any evidence that he's crazy or he's involved in some kind of militia, or some kind of sovereignty group, or one of these gangs or something that has a problem with law enforcement?
A I have no proof that he doesn't, either.
Q Okay. So because you don't have any proof, you assume that he is. Is that what you're telling us?
A Not all the way.
Q So if there's anybody who doesn't do what you say -- "Drop that gun" -- you have a right to shoot them because you think they might be an anti-police person?
A Not necessarily.
Q Well, what is necessarily? Necessarily gives the right to shoot somebody on their own land.
A If he points the gun at me --
Q Okay.
A -- yes, I would have shot him.
Q He didn't do that, did he?
A Apparently, he did. I was shot.
Q Only after what?
A After I was blinded by the lights from his

balcony.

Q After what? What else transpired?

A He yelled out he didn't give a fuck about being the police.

Q What else transpired? You don't think that gun pointed at him had anything to do with it?

A Honestly, I think he was going to shoot me either way.

Q Well, where do you get that from?

A When we yelled "Sheriff's Department," he yelled "I don't give a fuck."

Q All right. So then why in the world did you go out there with somebody if you thought somebody was going to shoot you anyway?

A I had no idea that he was going to yell "I don't give a fuck" until I was there.

Q Well, you hadn't been exposed to him until after he said "I don't give a fuck," right?

A Right that second or a few seconds, two or three seconds.

Q All of this went done in about two seconds, didn't it?

A It was pretty fast.

Q It was real fast, wasn't it? And you yelled "Gun," and you pointed your gun at him. That

flash you saw was that .06 shoot?

A No.

Q Quickly. It wasn't any of this "Let's discuss it," like there should have been. It was just pulling the gun on him and pointing it at him, and you got shot.

Q Like I told you, the floodlights blinded me.

Q All right. So you didn't answer my question about why didn't you just call down there and talk with Ms. Worley or Joe Worley and check on it and just say, "Look, the neighbors are complaining about you shooting down there. Probably, just a deer. Probably somebody down there shooting. Look, you're waking up your neighbors. Don't do that, Joe. Cut that stuff out. Don't be doing that anymore."

A I have never done that on a shots fired call, and I never would.

Q All right. Then, as an alternative, couldn't you have put your patrol car well back from the house, turned on your emergency lights, spotlight, high beams, and asked Mr. Worley to step out where you could see him? In other words, get in your patrol car. You said you had this little mike

on?

A Yes.

Q Did you have one in your car?

A Yes.

Q Why couldn't you have pulled the vehicle on down around there, behind the vehicle, behind the block of the vehicle, got on the mike and said, "Mr. Worley" or "Joe Worley" or "Margaret Worley," "We're the police. We're here. We need both of you to come out. Just come out. I've got to talk to you"?

A That's one scenario.

Q You could have done that, couldn't you?

A That's one scenario, yes.

Q You could have done that, couldn't you?

A Yes.

Q You could have called them on the phone?

A Could have called the SWAT teams, too.

Q You could have.

A But that wasn't necessary, either.

Q But you didn't. As soon as he said "I don't give a fuck," if he really said that -- if he really said that -- then are you going to walk yourself into harm's way -- if somebody just said that?

A Yes, I did.

Q All right. And that's part of your training?

A I don't recall ever being told to do that, but I did do it.

Q Okay. Are you familiar with the terms cover and contact?

A Cover, contact, concealment -- yes, I'm very familiar with them.

Q Aren't you trained to keep cover behind the engine block of the patrol car.

A There's no way possible to get in my patrol car in front of that residence.

Q Well, once you heard somebody that sounded like you say, say "What you want?" and you say, "Police." And he says, "I don't give an 'f,'" you know, you're trying to say on one hand it doesn't sound like a bad situation. Why would you just dally outside there and expose yourself to that? I don't understand.

A Do you know how many times I've been cussed out by suspects?

Q Okay. And so this homeowner was a suspect that night?

A There were shots fired. The neighbors had concerns about safety.

Q Did you talk --

A I have no idea why he shot. It could have very well have been at a fox.

Q Okay.

A I do not know.

Q I know, I know. And I wish somehow I could fix it for all of us. Let me ask you about Ms. Sheffield. Let me ask you about her. Were there lights on, or did they come on when you and the other officers drove up there?

A I don't know. When I got out of the car and started walking toward the Worleys' residence, I looked over. I saw lights, what I believed to be a kitchen, and I saw movement.

Q All right. Weren't you trained to always try to get the suspect to come to you rather than you going to him, and isn't that the standard police procedure to never put yourself in an exposed position on a shots fired call?

A No, that's not true.

Q That's not true?

A No.

Q Well, how would you have done it differently? How were you trained to do it?

A I have -- like I said, I've played this

over in my head thousands of times. What we did that night, we did the correct way. I wouldn't change a thing.

Q Okay.

A I got shot. That's just way it is.

Q Okay. You wouldn't do anything different?

A I can't help I got shot. We did what we needed to do that night.

Q Now you've got a uniform that you didn't have that night?

A Your uniform doesn't give you your authority. Your badge does, which I had properly displayed.

Q Okay. Do you know that active shooter -- is or isn't it true that Mr. Worley wasn't an active shooter? Was he an active shooter?

A He fired some shots prior to us getting there.

Q Do you know what time?

A No, I do not.

Q Okay. So obviously, if you took all that time to ring the doorbell, he wasn't an active shooter, was he?

A He could have been preparing.

Q Well, what are you trained -- that

somebody that's got all the lights out, that had left the scene or y'all were almost leaving the scene until the light came on, that that person must be inside planning to shoot a police officer?

A Jus thought he went back to bed or something.

Q Pardon me?

A Kind of thought he probably went back to bed.

Q Okay. I mean, in theory, you could have just waited till the next morning and went down there and saw him after it turned the light of day, and knocked on the door and said, "Joe, what you doing," right?

A Yes. But the Sheffields I'm sure would have complained to the sheriff that we didn't respond to their complaints.

Q Well, you did a good job --

MR. MYERS: Your Honor, I have not objected but one time I believe on this witness. But I think we've gone far afield about what the statute requires. What the officers could or could not have done is just not relevant.

MR. GARRETT: Your Honor, I'll show that it is very relevant, if I may.

MR. MYERS: It's not relevant to the statute.

MR. GARRETT: May I explain to the Court how it is?

THE COURT: Yes, sir.

MR. GARRETT: Your Honor, under our statute, it clearly provides that the officer has to announce himself according to applicable law. Under applicable law, if there's no practices and procedures for the McCormick County Sheriff's Department, those applicable law was to the general law and to what he's trained at the Academy.

It's clear the procedure used this night in question was not proper procedure. And our next witness will demonstrate that. We believe that the applicable law section requires that police officers follow applicable law in order for them to get the exemption.

Our legislature is smart. Our legislature could have said very easily all a police officer has got to do is say "Police officer," period, and that would be the end of it. Instead, our legislature said, "No, the officer has to give that information that he's a police officer under applicable law."

So we believe that based on other jurisdictions -- Colorado, Georgia, Florida -- that that other law means that they have to follow proper procedure when they announce themselves.

MR. MYERS: I think -- I'm sorry.

THE COURT: Go ahead.

MR. MYERS: I think the applicable law is knock and announce. And knocking and announce, this officer said was done. And ringing and announcing, which is analogous with knocking.

THE COURT: Since this is such an unsettled situation in the law, I'm going to allow you to ask questions. I've been struggling for the last 30 minutes with a lot of the questions, wondering what they had to do with anything that's within my realm of inquiry.

MR. GARRETT: I'll connect it up, Judge, very shortly when I put up my expert.

THE COURT: No, you're not going to connect up the things I've been thinking about, because you've been asking him questions like "Why would so and so put down such and such?" You've been asking him why other people did things.

I don't -- it sounds like a deposition in large part, Mr. Garrett. But I'm

going to let you go ahead. Go ahead.

MR. GARRETT: Yes, sir.

EXAMINATION CONTINUED

BY MR. GARRETT:

Q Do you agree that an officer should make every effort to make sure that the homeowner knows that the officer is coming on their property?

A In certain circumstances.

Q I'm talking about this circumstance.

A I didn't want to be a target unnecessarily. I never did. But how else could I have done this other than -- I talked to the Sheffields. Deputy Moore went directly to the residence and started knocking and ringing the doorbell. That was trying to make contact with the residents.

Q So do you agree or not that you have to make every effort to make sure that the property owner on this property that you're on knows that you're there?

A Which we were trying to do.

Q Okay. And is it especially important late at night when people are asleep, weapons may be present, especially in rural areas.

A Which we were trying to make contact.

Q No, I'm talking about the deer situation.
A Right.
Q And do you have any idea why this man would have shot a police officer that night?
A Some people don't like police.
Q Okay. So you think that's why he shot you?
A No, I have no idea why he shot me.
Q All right. Are you familiar with the terms fatal funnel, killing zone?
A Yes.
Q Do you know what they mean?
A Yes.
Q Okay. How about tombstone courage?
A Yes.
Q Are you familiar with those terms?
A Yes.
Q What do they mean?
A Fatal funnel?
Q Yes, sir.
A It's when you're pretty much in a funnel. Pretty much, there's no way of surviving. Tombstone courage, there's only heroes and dead heroes.
Q Okay, killing zone?
A Yes.

Q What about rushing a bad call. Do you know what that is when you rush a bad call?

A Where I took my time when I went over to the Sheffields to gather intel before going to the residence?

Q No, I'm talking about running out there after the first time he said "I don't give a fuck" or whatever.

A I wasn't rushing that night.

Q Okay. At the time you were shot, isn't it true that you had been walking around a darkened house late at night, exposed with no cover, on a gun case?

A The cover was at the side of the house.

Q Okay.

A And then I had my flashlight.

Q And you left the cover?

A To go out to the scene.

Q Isn't that a dangerous, unnecessary thing to do, reckless?

A It depends on whose perspective you look at it.

Q I'm looking at yours.

A He could have shot through the floorboards, too.

Q Sir?

A He could have shot straight through the floor and hit us too, because we were directly under him.

Q I understand. But he didn't do that, did he?

A He could have.

Q I understand he could have, but he didn't, did he? And had you not exposed yourself, he wouldn't have gotten a shot on you?

A I don't know that.

THE COURT: All right. Explain to me how that has anything to do with what I'm trying to decide.

MR. GARRETT: All right, Your Honor, I will. His procedure, Your Honor, as to him stepping out recklessly is not proper police procedure. It's our position that when he announced and he committed to shoot my client or aim his gun at my client, my client had every right to self-defense.

If you will look at the Castle doctrine, our legislature has allowed under Castle doctrine to incorporate any other defenses which the defense may use, including self-defense, defense habitation, and any other defense, Your Honor.

And this section is dealing with the recklessness of him exposing himself to a situation that he didn't need to, improper police procedure.

THE COURT: Go ahead.

Q You would acknowledge that you were wearing a low visibility uniform, if at all?

A Those khaki pants were very visible.

Q Have you -- what happened to the pants and the shirt that you had?

A I believe EMS cut my shirt off, and when I was in the hospital, the nurses or who cut the pants off me. I have no idea where they ended up.

Q This light that you were using, is it standard issue?

A No, it is not.

Q All right. Who bought that light?

A The light was given to myself and a couple of other international police advisors.

Q All right. And that's the one that --

A Yes.

Q -- was left at the house, was yours?

A It was issued by the U.S. Department of State, international narcotics and law enforcement.

Q All right. And it's not one of those larger mag lights?

A No, it was not.

MR. GARRETT: Beg the Court's indulgence.

THE COURT: All right.

Q One other thing. Have you ever had a certificate of reinstatement signed by a Circuit Court Judge prior to your going to work that night?

A Not that I'm aware of.

Q Sir?

A Not that I am aware of.

Q You're sure you didn't take an oath of office, and you're sure you didn't sign one of those or have a Judge sign one of those certificates?

A Me personally have a Judge sign it? No, I did not.

Q You've never seen one?

A No.

MR. GARRETT: Beg the Court's indulgence.

Q I believe that's a certificate of appointment, I believe is the proper word -- certificate of appointment?

A I did not personally have anyone sign it.

Q Okay.

THE COURT: Questions for the witness?

MR. MYERS: Yes, sir.

CROSS-EXAMINATION

BY MR. MYERS:

Q Bobby, y'all got the call in the early morning hours, after 3:00 a.m.?

A Yes.

Q Somebody's shooting in our neighborhood?

A Yes.

Q Firing a gun?

A Yes.

Q Between 3:30 and 4:00 in the morning?

A Yes.

Q You get out there at four or a little after, is that right?

A Yes, sir.

Q You were out there with two other officers?

A Yes, sir.

Q One officer, Nick Moore, rings the doorbell, knocks on the door, and says "Sheriff's Department," "Sheriff's Office," "Sheriff's Department"?

A Yes, sir, he went to the door.

Q You ascertained who the complainants are and went over to talk with them next door?

A Yes, sir.

Q Then y'all come back. I think you said

the light came on and off when y'all were fixing to leave?

A Yes.

Q You went back to the front door?

A Deputy Moore actually was walking away from the door, coming toward Deputy McAllister and myself when the lights came on and then immediately went back off.

Q Again rang the doorbell, knocked, and said "Sheriff's Department" or "Sheriff's Office," is that right?

A Yes, sir, myself and Deputy Moore and McAllister went back to the residence. I know that I was announcing "Sheriff's Department" and Deputy Moore was announcing "Sheriff's Office." I did not hear what Deputy McAllister was saying.

Q Okay. And the defendant comes out on the front porch, and y'all yell "Sheriff's Department" again. He replies, "I don't give a blank."

A I don't know if he was on the front porch or just had the door cracked, but he did yell that. Yes, sir.

Q At any time, did you or any of the deputies try to forcefully enter that residence?

A No, sir.

Q Did you forcefully go into the residence?
A No, sir.
Q At any time, did y'all try to forcibly enter or enter the residence?
A No, sir.
Q I'm want to show you what's -- what is that?
A My oath of county and state officers.
THE COURT: I didn't hear what he said, I'm sorry.
A It's my oath for county and state officers.
Q And you signed this?
A Yes, sir, obviously I did, because this is my handwriting or my signature.
MR. MYERS: We offer this into evidence, Your Honor.
THE COURT: Any objection?
MR. GARRETT: I'd like to see it. I don't know what date it is. Your Honor, I'm going to object to this because it does comply with the statute.
I'd ask the Court to compare the statute with the language on the affirmation vis-à-vis the bond and oath that is required by Section

23-13-20 and would tell the Court that the document presented is just not in compliance.

THE COURT: It seems to me that goes to the weight of the issue, not the admissibility of the document.

MR. GARRETT: Yes, sir.

THE COURT: It's overruled. Mark this in. It's the one you already marked before.

COURT REPORTER: State's One A, Your Honor, in evidence.

THE COURT: All right.

(State's Exhibit Number One A, Oath for county officers, was received in evidence.)

Q State's One A, what's the name on it?

A Robert Edward Rushton.

Q What's your name?

A Robert Edward Rushton.

Q Appointed to what office?

A Deputy sheriff, McCormick County.

Q What address?

A It's Post Office Box 2036, McCormick, South Carolina.

Q Whose address is that?

A That is the post office box for McCormick

Sheriff's Department.

Q Term to expire?

A Pleasure of the sheriff.

COURT REPORTER: Do what?

MR. RUSHTON: Pleasure of the sheriff.

Q This is the oath for county and state officers from the Secretary of State's Office. It says, "State of South Carolina, County of McCormick, 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; that I will, to the best of my ability, discharge the duties hereof to preserve, protect, and defend the Constitution of this state and of the United States, so help me, God." It is sworn to, subscribed to, on November 2, 2009. Whose signature is that on the bottom of that?

A It would be my signature.

Q And who was your notary?

A At the time, it would have been the Clerk of Court, Catherine Butler.

Q And she was the McCormick County --

A Clerk of Court.

Q Does that mean you took the oath of office

when you came back from Iraq?

A I must have. I just did not recall doing it.

Q Thank you.

MR. MYERS: That's all I have.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. GARRETT:

Q You do agree that either you, Moore, or Melissa were under the roof area of the house?

A Deputy Moore and I were. Melissa, Deputy McAllister, was off to the side.

Q And so y'all were under an actual roof where a door was as well as under an area where the only entrance next to that house was while ringing the doorbell --

A I believe it was --

Q -- and knocking?

A -- it was the door and the garage door, the only two.

Q But under the roof?

A Balcony -- under the balcony. I guess the roof does protrude as far as the balcony does.

Q Do you agree that y'all were in a place under the eave or under the roof on the night in

question, you and Officer Moore?

A Yes, we were standing on the front porch.

THE COURT: Further questioning of the witness?

MR. MYERS: No, sir.

THE COURT: Thank you, sir. You may step down.

MR. GARRETT: Nothing further.

THE COURT: Call your next witness, please.

MR. GARRETT: We call Mr. Kirkham.

THE COURT: Come around here, please.

(Whereupon, the witness was sworn.)

CLERK OF COURT: Thank you.

THE COURT: Have a seat and tell us your name, please.

DR. KIRKHAM: Yes, Your Honor. My name is George Kirkham.

THE COURT: Do you need him to spell that?

COURT REPORTER: Your last name, please.

DR. KIRKHAM: K-I-R-K-H-A-M.

COURT REPORTER: Thank you, sir.

MR. GARRETT: May it please the Court?

THE COURT: Yes, sir.

GEORGE KIRKHAM, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Dr. Kirkham, would you tell us a bit about you and your background?

A Well, basically, I'm a criminologist. I am professor emeritus at the College of Criminology and Criminal Justice at Florida State University and a criminal justice consultant. I can tell you about my education and background, if you'd like.

Q Please do.

A I hold a bachelor's and master's degree in the field of criminology from California State University at San Jose, a doctorate in criminology from the University of California, Berkeley. I've worked over the years in most parts of the criminal justice system.

I've been a probation counselor. I have worked at a state prison, Salt Lake State Prison, as a prison counselor. And I have also been a law enforcement officer with four different agencies as part of their individual research.

Q You say you've been a police officer yourself?

A Police officer, deputy sheriff, and undercover agent as part of a research project for 14 years, along with my university career.

Q All right. And have you ever testified in a court of law before?

A Yes.

Q And how many times would you say you've testified?

A I would say I've been involved in some -- you're talking about police related cases?

Q Yes, sir.

A Some thousand police related cases throughout the course of the last 35 years, cases that involved police procedure and standards, which is my field.

Q Have you given opinions for both the State and the defense?

A Yes, I've given opinions before for plaintiff and defense in civil actions and prosecution and defense in criminal cases.

Q Has courts approved you in order to testify as an expert?

A Yes. I've been involved in cases very recently and for a number of years.

Q Are you a published author, as well?

A Yes, I've published a variety of things. Most importantly, under grants from the U.S. Department of Justice, I've authored a series of some 26 training videos for law enforcement officers that are in use for many years in all of the states, including South Carolina, and at the FBI Academy, as well.

Some of them are also used abroad. There are countries, for example, who train their policemen, police in the field, obviously.

Q Is it fair to say you teach the teachers?

A Well, I do try to, to the extent that I can. You know, over the last 18 years, I've gotten as close to their world as virtually some of my students who are police officers, to get out of the ivory tower and go through a police academy and get out on the streets.

I've done that initially full-time in a high-crime university area in Jacksonville and then subsequently part-time as a police officer with three different agencies and two different sheriff's departments. And it's -- you know, I had a whole different understanding of the police role before I left the ivory tower and got into it.

I was able to learn many more things and

have spent my entire professional career studying police procedure and standards, trying to make contributions to make the world safer and better for officers and citizens.

MR. GARRETT: Your Honor, I'd move at this time to qualify George Kirkham as an expert in the area of criminology.

THE COURT: Any voir dire?

MR. MYERS: No objection.

THE COURT: He is so recognized in that field.

MR. GARRETT: Thank you, Your Honor.

Q Doctor, have you had an opportunity to review this case file?

A Yes, I have.

Q All the documents that have been provided to the defense from the Solicitor's Office?

A Yes, a very extensive case file.

Q All right. And have you had an opportunity to review and synthesize that information?

A Yes.

Q Have you had an opportunity to go out to the site to see it?

A Yes, at nighttime, a very dark night, yes.

Q Have you had an opportunity to review the documents of statements, the crime scene photographs, the evidence?

A Yes, all of the statements, the photographs, all the evidence material, yes.

Q All right. Now, do you have an opinion based upon your review of all those documents as to whether or not the McCormick County Sheriff's Department, and specifically Officer Rushton, on the night question followed proper police procedure as a matter of the law in the sense that we're talking about --

MR. MYERS: Your Honor, I don't know what that means, as a matter of law. We're talking about policy and procedures. We're not talking about a matter of law. I'd ask that he be more specific.

MR. GARRETT: Your Honor --

THE COURT: Yes, sir.

MR. GARRETT: -- if I may?

THE COURT: Yes, sir.

Q You read in the paperwork that McCormick County provided us with a statement that they had no policies and procedures in effect for the officer, for the uniform, for the car, for anything. They have no policies and procedures for McCormick County

Sheriff's Department?

A Yes, I did.

Q All right. And there is no -- you tell me as an expert, if there's no policies and procedures that are in written form for a county sheriff's department, what do we default to, to find out where their true policy and procedures are?

A Well, it's important to have policies and procedures in written form so that everyone understands what they're all doing. And whether the department is small -- the average American police force has about ten officers -- or whether it's like LAPD or NYPD, there are some things that are not dealt with in the policies that are dealt with in training.

For example, I've trained at the South Carolina Law Enforcement Academy in the past. And those things, even in the absence of written policy, are very well covered in basic recruit training. These are very fundamental points that they follow, which in this case are the actions of the officer, particularly Deputy Rushton.

Q If there's no policy or procedure in effect then in McCormick County, where would we look to -- if we're trying to determine whether or not

someone acted in accordance with policies and procedures of South Carolina, where would we look?

A We could go to a number of places. Probably the most immediate place would be the South Carolina Law Enforcement Training Academy, which has an excellent curriculum and which incorporates some of the -- and has for some years -- some of the state-of-the-art training that is received all over the country, for example, the so-called street survival seminar.

It covers -- in fact, officers and deputies in South Carolina through the training academy are given I think 14 or 16 hours of credit for completing street survival training. So there are a lot of sources, including the International Association of Chiefs of Police, the FBI law enforcement training bulletins.

There are many, but these are all -- what this case is all about, with all due respect, is following fundamentals, the same way a pilot landing a plane follows basic standards in his profession or a surgeon getting arterial bleeding does certain things.

We're talking about basic standards, and they really go more to his training and the

absorption of that material than to written policies.

Q In addition to having read all of the statements that have been provided by the State -- and you just heard Officer Rushton's testimony concerning the foundation upon which decisions were made that evening?

A Right.

Q I'd like for you to begin at the beginning and tell the Court, if you would, where you see areas, if you see any, of fail to procedures.

A And I'll try to do that --

Q -- to practice procedures.

A I think what is important to do -- and I didn't understand this until I put on a uniform -- is to give the officer the benefit of the doubt.

MR. MYERS: I hate to interrupt, but I really can't understand you.

DR. KIRKHAM: I'm sorry.

A You tell me if my voice drops. I had a problem with it earlier. Looking at the whole scenario from square one, I mentioned that it's important -- it's difficult for people who have not walked in the shoes of a police officer to understand what they do.

And so when I look at something like this, I'm trying to be objective. I'm trying to give the police the benefit of the doubt. There are some things we don't know. There are things that happen on calls that are totally different than what you'd expect. So with that caveat, I'll try to do that.

Q Okay. And as we talked under the Castle doctrine, the first thing an officer is responsible to do or can do to be exempt from the protection of the Castle doctrine is the officer has to identify himself under applicable law.

A Now, again, I'm not a lawyer. I'm not a member of the bar anywhere. So I'm speaking to you as a specialist in police procedure in terms of what an officer has to do. But if you wanted me to go back, the best way to approach this is to start with the call and what you do on a call like that, if I may.

Q Okay. Why don't you pull that microphone up? We're all having difficulty hearing you.

A Okay. The first point is there are calls, and there are calls. The word "gun" defines this type of call. There were shots fired.

I've been on numbers of those kinds of calls. There are calls that come to us, we're just

in the area floating around. There are rave calls. They will usually go out with a warning or something, some significant notation that they're a serious call.

You don't know what you're getting. So the first consideration is, is it an active shooter? And by that we mean are shots being fired now, in which case you would have to do things you would not like to do.

You may have to expose yourself. You may take certain risks and do things that you couldn't do otherwise in a different situation.

But as this was not -- this didn't go out as an active shooter. It just went out as a report of a lot of disturbance, shots fired. And it remains -- and I'd like to emphasize that I've lived in rural areas myself, as well as metro areas.

It doesn't matter where the call goes out in this day and time. It's always a serious situation. So what do you do first? You get all the information from dispatch you can while you're going, and more is better than less when it comes to backup -- two cars, three cars is fine. If there's a supervisor on the road, they would probably monitor it, as well.

The first thing you do is you contact what we call the R people. You go out to the location of the R people, the complaining party. And no one -- in a situation like this, no one -- remember, we're dealing with night. It's night. We know -- this is very important because I've seen it.

We have many cases over the years where, sadly, law-abiding citizens were shot by officers, officers were shot by law-abiding citizens, and, saddest of all, friendly fire where officers shot one another because they couldn't see, they didn't know what was going on.

So the first thing you have to do is to go from party to party and start -- always start asking the question if backup potential had been observed at a safe distance and not with approach. That violates fundamental officer safety principles the same way that pilots don't do certain things on approach, in violation of aviation procedures.

I represent to you that's the same in every state in the country. I've looked at training across the nation in this regard.

Q So in this case, are you saying, then, that that happened in this case, there was a breach of the fundamental approach?

A Yes, there was a breach of -- this is the first one, which is to go to the reporting party, the Sheffields, in this case. And before we put any officer -- there's always hazard to an officer in this role.

Before we put ourselves -- we know we don't have shots fired now. So what do we want to know? We want to know from these people, you know, what was happening. Does this person have any history of mental illness, for example, in relation to a mental hospital?

Did he drink, since this has happened before? Did he use drugs? Have you ever had any run-ins with him or know of anybody else that's had run-ins with him? And another big question is, what kind of gun -- do you know what kind of gun he's shooting?

I say that because -- you know, I own guns myself -- in rural areas, people commonly own more powerful weapons. And a rifle will go through -- you know, those ceramic inserts will go through like a knife through warm butter. So that's another question that would have helped.

Okay, so we know that. And they told us -- we'll just say it what the Sheffields have said.

"Well, he shoots from time to time." We don't know -- right now, we don't know as we stand here talking to the reporting party, is this just a guy who goes out and shoots his gun from time to time late at night, a little odd to be doing, or is he someone whose emotions are stirred.

Is he off his meds? Maybe he's on some antidepressant medication. Has he just killed his wife or his mother? You can watch TV any night of the week and see things like that happen. We know as a police officer these things happen.

So we know enough now to know it's high risk -- it's potentially a high-risk situation. And that's where all the training that, again, the South Carolina Law Enforcement Academy in its street survival and officer safety, and cover and contact -- the preference is always get them to come to us.

We want to take the situation on our terms. And what's the safest way? There's nothing mystical about this. It's very easy. Officers are trained what to be aware of.

What's the safest thing to do? The first thing you do is radio dispatch or call them on the cell phone if you have any radio problems out there and tell them to check the scene directory and to

find the Worleys' number -- and I know that they have a house phone out there that goes all through the house -- and to call them up and tell them the McCormick County Sheriff's Department is out here on a call and engage whoever comes to the phone in conversation.

"Who are you? We've got our deputies out. We're out here on a call about shots fired." They might say, "Well, I don't know what that's all about." We don't know exactly what their response may be.

If it's hang up, or it's expletives, then we know something else. Well, there's no down-side to making -- to having a dispatcher make that call or get us the number and we'll make the call, if they've got a cell -- probably the officers do have cells; I used my cell out there last night -- and then to call up and try to start some dialogue, to get Mr. Worley on the phone.

"Mr. Worley, we've got a problem out here. This is Officer So-and-So -- this is Bobby Rushton with the Sheriff's Department. We need for you to come and talk to us, okay?" And then what we're going to do is we're going to -- we don't want to surprise -- this is one of the tragedies; there are

statistics all over the country about it.

We don't want to surprise someone at night who's, you know, maybe asleep, has weapons in there, coming out of a foggy state of sleep, and it is so dark out there. I think the conditions I saw last night or back on that night, November 15, 2009, there was no moon at all.

It was just jet black, and I was concerned about spraining an ankle walking around out there. It was so dark. What we want to do then is, as we're trained in the Academy, from rookies on, patrol car visi-bar lights, we're going to turn on emergency lights, spotlights, if you have a spot on there, and go down there.

We immediately take position. We told him, "We want you to come out." We're going to very slowly approach the house. And the officer or officers are going to take a position to cover, which is between the door break -- the doors, as you were -- and the engine block of the car.

And if that person comes at you, we are behind a curtain of light. You heard the situation here, the testimony earlier about the spotlight, the deputy blinded by the spotlight.

It's the other way around. We want the

other person to be blinded by our headlights and our visi-bar lights, which also we've already had a phone call that said, "This is the Sheriff's Department." Knowing about emergency lights, the resident is knowing, you know, obviously we're law enforcement here.

And that is immediately. If we draw gunfire, we are in the best cover position we can. Or if someone begins shouting and cursing at us, now we now we've got a potential barricade situation. And I assume that they have a liaison with the State Police or their own SWAT unit. Then it's time to get to get SWAT and HNT, a hostage negotiation unit, out there and start dialogue with this guy.

So there would be every reason to expect from all the evidence I've seen that this man, as a criminologist having looked at his background, no reason I could see why he would shoot a police officer, that he would then come out.

We told him do not bring his weapon, come out empty-handed. Why do we have to do that? Well, it's important. We have a weapons call, and we explain to him "You need to come out with nothing in your hands." So I'm back there with my Glock, my old .22 or .23, and I'm braced in the door.

Other officers are out there in a cover position, whatever the be positioning cars as allowed by the driver. And he comes on around to us. We're behind the Great Divide. We see him.

Let's suppose, for example, that you couldn't raise him on the phone for whatever reason. There's no down-side to trying that. Then you use your head, same thing, cover and contact. We're not going to insert to this. We'll walk around the house under those kind of conditions, in darkness.

And it wouldn't matter what kind your car was, but the Sheriff's Department -- and I'm not criticizing your car, but it's somewhat dark and you actually apparently carried off waste in it.

I don't know why, with all due respect -- I've never known an officer, you know, working nights not to carry, and I never have carried anything but a light kind of like really a five-cell. You drop it off a ten-story building, and it's stable and puts out an enormous beam of light.

But you're not going to be out there walking around, because police officers die that way. You're exposed, you left cover, and there's no reason to do that. There's no reason to do that at all. There's no hurry.

We have no indication of a hostage situation. So we're going to try to get the person to come to us. And if he won't come out, then we're going to have another plan. But those are basic concepts, and these are things you heard as a rookie in the Academy and things that you should be keeping with you in any retraining over the years.

But all of the officers involved, you know, we have Moore and McAllister doing the same things. This is just -- this is not a safe way to handle a call. It's a tragedy for officers, and it was tragic for the officer who suffered a grievous wound, and for the homeowner, who may wind up shooting at someone who's there to serve and protect. So that's the long and short of it.

Q All right. You say that they are there to serve and protect. Are they there to serve and protect themselves, the neighbors, or who?

A Well, everybody. The highest priority is the public. We're there to serve and protect the public. And that's why I say -- and I've learned these things at the Academy, and I've learned them on the street, having been on calls like this many times -- that you can't help anyone if you get killed. And the worst thing, the greatest tragedy,

is that you wind up killing an innocent person unwittingly.

Q Based on what Officer Rushton said the Sheffields had to say and based upon their statements that are in the file that was provided, did you see any exigent circumstances that would require an officer -- that the Sheffields' safety was at risk at that moment?

A No, no. There was an exigent situation. And to try to give you a parallel, we're all familiar with a tragedy or some other issue. If you'd been an officer on the scene when Congressman Giffords was shot, you'd be in a really difficult position.

But you would have to rush, and you'd have to stop that active shooter, and you'd be risking hitting innocent people. That is a different situation. This is not an active shooter. It's a cold situation.

And so the safety mechanisms should kick in now. And safety says stay back, stay frosty, get some information. And I don't know exactly how much information from his testimony he had, but we've got enough to know gun, knife, private residence, shots fired.

We want that guy to come to us under our conditions, so let's try to hold of him. Let's try to call him. Let's try to P.A. him. And if won't respond to those things, now we know something else.

Q Let's suppose that the -- and I'm asking about training now. Let's suppose that the officer does not follow the rules, and he leaves cover and puts himself in a risky situation.

Suppose that the homeowner -- and would you agree with me that a homeowner should get the highest level of protection as far as a citizen?

A Yes, the highest reasonable level that an officer could provide, yes.

Q Okay. And if he leaves cover, and he finds that there is a citizen or a homeowner on the balcony, and he's got a gun, but it's not pointing at you, and he's not pointing at anybody else -- he's just letting you know he's got a gun -- does that give you the right to point to kill?

A It doesn't give you the right to shoot him. It is a definitely what we call a try and point situation. Same factors here, emphasizing that, again, you don't want to be in that situation.

It's not like an officer pulls somebody over, and they jump out of the car and start

shooting at him because he's got you pulled over for traffic. You know this is a bad call. You don't know what kind of -- what may be going on. There may be nothing.

But now what you've done is violated fundamental principles of cover and contact, basic procedures. You are now in the reverse situation that we want. You're now -- I can say this from having stood out there.

I'm a reasonably good shot with 20/20 corrected vision, and I do a lot of shooting with a Glock .23. And I aim my finger simulating what happened on that porch with what the deputy describes when that spotlight is on. I was totally blind, totally blind. And like I could not see.

I had people move. I couldn't tell if there was one or two people on the balcony. I had them point a five-foot broom, pressing out on different points and moving around. I could not see anything, just jet blackness.

So now I'm exposed, a deer in the headlights of a car. It's the worst situation. It's what the FBI law enforcement training bulletin calls a killing zone. You put yourself in a killing zone, and there is no reason to.

And obviously my concern is I want police officers to go home to their families. Officers die when they do this kind of thing.

Q All right.

A I know people do this.

Q And I guess the question is, are you trying to shoot somebody just because they've shown your their gun in the point position?

A No, you can't shoot -- let me emphasize. You're going to be in a ready position. You're going to be braced and pointed and ready to issue commands, "Police" or "Sheriff's Office, drop the gun, drop the gun."

You do that, and if there's any movement at all -- any movement at all -- toward you, you're going to shoot.

Q What if there's no movement?

A Well, here's the problem, from the deputy's testimony, is you can't see anything. I mean --

Q Well, the deputy says he saw the man standing there.

A Okay.

Q The deputy says he saw a sandy-haired man we'll describe as our client.

A Salt and pepper?

Q He said he saw a gun that appeared to be a long gun, a shotgun. He said he clearly could see the butt and could see the stock. And he could clearly see that it was pointed in a point position, forearm's position.

A Right.

Q Now, if the officer saw that, does the officer have a right to tell the person in his own yard, in his own house, on his balcony that he has to put his gun down?

A With all due respect, I think you're asking a question of law. I'm not familiar with South Carolina law. All I can think of is from a police procedure standpoint, it's a command. It's a point weapon command, drop your weapon. And then if things go black because a light comes in, you're in a hell of a fix.

Q Well, between you, if you put yourself in that position, and the homeowner who sees you aiming at him --

A Yes.

Q -- and who may not know you're a police officer.

A That would be --

Q Who wins? Who's supposed to shoot?

A Well, it's a homeowner. I can't be in the mind of anyone, Officer Rushton or Mr. Worley. But it's a homeowner, bearing in mind that people respond differently when they're asleep and they have --

Maybe some of you in here have had the experience of hearing a noise -- and I keep a gun by my bedside -- and reaching for it, but it's only a raccoon. You know, that's why it's so important, purpose and presence of the officer be announced, because if the homeowner sees somebody -- maybe he doesn't see them terribly well, because of their uniform, because of their physical position, because they're bladed in profile -- and sees that person --

You know, burglars carry little lights like that. Police officers don't usually carry them in the field on calls. Something like that, and sees them turning toward them with a gun, if I were a homeowner, I'd shoot that person.

Q So if the officer makes the mistake, puts himself in that position and he's got his gun in a firing position towards you, if you're the homeowner, you have a right to repel him?

A Any sense in that situation -- I mean,

anyone in that situation. But it's more than protecting your home. You've got your mother -- his mother is inside the house. She's probably scared. You would -- I mean, you would shoot in that situation.

You assume you're dealing with a burglar, a criminal, because there are so many ways for -- as we just talked about -- so many ways for law enforcement to make their purpose and presence quickly known with no risk to anybody. It really falls in the area of criminology we call victimology.

Q What does that mean?

A We talk about victim of genesis, a person who puts themself in a position to be victimized. I'm not really making any kind of comparison to the deputy's conduct. This is just by way of example.

The guy who slaps his wife around the kitchen and hands her a steak knife, he's drunk. He says, "Go ahead." That's victim participation. Police officers know better because we're trained better.

We know about certain things not to do. And nobody expects a law enforcement officer to have a crystal ball. But you don't need one in this

situation. It's so clear. I mean, we can see this in training over and over again, every state in the union, err in the direction of caution. Be safe, go home -- you know, do your job.

Q So had the officer done those things that you are saying he should have done that he would never have exposed himself to that situation?

A There is no reason. Somebody's got to -- if I take a knife to a child's throat or something, or somebody's about to commit suicide, the officer may have to -- may have to -- take chances. But this is not that kind of situation. It's a go slow, be careful situation.

Q If he had announced himself as a police officer -- let's assume that for a moment -- in this circumstance but he had not followed the proper procedure, has he really identified himself as a police officer at that time, as a police officer is supposed to identify himself as a police officer to a homeowner?

A Well, there's no question, there could be no question -- from the dispatch call, the visi-bar lights going on, the spotlight, the P.A. There's no question at all that these are the police.

In a situation like that, I have never in

my 35 years as a criminologist -- having worked a thousand incidents, I've never seen a situation of someone who opened fire on officers who was this type of person, that he's had no mental arrest history, no anger, no drugs, no alcohol, had no fight with the wife, hadn't just killed members of his family. Ordinary citizens don't do this kind of thing to police officers. It doesn't fit.

Q No motive?

A There's no motive, no mens rea, no.

MR. GARRETT: Beg the Court's indulgence.

THE COURT: Yes, sir.

Q After having reviewed the entire file and based upon training -- because there's no procedures that the county has, so based upon the South Carolina law enforcement training -- is it fair to say that at the time this officer identified himself, he was not acting in accordance with the procedures that he had been trained at the Academy?

A That is absolutely correct, yes.

Q And you talked about ways he could have done that, properly identified himself with a host of other things?

A Right. I mean no disrespect by this comment, but if you were making a training video for

officers, which I've done numbers of, you could use this tragedy in this case as a training video for why not to do this. You could test officers on it. This information is conveyed at the Academy frequently.

Q All right. And do you believe policy, the way everything came down that night --

MR. MYERS: Leading -- he's leading, Your Honor.

THE COURT: Very well.

Q Let me ask that as a hypothetical. Based on all the evidence that we've received into evidence, okay --

A Okay.

Q -- and that you've heard Rushton, and you've studied in this file, based upon the uniform and failure to identify, failure to use the lights, and the failure to phone call, and failure to use the speaker phone, and failure to get all the necessary information, failure to slow down and take time, the failure to keep yourself under cover, these actions by this officer do you believe to be unreasonable to a citizen who's watching this transpire in front of him, the parts that he doesn't know, it's reasonable to think that this is not an

officer?

A Yes, under the circumstances, it would be eminently reasonable in my view as a criminologist, having --

Q And if the individual homeowner --

THE COURT: Wait. Had you finished your answer?

A It would be eminently reasonable from my view as a criminologist, having evaluated many of these kinds of shooting situations, to not realize that they were law enforcement officers. All the circumstances, all the evidence and material, points to that. It would lead to that conclusion.

Q And therefore, if you really didn't believe and if it's reasonable not to believe that he was a law enforcement officer, and he's pointing a deadly gun at you, you've got a right to return fire?

A Yes. Under those conditions you would, yes.

Q Thank you. Please answer any questions for opposing counsel.

CROSS-EXAMINATION

BY MR. MYERS:

Q You reviewed all the material, Mr.

Kirkham?

A Yes, I have.

Q And you reviewed the neighbors' statements that the defendant had been out shooting on his porch before?

A The Sheffields' statements, yes.

Q And he was out there talking loudly --

A Yes.

Q -- and shooting a gun?

A Correct.

Q They didn't want to call the police, and they talked with the mother?

A That's correct.

Q It continued to happen, though?

A It happened, yes.

Q Finally, the night of this incident, they said that they couldn't it anymore, so they called the Sheriff's Department?

A I'm sorry?

Q The night of this incident, the neighbors said, "We had to call the Sheriff's Department," they couldn't take it?

A Yes.

Q And Mr. Sheffield from his house -- you know where his house is?

A Yes, I do.
Q It's a pretty good ways?
A Well--
Q A pretty good ways?
A Yes.
Q Mr. Sheffield, inside his house, he said he could hear the officers knocking and announcing they worked for the Sheriff's Department?
A That's what he says, yes.
Q And you reviewed the other two deputies' statements, Moore --
A And McAllister, yes.
Q -- and the lady?
A Yes.
Q And both of them said when they defendant came out, they yelled, "Sheriff's Department," and he said, "I don't give a blank"?
A That's correct. That's what they said.
Q Thank you.
THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. GARRETT:

Q Does that say that Mr. Worley was able to hear that in his double-insulated house?
A I'm not a building expert. I'm not an

acoustics expert. Were I to try to say what's audible at what decibel level in the night in that location, it's a fact question really. It's a jury question really.

Q All right. And there's nothing -- as it relates to what the Sheffields heard isn't what is important in this case?

A No, it's what -- what seems to be clear that could have prevented this tragedy from happening, proper police procedure. That's all.

Q And had we followed proper police procedures, there would not have been a shooting that night?

A No risk. It would be the same situation.

MR. GARRETT: Beg the Court's indulgence.

THE COURT: Yes, sir.

MR. GARRETT: That's all.

THE COURT: Recross?

MR. MYERS: No.

THE COURT: Thank you, Doctor. You can step down.

DR. KIRKHAM: Thank you, Your Honor.

THE COURT: How many more witnesses do you have?

MR. GARRETT: Plaintiff's case,

petitioner's case.

THE COURT: All right.

How many witnesses are you calling?

MR. MYERS: We don't have any witnesses, Your Honor. But we would like to put in the statements of Deputy Nicholas Moore and Deputy Melissa McAllister, statements of Mr. Allen Sheffield, statements of Gail Sheffield, and the statement of Sheriff Reid.

THE COURT: Wait. Is there an objection to that?

MR. GARRETT: Your Honor, I object to it.

MR. MYERS: Well, they -- they're allowed to put in statements.

MR. GARRETT: Your Honor --

MR. MYERS: In that pre-trial hearing, they said they put in witness statements. And this last witness says he relied on all that. So if he relied on all that, that makes it part of the record.

THE COURT: Mr. Garrett?

MR. GARRETT: Your Honor, I request permission to cross-examine those witnesses.

MR. MYERS: They've got the statements. And all I'm offering is the statements. And their

expert witness just relied on them.

MR. MYERS: They might be inconsistent. But the Supreme Court, filed May 9, 2011. They talk about the statements therein. They talk about the statements, 911 tapes, and other things that the State is allowed to introduce.

MR. GARRETT: We would obviously object.

MR. MYERS: And I get to put them in there. I didn't need to. You asked him if he relied on them.

THE COURT: Well, expert witness in the trial of that case. That's what was done in front of another judge.

MR. MYERS: Okay, we'll recall the doctor, Your Honor.

THE COURT: You want to recall him?

Doctor, will you come back up, please? You're still under oath.

DR. KIRKHAM: Yes, sir.

THE COURT: These statements are in that notebook that they handed up to me -- "they" being the petitioner or the plaintiff?

MR. GARRETT: They are not, Your Honor.

THE COURT: Okay. I don't know if we ever covered that issue. But they handed me a big

notebook and said that they wanted that to be part of the record. You all say they -- are you shaking your head at me?

MR. GARRETT: No, no, no.

THE COURT: Okay.

You are still under oath.

(Defendant's Exhibit Number Seven A, black notebook prepared by the defense, was marked for identification.)

RECALL EXAMINATION

BY MR. MYERS:

Q Doctor, this is the statement of Deputy Nicholas Moore, one of the guys that knocked on their door?

A Yes.

Q And you relied on that statement?

A Yes.

MR. MYERS: Your Honor, we'd offer this into evidence.

THE COURT: Any objection?

MR. GARRETT: No objection.

THE COURT: Mark it into evidence then, please.

MR. MYERS: And this statement, that's Deputy Nicholas Moore -- Nick Moore.

THE COURT: What else?

Q And then this was five pages of a handwritten statement and a typed statement of the female deputy, Ms. McAllister. Have you read that?

A I did.

MR. MYERS: I'd offer that into evidence.

THE COURT: Any objection to this?

MR. GARRETT: Your Honor?

THE COURT: Okay, go ahead and mark it in evidence.

Q And then also the neighbors, Dr. Kirkham, Alan Sheffield and Gail Sheffield, and Sheriff Reid?

A Yes.

MR. MYERS: We offer these, too, Your Honor.

THE COURT: Any objection to any of these?

MR. GARRETT: Subject to the prior objection.

MR. MYERS: We'll mark these all as one exhibit, Your Honor.

THE COURT: Mark those in the record, please, ma'am.

MR. MYERS: That's State's Number Two A.

(State's Exhibit Number Two A, 5 Statements, Moore, McAllister, Sheffield,

Sheffield, and Reid, were received in evidence.)

MR. MYERS: That's all I have.

THE COURT: All right, questions of the witness?

MR. GARRETT: No further questions.

THE COURT: Thank you, Doctor, you may step down.

All right, anything else from the State?

MR. MYERS: No, sir.

THE COURT: Anything from the defense?

MR. GARRETT: We call Mr. Sheffield to the stand.

THE COURT: Did you say Sheriff Reid?

MR. GARRETT: Sir?

THE COURT: Did you say Sheriff Reid?

MR. GARRETT: No, sir, I call Mr. Sheffield.

THE COURT: Sheffield?

MR. GARRETT: Mr. Alan Sheffield.

THE COURT: Mr. Sheffield, will you come around, please, sir?

(Whereupon, the witness was sworn.)

THE COURT: If you would state your name,

sir.

MR. SHEFFIELD: Yes, sir. My name is Alan Sheffield.

THE COURT: Wait.

Is your first name A-L-L-E-N?

MR. SHEFFIELD: A-L-A-N.

COURT REPORTER: A-L-A-N?

MR. SHEFFIELD: A-L-A-N.

THE COURT: Your last name?

MR. SHEFFIELD: S-H-E-F-F-I-E-L-D.

THE COURT: Thank you.

All right, Mr. Garrett.

MR. GARRETT: Thank you.

ALAN SHEFFIELD, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Mr. Sheffield, prior to November 15, 2005, have you ever seen Joe Worley with a gun in his hand?

A No, sir.

Q Had you ever heard shots fired at the lake out there?

A Yes.

Q And have you ever heard shots prior to

that fox out there on the Worleys' property?

A Yes.

Q How late would you say y'all have heard shots out there?

A I'm really not sure.

Q Okay. And on the prior occasion where -- was it you, or was it your wife that contacted law enforcement to express your concern about Joe Worley?

A That was my wife.

Q Did you participate in that interview?

A No, sir.

Q You didn't?

A No, sir.

Q And on that occasion, did you go over and speak to Joe about discharging a weapon, or getting loud, or anything like that?

A I did not speak to Joe, no.

Q And did you speak to his mother and tell his mother to tell Joe?

A I discussed it with his mother, yes, sir.

Q Do you have any knowledge whether or not Ms. Worley talked to him?

A She indicated some days later that she did.

Q All right. But you don't know that?
A I can just tell you what she told me.
Q Okay. But you don't know?
A No, I don't.
Q Okay. So do you know whether or not Officer Carmine (PH) -- I hope I'm pronouncing that right -- I believe he actually came out in September to speak with your wife. Were you there when he spoke to your wife?
A My wife actually went to the police station herself.
Q All right. And she spoke to Officer Carmine?
A I don't know.
Q All right. Do you know whether or not Officer Carmine thought it was necessary to go down to the Worley house to talk to Joe Worley about the alleged incident that happened in September?
A I believe my wife -- I expressed the concern that we didn't need that done, that we were going to try to handle it ourselves. She felt it was important to have it on record. That was her decision. I don't disagree.
Q Y'all moved into that house in 2006?
A Six, yes.

Q. Were y'all in real estate at one time? Is that right?

A. Yes, I was.

Q. At some point in time you had a very cordial relationship?

A. I had a pretty good relationship with him for a while. Well, maybe in '08.

Q. In '08.

A. Yes.

Q. All right. Y'all moved out there in '06. Do you have knowledge about the general makeup of that community in the four years before?

A. No.

Q. And had you ever made any complaints about them, or Joe, or anybody in the community at any time in the past?

A. No.

Q. None?

A. No.

Q. Okay. And after September, you made no complaints until this night, is that correct?

A. No complaints, that's correct.

Q. All right. And on this night -- have you ever been in the Worley house?

A. No, sir.

Q Did you ever have the pleasure of meeting Ms. Worley?
A Yes, I did.
Q And is he a well-educated man?
A Appeared to be.
Q A nice guy?
A Yes, he's a nice guy.
Q And he's proud of his house down there?
A That never came up in discussion.
Q Y'all didn't talk about that?
A It was mostly just the neighborhood.
Q You didn't talk about the features of double-insulated in the home?
A No.
Q Have you ever seen any wild dogs down there, any coyotes?
A I have not ever seen coyotes, no.
Q Seen any fox?
A Yes, sir.
Q And is it kind of common knowledge that there are fox around there?
A I don't recall any conversations about the fox, no.
Q But there are foxes down there?
A Sure.

Q What about Sweet Pea?

A Oh, yes. Yes, I've recently seen the cat when she was coming around outside.

Q They've got a cat named Sweet Pea?

A Correct.

Q And did you ever know that they were complaining the cat had gotten into a fight with a fox, or a coyote, or something?

A I knew that Sweet Pea had been hurt, but I don't recall any discussion about how that happened. No discussion about that.

Q So you wouldn't deny that there's been some problem with some type of wild varmints getting hold of Sweet Pea?

A I don't know that.

Q Okay. Now, on the night in question, you say you heard the officers knock and announce themselves, November 15th, is that correct?

A Correct.

Q Did you have your windows open?

A Yes.

Q So with the windows open, you would not be in a closed location; is that correct?

A That's true.

Q Now, I did go back and read your

statements, and one of the statements that you and your wife gave that there was a shot. And you actually saw the shot that hit Officer Rushton, correct?

A I saw Officer Rushton go down to the ground after a gunshot.

Q Okay. Well, how did you know it was a gunshot?

A It sounded like a gunshot.

Q It sounded like it?

A Yes, sir.

Q Did you see any flash?

A No.

Q In your position, could you see up on the balcony?

A No, sir.

Q How far out away from the deck would Officer Rushton have to be in order for you to see him being shot?

A Based on where that light is, if he's anywhere out from the side of the house, I would see him.

Q Okay. Out from the side of the house?

A Well, yes, that's where the light comes down. The spotlight comes down, and if he's

anywhere outside of there, if he's not under the deck, I can likely see him.

Q Did you look up to see whether or not he was pointing a gun?

A It happened too quickly. I could not tell whether Officer Rushton pulled his weapon or not. I was not expecting what happened.

Q So you don't know?

A No, I don't know.

Q And you don't know whether on the southern side of the house whether or not the Worleys (inaudible.)

A There's no way for me to know that.

Q No way to know that.

A Yes.

Q I found -- in your affidavit and in Ms. Sheffield's affidavit, I found three different times you -- and I'm not trying to hold you to it, I'm just wondering. But is it fair to say that the one report that you gave Officer Stallo is that it happened around 2:30 in the morning?

A I would say that's when it started, yes, around 2:30.

Q And there's another one, another report, where you say that it actually began about 3:30?

A I didn't realize that. It could be.
Q And then there's another one says around 3:15.
A I only made one statement.
Q Well, you made one statement to law enforcement, and then you made one to Officer Stallo.
A I didn't make that statement.
Q You didn't make any statement to the officer?
A I made one statement. The other statement from September was not made by me.
Q Who was it made by?
A My wife.
Q Oh, okay. I would assume your wife saw basically the same thing.
A I would assume so.
Q And as far as the timing, would it be fair to say you did not make a written statement as far as--.
A We did not discuss our statements. We did them at the same time, at the dinner table, with no discussion.
Q Okay. And on this particular night, you're not absolutely sure whether you heard one

shot?

A You're talking about before we called the police?

Q Yes.

A I'm absolutely certain it was two, yes.

Q And at the time of the shooting, how many shots did you hear?

A Two.

Q And according to your wife the shots down there--

A Honestly, I didn't really read my wife's statement very well. The shots where Officer Rushton got shot were within a couple of seconds of each other.

Q Okay.

A The time frame between the shots fired prior to this time was more in the term of 15 to 20 minutes between shots.

Q Your wife's statement says it was minutes minutes before the first shot and the second shot. Do you recall that?

MR. MYERS: I think he said that he hadn't read his wife's statement.

MR. GARRETT: Well, I'm just saying --

THE COURT: Are you abandoning your

question? I'm asking you, are you abandoning your question? Do I have to rule on that?

MR. GARRETT: No, you don't have to rule. I'll rephrase.

THE COURT: Go ahead.

MR. GARRETT: I'm sorry, Your Honor.

Q Officer Stallo said the statement was given by you and Gail Sheffield. Is that incorrect?

A The one in September?

Q There's one on July the 21st that's made to Shawn Stallo when he interviewed Alan and Gail Sheffield at their residence.

A All right, I'm honestly sorry. I forgot that one. I forgot what we were talking about. I thought we were referring to the other.

Q Is that correct?

A Yes, we were interviewed.

Q He said that you said?

A Again, those aren't our words, and that's not correct. It was not a few minutes. It was a few seconds.

Q Okay. This was an interview by Agent Shawn Stallo, July 21, 2010. It was at your house in McCormick, is that correct?

A Correct.

Q All right. Let's look at that. Let's go over that statement you gave when he interviewed you and tell me what parts you say that are not the truth. You can just go ahead and read it and tell us what parts are your statement and what parts are not your statement.

THE COURT: Let him read over it.

MR. GARRETT: Well --

Q What part do you disagree with as being your statement?

A A couple of minutes between shots, when Officer Rushton was shot.

Q A couple of minutes between the shots?

A Correct.

(The remainder of the testimony of this witness is not available.)

(The next available testimony is as follows.)

*****

THE COURT: I need a break. Let's take a break now.

(Whereupon, court was in recess after which the following proceedings were had:)

THE COURT: Do you all need Mr. Myers in here?

MR. MAYE: No, sir. He told me to go ahead.

THE COURT: Okay. Let's go ahead and tell the jury to be here at 2:00 tomorrow afternoon. If you all don't have anything else I can read, the stuff we can do, I'll hear it.

All right, you wanted to call another officer?

MR. GARRETT: We call Deputy Moore.

(Whereupon, the witness was sworn.)

THE COURT: All right, Mr. Garrett. I'm sorry, state your name.

MR. MOORE: Nicholas Moore.

NICHOLAS MOORE, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Deputy Moore, did you have an opportunity to talk to this Officer Stallo (PH) on Wednesday, July 21, 2010, about what happened at the Worley residence on that evening?

A Yes, I did.

Q Okay. Are you familiar with that?

A Yes, sir.

Q Why don't we pick up at the point where it says, "Deputies Rushton, Moore, and McAllister," about halfway down, "arrived at the incident location." Are you with me?

A Uh-huh.

Q "Deputy Rushton approached the complainant, Sheffield, while Deputy Moore knocked on the door of Worley's residence," is that correct?

A Yes, sir.

Q All right. And who was in charge of that operation? Were you in charge, was Rushton in charge, or was Melissa in charge?

A Well, nobody was really in charge. Law enforcement in general was out there.

Q Okay. So who was the senior-most deputy there?

A I would have been.

Q Okay. Were you wearing that outfit --

A Yes, I was.

Q -- or a similar outfit like that?

A Yes.

Q All right. And did you realize that Rushton did have a uniform on like that?

A Yes.

Q All right. And you would acknowledge that

he didn't have the badge on his shirt --

A Yes.

Q -- which is something that might have come later, is that correct?

A Yes.

Q All right. Next, it goes on to say that you knocked on the door for several minutes. You knocked on the door?

A Yes.

Q And was leaving when the top deck floodlights turned on, is that correct?

A Yes.

Q All right. So you had already left, and you and Melissa were heading towards the back of the building?

A Was leaving the --

Q The area.

A -- the area of the door.

Q Okay. And I'm assuming that Rushton was over there with the Sheffields?

A Yes.

Q And as y'all were all kind of meeting back up kind of where y'all split off behind the house to go to your various directions, the light came on?

A Yes.

Q So the light was on. Any question about the light being on?

A At what point?

Q At that time.

A No.

Q All right. Deputy Moore returned to the door and heard someone walking on the top deck above his head. Now, did you hear somebody on the deck before the door opened?

A No, the door was opened first.

Q All right. So you would have heard the door open, and then you would have heard somebody walking?

A Step out.

Q Okay, step out. And then Deputy Moore witnessed Deputy Rushton walked towards the top deck. Where was Deputy Rushton when you witnessed him walk towards the top deck?

A Out to my right.

Q All right. So let me make sure I understand you. You're right there. If this is the house -- counsel's desk is the house, okay -- you're to the right of the house?

A I'm standing right against the doorway --

Q All right. So you're outside the door.

A -- outside the house.
Q And so he would be in your general area. At that time, was he walking backwards?
A No, forward.
Q Did he walk towards the house?
A Yes.
Q Okay. So did he come -- I'm trying to figure out how he came to the house. Did he come to the house along with y'all, or did he come from a different direction?
A I do believe he came with me and then walked out to the edge of the woods --
Q Okay.
A -- and then started to walk -- maybe not really walk but take a step towards to where he could see what was going on, when the lights came on.
Q So you would agree from your position you couldn't see Joe up on his balcony?
A I could see his silhouette, I'll say.
Q Okay. But you couldn't see -- his silhouette? In other words, you could see his general outline?
A Yes, him and his general features.
Q Okay. And was the light still on?

A Yes, I do believe the light stayed on the whole time.

Q All right. So there wasn't a situation where the light cut off that blinded -- I mean, cut on that blinded Rushton?

A Not once he cut the light off the first time and then back on, he left it.

Q Well, when it's back on -- that's my point, Deputy Moore. You said you knocked on the door for several minutes and was leaving when the top deck floodlights turned on. In fact, it was only one light, isn't that correct?

A I don't recall. It lit up the whole front yard.

Q All right.

A You know, I didn't have time to look and count lights.

Q All right. And so you also didn't look to the other -- you weren't able to see the other end of the house to see whether that light came on?

A No, sir.

Q All right. And then you returned to the door and heard someone walking on the top deck above his head, is that correct?

A Yes.

Q "Deputy Moore returned to the door and heard someone walking at the top above his head, is that right? "Deputy Moore witnessed Rushton walk towards the top deck, heard Rushton yell at the person on the top deck 'Sheriff?s Office,' and then yell 'Gun.'"

A Yes.

Q "Deputy Moore next heard gunfire and saw Deputy Rushton fall to the ground."

A Yes.

Q You're telling this to a federal law enforcement officer, and you didn't say anything in there about "Who are y'all? What y'all want? You didn't say that in the statement, did you?

A No, sir.

Q You didn't say, "I don't give an f-u-c-k" -- you didn't say that either, did you?

A No, sir.

Q And you didn't say, "Put your gun down, put your gun down, put your gun down." Did you say that?

A No.

Q All right.

A He didn't put it in the statement here, but I don't know if I said it or not. So I would

guess I would say no.

Q Okay. I mean, it would be important for a United States elected official or ATF officer who's taking a statement -- not a sworn statement, but a statement and a summary of events -- to put down something like you put the guy on notice to put his gun down, would you agree?

A Uh-huh.

THE COURT: Say "yes" or "no," please.

A Yes, sir.

Q All right. So you took cover and yelled for Deputy Rushton to come to your location, is that correct?

A Yes.

Q Did you ever have your gun drawn and aimed at Joe Worley?

A I drew my gun, but I never took aim.

Q Okay. Is there any way Joe Worley could have seen you where you were?

A I can't -- I can't say.

Q Well, if you couldn't see him good enough to get aim on him -- I've walked out there. You've got to get way out there to the right side to be able to look up and see somebody up on that deck.

A He was on the porch. I never was. So I

can't say whether he could see me or not.

Q Okay. And what about Melissa? She says in her statements that she was always four or five feet to the back of you towards the trash can. Is that right?

A I guess so. I really don't know where she was at.

Q All right. I guess when the gunshot went off, did you see the muzzle flash?

A I don't recall.

Q When he hit the ground, how long was he on the ground?

A Two seconds.

Q Why didn't you shoot Joe?

A I didn't have a shot at him.

Q Okay. If you'd have had a shot at him?

A I'm not trained to shoot inside of a residence or toward a residence. There may be innocent people inside the residence.

Q Okay. And when did you decide that was your position?

A Immediately.

Q That was your training, okay. And then if Officer Rushton then had aimed his gun at Mr. Worley, what would be the intent of that aim?

A From who?
Q From Officer Rushton.
A I can't tell you what his intent was.
Q Okay. Then you heard another gunshot -- is that correct -- on your statement?
A Yes, there was a total of two gunshots.
Q Two gunshots. Now, is it possible that Joe could have shot him on the ground? Is there anything that would prohibit him from shooting him on the ground -- with an automatic 30.06?
A No, there was nothing that could have stopped him, I don't guess.
Q Rushton couldn't, because he was hit, he was down, he said flat on his face. Is that right?
A I don't know about flat on his face, but he fell.
Q Well, did it twirl him like Joe said it did? Did he take the impact of the gun, and it turned him around?
A I can't say -- I can't say that. I can tell you he fell. I don't know how exactly he fell.
Q Okay. So you weren't actually observing his body when he fell?
A I wasn't watching him the whole time. When I looked around, he was basically already on

the ground.

Q Okay. You were at the corner of the house, looking at the silhouette of Joe. And off to your right, you could see Rushton, okay. Did you hear their conversation?

A I heard Rushton say something about a gun.

Q Okay. Then what did you do?

A There wasn't much of a conversation.

Q What happened?

A I was saying "Sheriff's Office" the whole time.

Q Okay.

A There was never a conversation between anybody.

Q From the time that door opened until the time that shot came out, it was seconds, wasn't it?

A If even that long.

Q It was that fast. Basically, you heard the door open, you heard a step, bang.

A Heard a bang.

Q You heard him yell, "Gun." And what about this "I don't give an 'f'" and all that stuff?

A That happened while we were beating on the door.

Q Well, if that door upstairs is not open,

how do you hear all that stuff allegedly from Joe? If he's not out there, how does he hear you, and how do you hear him?

A He must have been out there when it happened.

Q All right. And is that why you say that -- is that why there's a change in the statement now that he was already out there on the deck when y'all were walking up to the scene?

A No, I never said he was on the deck when we was walking up.

Q Officer Rushton told Officer Stallo that he was already there on the deck walking on the deck when y'all arrived?

A I have no knowledge of what Rushton told Stallo.

Q I understand. But you didn't observe that or see anything like that?

A Him already on the deck?

Q Right.

A No, not when I first got there.

Q Your statement still is you heard "Sheriff's Office" and then yelled "Gun"?

A Yes.

Q All right. And how many seconds was there

between "Sheriff's Office" and "Gun"?

A One, if that many.

Q I mean, it was like bam, just like that "Sheriff's Office," "Gun," bam -- something like that?

A Right.

Q Okay. And then there was another gunshot. Are you -- the State has charged Joe in this case with attempting to kill you. Are you aware of that?

A Yes.

Q Did he attempt to kill you?

A I don't know what his intentions were.

Q All right. Well, I mean, you know Joe?

A No, never seen him before until then.

Q All right. Have you got any reason to believe he don't like you?

A I can't answer that question.

Q So why would Joe Worley intend to kill you?

A Why would he want to intend to kill the other deputy?

Q You know, you're lucky probably that he didn't see you point that gun at him at his house on his deck. What do you think?

A Well -- oh, well.

Q Oh, well. Then, of course, you helped get cover with distance, and you helped Officer Rushton get to safety?

A Yes.

Q Get himself to get treatment at the Medical University, correct?

A Yes.

MR. GARRETT: That's all I have of this witness.

MR. MYERS: I have just a couple.

CROSS-EXAMINATION

BY MR. MAYE:

Q Officer, the bottom line is when y'all went out there, Bobby Rushton went over to the Sheffields' house -- that's right -- to check on the complaint, right?

A Yes, sir.

Q At some point in time when you were over there, you saw a light come on and go off on the Sheffields' house, right -- not on the Sheffields' house but on the Worleys' residence, right?

A Yes.

Q Y'all went over after the light went out, beat on the door, and continually announced "Sheriff's Office" over and over again --

A Yes.
Q -- did you not?
A Yes.
Q Okay. At some point in time -- now, there's no light on shining out in the yard. At some point in time, y'all heard the screen door or the sliding door open, is that correct?
A Yes.
Q Okay. And in response to that, you and Bobby are down on the ground level at the door, beating on it, steady calling "Sheriff's Office" and beating on the door, is that correct?
A Yes, I was.
Q Wherever you were or wherever he was at that point in time, Mr. Worley in this case, as y'all are hollering "Sheriff's Office," you clearly heard him reply back, in response to that, "I don't give a fuck," is that correct?
A Yes.
Q Okay. So in acknowledgement of what y'all said, you don't have any doubt that he responded, "I don't give a fuck," when you identified yourself as Sheriff's Office?
A No, sir, no doubt.
Q Okay. As Officer Rushton walked back out

into the yard and looked back up in this case, the light came back on and blinded him at some point in time, is that correct?

A Yes.

Q Because the light had been off and was not on as he walked down in front of the house, is that correct?

A Yes.

Q Okay. In response to Officer Rushton telling Mr. Worley or him crying out "Gun," y'all continued to cry out "Sheriff's Office" and identify yourself as law enforcement officers, and there was conversation about him dropping the gun, wasn't there?

A Yes.

Q Y'all made those demands to him continuously, didn't you?

A Yes.

Q Then he fired and struck Officer Rushton in this case?

A Yes.

Q Any doubt in your mind about that?

A No doubt.

Q He then -- you motioned for him to come to you, is that correct?

A Yes.
Q And he came to where you were?
THE COURT: Motioned for who to come?
Q Officer Rushton. You motioned for Officer Rushton to come to you once you realized he had been hit and fell to the ground, correct?
A Motioned and both probably told him to come.
Q Okay. And he did come to you at that point in time?
A Yes.
Q Okay. And a subsequent shot was fired by Mr. Worley --
A Yes.
Q -- at some point in time?
A At some point.
Q Okay. Now, after you attempted to get him to safety, what did you hear Mr. Worley say as he came back out of the house and onto the ground level, as y'all were fleeing and trying to get the officer to safety? What did you hear him say?
A "Where you at, you son of a bitch?"
Q Okay. So he was down -- was he in pursuit of y'all at that point in time?
A That's what I thought --

Q Okay.
A -- that he was coming after us.
Q Okay. Where was he at that point in time? Was he on the ground level and left the house at that point in time?
A He was ground level, would have been on the left side of the house.
Q And y'all's primary concern was for Officer Rushton's safety, and y'all got him out of there, correct?
A Yes.
Q In fact, you left your automobiles there, didn't you?
A Yes.
Q You only took one car, didn't you?
A Yes.
Q Because Officer Rushton was severely injured?
A Yes.
MR. MAYE: Nothing further.
THE COURT: Further questions of the witness?
MR. GARRETT: Yes, sir.

REDIRECT EXAMINATION

BY MR. GARRETT:

Q I'm just having trouble understanding. While ago, didn't you tell me the light remained on?

A The light?

Q When I read this to you awhile ago, where we talked about the light that had been on, had come off, and now it was on.

A Yes, the light went off, came on -- was off to begin with and came on, went off, and came back on.

Q Came back on?

A When the actual shot -- when those shots were fired, yes.

Q How is that possible?

A I guess he left it on.

Q He left it on when?

A The last time he turned it on.

Q All right. So you're not trying to say he went in there and turned the light off and then turned it on to blind Officer Rushton, are you?

A I don't know what his intentions were.

Q When Rushton was out there, was the light on or off?

A Both. It was off to begin with. It came back on.

Q Okay. When the shots occurred, were the

lights on or off?

A On, I do believe.

Q On, okay. So the lights didn't get turned off and turned on at the time he got shot. They were already on, isn't that true?

A To the best of my knowledge, I do believe they were.

Q Okay. That's inconsistent with what you just told Mr. Maye, that they were off, they came on about the time of the shot and blinded Officer Rushton. Did you see -- you already said you didn't see the flash, is that right?

A Yes, I don't think I did.

Q All right. And all these other statements that you say that happened out there, you didn't tell all that to the agent that was investigating this from the Bureau of Alcohol, Tobacco, and Firearms. You do agree with that, right?

A I don't know if I exactly agree with the fact that I may not have told him that. It's not written in the statement, but I can't say that I did or did not tell him that.

MR. GARRETT: I'm not sure if I marked this. I want to make sure I mark this, both for identification and submission. That's 143.

THE COURT: Is there any objection?

MR. MAYE: Nothing, Your Honor, for the purposes of this year, no objection.

THE COURT: Mark it in evidence.

COURT REPORTER: It's Defendant's Five A, Your Honor.

THE COURT: Thank you.

(Defendant's Exhibit Number Five A, Summary of events, Stallo, 7-22-10, was marked for identification.)

Q Nick, have you had an opportunity to read the other statements of the other officers in this matter?

A I may have at some point in time, but I have not recently.

Q Okay. And so you -- in preparation for this trial, nobody went over that statement with you in relationship to the other statements?

A I was told to go over my statement. I have never sat and read anybody else's statement.

Q Okay.

A Not lately.

Q All right. So at one time, you did?

A I'm sure when the incident first occurred, yes, I probably did.

Q And here's why I ask the question. Your last statement to the -- the statement that after you heard somebody coming out the door and then yelled "Where you at? Where y'all at?" or something to that effect.

Isn't it true that all of the statements say that any other statements were made while he was still up there, and that was made at or about the time of the second shot, hollering and telling them to get out of there, or "I'll get you," or "Get from here," or something to that effect? And that was never made -- y'all had already gone, had cleared the back, back there, before that statement was ever made?

A What exactly are you asking me? I'm a little confused.

Q Well, you said in your statement something to the effect of -- with the cross-examination just then -- that the officer -- that Joe made the statement after he had come down out of the house and was now on the ground, hollering "I'm going to get you, you sons of bitches," or "you son of a bitch," or something to that effect. What did you say he said?

A Yes, he said, "Where you at, you son of a

bitch?"

Q "Where you at, you son of a bitch?"

A Yes.

Q He didn't say "bitches," more than one?

A We're talking about 2009.

Q I understand. But you recognize it as singular as opposed to plural?

A I don't recall.

Q As best you recall, is that correct?

A Best I recall, I would say, "Where you at, you son of a bitch?"

Q All right. And then the timing of that, wouldn't that have been at or near the second shot?

A No, that was after, a good bit after.

Q All right. Is it true that Joe ran back towards the house after he was hit? I'm sorry, is it true that Officer Rushton ran back towards the house after he was hit?

A He ran towards me.

Q And where were you standing?

A The corner of the house.

Q So isn't it fair that he ran towards Joe, who was on the balcony of the same house that you were at the corner of?

A He ran towards the house, but Joe was up

on the top balcony. He couldn't have actually ran towards Joe.

Q Well, he ran towards Joe's position. Regardless of whether he was upstairs, he ran towards Joe's house and Joe's position.

A Okay.

Q Is that fair?

A Yes.

Q And is it further fair that he ran towards the door?

A Yes.

Q All right.

MR. GARRETT: No further questions.

THE COURT: Anything else?

MR. MAYE: Just one.

RECROSS EXAMINATION

BY MR. MAYE:

Q The bottom line is this statement here, this line about "I'm going to get you son of a bitches" is included in the ATF agent's statement. So whether or not you told him, Worley told him -- I mean, you told him, Bobby told him, or Melissa told him. After he interviewed all of you, he did include this in his statement, correct?

A Yes.

Q All right. I'm going to make sure -- I know you've been through this over and over again -- but when Bobby was over talking to the Sheffields in this case, y'all saw the lights come on. Y'all had already gone over and beat on the door of this house, right?

A Yes.

Q You saw the lights come on. Y'all then went back over to the Worleys' residence, right?

A Yes.

Q But that light went off, is that right?

A I never actually left the Worleys' residence.

Q Okay. You stayed over there in the yard?

A Pretty much. I was proceeding to -- I was fixing to leave, but I never actually got out of his yard, and the light came back on.

Q As Bobby was over there, the light came on, then it went off, right?

A Yes.

Q Okay. Y'all went back down there and beat on the door over and over again. The light's off at this point --

A Yes.

Q -- right?

A Yes.
Q As Bobby leaves the position of where you two are beating on the door and announcing "Sheriff's Office" and walks back out into the yard, the light comes on and blinds him --
A Yes.
Q -- right?
A Yes.
Q You're absolutely certain that that's the order?
A Yes.
Q Okay.
MR. MAYE: Nothing else.
THE COURT: All right, anything else?
MR. GARRETT: I'm having difficulty understanding.

FURTHER REDIRECT EXAMINATION

BY MR. GARRETT:
Q Was the light on or off when Bobby got shot?
A On.
Q Okay.
A The light came on when the shot was fired. I don't know whether he left it on or turned it back off.

Q Say that again?
A I said the light was on when Bobby was shot, but I do not recall whether or not he turned it off after he shot Bobby or not.
Q He turned the light off after he shot Bobby?
A I don't recall if he did or not.
Q Okay. But it was clearly on -- the three seconds before Bobby was shot, that light was on?
A I don't know if it was three seconds.
Q A half a second, a second, two seconds. I'm not asking you to give me precisely, but some time?
A Yes, the light was on when Bobby was shot.
Q All right. And also in that report, if it was important for you to say about the, you know, "Where you at, you son of a bitch or whatever," "SOB," whatever, it was important for you to tell him the truth about what happened, is that correct?
A Yes.
Q So the other stuff about all these other words and all these other things, all that couldn't happen in those seconds, could it?
A All of what other things?
Q All these "Sheriff's Department," "Gun,"

"I don't give an 'f'," "What do y'all want?" -- I mean, we're talking seconds, aren't we?

A Not in between Bobby getting shot and him asking "Where you at, you son of a bitch?" It was maybe longer than seconds.

Q How many seconds?

A I'm going to say 30 to 45, maybe a minute.

Q It was a whole minute, then?

A I wasn't looking at my watch.

Q All right, one other thing. You said the officer crawled to you. That's the first time I saw that, "crawled to you." Did you tell Officer Stallo that he crawled to you?

A Crawled to me, walked to me. I don't really -- he got to me somehow. He was injured --

Q He ran, didn't he?

A -- and he got to me.

Q He ran, didn't he?

A I don't recall. I can't -- I mean, I can't swear to you that he ran, he crawled, he walked, he jogged. I can't swear to any of it. He got to me, though, I know that.

Q In your original statement, you said he ran, and the subsequent statement said he crawled. I just wondered if there's some reason for the

change in that part.

A Probably the dates in the statements was probably the reason.

Q Time had passed?

A Yes.

Q Thank you.

THE COURT: Anything else?

Thank you, sir. You can step down.

How many more witnesses do you plan to call?

MR. GARRETT: Melissa. She'll probably be the last witness, Judge.

THE COURT: All right, come on up, please.

MS. McALLISTER: Sara Melissa Hegler McAllister.

COURT REPORTER: Could you repeat that, please?

MS. McALLISTER: Sara Melissa Hegler McAllister.

COURT REPORTER: Sara McAllister.

MS. McALLISTER: I go by Melissa -- Melissa H. McAllister.

SARA MELISSA MCALLISTER, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Officer McAllister, when did you join the McCormick County Sheriff's Department?

A In April of 2008.

Q Did you have an opportunity to bag evidence and assist in the crime scene evaluation in this case?

A Yes.

Q And what can you tell me you did in this circumstance?

A In this incident?

Q Yes, ma'am.

A Photographed.

Q And who --

A Collected evidence into the bags.

Q Okay. And tell me exactly how that went. Tell me how y'all investigated the scene -- who was all involved? Were in charge in the investigation?

A I was never in charge of it, no.

Q Nick Moore, did he put you -- when the sheriff got there, did he pull you aside to instruct you or ask you to go on and do the evidence bagging and photographing?

A No.

Q Who did that? Who asked you to do that?

A No one.
Q You just did it on your own?
A Yes.
Q So if Mr. Nick Moore said that he saw you doing that, you just did that on your own, is that correct?
A Yes.
Q You've had some difficulties in the past with truthfulness in investigations, is that correct?
A Yes.
Q In fact, you were terminated from the Department of Natural Resources for not telling the truth in a crime scene investigation, isn't that correct?
A I was terminated, yes.
Q For that reason, and that's the stated reason in the letter of termination that's been provided to us from the State. Do you want to see the letter?
A Sure.
THE COURT: What's your answer?
A Yes, I'd like to see the letter.
Q Let me get it for you. While I'm waiting on the letter, why don't you just tell me what your

version is as to why you were terminated? And I want to be specific about crime scene investigation. I'll let you look at that letter dated May 29, 2007, from the Department of Natural Resources.

A Uh-huh.

Q Do you recognize that letter?

A Yes, sir.

Q And would you tell us the basis for the termination? Did your supervisor --

A Failure to cooperate with an investigation.

Q What else?

A "Your failure to be truthful."

Q Truthful?

A Right.

Q Okay, go ahead. What else --

A Do you want me to read all of it?

Q Well, what were you untruthful about? What does it say?

A I wasn't untruthful.

Q Did you have some --

A I just did not comply.

Q There was a DNR death, is that correct?

A Uh-huh.

Q And I believe you were on one of the other

boats?

A Uh-huh.

Q Is that correct?

A Yes, sir.

Q Is that a "yes"?

A Yes, sir.

Q And as a result of the fatality, you were required as a DNR officer to secure the scene, is that correct?

A Yes.

Q All right. And did you secure the scene?

A No.

Q What did you not do to secure the scene?

A What did I not do?

Q Yes, ma'am. What did you fail to do?

A Well.

Q Tell me about the container of beer. What did you do with the container of beer?

A I didn't do anything with the container of beer.

Q What did somebody else do with the container of beer?

A They took it.

Q They took it?

A Uh-huh.

Q Where did they take it?
A I don't know where. I guess it was on the bank.
Q You're guessing what?
A I'm guessing it was on the bank.
Q Somehow it got out of your boat that you were in and got on the bank?
A Yes.
Q And did you know how that happened?
A No.
Q But you never reported that to the --
A No.
Q And they found out later on that happened, is that correct?
A Yes, sir.
Q And when you were questioned about it, you initially told them no, you didn't know anything about that?
A Yes.
Q And then you subsequently told them that you did, is that correct?
A No, there wasn't any time. I didn't tell them.
Q Do you dispute the testimony?
A Yes, I didn't tell them.

Q All right. And as a result, you got terminated?
A Yes, sir.
Q All right. Now, what steps did McCormick do in hiring you, or do you know?
A I'm not really sure of their process.
Q So did you work anywhere from May 29, 2007, until you were hired in '08?
A No, I did not.
Q And you were hired when?
A '08.
Q '08 -- in what month of '08?
A April.
MR. GARRETT: We have marked that. I move to introduce Six A into evidence, Your Honor.
THE COURT: Any objection to that?
MR. MAYE: No.
THE COURT: Mark it into evidence.
(Defendant's Exhibit Number Six A, Letter of termination from DNR, was marked for identification.)
Q Now, was this discussed when you got hired?
A Uh-huh.
Q Is that a "yes"?

A Yes.

Q We're from the South, and we're bad about saying "uh-huh" and "huh-uh."

A I'm sorry.

Q But try to say "yes" or "no" in order to help her, because she can't put an "uh-huh" or "huh-uh," and we won't understand it later on.

A Yes, sir.

Q Okay, all right. Now, it seems to me that you were kind of back behind Officer Moore, is that correct --

A Yes, sir.

Q -- when all this stuff went down?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q All right. And he sent you back to go get the car and to call in, is that correct?

A Yes.

Q And you got back there to the apex of the vehicle, as you said in your report, is that correct?

A Yes.

Q And waited until Officer Moore and Officer Rushton got back to the bushes there -- or did they

get to the bushes first, and then you went to the apex of the car, or how did that work?

A All I know is I was running.

Q Okay. When did you start running?

A When they began retreating.

Q Okay. So when Mr. Moore began retreating, you began retreating, all right. What's the closest you go to the corner?

A The closest I got to the corner?

Q The corner of the house there where the door is.

A The catwalk area, where the trash cans are over to the left, yes.

Q Eight to ten feet back?

A Uh-huh.

Q All right. And there's differing stories between your stories and the other officers' stories. Did you see Mr. Worley?

A No.

Q Did you ever see Mr. Worley?

A When he was arrested, yes.

Q When he was arrested, all right. And did you see Rushton hit?

A I don't believe I saw him get hit. I just heard "Oh, God."

Q You heard what?
A "Oh, God."
Q Who said "Oh, God"?
A One of them.
Q Bobby?
A I'm guessing Bobby did.
Q Did Bobby say, "I'm hit"? Do you hear him say, "I'm hit"?
A I did not.
Q Okay. And you say in your statement you lost vision of him?
A Huh?
Q You said you lost vision of him.
A Uh-huh.
Q Of Bobby?
A Uh-huh.
THE COURT: Try to say "yes" or "no."
A Yes, sir.
Q Did you see him running back with Nick Moore, or were you already headed out to go get the car?
A I saw him going with Nick, and I was running to the car.
Q Sprinted on out ahead. Where was your car parked?

A Right behind Deputy Moore's.
Q And where was Deputy Moore's patrol car?
A In the next driveway over.
Q And where was your car parked, there?
A Yes, right behind him.
Q So both of your cars were in the next-door neighbors' driveway?
A Yes.
Q Is that correct?
A Yes.
Q So there was only one patrol car at the Worley residence?
A Yes.
Q And where was it parked?
A In the yard.
Q Where at?
A I couldn't tell you exactly where in the yard.
Q At one point, you went out and got Nick Moore's phone, is that correct?
A Yes.
Q His phone was across in the Stevens' driveway?
A Yes.
Q All right. And you called in to 911?

A No, I took the phone to Nick.
Q Okay.
A And then I went back to my vehicle to get Bobby and Nick.
Q To get what?
A To get Bobby and Nick.
Q Okay. So you backed your car out of the Stevens' driveway, pulled down to the Worley driveway --
A Yes.
Q -- helped Nick load Bobby up?
A Yes.
Q And y'all went on up to the first responders?
A Yes, sir.
Q And they were right there -- is it Sandy Springs or Sandy Ridge?
A Yes, sir.
Q Right there?
A Yes, sir, they were already there.
Q Okay, all right. And what's your version?
A Huh?
Q What's your version of what happened?
A What's my version of what happened?
Q What happened that night?

A You want me to read the statement?
Q No, I want you to tell me what you remember. If you don't remember, that's fine.
A I do.
Q It's been some time.
A Yes, it's been a year and a half.
Q Okay. Do you feel comfortable enough to talk about it?
A Yes.
Q Okay, what happened?
A We arrived at the scene.
Q Okay.
A Knocked on the doors.
Q Who knocked on the doors?
A Nick.
Q Okay.
A Bobby talked to the next-door neighbors.
Q Okay.
A Nick knocked and announced again.
Q Okay.
A So a light had previously gone on and off.
Q While y'all were knocking or not knocking?
A I'm not really sure because he was the one who -- Nick was the one who told me the light came on.

Q He told you it came on and off?
A Yes, because I was watching Bobby as he was over at the Sheffields'.
Q Oh, okay. So you never saw the light come on or off?
A Not until the light came on when someone came out of the house.
Q All right, so the light came on, someone came out of the house. Then what happened?
A Then what happened?
Q Yes.
A Bobby was shot.
Q Okay. So the light came on, somebody came out of the house, and Bobby got shot?
A Yes. Nick stated, "Sheriff's Office," and I heard, "I don't give a fuck."
Q Okay.
A And that's when shots were fired.
Q Gunshots fired?
A Yes, sir, as Bobby was stepping out.
Q All right. So you never heard anybody say anything like "Who are y'all?" You didn't hear that, did you?
A No, I didn't.
Q And you didn't hear any statements about

"Put your gun down, put your gun down"?

A I did.

Q Oh, you did?

A Yes.

Q While ago in your statement, you didn't recall that?

A I don't have the statement right here in front of me.

Q All right. That wouldn't be important -- "Put your gun down, put your gun down"?

A Yes.

Q Who said it?

A Both.

Q How many times?

A I can't recall.

Q More than once?

A I guess it would have to be more than once. Nick said it, and Bobby said it.

Q Did they say it at the same time?

A I don't know.

Q When the word "gun" happened, how long was it between the word "gun" and the fired shots?

A It all seemed so fast.

THE COURT: All of it what, now?

A It all seemed so fast.

Q Between "gun" and the shot, was it about like bang -- "gun," bang? Was it like that, or was it longer?

A I can't recall. I don't know how fast it was.

Q Okay. You didn't know Bobby had been hit, is that right?

A Huh-uh.

Q Why? Is that a "no"?

A No, I did not. I did not realize he had been until Nick stated that he was shot. I saw him stumbling towards me, and so they ran. And it was when he laid down, he was on the ground, that I actually realized then.

Q That's when they were back behind the house?

A The bushes.

Q In the bushes, hiding and cover?

A Yes.

Q When you realized he had been hit?

A Yes.

Q I believe you said you saw where he had taken the shot where the bullet went in --

A Yes.

Q -- and maybe took off a finger?

A Yes, sir.
Q Okay. Do you know Worley?
A Huh?
Q Do you know Joe?
A No.
Q Do you have any reason to think he would be trying to kill you -- any motive to kill you?
A I have no idea, no.
Q All right. You never met him before?
A Not that I can recall.
Q Do you know Margaret, do you know Ms. Worley; his mom --
A No.
Q -- Ms. Mary?
A I met her that night.
Q Okay.
A But I wouldn't know her. I don't know her.
Q She was very cooperative, wasn't she?
A Yes.
Q She invited y'all into the house?
A I don't know. I didn't go in the house.
Q You didn't participate in that?
A I didn't go into the house until later.
Q Okay. You said you took the photographs?

A Uh-huh.
Q That's "yes"?
THE COURT: That's "yes"?
A Yes.
Q Whose camera did you use?
A The department's.
Q Did Bo Willis have a camera?
A Yes.
Q Is that his camera or a department camera?
A Two separate cameras.
Q So y'all use two separate cameras?
A Yes.
Q All right. And who took the photographs?
A I did.
Q All of it?
A No. I don't know what Bo took pictures of. I can't account for him.
Q You can't account for Bo Willis?
A No, I can't.
Q So you did part of the investigation, and he did the other part of the investigation?
A I have no idea. I did, yes. I'm guessing he did. I mean, I was there a little while with Bo, but I don't know what he did after I left.
Q What items of evidence did you pick up?

A What items of evidence did I pick up?
Q Yes, ma'am, and photographed -- that you bagged and photographed?
A The shells.
Q The shells?
A Yes, the shells and the ammo from Bobby's gun.
Q Okay. Where did you find the shells and the ammo from Bobby's gun?
A Throughout the yard.
Q Throughout the yard?
A Yes.
Q Have you looked at the drawing that's been prepared in this case by Bo Willis?
A No.
Q You haven't?
A No.
Q Have you read his report?
A No.
Q He draws a round -- basically, just a round area right there in front of the flower bed back to the porch, just around there, and it says "various items found in this area." Did you take any pictures of it as they lay on the ground? Did you take any pictures of that?

A Yes.
Q Okay. And what about the part that goes from the grass all the way up to the flower bed, did you take any pictures of that?
A I don't recall -- the flower bed, no, I didn't.
Q There was a piece of Bobby's gun that was found in that area. Did you find that piece?
A No.
Q Do you know who found that piece? Any idea?
A No.
Q You just found casings and shells?
A What I saw.
Q Did you find any distorted bullets or anything like that out there, do you recall?
A No, sir, I don't recall.
Q If you would have bagged that evidence, would you have put your initials on it?
A Yes.
Q You took a picture of it. Give me your procedure. What would you do?
A What would I do?
Q Uh-huh. How do you do it?
A How do I do it? I took the photograph and

took the paper and the ammo and put into the bag, sealed it, wrote my name, approximately where they were located.

Q Okay. Did you take a picture of it where it was located?

A Yes.

Q Okay. Did y'all use any GPS or anything like that?

A No.

Q And is there any reason why y'all didn't turn this thing over to SLED to have SLED investigate it for y'all?

A Can you say that again?

Q Any reason that your department, the Sheriff's Department -- was there any discussion as to why y'all didn't turn it over to SLED and let SLED investigate it?

A No.

MR. GARRETT: Nothing further.

THE COURT: Anything else?

MR. MYERS: No.

THE COURT: Thank you, ma'am. You may step down.

Any other witnesses?

MR. GARRETT: No, Your Honor.

THE COURT: Is there anything further from you all?

MR. MYERS: No, sir.

THE COURT: You want to make your arguments tomorrow?

MR. GARRETT: Whatever you want to do is fine.

THE COURT: Do you all want to make your arguments tomorrow?

MR. MYERS: That would be good, Your Honor.

THE COURT: You all be here at noon tomorrow. Court is in recess until noon.

You all have Mr. Worley here tomorrow at noon, okay?

MR. GARRETT: Yes, sir.

THE COURT: All right.

-- End of Day --

Wednesday, June 1, 2011

THE COURT: I'm ready. What's your argument?

MR. HENDERSON: Your Honor, I'm Carson Henderson and Your Honor, I'd like to get this marked as a Court's exhibit. It's basically some applicable law.

(Court's Exhibit 1A, applicable law prepared by the defense, was received in evidence.)

THE COURT: All right, go ahead.

MR. HENDERSON: Yes, sir, Your Honor, if it pleases the Court. The top documents in this packet, Your Honor, just bears proof that Deputy Rushton had quit the McCormick County Sheriff's Office and was rehired.

Your Honor, based on the testimony presented yesterday defense believes it made a prima facia showing that Deputy Rushton is not a qualified deputy of McCormick County, Your Honor.

And the documents attached, and I'll just flip through the documents, Your Honor, and this is based upon his sworn testimony yesterday. He said that to the best of his knowledge he'd never been approved by a circuit court judge since he's been rehired as a deputy. And Your Honor, that's code section 23-13-10 which is provided in this packet of materials.

Your Honor, this Deputy Rushton testified as well that he'd never given an oath of office as required by code section 23-13-20. But during his testimony the solicitor's office produced a bond,

Your Honor. Actually, I've got it in my stack of materials.

But under 23-13-20 there are two oaths that are required for every deputy sheriff to be taken, Your Honor. The one that was provided to us was a constitutional oath which is required by section 26 of article 3 of the constitution. The one that he had not taken is the statutory oath and they are different oaths, Your Honor.

Under 23-13-20 -- and these oaths are required to be maintained by the Clerk of Court, Your Honor. And I've put the constitutional oath in here, Your Honor, and I've put a copy of the document introduced into evidence yesterday as the constitutional oath. But again, there is no statutory oath. And Your Honor, he never presented any evidence that he provided any bond, for whatever it's worth, Your Honor.

We believe that we have put forth a prima facia case that Deputy Rushton when all of this happened on November 15th 2009 was not a duly qualified deputy sheriff of McCormick County. And Your Honor, I would refer to code section 23-13-50 which talks about those exact words, "When duly qualified." It is our position that he wasn't duly

qualified.

Your Honor, under these Castle Doctrine Motions, going back to this State vs. Duncan case that we provided to the Court yesterday, you must examine the Castle Doctrine Motion through the defendant's eyes. In this case this is a law that's designed to protect homeowners.

And the General Assembly has made it very clear that they are protecting the right of homeowners so I believe if you look through Mr. Worley's eyes about whether there's sufficient evidence in the record, more likely than not the Castle Doctrine was -- that he's entitled to the protection of the Castle Doctrine.

Your Honor, I've put this packet of material together, code section 16-11-420, "That homeowners have a right to expect to remain unmolested and safe within their homes and that no person should be required to surrender his personal safety to a criminal nor should a person be required to needlessly retreat in the face of intrusion or attack."

Your Honor, Mr. Worley was clear in his testimony. He thought he was being burglarized. He had heard of home invasions through media. His

mother's property where he was at had been burglarized before and there had been an attempted burglary down there.

Mr. Worley testified heard this continuous door bell ringing in the middle of the night, early in the morning. He testified he heard no voices, and again this is in the house, heard no voices. He heard no door knock. And you heard the testimony his house was double insulated.

And you heard Mr. Worley testify that when he was looking out the upstairs sliding glass doors the only thing he saw was dark. He didn't see any light, didn't see any blue lights, didn't see anything flashing at all.

And Mr. Worley indicated he wasn't about to go downstairs and open up the ground floor door when it had no peep hole and no window. Plus there no windows downstairs at all, Your Honor. His only means to look out was this upstairs sliding door and he didn't see anything.

Your Honor, based upon Mr. Worley's testimony, at this point in the case, I believe under 16-11-440 he is entitled to the presumption that he believed somebody was in the process of unlawfully and forcefully entering his building or

residence. And that there is evidence in the record to suggest that he knew or had reason to believe that an unlawful or forceful entry or act was occurring or was about to occur.

Your Honor, I think that at this point in the case I think he's entitled to this presumption. Now, you look at whether or not law enforcement is protection against Mr. Worley's presumption under the Castle Doctrine.

The first one is, Your Honor, under 16-11-440, and I've tried to break it down, that the first step the government has to prove is that Mr. Rushton was a law enforcement officer. And Your Honor, as we believe, we believe we put up a prima facia case indicating that he is not a qualified deputy sheriff of McCormick County.

But Your Honor, assuming and to play devil's advocate, which we're not conceding, but assume that he is a qualified deputy sheriff of McCormick County, the next issue is whether or not he attempted to enter a dwelling or residence. And Your Honor, by Deputy Rushton and Deputy Moore's own admission they were up under the roof of this porch or balcony ringing door bells and banging on the door.

And under the Castle Doctrine the porch area and any area under the roof is included in your definition of residence and dwelling. So I believe we have that element that they were attempting to enter the residence, Deputy Rushton was attempting to enter the residence. And then the issue of in performance of his official duty again we maintain that there can be no official duty if you are not duly qualified to be a law enforcement office.

But without conceding that Deputy Rushton is not, assume that he is for a moment, that he's there in the performance of his official duty. The next issue is did he identify himself in accordance with applicable law.

Your Honor, again, going back to the evidence that's in the record Mr. Worley only heard the door bell prior to opening the door. He never heard any knocking, never heard any voices. Again, we're talking about prior to opening the door. Mr. Worley testified he didn't see anyone prior to opening the door, it was pitch black outside. And you heard evidence that this was the darkest night of November '09. Literally there was no moon that night, Your Honor.

Deputy Rushton has testified he was not

wearing a departmental issued uniform. In fact, he bought these clothes someplace himself and was waiting on his uniform to come in. Your Honor, you heard testimony from Deputy Rushton that he wasn't wearing a hat, that law enforcement officers typically wear.

And of course, if he didn't wear a hat he didn't have badge on that hat he's not wearing and Your Honor, you've heard testimony that he wasn't wearing any clothing marked sheriff's department or law enforcement, police, anything along these lines. And you've heard testimony that Deputy Rushton was wearing no florescent clothing.

Your Honor, at the back of this material I've produced code section 23-23-10 and all the subsequent statutes that deal with law enforcement training. Your Honor, actually this is the legislation that created the South Carolina Criminal Justice Academy and made it a stand-alone entity from the Department of Public Safety.

And I've underlined various portions of this law, Your Honor, that says the purpose of this criminal justice academy is to train law enforcement officers. That we're setting standards for law enforcement service, that we shall provide

facilities and training for officers. So the law is very clear that we've got an agency here in South Carolina, the Criminal Justice Academy that's sole duty is to train police officers in proper procedure and policies.

Your Honor, yesterday Dr. Kirkham, our expert witness, testified that in his professional opinion, that all this was a shots fired, a gun call, that the prudent way to do this, the acceptable way to do this would have been Deputy Rushton either have dispatched, called the Worley residence -- Your Honor, the Worley's phone number was in the county phone book at this time.

Or the proper thing would be for Deputy Rushton once he got the number to call the Worley residence. Wake them up, let them know law enforcement is outside and wants to talk to them. And then if that didn't work Dr. Kirkham said Deputy Rushton should have used his squad care PA loudspeaker system, some sort of bull horn to wake the people up if you truly wanted to talk to them.

And at that point in time, when you're making this contact, with the Worleys, turn on your blue lights. You could have blared your siren. You would have made these people wake up and come out of

the house and come to you.

Now, Your Honor given -- there's been a lot of factual dispute about what was said after Mr. Worley came outside on November 15th 2009. And Your Honor, I submit to you, it really doesn't matter what was said.

Everybody's got a different remembrance about what was said or not said. But according to Dr. Kirkham that if anything was said the actions of Deputy Rushton and these other deputies did not match up with what Mr. Worley saw.

He's looking at the darkness. He doesn't see any blue lights. He doesn't hear sirens. All me sees is somebody in his yard with a small flashlight that he testified he believed was a burglar's flashlight. He saw Mr. Rushton not dressed in a uniform. And most importantly, he saw Deputy Rushton aiming a fire arm at him, going to kill him.

Deputy Rushton testified to that, that he intended on shooting him. I can only assume that he was going to shoot Mr. Worley, going to shoot him to kill him. That's what Mr. Worley saw that night, Your Honor. Regardless of what got said, anything he could see did not match up with what, you know,

what words of anything he heard didn't match up with what he was seeing.

And you heard Dr. Kirkham testify that in his professional opinion that Deputy Rushton and other law enforcement officers did not announce themselves in accordance with applicable law, which includes no applicable policies and procedures taught by the South Carolina Criminal Justice Academy.

And Dr. Kirkham testified that to his professional opinion that a reasonable homeowner or a person inside a home, inside Mr. Worley's position that night, would not have known that Deputy Rushton was a law enforcement officer.

And Your Honor, the Castle Doctrine here under 16-11-450 -- again, I submit to the Court that the Court looks at this through Mr. Worley's eyes, through the homeowner's eyes. And more likely than not was he justified in doing what he did.

Your Honor, under 16-11-450 not only do we submit that Mr. Worley is entitled to protection under the Castle Doctrine statute but that code section also incorporates any other applicable provision of law that justifies a homeowner in using deadly force.

Your Honor, we would submit this is flatly the case of self defense. We would submit this is a classic case of defense of habitation. But also that Mr. Worley had the right to resist an unlawful arrest assuming that Deputy Rushton is in fact a qualified deputy. Your Honor, I believe pointing and aiming a firearm at you is the most effective means of arrest that can be out there.

And also Code section 17-13-20 that Mr. Worley has the absolute right in the nighttime to arrest a person that he believes is felon. And Your Honor, we would submit that under all of these various statutory rights and or common law case law -- and in Your Honor's notebook we provided yesterday there is plenty of law on all of these issues.

We would submit that Mr. Worley has proven looking through his eyes more likely than not that he is entitled to protection of the Castle Doctrine. And we would ask, Your Honor, that the indictment be dismissed against Mr. Worley.

THE COURT: Solicitor?

MR. MYERS: Your Honor, the defense of habitation and/or the Castle Doctrine is all based on reasonableness. The word "reasonable" appears

throughout the Doctrine itself. 16-11-420 section (d) says, "The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers."

Subsection (e) says, "The General Assembly finds that no person or victim of a 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." That's in the first part.

In 16-11-440 (a) (1) talks about a person using deadly force in a home if the person against whom the deadly force is used is in the process of unlawfully and forcefully entering.

Subsection (a) (2) says that the person who uses deadly force knows or has reason to believe that an unlawful and forcible entry is occurring or has occurred.

Throughout this, Your Honor, it talks about attacks, intrusions, or attackers and intruders. And to come under the statute, the action of the people outside the property must be unlawful, and they must be forcibly entering. There's no evidence to support that. There's no

evidence anywhere.

The officers were out there lawfully. They were responding to a complaint of a weapon being fired between three and four o'clock in the morning. They were out there to try to calm things down, to stop disturbing the peace, interfering with the neighbors' lives.

Now, there were three duly qualified, sworn, certified deputies out there. And it doesn't say he's not a deputy, Your Honor. That's an administrative thing. He has taken the oath of office, he has been to the academy, he trained officers in Iraq. He is a qualified deputy.

Coming down, Your Honor, to 16-11-440 subsection (d), the presumption provided in subsection (a) does not apply, Castle Doctrine does not apply, if the person against whom deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied building, in the performance of his duty, 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.

Here again, there's nothing unlawful. And

we submit to you that this is an "or" in subsection (4). It's not an "and," it's "or," that he officer identifies himself in accordance with law. Or that the homeowner reasonably should have known the person entering or attempting to enter was a law enforcement officer.

They weren't out there unlawfully. They were out there performing their sworn duty. Again, Your Honor, in the same act, in 16-11-450, subsection (a), "A person who uses deadly force as permitted by the belief in this argument or another capital belief or argument is justified in using deadly force and is immune from criminal prosecution in a 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 duties and he identifies himself first under the applicable law. Or, again, if the person using deadly force knows or reasonably should have known that the person was a law enforcement officer."

We submit to Your Honor, first of all, the main part of 440 does not apply because they have to show that whatever these officers did was unlawful and there was force used to enter or attempt to enter.

In Duncan, it cites Fair versus the State of Georgia, 702-SE2nd-420, a 2010 case. That's what they did in this case. They cover that case, which our Supreme Court says it's a similar statute. The Court majority says they can plead that under this that the requirement that the entry or attack must in fact be unlawfully or for the use of threat before it can justify it with the defense of habitation.

Therefore, they have failed to begin with on the main part of the statute. They were obviously there lawfully. No force was used whatsoever.

The second thing, Your Honor, is these officers out there in their capacity identified themselves as law enforcement officers. That's a jury issue. The defendant says he didn't know. The officers said, "We were shouting, screaming, banging on the door, ringing the bell."

Even the next-door neighbors way over across the path over there heard this. I can't believe the man's living in a sound-proof house and he can't hear people talking. That defies common sense.

It's a jury question as to that, of them

identifying themselves. It's also a jury question, Your Honor, as to whether the defendant reasonably should have known that the person entering or attempting to enter, neither of which occurred, is a law enforcement officer. And I think the clearest thing we have is he knew, because when they said "Sheriff's Department," he said, "I don't give a blank." He didn't. He didn't really care.

He said he's been asleep since 11 or 12. Well, that's disputed by the neighbors next door, when the shots occurred 15 or 20 minutes apart, three and four o'clock in the morning. The officers get out there about four. They were performing their duties.

We submit to you, Your Honor, the Castle Doctrine was not enacted to prevent officers from carrying out their duties. The officers were carrying out their duties.

They identified themselves, they were lawfully there, there was not even an attempt to enter the Worley residence. They were knocking on doors, ringing bells. And they can come in with the Monday morning quarterback and play hindsight all they want to. They facts are the facts.

The officers weren't out there to arrest

anybody. They go out there, and they would say, "Let's stop all this foolishness. Let's stop this shooting in the middle of the night. Let's have peace in the neighborhood." They were peace officers trying to restore peace. We submit to you this is an issue for the jury, that the Castle Doctrine does not apply.

THE COURT: All right, is there any reply?

HENDERSON: Very briefly, Your Honor. I think it's the government that's looking at this in hindsight, Your Honor. Mr. Worley has testified about his perceptions that night.

And of course, now we know Mr. Worley knows that some of the perceptions he made that night were wrong, they were inaccurate. But, Judge, you look at this more likely than not through the defendant's eyes while this was happening.

I mean, this is something that we can't Monday morning - of course, we Monday morning quarterback about it now. But that night, there was no time. Mr. Worley has testified about what he reasonably believed, based upon what he was hearing and seeing at that point. Your Honor, I think that's got to be very clear.

And as for this Georgia case, Fair vs.

State, Georgia has a somewhat different Castle Doctrine than we do, Your Honor. And plus, in that case, there was a no-knock warrant being served. And the Georgia Supreme Court says because there was a warrant being served that the deputies could not be trying to enter the house unlawfully.

That's why we made it very clear in this case, Your Honor, that Deputy Rushton had no warrant. They did not have any lawful right to enter that house to get anybody.

Your Honor, in looking through Mr. Worley's eyes here, there is ample evidence in the light most favorable to him, more likely than not, that he believed that somebody was unlawfully and forcefully trying to enter his house to do something to him.

And, Your Honor, in talking and going back to the issue about whether or not Deputy Rushton is a qualified law enforcement officer, under the statute I've given you it talks about oaths, and it talks about going in front of the circuit judge. These are "shall," these are not permissive statutes. These are mandates, and from his own testimony he has not been through what the law mandates before he can duly discharge any duties as

a deputy sheriff.

THE COURT: Anything else, Solicitor?

MR. MYERS: No, sir.

THE COURT: I'll notify you of my decision in writing. Thank you.

MR. MYERS: Thank you.

MR. HENDERSON: Your Honor, may I be heard on one other matter?

THE COURT: Sure.

MR. HENDERSON: Your Honor, we would like to renew our motion for bond. Your Honor, we previously made several motions that the Court has denied based upon the government's allegation that Mr. Worley is a menace and a danger to the community.

Your Honor, I believe the testimony that came out yesterday told a totally different side of the story. Yesterday was Mr. Worley's chance to get up in court and put forth evidence about what he says happened through his eyes.

Your Honor, we believe that just totally paints a whole different picture. Your Honor, we've repeatedly asked for a speedy trial in this matter, and again the government opted to have this Castle Doctrine hearing at the same time that they wanted

to have the trial.

I know this Duncan case has just come down. I think it has given us a lot of guidance under these Castle Doctrine cases. I have a feeling this case is going to give us some more guidance from the appeal courts level.

Your honor, but based upon what the Court heard yesterday, we would submit that Mr. Worley should be entitled to a reasonable bond. And, Your Honor, as we have suggested to the Court before, we have no problems if the Court put him under house arrest at his primary home in Aiken County and that he can't come to McCormick County unless he is here on court business or visiting one of his attorneys.

And, Your Honor, if you wanted him to report to the Aiken sheriff, Aiken probation, whoever, we will consent to any requirements that the Court put on him. But, Your Honor, Mr. Worley has now been incarcerated for 18 months, and we believe that yesterday hopefully shed a different light on what went on at his mother's residence on the night of November 15, 2009.

THE COURT: Does the State wish to be heard?

MR. MYERS: The State takes the same

position they have previously as to the dangers of that, Your Honor.

THE COURT: I'll notify you of that decision in writing as well.

MR. HENDERSON: Thank you, Your Honor.

THE COURT: Thank you very much.

--End of Transcript of Record--

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

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF McCORMICK	)	
STATE OF SOUTH CAROLINA,	)	
	)	
-vs-	)	AMENDED ORDER ON
	)	RECONSIDERATION OF THE
JOE ROSS WORLEY,	)	DEFENDANT'S MOTION TO
	)	BAR PROSECUTION
Defendant,	)	Case Numbers J-036561, J-036562,
	)	J-036563, J-036564, J-036565, J-036566

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*, 392 S.C. 404, 709 S.E.2d 662, 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 Frank R. Addy, who has been assigned by the Chief Justice to handle that issue.[1]

WPL #1

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 fired by Mr. Worley

[1] The procedure upon recusal required the court to refer the matter to the Chief Judge for Administrative Purposes, Judge McMahon. Upon doing so, he recused himself, and the Chief Justice assigned Judge Addy to hear the bond motion.

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.

WPC #2

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.

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.

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.

WPC #3

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.

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 enforcement officers. When no one answered, the deputies did not attempt to force their way into the home. Rushton and perhaps the other deputies went back up to the home of the complaining parties. Rushton testified that Moore was headed up toward the Sheffield home. 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.

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 his badge displayed.

WPH #6

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

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.

WHC #7

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. More troubling and problematic in this particular case is that the wording of the Act provides an extremely significant granting of immunity to anyone who is "permitted by the provisions of this article or another applicable provision of law" to use deadly force. However, the bulk of the Act is couched in terms of stating presumptions, not authorizations or permissions. Regardless of how the court rules, it is recognized that the ruling will be subject to attack and that other constructions of the statute can be made.

The Act is stated to be an attempt to codify the common law Castle Doctrine. As explained in *State v. Dickey*, 380 S.C. 384, 669 S.E.2d 917 (SC App. 2008), cert. granted Nov. 10, 2009, "Under the Castle Doctrine, one attacked, without fault on his own part, on his own premises, has the right in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." Citing *State v. Hewitt*, 205 S.C. 207, 212, 31 S.E.2d 257, 258 (1944). The statement of legislative intent is found in §16-11-420, which reads:

> (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 #8

First, to address where there seems to be no ambiguity, the Act does not extend immunity to persons who use deadly force against a law enforcement officer who properly identifies himself as such or whom the person using deadly force knew or should have known was a law enforcement officer. S.C. Code Ann. 16-11-450(A) reads:

> 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.

So, there is no immunity if Rushton was a law enforcement officer acting in the performance of his official duties, who identified himself in accordance with applicable law; or, if Mr. Worley knew or reasonably should have known that Rushton was a law enforcement officer. Under *Duncan*, it presumably would be the burden of Mr. Worley to disprove that those conditions existed.

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 was shooting was a law enforcement officer.

Wht #9

Was Deputy Rushton a Law Enforcement Officer Under the Act?

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 Kathryne 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.

WM #10

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.

WMC #11

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 prove 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.

Will #12

> 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.

Wall #13

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

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 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 create a presumption that would prohibit prosecution because none of the people in Mr. Worley's yard were attempting to enter the home.

S.C. Code Ann. §16-11-450(A) reads:

> 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

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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.

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.

WMC #15

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), 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 a presumption related to 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 not follow proper law enforcement procedures. So, the court will address those issues.

Immunity is inapplicable under §16-11-450 where the person against whom force was used was a law enforcement officer acting in the performance of his official duties who identified himself in accordance with applicable law, or the person using deadly force knew or reasonably should have known that the person was a law enforcement officer. The presumption of fear that would be afforded to Mr. Worley under §16-11-440(A) is inapplicable where the person [subsection (4)] "against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle 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."

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 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. Again, they did not enter the residence or attempt to do so. Thus, while this subsection does not provide immunity from prosecution, 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]

The defendant has failed to prove that he is entitled to the presumption of Subsection (A) because he has failed to prove that Mr. Rushton was not a law enforcement officer within the meaning of the Act; failed to prove that Mr. Worley did not know that Mr. Rushton was a law enforcement officer within the meaning of the Act; failed to prove that Mr. Worley reasonably

[2] Though the court does not recall it being specifically raised, there is not a presumption 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.

should have known that he was firing upon a law enforcement officer within the meaning of the Act; and, failed to prove that anyone was entering or attempting to enter his dwelling. The preponderance of the evidence establishes that the persons on Mr. Worley's lawn were law enforcement officers as that term is used in the Act, who were attempting to get Mr. Worley to answer his door and talk to them. He has failed to prove that these persons were doing anything unlawful, including failing to prove that Mr. Rushton was acting unlawfully and improperly when he pointed his weapon at Mr. Worley.

Likewise, the defendant has failed to prove that he is entitled to immunity because the exception for law enforcement officers under §16-11-450 applies. The evidence establishes that the person against whom force was used was a law enforcement officer acting in the performance of his official duties who identified himself in accordance with applicable law, or the person using deadly force knew or reasonably should have known that the person was a law enforcement officer.

Wire #18

In the alternative, the court believes that there is a reasonable construction of the Act that would provide that the provisions of §16-11-440 largely explain when deadly force is "permitted" under §16-11-450, thus providing when immunity is applicable. Even if people were entering or attempting to enter the residence, the provisions of §16-11-440(B) disallow the presumptions of subsection (A) where Mr. Worley knew or should have known that the people on his lawn were law enforcement officers.

As discussed previously, the language of the Act is problematic because it provides immunity for people "permitted by the provisions of this article or another applicable provision of law" to use deadly force, but the Act seems to do little to define who is permitted to use deadly force. It seems logical and permissible to look at the entire Act and the common law

Castle Doctrine, and to interpret that the General Assembly intended for the language of §16-11-440 to be read in terms of providing who is permitted to use deadly force. If so, then it would be, as stated in the original order, that in order for immunity to attach, §16-11-450(A) would require 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.

It may be that such an interpretation is bolstered by a statement by the Supreme Court in *Duncan*. In determining that immunity was appropriate, the Supreme Court stated: "We find respondent showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering respondent's home in accordance with § 16-11-440. Accordingly, the circuit court properly found respondent was entitled to immunity under the Act." Arguably, that language gives some credence to an interpretation that §16-11-440 provides situations where deadly force is "permitted" under the Act, thus granting immunity under §16-11-450(A).

If it is permissible to construe the Act as having §16-11-440(A) provide parameters of who is "permitted" to use deadly force, there would be an inquiry of the disallowance of immunity where force is used against persons who have a right to be in the residence, or against law enforcement officers who are performing their official duties and announce their presence, as specified under §16-11-450(B). That would include whether the defendant has established that he did not know or that it was reasonable for him not to know that the persons were law enforcement officers; and, it would include an inquiry as to whether immunity is available when the person shot was not entering or attempting to enter the residence.

Other Applicable Provision of Law

The defendant asserts that he is granted immunity because he was authorized to use deadly force by "another applicable provision of law" under §16-11-450(A). Specifically, he raises the following principles of law.

(1) Self-Defense

At trial, the State would have to disprove self-defense beyond a reasonable doubt. However, at this stage, to support this claim under "another applicable provision of law," the defendant would have the burden of proving by a preponderance of the evidence that he is entitled to immunity under §16-11-450(A) based on establishing that he acted in self-defense. The court finds that he has not met his burden of proof.

In *State v. Bixby*, 338 S.C. 528, 698 S.E.2d 572 (2010), the Supreme Court of South Carolina stated:

WPH #20

> There are four elements required by law to establish a case of self-defense. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). The four elements are:
>
> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the [388 S.C. 554] same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life.
> Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

While the court believes that the defendant would like to focus only on the period of approximately one second when Mr. Rushton raised his pistol and Mr. Worley responded by

firing, the court does not believe that to be the proper analysis. The court finds that the preponderance of the evidence is that the "difficulty" was brought on by Mr. Worley's conduct.

The court finds that the greater weight of the evidence is that the defendant knew or should have known that law enforcement officers were on his lawn. He asked who was there. They responded that they were law enforcement officers. The defendant yelled that he did not give a f____, and he then proceeded from the security of the walls of his residence out onto his deck with a loaded rifle. Mr. Rushton acted appropriately in meeting that condition, and Mr. Worley fired upon him.

The court does not find that the defendant has proven any of the four elements of self-defense. In the court's view, the greater weight of the evidence supports the conclusion that Mr. Worley's acts were those of defiance and aggression. Our Supreme Court has noted that there is a difference between being armed in self-defense and acting in self-defense. [See *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 766 (SC App. 2010).]

(2) Defense of Habitation & Common Law Castle Doctrine

The defense also raised the applicability of the defense of habitation as entitlement to immunity under §16-11-450(A). As explained in *State v. Bryant*, 391 S.C. 225, 705 S.E.2d 465 (SC App. 2010):

> The defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). "One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation." State v. Lee, 293 S.C. 536, 537, 362 S.E.2d 24, 25 (1987). "For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." Rye, 375 S.C. at 124, 651 S.E.2d at 323. Unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he or his [391 S.C. 234] property was in imminent danger of sustaining serious injury or damage. Id. Rather, the defense

> of habitation provides "where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." Id. "The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was 'defending himself from imminent attack on his own premises.' " State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001) (quoting Lee, 293 S.C. at 537, 362 S.E.2d at 25). Although self-defense and habitation are analogous, the defenses are not identical. Rye, 375 S.C. at 124, 651 S.E.2d at 323.

Here, the court finds that the defendant has not established, by a preponderance of the evidence, that there was an imminent attack upon his premises or that his actions in confronting the perceived attack were reasonable under the circumstances. For reasons explained in great detail previously, the court's interpretation of the credible evidence is that no one entered or attempted to enter the defendant's home. The fact that the entry door is underneath a deck that is an appurtenant structure to the residence or underneath the eves of the house, and the officers were at the entry door at times, does not establish an unwarranted entry into the residence of the defendant. The officers were knocking and announcing, and they were ringing the doorbell. The court finds that the greater weight of the evidence does not support that the defendant acted reasonably under the circumstances because he knew or should have known that law enforcement officers were on his lawn, he asked who was there, they responded that they were law enforcement officers, the defendant yelled that he did not give a f___, and he then proceeded out onto his deck in an act of defiance with a loaded rifle. Any reasonable person under those circumstances would expect that the officers would draw and point their weapons in response. Even the defendant's expert witness testified that Mr. Rushton was justified in aiming his pistol at Mr. Worley when there was a call of "gun" under the circumstances that existed at the time.

(3) Citizen's Arrest of a Felon at Night

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 in 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.

The defendant asserted the provisions of S.C. Code Ann. §17-13-20 as "another applicable provision of law" extending immunity under the Act.

> § 17-13-20. Additional circumstances where citizens may arrest; means to be used.
>
> A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person:
>
> (a) has committed a felony;
> (b) has entered a dwelling house without express or implied permission;
> (c) has broken or is breaking into an outhouse with a view to plunder;
> (d) has in his possession stolen property; or
> (e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.

There is no evidence that could be viewed as invoking subsection (d) under any scenario. Moreover, the court recalls no indication whatsoever that the defendant was attempting to place anyone under arrest. His assertion is that he was acting in defense of himself and his home. The court finds that the defendant has failed to prove by a preponderance of the evidence that he is entitled to immunity based on this statute under the Act.

In *State v. Cooney*, 320 S.C. 107, 463 S.E.2d 597 (1995), the Supreme Court of South Carolina stated:

> In order to invoke the defense of justifiable killing in apprehending a fleeing felon, appellant at a minimum must show that he had certain information that a felony had been committed, § 17-13-10(b), and he used reasonable means to effect the arrest, State v. Nall, supra. There was evidence presented that appellant had certain information that a felony had been committed. However, State courts examining similar situations have found that whether reasonable force was used to apprehend a fleeing felon is a factual question left to the jury. People v. Couch, supra; State v. Clarke, 61 Wash.2d 138, 377 P.2d 449 (1962).
>
> The determination of reasonableness depends upon the facts of the case and is a question for the jury unless there is no evidence to support a finding of reasonableness. The trial judge found killing an unarmed fleeing suspect is per se unreasonable. We hold it was reversible error to not charge the jury on the

common law of citizen's arrest and the use of reasonable force since evidence placed appellant's reasonableness in apprehending Mr. Williams in issue.

This is a fact-specific issue. The court's view of the overall facts has been repeatedly recited and does not support any determination that there was information that the defendant deemed to be that a felony had been committed. The court doubts the applicability of this statute to this case. Assuming that the statute were to be construed as applicable, then to justify shooting Mr. Rushton, the defendant in this pre-trial hearing under *Duncan* must establish that he used reasonable means under the circumstances in firing upon Mr. Rushton. For reasons stated previously, the court finds that the evidence supports the opposite conclusion.

(4) Resisting an Unlawful Arrest

#24 The defendant argues that he is entitled to immunity because he was resisting an unlawful arrest. The court disagrees. There was no evidence that Mr. Worley was placed under arrest or that there was an attempt to place him under arrest prior to his shooting Mr. Rushton. The preponderance of the evidence is that the officers were attempting to get him to answer the door so that they could talk to him about the neighbor's complaint.

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 Honorable Frank R. Addy to have a hearing scheduled on the defendant's motion to reduce bond.

AND IT IS SO ORDERED.

December 6, 2011

William P. Keesley, Judge

Exhibit C

MEMORANDUM

TO: Desiree Allen

FROM: Rema K. Thomas

DATE: July 5, 2011

RE: Auto break-in and missing court records

Desiree, I am writing to inform you of a loss of court records I experienced through an auto break-in on Thursday, June 23, 2011. I have been waiting on the police report to send to you with this memo. I received the police report on Friday, July 1, 2011.

On Thursday morning, June 23, I left Chapin to work in Manning. I knew there was a likelihood that I would be in Manning on Friday so I was prepared to stay overnight in Manning. I had in the vehicle a big, expandable briefcase with CDs, paperwork, paper notes and cassette tapes from a motions hearing in McCormick County the week of May 31, 2011.

My plan was to meet on Friday with a transcriber I often use, who lives off Hwy 378 near the V. A. Hospital, and give her the transcript to work on. I had already received four letters requesting the motions hearing, which would have been approximately 300 pages. Several copies would be sold, unusual in today's economic times, justifying using the typist.

This briefcase, with it's contents, was taken from the vehicle. The cassette tapes corresponding with the hearing were in a box in the van and were dumped out and strewn about the vehicle with other things. I have photos of what the inside of the van looked like after the vandalism.

Because some of the cassette tapes were broken and unraveled I had to listen to the cassette tapes to know what testimony is where and what I can transcribe. I believe I can transcribe approximately 210 pages of the hearing. At least three cassettes are missing from the group. They were inside the briefcase.

I do not know how you want me to handle notifying the attorneys who have ordered the transcript. Do you want to notify them or do you want me to write to them and tell them the situation, include a copy of the police report and tell them what portions of the requested transcript they can expect to receive? I believe the missing materials relates to one entire witness and part of another witness. It was not a trial, but motions in advance of a trial.

Obviously, this is a very unfortunate situation. As it turned out, I was not going to stay in Manning on Thursday night and I was on my way back to Chapin. I stopped on Hwy 378, on the Sumter Highway, to go into a grocery store to kill time until the typist got off from work. I was inside the store about an hour. When I came out I found the break-in. My entire back-up system was stolen.

I told the police officer the recorders were worth approximately $100.00 each at a pawn shop because they were old, but they still worked fine. I have learned that it will cost much more than that to replace them. However, my insurance is $1,000 deductible so I will be out-of-pocket at least that much to buy new equipment. I have been told to file an amended police report reflecting replacement costs for what was stolen. I have been able to borrow a back-up system to use temporarily.

My laptop computer and Stenograph writer was in the back of the van but the thieves didn't open the back hatch. The police officer believed the thieves worked from the side sliding door and would have been seen if they had tried to open the back of the van.

Please let me know how I am to proceed with this situation. I apologize for the problem and the inconvenience to you this will create. For 18 years I have been parking my vehicle overnight at motels and in parking lots all over the state and have been very fortunate to have had no break-ins until now.

1730

Col Thomas

Columbia Police Dept
SC0400100

INCIDENT REPORT

INFORMATION ONLY: [ ]

CASE NUMBER: 110018891

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE
1. 16-13-0180(1)(Z)(B) AUTOBREAKING 23G THEFT OF MOTOR VEHICLE PARTS OR ACCESSORIES	YES NO	YES NO	PARKING LOT/GARAGE
2. 16-13-0030(A) LARCENY/PETIT OR SIMPLE LARCENY 23H 23H ALL OTHER LARCENY	YES NO	YES NO	PARKING LOT/GARAGE
3.	YES NO	YES NO	

TYPE VICTIM: Individual, Business, Financial Inst., Government, Relig. Org., Soc./Public, Other, Unknown, Police Off.

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER): 7545 GARNERS FERRY RD, COLUMBIA, SC
ZIP CODE: 29209-0000
WEAPON TYPE: NONE

INCIDENT DATE	24 HR. CLOCK	TO DATE	24 HR. CLOCK	DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART TIME	LOCATION NO.
08/22/2011	08:00	08/23/2011	18:00	08/23/2011	16:45	16:50	17:10	465

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE): THOMAS, REMA
RELATIONSHIP TO SUBJECT: #1 ST
RESIDENT: S | RACE: W | SEX: F | AGE: 66 | ETH: N | DAYTIME PHONE: 803-345-0621 | EVENING PHONE:

ADDRESS: 806 YACHT CLUB PT | CITY: COLUMBIA | STATE: SC | ZIP CODE: 29036-0000 | LOCATION NO.: 290

VICTIM'S NAME (LAST, FIRST, MIDDLE): THOMAS, REMA
RELATIONSHIP TO SUBJECT: #1 ST
RESIDENT: S | RACE: W | SEX: F | AGE: 66 | ETH: N | DAYTIME PHONE: 803-345-0621 | EVENING PHONE:

HEIGHT: 505 | WEIGHT: 216 | HAIR: GRE | EYES: BRO | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.:

ADDRESS: 806 YACHT CLUB RD | CITY: CHAPIN | STATE: SC | ZIP CODE: 29036-0000 | LOCATION NO.: 299

VISIBLE INJURY: YES NO | EXPLAIN: | COMPLAINT OF NON-VISIBLE INJURIES: YES NO
VICTIM NO. 1 USING: ALCOHOL YES NO UNK. | DRUGS: YES NO UNK. | TYPE:
MO/MANNER: ONE-MANNER, DETECTIVES/LAST, OTHER, AGE, ASSISTED | 1-This Jurisdiction, 8-State, O-Out of State, U-Unknown

SUBJECT NO. 1 (SUSPECT / RUNAWAY / WANTED / WARRANT / ARREST / JAIL / SUMMONS)
NAME (LAST, FIRST, MIDDLE): UNKNOWN, UNKNOWN | RACE: | SEX: | AGE: | ETH: | DATE OF BIRTH: | HEIGHT: | WEIGHT: | HAIR: | EYES:
FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.: | DAYTIME PHONE: | EVENING PHONE:
ADDRESS: NO KNOWN ADDRESS | CITY: | STATE: | ZIP CODE: | LOCATION NO.:
SUBJECT USING: ALCOHOL YES NO UNK. | DRUGS YES NO UNK. TYPE: | ARRESTED/HAVE OFFENSE SCENE: YES NO | TOTAL ARRESTED: | DATE/TIME OF OFFENSE: | DATE/TIME OF ARREST:

DAY OF THE WEEK: S M T W T F S UNK / 1 2 3 4 5 6 7 8
HOW REPORTED: A B C D E F (A circled)
A= OFFICER DISPATCHED ON CALL, B= REPORT TAKEN BY PHONE, C= COMPLAINANT WALKED IN, D= COMPLAINT WRITTEN IN, E= OFFICER INITIATED, F= OTHER
OFF. FACTOR: N
A= RESISTANCE/HOSTILITY, B= WEAPONS, C= UNFOUNDED CALLS, D= MENTAL SUBJECT, E= COMPLAINANT FRE-QUENTLY INTOXICATED, F= DOMESTIC, H= NORMAL

NARRATIVE

COMPLAINANT STATES THAT UNKNOWN SUBJECTS GAINED ACCESS TO LISTED VEHICLE. UPON GAINING ENTRY, UNKNOWN SUBJECTS REMOVED TWO SONY BRAND AUDIO RECORDERS VALUED AT $100 EACH AND A BROWN BRIEFCASE VALUED AT $50. CONTAINED IN THE BRIEFCASE ARE VARIOUS COURT DOCUMENTS. REPORTING OFFICER DID NOT PROCESS THE VEHICLE DUE TO THERE BEING NOTHING TO PROCESS. COMPLAINANT STATES THAT THE VEHICLE WAS LOCKED AT THE TIME THAT THE LARCENY OCCURRED BUT NO DAMAGE WAS NOTICED ON THE VEHICLE.

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY: SC0400100
JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY:

PROPERTY EQPT.

TYPE/GROUP	2E	2Z					TOTAL VALUE
STOLEN	$200.00	$50.00					$250.00
DAMAGED							$0.00
BURNED							$0.00
RECOVERED							$0.00
SEIZED							$0.00

ADMINISTRATIVE

SUBJECT IDENTIFIED: YES NO | SUBJECT LOCATED: YES NO | S.F.: AN | ACTIVE / UNFOUNDED | ADM. CLOSED | ARRESTED UNDER 18 / ARRESTED 18 AND OVER | EX-CLEAR UNDER 18 / EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1 OFFENDER DEATH, 2 NO PROSECUTION, 3 EXTRADITION DENIED, 4 VICTIM DECLINES COOPERATION, 5 JUVENILE NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
PARKER WALTER B	08/23/2011 06:55:30 PM	22148	BRANHAM AMANDA L	08/23/2011 07:32:04 PM	21606

FOLLOW-UP INVESTIGATION: YES NO | OFFICER:

FRITG 2043

Exhibit D

RECEIVED
Via US Mail 02-01-2013

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.

AMENDED INTIAL BRIEF OF APPELLANTS

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ATTORNEYS FOR APPELLANT

RECEIVED
JAN 09 2013
SC Court of Appeals

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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 APPLICABILTY 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 Amended[1] 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 briefs[2] 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 Appellant[3]. Rushton was there with two officers (Nick Moore and Sara McAllister[4]) 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 proferred 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 APPLICABILTY 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 deadline 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 plan 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, Ruston testified only that his signature was on the document. (Tr. p. 109, lines 2 - 3). Rushton did not testify[6] 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 certified[7] as a Class I law enforcement office 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,

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.

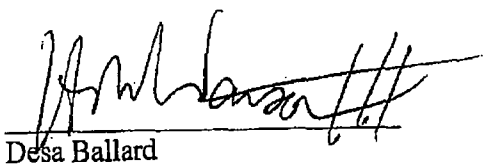
Retrospectively, of course, it is obvious that Rushton, Moore and McAllister were trying to serve the community and do their jobs. But when examined from the perspective of Appellant, or any other reasonable person placed in his shoes, at the relevant time when Appellant was making decisions about what 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

Exhibit E

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.

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.

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,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By: _____
Mark R. Farthing

Office of the Attorney General
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February 7, 2013

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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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

The Supreme Court of South Carolina

RECEIVED
JUN 26 2014
SC Court of Appeals

The State, Respondent,

v.

Joe Worley, Petitioner.

Appellate Case No. 2013-002477
Lower Court Case Nos. 2010-GS-35-00049, -00050, -00051, and -00052,

---

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

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

Exhibit F

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' 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.

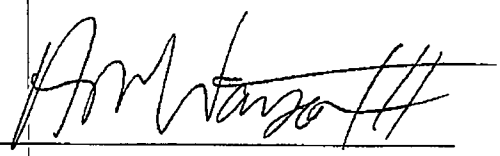
Appellant believes that relevant in this consideration for the nature of any remand is recent case law that appears to indicate partial reconstructions may be disfavored. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012). That matter was remanded for a new trial in light of a 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, pardoxically, 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.

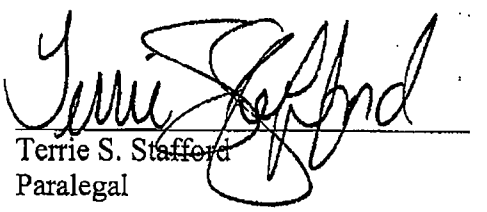
State of South Carolina,

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

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.

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 detainee[1]. 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, Rushton[2], 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 proceeding[5]. 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.

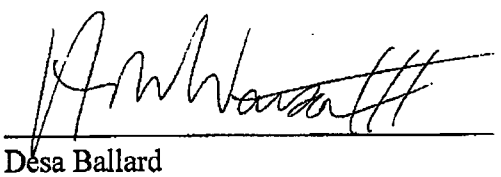
scratch.

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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ATTORNEYS FOR APPELLANT

March 6, 2013

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

Exhibit G

RECEIVED
Via US Mail 03-29-2013

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
3/28/13

Exhibit H

State of South Carolina

Court of General Sessions

County of McCormick

State	)	
	)	
	)	Transcript of Record
v.	)	10-GS-35-0049
	)	10-GS-35-0050
Joe Ross Worley	)	10-GS-35-0051
	)	10-GS-35-0052
Defendant.	)	

June 14, 2013
Edgefield, South Carolina

B E F O R E:

The Honorable William P. Keesley, Judge.

A P P E A R A N C E S:

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Attorney for Rema Thomas and Desiree Allen

Stacy L. Sheppard, RPR
Circuit Court Reporter

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E X H I B I T S

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(The following proceedings were held on June 14, 2013.)

THE COURT: This is in the matter of the State versus Joe Ross Worley. This is a McCormick County case. I previously conducted a hearing under the Defense of Persons and Property Act in McCormick quite some time ago and made rulings and basically denied the efforts of the defense to be declared to be immune from further prosecution or civil suit.

After that ruling was made and in the written order, I felt that I was having to make such fact specific findings that dealt with the credibility of the claims of Mr. Worley that the appropriate thing for me to do was to recuse myself from further consideration of the civil or criminal cases, and I put that in the order. It wasn't because of any actual bias or animus or anything else. It was just what I felt was the appearance. Having made specific findings on very fact specific issues, I just felt it would be better that I recuse myself.

So I notified the other resident judge, Judge McMahon, under the procedure that we're to follow. And my understanding is that he subsequently recused himself and Judge Addy was assigned by the Chief Justice.

Now, what I really did not think through, I guess, was that there might be a motion for a reconsideration, which there was. So there was a rather detailed motion for reconsideration that was filed. There also had been bond matters because Mr. Worley has been incarcerated for an extended period of time. He's still incarcerated.

Now, Judge Addy was able to deal with the bond issues, but the reconsideration issue, I then had an ethical question as to whether I could having recused myself from the case due to the reconsideration motion. With the consent of counsel, I contacted Professor Freeman, who is, I think, recognized as certainly one of the most fore -- foremost authorities on ethics in South Carolina and got an opinion from him, which should be in the file. And I do have the McCormick Clerk of Court here and the McCormick -- the case file is here. In any event, my recollection of Professor Freeman's response to me was not only did I have the ability to do it, I had the obligation to do it.

So the reconsideration motion was, as I mentioned, extensive. It took quite a while to do. I went through all of those things. And I did agree with some of the positions of the defendant and did

modify the order. I've got so many different versions of the order in the computer, I have a real hard time figuring out which one is the last one because I've done so many orders in this case.

However, there was another twist that came along. The defense had asked if they could get the transcript before I ruled on the reconsideration. And all this is coming from my memory, I apologize to you all. If I state anything incorrectly, you can correct me. They wanted the transcript and it was learned that the court reporter had equipment in a vehicle and the vehicle was broken into and certain things were stolen, and because of that, there are gaps in the record. I have not talked to the court reporter. Having recused myself from the case, I have purposely stayed as far away from it as I possibly can.

So I learned that the case had been taken up on appeal. I knew it was going to be appealed regardless of how I ruled because the procedure now is for us to have this Castle Doctrine hearing, the Defense of Persons and Property Act hearing, wherein the defendant had the burden of proof and it's a preponderance of the evidence standard. And it's immediately appealable. So regardless of whether I

ruled for the State or the defense, I knew it was going to go up on appeal and it did, apparently. And the South Carolina Court of Appeals has it.

And there is, in the memorandum that was submitted and in -- in the letter that was sent to Judge McMahon, there are attachments, one of which is that Judge Cureton has issued an order, which was filed on March 28th, 2013, which denied a motion for a de novo hearing and remanded the matter to this Court for reconstruction of the missing portions of the record. A copy was sent to various attorneys.

I didn't know anything about it. Somebody notified me about it. I can't say exactly how I learned. I think it was in an e-mail and -- Oh, it was an e-mail or some sort of response going back because Judge McMahon had said that I was recused, if I recall correctly, and Judge McMahon was recused and they should refer it to Judge Addy. And, of course, Judge Addy wasn't present for the hearing, so we're here.

We had previously scheduled this, it was continued. I don't know that a hearing is necessary, but I wanted to afford an opportunity for a hearing and my understanding was that Mr. Worley's counsel was requesting one. And I'm certainly very

amenable to allowing the presentation of whatever we need to present today.

The first thing I guess I need to cover, however, is that I did not try to seek a second opinion from Professor Freeman because I think the concept's the same. Nobody else is in the same position to decide issues about reconstruction of a record or to attempt to. I don't know how it's fair for any other judge to be put in the position of trying to reconstruct it.

A reconstruction of the record doesn't deal with any further rulings as far as any future rulings on the criminal case or the civil case. It just deals with the prior matters that were handled. And so I think the same thing applies that Professor Freeman would say, I've got not only ability, but the obligation. But if any of y'all want to put anything on the record about the recusal, now is the time.

MR. MAYE: Nothing from the State, Your Honor.

MS. BALLARD: Nothing from the defendant, Your Honor.

THE COURT: All right. Now, Ms. Ballard, your side has the burden, so I guess we'll start with you.

MS. BALLARD: Yes, sir. Thank you, Your Honor. I've been practicing for 30 years and I've never had to be involved in a reconstruction of a record, so I'm not sure exactly what the procedure is. I looked to the prior case law for guidance on that issue and, fortunately, there was some. I have cases that I can hand up to Your Honor.

For the record, China versus Parrott, a 1968 case from the Supreme Court of South Carolina, which provides guidance in reconstructing the record that permits affidavits of counsel and an affidavit of the court reporter, also indicates that -- I'm sorry -- There's a subsequent case that permits the trial judge's notes, that's Whitehead versus State, to also be used. That's, again, from the South Carolina Supreme Court in 2002.

The most recent case from our appellate courts that address the issue of reconstruction of the record is Adams versus Allen decided by the Court of Appeals in May 2012. There are some other cases as well.

What these cases tell me, Your Honor, and I'll hand up copies to you and to the State, that we are supposed to use your notes from the trial. We are supposed to use affidavits of the counsel who

attended trial and the testimony of the court reporter, who is present here today, to reconstruct what was missing.

Your Honor, I'd like to, if I could, mark Judge Cureton's order dated March 28th, 2013, as an exhibit to this hearing, if that's agreeable.

THE COURT: Sure. Hand it to the court reporter, please.

(Defendant's Exhibit Number 1, Order of Judge Cureton, marked and admitted into evidence.)

MS. BALLARD: Thank you, Your Honor.

As we prepared for this hearing, we have Judge Cureton's order, of course, that remanded it to reconstruct the missing portions of the transcript. And I provided Justin, prior to the hearing, with a copy of the portion of the transcript that we received from the court reporter. And it picks up I can't tell how far into the hearing, but all of the introduction of the hearing, the motions that were made by Mr. Henderson and Mr. Garrett are missing and all of Mr. Worley's testimony is missing.

There is another gap in the transcript that begins on page -- another gap that begins on page 159 at the -- I can't tell if it was the conclusion of the testimony of Allen Sheffield or whether his

testimony was finished. And I can't tell how long the break was.

So what we have, Your Honor, we have great concerns about whether a sufficient record can be reproduced at this point. Some of the cases from the appellate courts, particularly State versus Ladson and Koon versus State, as well as the Adams case that I've already referred to Your Honor, talk about the difficulty in reconstructing the record. And, particularly, the Adams case talks about the inabil -- if the court is unable to adequately reconstruct the record, the defendant's due process rights are implicated and a new trial will be warranted.

That being the case, Your Honor, we have attempted, to the best of our ability, to summarize from trial counsel's notes, Mr. Worley's testimony. It's a document that we had submitted to the Court of Appeals as a proposed portion of the record on appeal. This document was done made -- by Mr. Henderson and Mr. Garrett based on their trial notes taken contemporaneously with Mr. Worley's testimony, but we don't have any other notes of the other witness that was testifying, Mr. Sheffield, of his missing testimony.

And all we have -- we don't have anything about what the pretrial motions were other than, apparently, the case was actually being called for trial. And Mr. Henderson made a motion under the Castle Doctrine, which is -- we have that portion of the transcript missing. Mr. Garrett made a motion to sequester witnesses, that, of course, is missing as well. And that portion of the transcript starts with Your Honor saying to Mr. Garrett, Call your next witness. So we have the entire beginning portion of the hearing missing, as well as all of Mr. Worley's testimony.

And the problematic thing with that, Your Honor, is that Mr. Worley had the burden of proof. So it's ironic that his is the testimony that is completely missing from the record.

I would introduce into evidence, the State has already received this as part of the appellate proceedings, the affidavit of Mr. Henderson and Mr. Garrett with their reconstruction of Mr. Worley's testimony from their contemporaneous trial notes. I'd like to introduce that into evidence as Exhibit 2.

THE COURT: Mark it in the record, please.

(Defendant's Exhibit Number 2,

reconstruction of Joe Worley's testimony, marked and admitted into evidence.)

MS. BALLARD: I have two witnesses, Your Honor. One is the court reporter, Rema Thomas, and her supervisor from Court Administration to talk about the efforts that have been made to -- why the record is missing, first, and the efforts, if any, that have been made to reconstruct the record. I propose calling Ms. Thomas to the stand at this point.

THE COURT: All right. Call your witness.

MS. BALLARD: Ms. Thomas.

REMA THOMAS,

having been duly sworn, testified as follows:

MS. BALLARD: Your Honor, Ms. Thomas is represented by Mr. Nicholson from the Attorney General's Office. I just wanted to make sure that was noted for the record.

THE COURT: All right.

DIRECT EXAMINATION

BY MS. BALLARD:

Q Ms. Thomas, how are you employed?

A I'm employed by South Carolina State Court Administration.

Q All right. And how long have you been employed as a court reporter?

A Nineteen and a half years.
Q Are you assigned to a particular judge?
A No.
Q Are you what they call a roving court reporter?
A Yes.
Q Were you the court reporter at a hearing held before Judge Keesley on May 31st, 2011 and June 1st, 2011?
A I was.
Q Prior to that hearing, did you test your equipment and determine that everything was working appropriately as far as you could tell?
A I did.
Q Did you have backup tapes?
A I did.
Q And did you record, forgive me if I use the wrong term, stenographically versus steno mask?
A Stenographically, yes.
Q Stenographically. And just for the record, that's the one with the keyboard as opposed to the mouthpiece; is that right?
A Correct.
Q Okay. And did you take those entire proceedings in the Worley case those two days?
A I did.

Q Did you maintain a trial log of the proceedings in that case as required by the South Carolina Court Reporter Manual?

A I did.

Q Ms. Thomas, what did you do after the trial with your tapes and your stenographic notes and your trial log?

A They are all assembled, put into an expanding folder and shelved for future reference.

Q All right. Where do you keep those?

A At my house.

Q Do you have a special area set aside where those are retained in a secure location?

A I do. I have an office, yes, room.

Q Did you receive one or more requests to transcribe those proceedings?

A I did.

Q How many requests did you receive, if you recall?

A I don't recall. I know three for sure.

Q All right. And what is your procedure when you receive requests for preparation of a transcript? What do you -- what's your first step?

A I would log those requests with the dates they're received onto a log sheet that's used at the

end of the month for a report.

Q Is this an official form from Court Administration?

A The monthly report is that this information is transferred to. And then I would see how far down my list of what's ahead of that transcript. Sometimes there might be 5-, 6-, 800 pages ahead of this one, so I would hold that request until I get to where it's time to transcribe it. And when it's time for that particular one, then I would pull off of my shelf the folder which has everything in it from that week of court, everything.

Q All right. The file, the folder I think you called it that you prepared for Mr. Worley's case, what specifically was in that file?

A Everything.

Q You need to give me more than everything?

A It would have my courtroom worksheets. It would have the paper tape from court. It would have the disk out of my machine. It would have the backup tapes. Other words, if I drop dead and Court Administration came to secure everything that I had done, one week's trial work would be contained in a folder. It's not piecemealed here, there and yonder because somebody might need to pull a week's worth

off a shelf that needs to all be together.

Q Okay. So the folder that you're talking about was not a folder exclusively for Mr. Worley's case, it was a folder for that whole term?

A It would have been for the whole term. However, when I pull it off the shelf, I don't take everything out. I mean, I don't take the worksheet for a second or third trial we might have had that week. The backup tapes that pertain to that would be -- I would take those out, put them in a folder like this and set them on the shelf. They'd be left. They wouldn't be pulled down because I wouldn't need them.

Q All right. So what did you do when you accessed this file to obtain the materials related to Mr. Worley's hearing?

A Usually, at least once or twice a week, I meet with a typist, pick up work from her, take her work. So during that week some time, whenever I had time, I usually go by where she works at night -- or where she lives at night or where she works during the day and I would bring her the next one or two trials or one or two or three guilty pleas, whatever I want her to transcribe next, I would take it to her and pick up what she has ready.

Q All right. Who is the typist?
A Her name is Becky Mayo, M-a-y-o.
Q Is she an employee of the State?
A She is, but not for Court Administration.
Q Is she employed for the purpose of transcribing -- is she employed by the State for the purpose of transcribing official records?
A No. She's employed at the university full-time. She does transcribing at nights and on weekends as a second job.
Q All right. And as whose agent does she do that work?
A Me. I mean, I'm responsible for the work. She types for me. She has no liability for the job. It's my job that -- there's no way you could ever keep up with transcripts if you didn't have somebody helping you.
Q Okay. So is using a typist a procedure that's been approved by Court Administration?
A Yes. They encourage it.
Q Okay. And I'm sorry, I'm not completely familiar with the Court Reporter Manual. Is that discussed in the Court Reporter Manual?
A I don't know. I'm not sure.
Q Okay. Tell us what you did to assemble the

materials for this request, this transcript request, what you assembled and what you did.

A I would pull down the file. I would look on my -- the courtroom log sheet. It would have been audio tapes one through 33 or whatever that would have applied to that particular trial. I would have pulled the other ones out, left them on the shelf and handed her -- and taken the worksheet, the disk from my computer and everything else that was in the file.

Q Now, Ms. Thomas, I understand that your vehicle was broken into; is that correct?

A Yes.

Q Tell us about the circumstances. Where were you and where were you coming from when that occurred?

A I'd been, I believe, in Manning in court that day and I was coming back up 378 to Columbia. And I had planned to stop and meet with the typist at the end of the day at 5:00 and I needed to kill just a little bit of time before I got to USC where she works. So I pulled, and I'm not real familiar with 378, so I pulled off into -- I was looking for a shopping center somewhere that I could get my nails done or go to a grocery store, somewhere just to

kill about an hour or however much time I needed. I don't remember exactly. And that's what I did was just pull into a shopping center to spend some time before it was time to go to meet with her. I came out of the shopping center --

Q Let me stop you before you came out of the shopping center. When you went into the shopping center, did you ensure that the materials that you had brought to give to Ms. Mayo were still in your vehicle?

A Yes.

Q Were they still intact at that time?

A Yes.

Q And how long were you gone from the vehicle?

A I don't know.

Q Can you estimate for me?

A An hour.

Q All right. When you came back, what did you find?

A I came back. I got in my van. I left the parking lot. I pulled back out on 378 and I happened to remember that I had passed a fruit stand under a big tent just maybe a half a mile down the road before I had pulled over into the shopping center. So I went back down the road to where the

fruit stand was, pulled in, got out, bought peaches, watermelon, cantaloupe, whatever I bought. Then I opened the side door, the sliding door of the van, to put my stuff in and that's when I realized that it had been ransacked and gone through.

Q All right. What type of vehicle were you driving?

A Toyota van.

Q And how is it -- other than the driver's door, how is the back portion of it accessed?

A Well, you can lift the gate in the main back, but there's a bench seat across the back there or you can open the sliding glass -- the sliding doors on the sides.

Q And where was your file for the Worley case?

A In -- I have the seats taken out of the van so I can have boxes and whatever. So when you open the sliding door, they would have been sitting right inside there on the floor where a seat would normally be.

Q So that was, essentially, what would have been a back seat?

A The middle row seats.

Q The middle row seat, all right. When you came back out and got in your van, did it appear to be

anything wrong with your van?

A I didn't notice anything wrong.

Q There were no doors standing open?

A No.

Q So when you noticed something was amiss, what did you see?

A Well, when I opened the sliding door and I looked in, the stuff was just kind of -- there was tapes thrown everywhere. There was papers from other personal stuff that I had in there, just somebody had gone through things quickly and just, you know, dumped them, thrown them out. And -- I mean, it wasn't like I left it. And my big briefcase was gone.

Q Your big briefcase which would have -- does the briefcase have anything to do with the file from Mr. Worley's case?

A Yes. That briefcase I usually have -- it's big. It has two zippers on each side and inside of it would be those files that's sitting in there.

Q All right. So I want to make sure I'm clear. All of Mr. Worley's transcript materials or pre-transcript materials were in the briefcase; is that correct?

A Correct.

Q And the entire briefcase was gone?
A Gone.
Q All right. What from Mr. Worley's file was left?
A Well, there were some cassette tapes on the floor with other papers and stuff, which was from other stuff in the van. So, at that time, not knowing what numbers or whatever goes with what, I really didn't know. And I didn't try to go through things and touch things and disturb things until I called the police. So as it turned out, there was, I don't know, two or three or four cassette tapes there on the floor that had fallen -- either been thrown out of the briefcase or fallen out or whatever, but they were there on the floor.
Q All right. And you testified that you called the police?
A Oh, yes, I did immediately.
Q Let me show you -- I'll have this marked first.
MS. BALLARD: Would you mark this for identification? It's a police report with attachments.
(Defendant's Exhibit Number 3, incident report, marked for identification.)
Q Ms. Thomas, can you identify what's been marked

as Defendant's Exhibit Number 3?

A Yes, that looks like it.

Q Looks like what?

A The police -- the incident report, June the 23rd, 2011.

Q From the theft of your vehicle?

A Correct.

MS. BALLARD: Your Honor, I'd move Plaintiff's Exhibit Number -- excuse me -- Defendant's Exhibit Number 3 into evidence.

THE COURT: Any objection to this?

MR. MAYE: None.

THE COURT: Mark it in evidence, please, ma'am.

(Defendant's Exhibit Number 3, incident report, admitted into evidence.)

BY MS. BALLARD:

Q Ms. Thomas, the -- how many police officers responded?

A One.

Q And I assume you told him essentially what you've told us?

A Right.

Q Did you go back to the location where your car had been parked for about an hour or did he come to the fruit stand where you were?

A He came to the fruit stand.
Q All right. Did he take any photographs of the damage?
A Not that I know of.
Q Did you take any photographs of the damage?
A I did while I was waiting on him.
Q All right. How many photographs did you take?
A Two.
Q And are those photographs still in existence?
A No.
Q What happened to those photographs?
A Some time last fall I needed space on my cell phone which had filled up for the capacity of photos I can take, so that was part of photos that I eliminated for space. I had no reason to believe I would need them, so.
Q Okay. You were aware at that time, were you not, that we had made a request for the transcript and there was a portion of it missing?
A Yes. I knew there was a portion missing.
Q Okay. Defendant's Exhibit Number 3 indicates that you called the police about 4:45 in the afternoon. Does that sound about right?
A Yes.
Q And I'm not good with police reports, but it

appears to indicate that the time of the incident is 8:00 a.m. Do you see that?

A I don't know what that means. I don't know what a 24-hour clock is. I don't know.

Q Okay. Well, the police report reflects that the incident date was 6/23/11 at 8 -- 0800 on a 24-hour clock ending on 6, it's either 23 or 29, at 1500 o'clock. I don't know the 24-hour clock very well either, but that sounds to me like a period of several hours. Did you report to the officer that you weren't sure at what time during the day your car had been broken into?

A Oh, no, I was very sure. I just -- no. I was very sure.

Q Okay. So what time did you tell him the event had occurred?

A Approximately an hour before.

Q Okay. And pages two and three of Exhibit Number 3 are what?

A Pages two and three are the -- is the memo that I sent to Court Administration letting them know what had occurred.

Q Okay. Did you speak with anyone at Court Administration about this event? Don't tell me what they said, just tell me if you had any

conversations.

A Not at that time.

Q Did you ever have any conversations with Court Administration about this event and the request for the transcript?

A No.

Q What efforts, if any, were undertaken by you to create a transcript with what you had left?

A Immediately we transcribed what I had. I started immediately working on what I had.

Q What did you have?

A What was found on the floor of the van.

Q And what was that?

A Cassette tapes.

Q And those cassette tapes were what? Were they backup tapes?

A They were the backup tapes of testimony of some of the witnesses.

Q All right. Did you have anything from which you could transcribe from your Stenograph machine?

A No.

Q So the transcript that's been provided to us that we provided to Judge Keesley was prepared solely from the backup tapes?

A Correct.

Q If you'd had the -- did you did you do it or did someone else do it?

A I did part of it. I started it and I think Becky finished it.

Q Okay. Working exclusively from the backup tapes?

A Yes.

Q Did you have a list of witnesses?

A No.

Q Did you have a list of -- did you have your trial log?

A No.

Q Did you attempt, through contact to the Clerk's office or anyone else, to try to obtain any information to assist you in making a better reconstruction of the record?

A I did not and I don't know what they would have that would have been beneficial.

Q How do we know, looking at the transcript that we have, who the witnesses were since we only have a portion of the transcript?

A Well, I guess you just have to assume that what's there is correct.

Q All right. So is there anything in the official record that will tell us who the witnesses

were, who all the witnesses were?

A No.

Q Is there anything that, in the official record, that tells us what all the exhibits were?

A No.

Q In the transcript that was prepared, was it all audible so that you could accurately transcribe it?

A Yes, definitely.

Q All right. And the references in the transcript to exhibits are simply what was reflected in the backup tapes; is that correct?

A Yes.

Q All right. So as we sit here today, we don't know how many witnesses' testimony is missing; is that correct?

A Correct.

Q And when you prepared the transcript to provide to the parties that had requested it, you did a certification which indicated that it was an incomplete record, did you not?

A That's correct.

Q Did Court Administration assist you in any way in trying to reconstruct the record by obtaining information from the Clerk's office or from any other source?

A No, because it's not their job to have that information conclusively. That is the job of the court reporter.

Q All right. But you didn't contact the Clerk's office or attempt in any way to supplement what was left after the theft to create a complete record; is that right?

A No, because they wouldn't have anything.

Q They being --

A The Clerk's office.

Q -- the Clerk's office?

A No.

Q They wouldn't have exhibits?

A They would have the original exhibits.

Q But you didn't make any effort to ensure that the transcript you prepared identified all of the exhibits, did you?

A Well, they were identified inside the -- in the testimony in the transcript.

Q So the exhibits that are identified in the partial transcript that we have are only the exhibits that were referenced during that portion of the hearing that we do have backup tapes for, correct?

A Correct.

Q All right. Now, you've brought with you today what?

A Exactly what you handed me except for the subpoena and I have a floppy disk from the testimony -- from the transcript that was prepared from the cassette tapes.

Q All right. Now, you had cassette tapes. What happened to the cassette tapes?

A The cassette tapes that -- the portion of the transcript that we have were pulled out the first of the year and reused because that's what we do. If we're not notified that there's some challenge to the testimony, then we reuse them.

Q All right. So what do you have on the CD?

A The transcript.

Q Where did that come from?

A From the cassette tapes.

Q Explain to me, is it an audible CD or is it a PDF of what you typed? What is on the CD?

A There's no CD.

Q I'm sorry. I thought you said you brought a CD?

A I did not. I said I brought the floppy diskette.

Q I'm sorry. What's on the floppy diskette?

A The transcript that was prepared from the cassette tapes.

Q And is that an audible re-creation of the -- is that a copy of the backup tapes, an audible copy of the backup tapes?

A It is the transcript that was prepared from the cassette tapes that you audibly listen to and transcribe from.

Q All right. So what we have on the floppy disk that you brought today is simply an electronic copy of the transcript that was typed up; is that correct?

A That's right.

Q All right. So we don't have any audible record or any written record of the proceedings that occurred before Judge Keesley on May 31st, 2011 and June 1st, 2011, other than the partial transcript that you prepared from the backup tapes; is that right?

A Yes.

MS. BALLARD: Beg the Court's indulgence just a moment.

THE COURT: Yes, ma'am.

(Pause.)

BY MS. BALLARD:

Q Was your vehicle locked at the time of this incident?

A As far as I know, it was locked.

Q Okay. Does it lock -- is it a manual lock or is it one that you click with a key fob?

A Both.

Q How do you normally lock it?

A Manually.

Q You push the lock down before you close the door? Before you went into wherever -- the store, did you check to make sure that the car did, in fact, lock when you left it?

A I think I probably did.

Q Is that your normal custom and habit?

A Right, it is.

Q When you came back to get into the van, was it still locked?

A Well, I hit the key fob to unlock it, so I'm assuming it was locked.

Q But you didn't try it to see if it was locked?

A I did not.

Q Okay. Did you hear anything click when you hit the fob?

A I don't recall thinking it was not locked, so.

Q Okay. Now, the tapes that were left in your

vehicle, what size tapes are these?

A Cassette recorder standard tapes.

Q They're not mini tapes. They're the size of a pack of cigarettes maybe?

A Yes.

Q All right. And how many tapes from Mr. Worley's matter remained?

A I don't know because the courtroom log sheet was missing also and that would have told me how many tapes there were.

Q Were the tapes labeled in any way?

A Dates and numbers.

Q Dates of the hearing?

A Uh-huh. The dates -- right.

Q And what else was on there?

A The -- they would have been numbered.

Q All right. Was there anything on the outside of the tapes that would indicate whose witnesses -- whose witnesses' testimony was included on the tape?

A No.

Q Did the briefcase also contain the disk or memory from your Stenograph machine?

A It did.

Q All right. Was that also taken?

A Yes.

Q Does your Stenograph machine have any built-in memory other than a CD or some other tape?

A No.

Q Before you put the materials in your car to take them to Ms. Mayo, did you copy them on to a hard drive somewhere so you would have a backup in the event there was an accident or some other event?

A No.

Q All right. So the only place we would have had any record at all was in the back seat of your car that day, correct?

A Yes.

Q Was there any damage to your car?

A The police report says there was no damage, but we did, later that night, notice long scratches along the side of it, so.

Q Did any repairs have to be made --

A No.

Q -- to your vehicle?

A No. Well, we didn't -- the scratches are still there. We didn't have it repaired.

Q Was a latch broken or anything?

A No.

Q Do you still have the vehicle?

A I do.

Q Okay. After you left Manning, had you made any stops before you pulled into this shopping center?

A I don't recall.

Q You don't recall if you made any or --

A If I might have stopped to get gas or something before I left Manning, I really don't remember.

Q Okay.

MS. BALLARD: I don't have any further questions for this witness.

THE COURT: All right. Anything from the State?

MR. MAYE: No questions.

THE COURT: Mr. Nicholson.

MR. NICHOLSON: No questions, Your Honor.

THE COURT: All right. Ms. Thomas, if you'll stay there, I'm going to direct the questions to everyone.

How did the exhibits get to the Court of Appeals?

MS. BALLARD: The exhibits, Your Honor?

THE COURT: Yeah. I never did appellate work, so you'll have to forgive me, I don't know.

MS. BALLARD: Yes, sir.

THE COURT: There's -- I have the Clerk's file up here. I can see on the top that there are

exhibits. You asked her about exhibits. I had made a note in my margin to ask the same thing you did, Wouldn't you transmit the exhibits to the clerk at the end of the trial? And the transmittal sheet that I do see is here. So I'm confused about the questioning about how would you know that all of the exhibits were there.

MS. BALLARD: Your Honor, I was hired to handle the appeal. I didn't try the case. I had the exhibits that were provided to me by the trial counsel. I did not contact the Clerk's office to get copies of the exhibits because my co-counsel had their own copies.

THE COURT: All right. So the Clerk of Court doesn't transmit the exhibits to the Court of Appeals normally?

MS. BALLARD: No, sir. The way it works is the appellant is responsible for putting together the record on appeal, which normally includes written documents. If -- there's a rule, and I don't recall the rule number, I can find it for you, that if the original exhibits are demonstrative evidence or they're oversized or otherwise cannot fit into the transcript on appeal, the Court of Appeals issues an order to the Clerk of Court to transmit the original

exhibits to the Court of Appeals, but that did not occur in this case.

THE COURT: Okay. But as far as the exhibits, they should all be right here should -- whether they're referred to on the tape or not, they should be -- the original exhibits should have been transferred to the Clerk of Court at the conclusion of the hearing.

MS. BALLARD: Ms. Thomas should have done that, yes, sir.

THE COURT: Which is what this form indicates. It's signed for by Buffey Shorter, who works with the Clerk of Court's office in McCormick, and by Ms. Thomas on June the 1st.

MS. BALLARD: Yes, sir. And my question to her was whether she accessed the Clerk's file to ensure that she had identified all of the exhibits in the official transcript and she said she had not.

THE COURT: Do y'all have anything else with this witness?

MS. BALLARD: Let me check.

MR. MAYE: Nothing from the State, Your Honor.

THE COURT: Ms. Thomas, did you want to chime in on that at all?

THE WITNESS: No, sir.

BY MS. BALLARD:

Q Have you had any other break-ins to your vehicle?

A No.

Q And the tapes that were left, were they intact?

A One of them had to be rewound. It was pulled out of the casing, but we were able to wind it back.

Q And for a two day hearing, how many tapes would you normally have?

A Well, you could have one or you could have 30 depending on --

Q Because the reason I'm asking is we have -- the entire beginning of the hearing is gone. We don't have any of that. And then on page 159, we have another gap. How come?

A That's what I found on the floor of the van.

Q So we don't know how big that gap on page 159 is. We don't know how many witnesses there were or what those proceedings were?

A The courtroom worksheet that had the numbers, the witnesses, the cross, the redirect, the recross, the next witness, the tape number, the reference to my paper tape numbers, those were all on the courtroom worksheet.

Q . And the courtroom worksheet had not been

photocopied or scanned or --

A No.

Q -- duplicated in any way?

A And I also would have had the copy of the exhibit sheet. When I hand the exhibits to the Clerk of Court's office, we get a receipt for those. That would have been in there, too. But in, you know, 19 years, I've never had a problem, so.

MS. BALLARD: Okay. Thank you, Your Honor. I don't have any further questions for this witness.

THE COURT: Thank you, ma'am. You may step down.

MR. NICHOLSON: Your Honor, may she be excused?

MS. BALLARD: I have no objection.

THE COURT: Thank you very much, ma'am.

MS. BALLARD: Your Honor, we call Desiree Allen to the stand.

THE COURT: Come around, please, ma'am.

She's free to go.

DESIREE RUTLEDGE ALLEN,

having been duly sworn, testified as follows:

THE CLERK: Have a seat. State your full name and spell your last name, please.

THE WITNESS: Desiree Rutledge Allen, A-l-l-e-n.

DIRECT EXAMINATION

BY MS. BALLARD:

Q My married name is Allen just for your information.

A Maybe we're cousins or something.

Q Maybe we are. Where do you work, Ms. Allen?

A I work for the South Carolina Judicial Department.

Q And in what particular office?

A The Office of Court Administration.

Q What is your specific title?

A Program manager.

Q Do you have multiple programs that you oversee?

A No, just two.

Q And what are those two?

A Court reporters and court interpreters.

Q With reference to your duties as to court reporters, what do those include?

A They include the scheduling of court reporters to terms of court, approval of leave, the day-to-day operation of the scheduling of court reporters, any problems that may come up, the overseeing of monthly reports that they file, the approval of travel. Those are the basic things that I can think of.

Q What kind of monthly reports are court

reporters required to file?

A The court reporters are required to file a monthly report of transcript requests that they receive. They have to indicate the date that the request was received, the date of the hearing, how many pages it is, whether they need an extension, whether the case is on appeal. I think that's what's asked for on the form.

Q All right. Do the court reporters have to provide you with reports of what proceedings they've taken in the regular course of their duties?

A Not specifically. There's no -- like, I would have no idea what cases were heard unless it was requested because then it would be placed on the monthly report.

Q By the court reporters?

A Yes.

Q Okay. Ms. Allen, did you receive communication from Ms. Thomas after the events that she described?

A Yes, I did.

Q What, essentially, shortly did she tell you?

A She described an incident where her vehicle was broken into and various materials were taken.

Q Was this a verbal conversation or was it something transmitted to you in writing?

A I don't recall. It seems to me that she probably called to let me know that something had happened and then I, in turn, asked her to reduce it to writing so that we would have, you know, something in her file concerning that.

Q And referring to Defendant's Exhibit Number 3 pages two and three, can you identify what those are?

A This appears to be a memorandum that she provided to me after, you know, calling to tell me about the incident.

Q And what's the date of that memorandum?

A The date of the memorandum is July 5th, 2011.

(Defendant's Exhibit Numbers 4 and 5, letters, marked for identification.)

Q Let me show you what's been marked for identification as Defendant's Exhibit Number 4. Do you recognize this letter, Ms. Allen?

A Not specifically, but it is addressed to me at Court Administration.

Q Do you recall receiving that letter? It's a letter from me, correct?

A Yes, ma'am.

Q Do you recall receiving that letter?

A Not specifically.

Q Let me show you Defendant's Exhibit Number 5 and ask if you can identify that?

A This appears to be a letter from your office dated September 1st, 2011, addressed to me.

Q And do you recall receiving that letter?

A Not specifically.

Q Ms. Allen, when it was brought to your attention that Ms. Thomas had incomplete records from the Worley hearing, what, if anything, did Court Administration do to assist her in preparing a complete transcript of the proceedings for May 31st, 2011 and June 1st, 2011?

A What did we do to assist her in preparing a transcript?

Q Yes.

A Nothing.

Q Did Court Administration contact law enforcement or contact the Clerk's office or do anything to try to produce a complete transcript?

A No, ma'am.

MS. BALLARD: Your Honor, I'd move Exhibits 4 and 5 into evidence, although she's not been able to specifically...

THE COURT: Anything y'all need to put on the record?

(Pause.)

MS. BALLARD: I understand there's no objection, Your Honor.

THE COURT: Mark those in evidence.

(Defendant's Exhibit Numbers 4 and 5, letters, admitted into evidence.)

BY MS. BALLARD:

Q Ms. Allen, there's Rule 607 of the appellate court rules that governs court reporters; is that correct?

A That's correct.

Q And are you -- I assume you're familiar with that rule?

A Yes, ma'am.

Q Subsection (i) of that rule requires a court reporter to retain backup tapes for a period of five years. Are you familiar with that?

A Yes, ma'am.

Q Is it permissible for court reporters to dispose of the tapes more than five years -- or less than five years after a proceeding?

A No. The rule is clear that the proceedings -- the materials from those proceedings should be kept for five years.

Q All right. So what's a court reporter supposed

to do with the backup tapes after she has prepared a transcript?

A If we're talking about after the transcript is prepared, then they only have to keep them for 30 days. After that, they are allowed to destroy them.

Q All right. So, in this case, when there was only partial backup tapes, what would Court Administration's requirements have been regarding the backup tapes?

A Thirty days after the transcript was prepared, those tapes could be destroyed.

Q Is there any exception for a circumstance where the court reporter is not able to provide a complete transcript?

A No, ma'am.

Q Ms. Allen, did you report this event to anybody else in Court Administration or with the judicial department?

A No, I did not.

Q Was an incident report done at Court Administration regarding the missing tapes or the inability to produce a transcript?

A No, there was not.

MS. BALLARD: That's all I've got. Thank you very much.

THE COURT: Any questions of the witness?

MR. MAYE: None from the State, Your Honor.

MR. NICHOLSON: Nothing, Your Honor.

THE COURT: Anything else?

BY MS. BALLARD:

Q How often does this happen, Ms. Allen?

A How often does what happen?

Q That a court reporter is unable to produce an entire transcript.

A There's no set time, but I would say that that's not the first time. I don't know. Occasionally.

MS. BALLARD: Okay. Thank you.

THE COURT: Anything else?

MS. BALLARD: Nothing further from this witness.

THE COURT: Thank you very much. You may step down.

MR. NICHOLSON: Your Honor, may Ms. Allen be excused?

THE COURT: Any objection to the witness being excused?

MS. BALLARD: No objection.

THE COURT: You're free to go. Y'all can go out the back if you would like to leave. You're

welcome to stay if you like to stay.

Any other witnesses for the defendant?

MS. BALLARD: Your Honor, I would ask you to accept the summary of the testimony of Mr. Worley --

THE COURT: Hold on just a second.

I'm sorry. Go ahead.

MS. BALLARD: Your Honor, I had introduced into evidence the affidavits of Mr. Henderson and Mr. Garrett which include the -- their summaries from their contemporaneous notes of the testimony of Mr. Worley, but I don't have anything else that can be used to assist us in reconstructing the record. I know I'm not supposed to ask you, but does Your Honor have any trial notes from the hearing that can be used to help reconstruct the record?

THE COURT: I'm trying to locate them. The order -- the orders that have been entered, my recollection is, pretty much contain all -- everything. But I looked this morning. I will let you all know if I have problems locating them. I'll just have to look. I did not know it would come to this. I suspect they're somewhere in the office in a file. One of my law clerks went through at my direction and reorganized everything and --

MS. BALLARD: I was a law clerk. I know how

that's done.

THE COURT: Well, I have a file with Mr. Worley's name on it right here that I have kept in my handwriting in my office, but I know -- I seem to recall sitting over there doing those orders and going through each of those witnesses and the notes.

Now, I have affidavits from the attorneys. Is there any kind of affidavit or anything from Mr. Worley that you all want to put in?

MS. BALLARD: No, sir.

THE COURT: I'll let y'all know what I find out about the notes. If I can't find my notes -- I don't know why I won't be able to find them except I've just been doing this so long that there's a big stack.

MS. BALLARD: Your Honor, the cases that I've read indicate that the judge's notes can be used to assist in reconstructing the testimony.

THE COURT: I have no problem whatsoever. If I can locate them, then I will make a copy of them. I know they're not going to be legible, so I'll probably have to type out what they say and attach the handwritten copy to it. And if I cannot find them, I will say my mea culpas and say I just cannot find them.

MS. BALLARD: I guess my question was going to be could we -- if you do find them, could we introduce them as part of the record?

THE COURT: Oh, yeah. I think the remand is for me to try to reconstruct the record. And I've always thought any notes that I might have would be about the only means by which I could reconstruct the record.

MS. BALLARD: Well, the case law, fortunately, lets us have affidavits as well.

THE COURT: That I could reconstruct the record. I'm sorry. I'm still phrasing that poorly. That personally I would be able to say anything about what happened. But, yes, I agree with the affidavits and the concept. I do have -- do y'all have anything y'all want to put in?

MR. MAYE: Your Honor, I have my raw notes. I mean, I think anything else almost gets to advocacy. I've got my raw notes here and you can certainly have them, but I've got, you know, I got Worley's name written down and I've got the things that I've noted that he wrote down. And I wrote it contemporaneously. And I haven't edited or changed it in any way, but I have my raw notes here as to his testimony.

It looks like it's about -- looks like about seven pages. And I looked through it to make sure I didn't put any editorial comments like I need to go to the bathroom or anything bad. It looks all pretty clean to me. So I can -- I'll certainly be glad to give it to the Court for what it's worth.

THE COURT: I don't want them modified. Whatever you've got --

MR. MAYE: No. I got just as I wrote it back then.

THE COURT: All right. You've got notes of the direct examination of Mr. Worley.

MR. MAYE: Yes, it appears to me. I just pulled in this notebook right here -- I mean, pulled it out of.

THE COURT: I recall Solicitor Myers being there and I recall you being there. I don't know if Mr. Young was there or not.

Were you there too, Mr. Young?

MR. YOUNG: Your Honor, I personally went back and tried to find my notes. I had written some notes, investigatory notes, on the front of the folder he's referring to, but I cannot locate the notes that I made. I will go look again.

THE COURT: All right. Well, do you recall who

conducted the cross-examination of Mr. Worley?

MR. MAYE: Solicitor Myers.

THE COURT: That's what I was thinking, but I wasn't certain.

MR. MAYE: And, Your Honor, I just sat as I normally did and I jotted down --

THE COURT: Is the testimony of the Clerk of Court in there, in the transcript?

MS. BALLARD: No, sir.

THE COURT: Do you all recall -- at some point in time, the -- what was the name of the person who was shot?

MS. BALLARD: Mr. Rushton.

THE COURT: Mr. Rushton was testifying about not recalling whether he ever took the oath or not and somebody went down to the Clerk's office and got the oath, which is part -- a copy of the written note is one of these exhibits. Do you all recall whether the Clerk took the stand?

I thought -- it wasn't you. It would have been Ms. Butler.

MS. BALLARD: Mr. Garrett says he recalls her taking the stand.

MR. GARRETT: Or did we stipulate?

THE COURT: I don't recall.

All right. Let me ask you this, and the Clerk's here and I don't know how formal this has to be, what does the Clerk write down about the witnesses and what kind of log does the Clerk keep during court?

MS. BALLARD: That would be helpful, Your Honor.

THE COURT: You probably need to do this under oath. Can you come around and be sworn?

GWENDOLYN DORN CHILES,

having been duly sworn, testified as follows:

THE CLERK: Have a seat. State your full name and spell your last name, please.

THE WITNESS: My full name is Gwendolyn Dorn Chiles, C-h-i-l-e-s.

EXAMINATION

BY THE COURT:

Q And, Madame Clerk, you're now the Clerk of Court of McCormick County; is that correct?

A Yes, sir.

Q And at the time of this hearing we're talking about, what position did you hold?

A I was the Deputy Clerk of Court at the time.

Q Do you recall whether you were in the courtroom or not?

A Yes, sir, I was.

Q Do you remember if you were there the whole time?

A Pretty much the whole time.

Q And the Clerk of Court was who?

A The Clerk of Court was Kathryne Butler.

Q And Ms. Butler has now been elected probate judge and you were elected Clerk -- you were first appointed Clerk and then elected Clerk of Court, correct?

A Yes, sir, that's correct.

Q All right. Now, how long have you worked in the Clerk's office?

A I've been in the Clerk of Court's office for 23 years.

Q What's the normal procedure and what would have taken place as far as what notes the Clerk of Court would have made? Is there any kind of log or journal or anything that the Clerk maintains in a hearing of this sort?

A As the deputy clerk, I took the position as to create my own little journal. I have a --

MS. BALLARD: May I get a little closer, Your Honor?

THE COURT: Sure.

THE WITNESS: I have a five subject tablet that I use to write notes. And usually I do try to write down the time and the date and the name of the witness that was present or that testified that day.

BY THE COURT:

Q Do you know if you have that in this case?

A I'm sure that I do because I've been doing this for quite some time.

Q Can you find it?

A Yes, sir, I can.

Q All right. Would you mind sharing it with us?

A I have no problem with sharing it. I'll be glad to.

Q Do you swear to me you will not modify it in any way?

A I swear to you I will not modify it in any way.

Q All right. Well, would you obtain it, secure it, make copies of it, put a copy of your notes in the file that you brought today, send a copy to the attorneys for both sides for me?

A Yes, sir, I will.

THE COURT: All right. Do y'all want to ask her --

Q But what about is there any other official record? Is there any kind of journal or log? I see

clerks writing down there and I don't know what they're writing. Is there any kind of journal or official record aside from your notebook?

A No, sir. I can and will check with Ms. Butler to see if there's anything that she have, but I don't think so. I think I was mostly the record keeper.

Q Do you recall if Ms. Butler took the witness stand or anyone took the witness stand from the Clerk's office to certify that that oath was in the files of the Clerk's office?

A I don't think Ms. Butler took the stand. I think we obtained the information that was needed from the administrative secretary, the information that she had, along with the information that we had on record, I think that was used. But I don't think she took the stand.

THE COURT: All right. Do you want to ask her any questions?

MS. BALLARD: No, sir. I just was up here because I wanted to make sure I could hear.

THE COURT: Do you want to ask her anything?

MR. MYERS: No.

THE COURT: Thank you very much, Madame Clerk. We'll just adjourn this hearing then and I will

attempt to obtain my notes, we'll get Mr. Maye's notes --

MS. BALLARD: Can I get a copy of Mr. Maye's notes?

THE COURT: Sure.

MR. MAYE: Sure. And, Your Honor, I haven't looked at them since the day that we had the hearing nor have I touched them since the day. I looked in the notebook here and they were in here and I have them just exactly they were that day. They're not voluminous.

THE COURT: Can we make your originals part of the record?

MR. MAYE: Sure, as long as I can get a copy.

THE COURT: Ms. Newby, would you make copies of this for both sides and for me?

THE CLERK: Sure.

MR. MAYE: Your Honor, that's raw just as I took them that day.

THE COURT: That's the way mine are going to be too when I locate them.

MR. MAYE: Because I note the next thing that I have in there is I wrote Bobby Rushton's name and I went down and -- what else is missing, just his?

THE COURT: Well, we don't know what's missing

at this point, that's the problem. If you've got other notes, make them all part of the record.

MR. YOUNG: Your Honor, again, I will make an effort to try to locate any notes that I may have.

THE COURT: Give me all the notes from the hearing.

MR. MAYE: Sure.

THE COURT: Because one of the questions is what witnesses may be left out in this and, of course, her journal is going to help a lot once we get that.

All right. I'm just going to recess this hearing then until we can try to supplement -- get this additional information. If we need to reconvene, y'all let me know, all right?

MS. BALLARD: Yes, sir. And I just want to reserve my right to make any motions after we have a reconstructed record as to the sufficiency of the record.

THE COURT: Certainly.

MS. BALLARD: Thank you, Your Honor.

THE COURT: All right. Now, if there's any matters about Mr. Worley's bond or anything else aside from the reconstruction of the record, y'all take those up with Judge Addy, all right.

MS. BALLARD: Thank you, Your Honor.

THE COURT: Thank you very much. Thanks for accommodating me today.

(Court's Exhibit Number 1, notes of Ervin Maye, marked for identification.)

END OF PROCEEDINGS

C E R T I F I C A T E

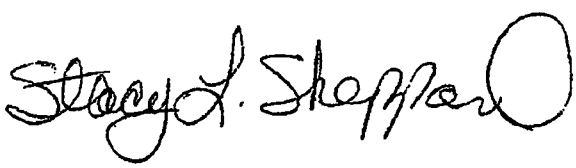
STATE OF SOUTH CAROLINA

COUNTY OF MCCORMICK

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Criminal Court for McCormick County, South Carolina, on the 14th of June, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 31, 2013



Stacy L. Sheppard, RPR
Circuit Court Reporter

State of South Carolina v Joe Ross Worley

Case no: J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

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August 16, 2011

Via U.S. Mail
Desiree Allen
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Columbia, South Carolina 29201-3739

Re: *State of South Carolina v. Joe Ross Worley*
Case No: J-036561, J-036562, J-036563,
J-036564, J-036565, J-036566
Hearing, McCormick County, Judge Keesley, May 31, 2011-June 1, 2011

Dear Desiree:

Our office has been retained to represent Joe Ross Worley in a pending matter. Prior to our involvement, a hearing had been held on the dates above. Karl Brehmer, who is handling a companion civil case, had ordered the transcript from the hearing and I believe others had ordered it as well. We have attempted to obtain the transcript, and have received the enclosed documents from the court reporter.

Please advise us what, if anything, has been done or is being done to try to reconstruct the record from the hearing held in Mr. Worley's case May 31, 2011-June 1, 2011 in McCormick County.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

c: Carson Henderson, Esquire
Billy J. Garrett, Jr., Esquire
Karl Brehmer, Esquire
Rema K. Thomas

Ballard Watson Weissenstein
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

September 1, 2011

Via U.S. Mail
Desiree Allen
Manager, Court Reporting and Court Interpreters
Calhoun Buidling
1015 Sumter Street, Suite 200
Columbia, South Carolina 29201-3739

Re: *State of South Carolina v. Joe Ross Worley*
Case No: J-036561, J-036562, J-036563,
J-036564, J-036565, J-036566
Hearing, McCormick County, Judge Keesley, May 31, 2011-June 1, 2011

Dear Desiree:

Our office wrote you on August 16, 2011, (letter enclosed) regarding the transcript of Mr. Joe Ross Worley's hearing held on May 31, 2011, to June 1, 2011. Please advise us what, if anything, has been done or is being done to try to reconstruct the record from the hearing.

We understand from Rema Thomas that your office is assisting in the matter. Please advise at your earliest convenience what steps are being taken to reconstruct the record of the referenced proceedings.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

Enclosure

c: Carson Henderson, Esquire
Billy Garrett, Esquire
Karl Brehmer, Esquire
Rema K. Thomas

Ballard
Watson Weissenstein
PERSISTENT. UNWAVERING.

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August 16, 2011

Via U.S. Mail
Desiree Allen
Manager, Court Reporting and Court Interpreters
Calhoun Building
1015 Sumter Street, Suite 200
Columbia, South Carolina 29201-3739

Re: *State of South Carolina v. Joe Ross Worley*
Case No: J-036561, J-036562, J-036563,
J-036564, J-036565, J-036566
Hearing, McCormick County, Judge Keesley, May 31, 2011-June 1, 2011

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Our office has been retained to represent Joe Ross Worley in a pending matter. Prior to our involvement, a hearing had been held on the dates above. Karl Brehmer, who is handling a companion civil case, had ordered the transcript from the hearing and I believe others had ordered it as well. We have attempted to obtain the transcript, and have received the enclosed documents from the court reporter.

Please advise us what, if anything, has been done or is being done to try to reconstruct the record from the hearing held in Mr. Worley's case May 31, 2011-June 1, 2011 in McCormick County.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

c: Carson Henderson, Esquire
Billy J. Garrett, Jr., Esquire
Karl Brehmer, Esquire
Rema K. Thomas

(1)

GS- McCormick

5-31-11

State v. Worley

motion

strike jury

not sworn then

then take up motions

Δ objects

4

pretrial will take a good one-half day

trial not commenced until jury sworn

wants witnesses sequestered

pursuant to S16-11-44e

law enforcement officer

Wpse
#5

(2)

(Barnett) Joe Ross Worley
53 y/o
3/5/58
resident of Aiken Co.
Colley Acres

lives w/ mother
lake has been in Mc Cor Co. over 40 yrs.
would come to Mc C. prop Thurs. - leave on Sun.
folks worked @ SRS
[illegible] - mail

had break-ins 30-40 yrs ago
2x
someone has tried to break in to the bar.
burg. alarm exp. - turns on when cleared

mother went to bed
went outside to smoke cig.
saw fox outside
have a cat - elaborate cat walk

a fox had injured cat previously
used 30.06 to get fox out of area "motivated it out of area"
180 grain bullet

WPR #4

(3)

shot things thrown down toward water when kids
stopped shooting across lake - 20 yrs. ago

always someone shooting somewhere
w/f 9/09, had not shot weapon for 20 yrs.

Sheffields - neighbors told about fox
shot rifle 3-4x between Sept & Dec.
2x each?
w/f 11/05 - no one had come to a & said could
not be shooting weapon @ night

not drinking or on drugs that night
thought could legally shoot @ fox

~11:12 p.m. went out
thought was part of fox's territory
motivated him out of area - shot 2x
unloaded gun - put under bed & went to bed

gun was his father's - left to his mother

doorbell rang - real early in morning
does not know what time
did not hear anyone knocking or saying anything

W#1

(4)

house is double insulated
doorbell ringer is on 2d floor – woke him up

put on clothes
went to sliding glass door & pitch blk. dark
did not turn on lights
decided not to go to door
no peep hole
no window near door
if broke into that door, also have to break in 2d floor

did not see any blue lights
" " " any cars or car lights

over 100 ft.
no one called on phone to say officers coming

thought might be home invasion

door bell repeatedly ringing

got gun – loaded gun
did not know if safety was on or off
went to night light to see if safety on

WPD #8 burglar runs out w/ dining, pencil flashlight

(5)

told bruzzo to freeze
dropped flash light
@
gun aimed @ him
shot - turned bruzzo around
bruzzo ran to back, then turned & ran toward △
shot into trees

told him he better haul ass

did not hear say anything
went outside & got flashlight & gun

saw Sheriff's car - pointed toward neighbor's house to the side
Trying to decide if Sheriff or bruzzo was shot
if cop car, wanted to
↙
mark location of car

went upstairs
noticed neighbor's lights on
walked up to main rd.
car came across driveway
shone flashlight in face
person said not to shine flashlight in face
" " " "
shone
he said cops

Wpn #9

(6)

person said he just woke up - asked who he was said he was Sheriff -

person told them lock him up

no uniform

if had not aimed gun @ him, would have been de
was in fear of dying
gave him no choice

never identified himself as a law enf. officer

doesn't know police procedure

had automatic weapon

flashlights, dark gun, shadows - ran toward [illegible]

never heard siren
somebody cut on a blue light, but doesn't know when

no idea it was a police officer

#

Sheffields informed about [illegible]
[illegible] A's mother

WPD #10

(7)

Cat was injured
around 10th day of '09 started shooting @ f8 x
3-4 x

Sheffields or st.
Stevens or Lyf

went out on balcony to smoke cigarette
saw fox ~ 11-12 - Lyf went to bed -
saw shadow

shots right together
put gun underneath couch

mother was asleep
& went to sleep ~ 12 m.

pitch black dark
light up tops of trees
when smoke, all lights were on in tree.

no idea what time doorbell started
did not ask who was ringing doorbell
when went to look out sliding glass door, pitch blk. - no lights
only light on is night light
kitchen light is lit ?

Wpc #11

(8)

Δ Cat on outside light
friend or outside light
took one step or

told to freeze
aims
No idea who it was
never identified himself

200 ft to Sheffield's home
never heard said anything
Never said did not give a f—

One person was out there

MARK CAR — gun turned his around — he ran toward flame bird,
then embankment

car was behind him, pulled off behind neighbor's shop
on a driveway

did not call police

not known in 2009
↓
2010

WPH #12

(9)

Re-Direct

flashlight

guy beside A kept saying "you shot him"

A said "they rang doorbell"

Didn't give chance to say that "painted gun in face"

Can't tell if man or woman

Could make out object

saw it aimed @ A

fax could have come

re-cross

ROBERT E. RUSHTON

oath taken when came on S/D

worked ~ 6 yrs. - resigned, then 4 yrs.

was in Iraq as International Police Advisor

WPA #13

Pre-Trial

- Motion to sequester witness in courtroom (i.e Law Enf)
  Motion Denied

		Redirect	
Joe Worley	12:17 -12:54	Garrett	1:15 – 1:21
	12:54 - 1:15	Myers	1:21 – 1:22

- Lunch 2:20
- Bobby Rushton 2:25 – 4:16 Garrett 4:24
  4:16 – 4:23 Myers
- George Kirkland 4:25 – 5:10 Garrett
- Allen Shelfield 5:11 Garrett 5:31
  Meyers
- Nick Moore
- Melissa H McAllister 6:21

June 1, 2011

State vs Worley

- Def (Henderson) 12:05 – 12:23
  State (Meyers) 12:23 – 12:30
- Motion Denied
- Both taken under advisement

State vs. Joe Ross Worley
2010-GS-35-00049, 2010-GS-35-00050, 2010-GS-35-00051, 2010-GS-35-00052
Appellate Case Number; 2012-210646

Judge's Notes from Hearings Held May 31 – June 1, 2011
Re: Castle Doctrine Hearing / Immunity Under Defense of Persons and Property Act

Testimony of Joe Ross Worley

Direct Examination of Joe Ross Worley

53 years old
Born 3/5/58
Resident of Aiken County
College Acres
Lives with mother
Lake house in McCormick County, over 40 years
Would come to McCormick property on Thursday, leave on Sunday
Father worked at Savannah River Site (SRS)
Mother was housewife
Had break-ins 30-40 years ago
Two times
Someone has tried to break in the house
Burglar alarm system – turns on when leaves house
Mother went to bed
Defendant went outside to smoke a cigarette
Saw a fox outside
Have a cat – elaborate cat walk
A fox had injured cat previously
Used 30.06 to get fox out of area – "motivated it out of area"
180 grain bullet
Not trying to kill the fox – been shooting in that area for 40 years
Shoot things thrown down toward water when kids
Stopped shooting across lake about 20 years ago
Always someone shooting somewhere
Before September 2009, had not shot weapon for 20 years
Sheffields – neighbors told about fox
Shot rifle 3 to 4 times between September and December
2 times each?
Before November 15, no one had dome to the defendant and said could not be shooting weapon at night
Not drinking or on drugs that night
Thought could legally shoot at fox
About 11:00 to 12:00 midnight, went out
Thought was part of fox's territory
Motivated him out of the area – shot 2 times

WM #1

Unloaded gun – put under bed and went to bed
Gun was his father's – left to his mother
Doorbell rang – real early in the morning
Does not know what time
Did not hear anyone knocking or saying anything
House is double insulated
Doorbell ringer is on second floor – woke him up
Put on clothes
Went to sliding glass door and it was pitch black dark
Did not turn on lights
Decided not to go to door
No peep hole
No window near door
If break into that door, also have to break in second floor
Did not see any blue lights
Did not see any car or car lights
Over 100 feet
No one called on phone to say officers coming
Thought might be home invasion
Doorbell repeatedly ringing
Got gun – loaded gun
Did not know if safety was on or off
Went to night light to see if safety on
Burglar runs out with dinky, small flashlight
Told burglar to freeze
Dropped flash light
Gun aimed at him
Shot – turned burglar around
Burglar ran to bank, then turned and ran toward defendant
Shot into trees
Told him he better haul ass
Did not hear say anything
Went outside and got flashlight and gun
Saw Sheriff's car – pointed toward neighbor's house to the side
Trying to decide if Sheriff or burglar was shot
If cop car, wanted to mark location of car
Went upstairs
Noticed neighbor's lights on
Walked up to main road
Car came across driveway
Shove flashlight in face
Person said not to shine flashlight in face
Shone flashlight in face
He said again
Person said he just woke up – asked who he was, said he was Sheriff
Person told them lock him up

Wall #2

No uniform
If had not aimed gun at him, would have been ok
Was in fear of dying
Gave him no choice
Never identified himself as a law enforcement officer
Does not know police procedure
Defendant had automatic weapon
Flashlight, dark gun, shadows – ran toward embankment\
Never heard siren
Somebody cut on a blue light, but does not know when
No idea it was a police officer

Cross Examination of Joe Ross Worley

Sheffields informed about fox
Man told defendant's mother
Cat was injured
Around Labor Day of 2009 started shooting at fox
3 to 4 times
Sheffields on right
Stevens on left
Went out on balcony to smoke cigarette
Saw fox – 11:00 to 12:00 – before went to bed
Saw shadow
Shots right together
Put gun underneath couch
Mother was asleep
Defendant went to sleep around 12:00 midnight
Pitch black dark
Light up tops of trees
When smoking, all lights were on in house
No idea what time doorbell started
Did not ask who was ringing the doorbell
When wen to look out sliding glass door, pitch black – no lights
Thinks light in kitchen
Defendant cut on outside light
Turn on outside light
Took one step out
Told to freeze
Aims
No idea who it was
Never identified himself
200 feet to Sheffields' house
Never said anything
Never said did not give a f_____
One person was out there

Wlee #3

Gun turned him around – he ran toward flower bed, then embankment [in margin, "mark car']
Car was behind house, pulled off behind neighbor's shop
On defendant's driveway
Did not call police
Not broken in 2009 to 2010

Re-Direct Examination of Joe Ross Worley

Flashlight
Guy beside defendant kept saying "you shot him"
Defendant said "they rang doorbell"
Did not give chance to say that "pointed gun in face"
Could not tell if man or woman
Could not make out object
Saw it aiming at defendant
Fox could have been coyote

No Notes Taken for Re-Cross of Joe Ross Worley

==========

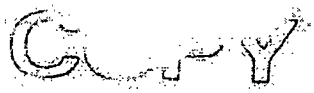
A photocopy of the presiding judge's original notes of the testimony of Joe Ross Worley is attached.

William P. Keesley
Presiding Judge

Edgefield, South Carolina
July 17, 2013

#4

MEMORANDUM



TO: Desiree Allen

FROM: Rema K. Thomas

DATE: July 5, 2011

RE: Auto break-in and missing court records

Desiree, I am writing to inform you of a loss of court records I experienced through an auto break-in on Thursday, June 23, 2011. I have been waiting on the police report to send to you with this memo. I received the police report on Friday, July 1, 2011.

On Thursday morning, June 23, I left Chapin to work in Manning. I knew there was a likelihood that I would be in Manning on Friday so I was prepared to stay overnight in Manning. I had in the vehicle a big, expandable briefcase with CDs, paperwork, paper notes and cassette tapes from a motions hearing in McCormick County the week of May 31, 2011.

My plan was to meet on Friday with a transcriber I often use, who lives off Hwy 378 near the V. A. Hospital, and give her the transcript to work on. I had already received four letters requesting the motions hearing, which would have been approximately 300 pages. Several copies would be sold, unusual in today's economic times, justifying using the typist.

This briefcase, with it's contents, was taken from the vehicle. The cassette tapes corresponding with the hearing were in a box in the van and were dumped out and strewn about the vehicle with other things. I have photos of what the inside of the van looked like after the vandalism.

Because some of the cassette tapes were broken and unraveled I had to listen to the cassette tapes to know what testimony is where and what I can transcribe. I believe I can transcribe approximately 210 pages of the hearing. At least three cassettes are missing from the group. They were inside the briefcase.

I do not know how you want me to handle notifying the attorneys who have ordered the transcript. Do you want to notify them or do you want me to write to them and tell them the situation, include a copy of the police report and tell them what portions of the requested transcript they can expect to receive? I believe the missing materials relates to one entire witness and part of another witness. It was not a trial, but motions in advance of a trial.

Obviously, this is a very unfortunate situation. As it turned out, I was not going to stay in Manning on Thursday night and I was on my way back to Chapin. I stopped on Hwy 378, on the Sumter Highway, to go into a grocery store to kill time until the typist got off from work. I was inside the store about an hour. When I came out I found the break-in. My entire back-up system was stolen.

I told the police officer the recorders were worth approximately $100.00 each at a pawn shop because they were old, but they still worked fine. I have learned that it will cost much more than that to replace them. However, my insurance is $1,000 deductible so I will be out-of-pocket at least that much to buy new equipment. I have been told to file an amended police report reflecting replacement costs for what was stolen. I have been able to borrow a back-up system to use temporarily.

My laptop computer and Stenograph writer was in the back of the van but the thieves didn't open the back hatch. The police officer believed the thieves worked from the side sliding door and would have been seen if they had tried to open the back of the van.

Please let me know how I am to proceed with this situation. I apologize for the problem and the inconvenience to you this will create. For 18 years I have been parking my vehicle overnight at motels and in parking lots all over the state and have been very fortunate to have had no break-ins until now.

Col Thomas

Columbia Police Dept
SC0400100

INCIDENT REPORT

INFORMATION ONLY: [ ]
CASE NUMBER: 110018591
NCIC: INC. [ ] ENTD. [ ]

EVENT

	INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNIT NUMBER	TYPE VICTIM
1.	16-13-0160(1)(2), (B) AUTOBREAKING 23G THEFT OF MOTOR VEHICLE PARTS OR ACCESSORIES	YES NO	YES NO	PARKING LOT/GARAGE		
2.	16-13-0030(A) LARCENY/PETIT OR SIMPLE LARCENY 23H 23H ALL OTHER LARCENY	YES NO	YES NO	PARKING LOT/GARAGE		
3.		YES NO	YES NO			

Type Victim: Individual, Business, Financial Institution, Religious Org., Society/Public, Other, Unknown, Police Officer

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER): 7545 GARNERS FERRY RD, COLUMBIA, SC
ZIP CODE: 29209-0000
WEAPON TYPE: NONE

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME		TIME ARRIVED	DEPART TIME	LOCATION NO.
					DISP. DATE	DISP. TIME			
06/23/2011	09:00		06/29/2011	16:00	06/23/2011	16:45	16:50	17:10	465

VICTIM NO. 1

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE
THOMAS, REMA	ST			S	W	F	55	N	803-345-0821 H	

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
808 YACHT CLUB PT	COLUMBIA	SC	29036-0000	299

VICTIM'S NAME (LAST, FIRST, M.POLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE
THOMAS, REMA	ST			S	W	F	55	N	803-345-0821 H	

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
506	210	GRE	BRO	

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
808 YACHT CLUB RD	CHAPIN	SC	29036-0000	299

VISIBLE INJURY(IES): YES NO EXPLAIN:
CO-PLAINTIFF/NON-VEGETATIVES: YES NO
VICTIM(S) USING ALCOHOL: YES NO UNK. DRUGS: YES NO UNK. TYPE:
TWO-MAN/VEH. ONE-MAN/VEH. DESTRUCTION/PLASM. OTHER ALONE ASSISTED
J-This Jurisdiction, S-State, O-Out of State, U-Unknown

SUBJECT NO. 1

	NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
SUSPECT / RUNAWAY	UNKNOWN, UNKNOWN									

WANTED / WARRANT / ARREST / JAIL / SUMMONS

FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

DAYTIME PHONE: H / B
EVENING PHONE: H / B

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
NO KNOWN ADDRESS				

SUBJECT(S) USING ALCOHOL: YES NO UNK. DRUGS: YES NO UNK. TYPE:
ARRESTED/CHARGED: YES NO TOTAL # ARRESTED:
DATE/TIME OF OFFENSE:
DATE/TIME OF ARREST:

DAY OF THE WEEK: S M T W T F S UNK (1 2 3 4 5 6 7 8)
HOW REPORTED: A B C D E F
A= OFFICER DISPATCHED ON CALL, B= REPORT TAKEN BY PHONE, C= COMPLAINANT WALKED IN, D= COMPLAINT WRITTEN IN, E= OFFICER INITIATED, F= OTHER
DIFF. FACTOR: N
A= RESIST/AGG/HOSTILITY, B= WEAPONS, C= UNFOUNDED CALLS, D= MENTAL SUBJECT, E= COMPLAINANT PREQUENTLY INTOXICATED, F= DOMESTIC, H= NORMAL

NARRATIVE

COMPLAINANT STATES THAT UNKNOWN SUBJECTS GAINED ACCESS TO LISTED VEHICLE. UPON GAINING ENTRY, UNKNOWN SUBJECTS REMOVED TWO SONY BRAND AUDIO RECORDERS VALUED AT $100 EACH AND A BROWN BRIEFCASE VALUED AT $50. CONTAINED IN THE BRIEFCASE ARE VARIOUS COURT DOCUMENTS. REPORTING OFFICER DID NOT PROCESS THE VEHICLE DUE TO THERE BEING NOTHING TO PROCESS. COMPLAINANT STATES THAT THE VEHICLE WAS LOCKED AT THE TIME THAT THE LARCENY OCCURRED BUT NO DAMAGE WAS NOTICED ON THE VEHICLE.

PROPERTY DESC.

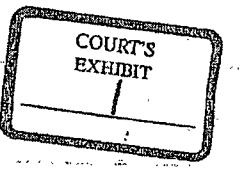
	JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY: SC0400100	JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY						
TYPE (GROUP)	25	25						TOTAL VALUE
STOLEN	$200.00	$60.00						$260.00
DAMAGED								$0.00
BURNED								$0.00
RECOVERED								$0.00
SEIZED								$0.00

ADMINISTRATIVE

SUBJECT IDENTIFIED: YES NO
SUBJECT LOCATED: YES NO
S.F.: AN
ACTIVE UNFOUNDED ADM. CLOSED
ARRESTED UNDER 18 ARRESTED 18 AND OVER
EX-CLEAR UNDER 18 EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1 OFFENDER DEATH, 2 NOT PROSECUTION, 3 EXTRADITION DENIED, 4 VICTIM REFUSES COOPERATION, 5 JUVENILE NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
PARKER WALTER S	06/23/2011 06:56:30 PM	22148	BRANHAM AMANDA L	06/23/2011 07:02:04 PM	21666
			FOLLOW-UP OFFICER		
			FOLLOW-UP INVESTIGATION YES NO		



Worley

res of Aiken Co
30 Vanderbilt D.R.

father owns residence

came to prop about every wknd
Thurs, FRI, SAT

Daddy was SRS emp

Mama's is housewife

lives w her both places

every guest room totally leading

40 years ago some breakins

have an alarm

turned

mom went to bed

went outside to smoke cig

there was a fox out there
they have a cat

Sweat Pig

- thinks fox got into cat
- "he motivated it out of there"
- think it was a 180 grain bullet
- shot at fox 2 times w armor piercing rounds ?
9) - off + on
- quit shooting
- In Sept prior of 2009 ~~2008~~
- ~~Shot~~
- had not shot weapon in 20 years
  - had shot gun as well
  - next door
Q which neighbor said there was a fox out there ⇒ NAME ?
new neighbors the sheffields said there was a fox

saw him one weekend

- mom

- from 0 Sept 09

till

NOV 15

- no one told him before NOV 15th ~~there was~~ it was illegal to shoot cats

- think that was

- shot two times at fox

- then he unloaded it & set it under the couch

- it is mamas gun

- brother served in secret service

- next door bell rings

- real early in morning

- could not hear knocking

- could not hear anything

sidewalls have insulation
double insulated

- if you are in Bedroom
- can hear doorbell
- had dressed for Bed
- just listening
- walked out looked out window
- if was pitch black dark
  Q ⇒ then how had he seen the fox + shot
- Q Do burglars RING DOORBELLS?
- saw no Blue lights
- he said he was looking up driveway there was a streetlight
- have suffered break in + there

it was now stop ringing
COOR ~~BEE~~ C

- he loads the gun & chambers it
- did not know if it was went to
- flipped light on
- the Burglar runs out
  he said freeze
  guy drops flashlight & shot the gun out of his hand
- he runs to a bank & stopped

Q - & he can see all of this in this pitch black dark
then he let one off into trees

- holding gun he shoots left handed

Q - and he can see all of this in this pitch black dark

- car had lights on in neighbors driveway
  he said
- he put gun in car to mark location of car
- he said headlight were on
- was that a sheriff or a Burglar
  (Q - but he can see well enough to shoot a gun out ~~of~~ of someones hand)
  but can't see it's a cop
  put the gun in car
  to mark location
- sent mom to Neighbors house Q (with a Burglar on the loose?)
- sheriff says give me a minute I am just waking up
- told sheriff gun is in the car

person did not have a uniform

saw fox around 11 or 12

- just saw a shadow

NOV 15 2009

- 1st shot around 11 or 12
  her says shot 2 times & once

- unloads gun & put it under the couch

- most times it wakes her up

- then around 12

- Balcony light is on when they

- when ~~them~~ lights were on w the lights

- shadow of a fox

- door bell started ringing

-

- Bobby Rushton
- return to duty Nov 1, 2009
- go through
- had to catch up m-f in S. office - retraining
- have not given an oath of office
- 1st oath I took forever
- DLY
- badge # 113
- badge # changed numerous times
- filled out a new
- try to "claim" he was not an officer "do you readminister oaths"
- veh training
- legal updates
- 1st night Back
- psychological (go through testing)

- narcotics officers, investigators many officers wear different clothing
- dispatcher called her
- where did Bobby park
- veh/h vehicle parked in yard
- he turned in
- came to back of residence

- ~~are there any cases on failure of being resident as to status~~

- how long would you keep your job if you woke up every neighbor hollering on a PA and turning on lights and driving through someones yard...

- George Kirkham

- Opinion
  - followed proper police procedure

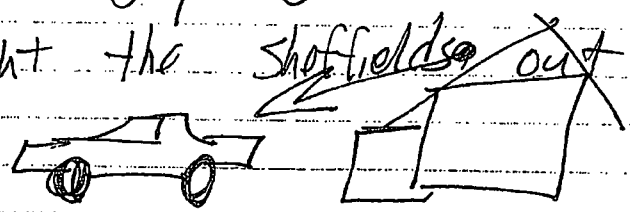
- Street survival Training

- Square One -
  - 1st sentence expert says this has nothing to do w law only police procedure

- active shooter are shots being fired now

- more is better than less
  - they had 3 guys and/or girls go out

- they sought the Sheffields out



- failure to stop + DUI
  - ↳ history of not complying w officers + abuse of alcohol

- radio dispatch - house phone call them up
  - go out w a phone call while he murders someone and/or prepares for the arrival of police they never do that

- they should have called on phone

+

- driven out into the yard w lights / on - Blue Lights and demanded that the guy come outside

- if he did not come out then call the State Police SWAT

- when this was not an active shooter don't rush, no big deal but do all of these extreme measures regarding dealing with them...
  one good statement
  20-20 corrective vision
  ↳ which is all this is

- officers die because people such as Worley shoot them

- you have to believe him (Worley's) version of this for any of this to apply

- so this is Bobby's fault... that Worley shot him

this guy responded
"I don't give a fuck"
and had
body armor piercing rounds

- said Bobby had not followed proper police procedures
you could use this as a training video on what not to do
↳ drive up in the yard w lights going
- it would be reasonable for a citizen to think this was NOT a policeman b/c of his failure to follow proper police procedures
utrasound
↳ how would a citizen know what proper procedures were to draw such a conclusion
- he could have shot through the windshield of the car from that balcony

Alan Sheffield

- prior to Nov 15, 2009
  - never saw him
  - ever heard firecrackers
  - 10 - 10:30
  - his wife called the sheriff did not speak to Joe
  - talked with ~~MS Sheffield~~ MS. Wolley she said she talked to Joe Wolley
  - moved in 2006
  - had a good relationship w Margaret (his mom)
  - made complaint + met father nice guy - relavance double insulation
  - never. seen Coyote
  - never had conversation with Cat...

cont deny . . . improper question

- heard officers knock and announce they had windows outside

- if someone was outside on the deck would they have heard the officers identifying themselves

- 1st shots
- shot generally 1 time per weekend

NICK Moore

- stallo
- who was in charge
- nobody really in charge
- Nick was senior most deputy Rushton
- did not have badge on shirt
- no question
- do believe light
- he cut light back on
- It lit up whole front yard
- steady
- I dont give a fuck

grasp at straws

Re: [redacted] 6/14/13 — Reconstruction Hearing —
Def. 1 [redacted] Exhibit Judge Keasler / Stacy Stamped
Judge Cureton order

Def 2 Exhibit

Remm Thomas 1st Witness rep by Mr. McClain w/AG's office
5th/11 + 6/1/11 in accurmicle

Police report w/attachments D3 exhibit

STATE + AG No questions

Judge

Desira Allen - witness # 2
Exhibit D4 + D5

Atty + witness 1+2 excused

Comm witness # 3
Pull notes mailed copy to Mr Garrett, solicitor + Judge.
Put copy in file as well.

2013 JUL 14 PM 2:05
CLERK'S [illegible] COURT
[illegible] COUNTY, SC

Steph
to
6-1-11

Note: Pull Tablet on GS/CP for my notes on [illegible]

State vs Joe Ross Worley 2010-49-52

- Juror excused around noon - are to call back after 6 pm for futher instruction.

- #80 Valerie Dubose - 3rd shift protect.

- #237 Peter Shaffer - ok

- Pre-Trail.

- Motion to segregate witness in courtroom (Rule 615) motion Granted

- Joe Ross Worley 12:17 - 12:54 Garrett 1:15 - 1:41
  12:54 - 1:15 Myers 1:21 - 1:22

Lunch 2:20

- Bobby Rushton 2:25 - 4:14 Garrett 4:24
  4:14 - 4:23 Myers

- George Kirkland 4:25 - 5:10 Garrett

Allen Shelfield - 5:11 Garrett 5:31
Myers

- Nick Moore

- Melissa H McAllister - 6:21

June 1, 2011

2011 - 28, 29, 30, 31 + 91

State vs Roy Gilchrist
Cont til August 29, 2011 before
Judge Cottingham

- STATE VS WORLEY

Def. (Henderson) 12:05 - 12:23
STATE (Meyers) 12:23 - 12:30

Motion for bond

Both taken under advisement

- Christopher White - WGS - 18 mts

- Shanigna Marie-Caraballo - WGS - 2yrs Probation

- Diane Bletcher - WGS - 18 mts

JOE ROSS WORLEY'S TESTIMONY ON TUESDAY, MAY 31, 2011

A. DIRECT EXAMINATION BY MR. GARRETT (38 minutes)

1. His background information – how old he is, his education, his work history, and where he lives.

2. He lives with his mother, Mary Worley, in Aiken, South Carolina.

3. Mrs. Worley was a housewife

4. His father, Robert Fred Worley, Sr., who was an engineer at the SRS bomb plant, is deceased. Mr. Worley died in December 2006.

5. Joe's brother, Robert, was in the Secret Service.

6. His father and mother purchased property on the lake in McCormick in the 1960's, placed a mobile home on the property, and later built a house on the property.

7. Joe and his father hunted on the property and shot firearms on the property from the time his parents bought the property.

8. Joe's father bought a 742 Woodmaster 30.06 rifle years before. The rifle, along with other guns, was stored in Joe's mother's bedroom.

9. The McCormick house is owned solely by Mary Worley, and Joe and his mother stayed at the McCormick house most weekends each month.

10. Joe had cared for his mother since his father's death.

11. Joe and his mother would stay at the McCormick house about every Thursday through Sunday year round.

12. The McCormick house is located on Lake Thurmond in a rural area of the county with a lot of animals such as deer, raccoons, foxes, etc. There are a lot of animal poachers in the area.

13. Joe's father built the McCormick house with the help of his wife and family. The house is double insulated, two stories, the only door into and out of the house is on the first floor, no peephole in the downstairs door, and no windows downstairs to see who is at the door.

14. The front door faces the lake, and there's no outdoor lighting between the house and the lake.

15. There is a balcony on the second floor facing the lake, and the balcony can be assessed only through two-panel sliding glass doors on the second floor.

16. The front door is under the balcony on the second floor, and the second floor balcony is under the roof's eave.

17. Both bedrooms are on the second floor at the rear of the house, farthest from the lake.

18. Joe sleeps in one bedroom, and his mother sleeps in the other bedroom.

19. His parents' mobile home was burglarized twice years ago.

20. After the house was built, someone tried to break into the house, and that is why Joe's parents installed a burglar alarm.

21. Joe had read about home invasions and had seen reports about home invasions on TV in recent times.

22. Joe and his father built a ramp for his mother's cat, Sweet Pea, to climb from the ground to the second floor balcony, and also built a house for the family's cats on the second floor balcony.

23. Joe referred to Sweet Pea as "my good fat cat."

24. On November 14, 2009, Joe and his mother ate supper and watched TV. Joe's mother went to bed first.

25. On November 14, 2009, Joe went outside to smoke around midnight.

26. There was no moon, as this was the darkest night of November 2009.

27. Joe noticed what appeared to be a fox in the yard.

28. Joe went inside to get the rifle and ammunition.

29. While outside on the balcony, Joe used his father's rifle to shoot twice at a fox suspected of harming Sweet Pea. Joe wasn't trying to kill the fox, but was trying to motivate the fox to leave the yard.

30. Joe fired the shots around midnight.

31. Sweat Pea had previously been injured by a wild animal, thought to be a fox, and had to be treated by a veterinarian.

32. Joe went back inside, unloaded the rifle, put the rifle under the couch, and went to sleep.

33. The A/C unit was running on the second floor while Joe and his mother slept.

34. Joe was woken by a constant ringing of the downstairs doorbell. Joe said it sounded like, "ding, ding, ding, ding." The door bell ringer was loud and was on the second floor.

35. Joe got up and put on his clothes.

36. It was dark inside the house.

37. Joe didn't hear anyone knocking on the downstairs door.

38. Joe refused to go downstairs and answer the door, because he was afraid that he would be robbed or attacked and he wouldn't see it coming. Joe was worried about a possible home invasion.

39. Joe looked outside through the closed upstairs sliding glass doors, but didn't see anything in the yard.

40. Joe didn't see any cars or any blue lights; didn't hear sirens, a bull horn or loud speaker; and didn't receive a telephone call from his neighbors, dispatch, or law enforcement.

41. Joe got the rifle and ammunition, loaded the rifle, walked to the sliding glass doors, and turned on the upstairs balcony lights.

42. Joe didn't go outside. He stopped, realizing that the rifle's safety may be off. He needed to check the safety on the rifle.

43. Joe turned off the balcony lights prior to checking the rifle's safety. He walked into the kitchen near a small night light where he checked the rifle's safety.

44. Joe went back to sliding glass doors, looked outside where he didn't see or hear anyone, then turned on the balcony lights, opened the sliding glass doors, and walked outside.

45. When he walked outside onto the balcony, Joe had his father's rifle in the port position pointing upward.

46. When Joe got onto the balcony, he immediately saw a person moving in the yard about thirty (30) feet from him somewhat straight ahead of him near a flower bed, Joe yelled

"freeze," the person in the yard turned toward Joe and immediately aimed what looked like a gun at Joe, and Joe shot toward the person's hands.

47. The person in the yard appeared to be a burglar.

48. The person in the yard wasn't dressed in a police uniform and wasn't wearing a hat, vest, coat, badge, shirt, or anything else readily identifying himself as a law enforcement officer.

49. The person spun around and fell down after being shot.

50. The person got up, ran across the yard, and stopped. The person almost fell into a gully area, but stopped near a railroad tie and sewer cap.

51. The person turned and started running toward Joe and the house's downstairs door.

52. Joe fired a second shot into the air into the trees way over the person's head to motivate the person to leave.

53. Joe went inside and spoke to his mother, who had woken.

54. Joe waited. He went downstairs after a period of time and listened. He didn't hear anyone.

55. Joe opened the downstairs door and waited some more. He stepped outside. He saw no one. He heard no one. He walked into the yard. Joe believed that the burglar had been run off. Joe didn't know whether he had shot the person or not.

56. Joe saw the person's "dinky, small" flashlight in the grass and picked it up. He also picked up what remained of the person's gun and unloaded the gun as he walked back to the house.

57. Joe walked around the house and saw a police car parked approximately 120 feet behind and to the side the house.

58. Joe put what remained of the person's gun in the police car.

59. This police car couldn't be seen while Joe was standing on the balcony facing the lake, and couldn't be seen from the upstairs windows.

60. Joe denied hearing the person in the yard say anything.

61. Joe denied seeing or hearing Deputy Moore and Deputy McAllister.

62. Joe wouldn't have come out of the house with a rifle if he had known law enforcement was in the yard.

63. Joe wouldn't have shot the person in the yard if the person hadn't aimed a gun at Joe.

64. Joe had no choice but to shoot.

65. Joe could have killed the person in the yard if he had wanted to.

66. Joe denied that his mother, the neighbors, the police, or anyone else had ever complained to him about shooting on his mother's property.

67. There were no subdivision rules or local ordinances which prohibited him from shooting in his mother's yard.

68. Joe and his father had fired guns on the property for forty (40) years.

69. No one had ever requested that Joe not shoot on his mother's property.

70. Joe's neighbor, Mr. Sheffield, had told Joe's mother about the fox, and Joe's mother had told Joe about the fox.

71. Joe and his mother surmised that it was the fox which had injured Sweet Pea.

72. Prior to November 14, 2009, Joe had shot at what appeared to be a fox on three (3) or four (4) occasions. Joe first shot at the fox in September 2009. Prior to September 2009, and after his father's death, Joe had not shot guns on his mother's property.

73. Joe wasn't drinking alcohol or taking legal or illegal drugs on November 14-15, 2009.

74. Numerous people fire guns or explode fireworks in the area at all times of the day and night.

B. CROSS EXAMINATION BY SOLICITOR MYERS

75. Joe's parents' mobile home and house had been burglarized many years ago, and not recently.

76. Joe's mother told Joe about the fox, and she learned about the fox from the neighbor, Mr. Sheffield.

77. Joe had previously shot his father's rifle three (3) or four (4) times at an animal that appeared to be a fox in the shadows.

78. Joe always shot the rifle in front of the house toward the lake.

79. On November 14, 2009, Joe saw what appeared to be a fox sometime between 11:00 p.m. and midnight. That's why he got the rifle and shot.

80. The rifle and ammunition were in a gun cabinet with other guns in Joe's mother's bedroom.

81. Joe shot at the fox while smoking and sitting with his face toward the lake. The balcony light to Joe's right was on, and it was the only light on. (Looking from the lake toward the house, the balcony light would be to Joe's left.)

82. Joe could see shadows and movement on the ground while sitting and smoking on the balcony.

83. Joe said the door bell woke him up.

84. Joe denied opening the balcony door and asking, "Who's down there?"

85. Joe said he watched the hands of the person in the yard, because you can only be hurt by someone's hands.

86. The person in the yard aimed a gun at Joe.

87. Joe denied saying anything to anyone in the yard.

88. Joe said he was shooting at the hands of the burglar.

89. Joe didn't see the police car in the neighbors' yard until after the incident when he walked around his mother's house.

90. Joe put part of the person's gun into the police car to mark the location.

91. Joe wasn't sure why or who he was marking the location for.

92. Joe didn't call the police.

93. Joe didn't know who was driving the police car or where the driver was.

THE ABOVE SUMMARY OF THE TESTIMONY GIVEN BY JOE ROSS WORLEY UNDER OATH ON MAY 31, 2011, IS ACCURATE TO THE BEST OF OUR RECOLLECTION AND CONTEMPORANEOUS NOTES.

THIS SUMMARY OF MR. WORLEY'S TESTIMONY WAS RECONSTRUCTED USING CONTEMPORANEOUS NOTES.

Billy J. Garrett, Jr.
Attorney for the Defendant

Carson M. Henderson
Attorney for the Defendant

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 7TH DAY OF SEPTEMBER, 2012.

Notary Public for South Carolina
My Commission Expires: 11-20-13

Exhibit I

RECEIVED
Via US Mail 08-22-2013

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 201

Exhibit J

State of South Carolina

Court of General Sessions

County of McCormick

State)
)
v.)
)
Joe Ross Worley)
)
Defendant.)

Transcript of Record
10-GS-35-0049
10-GS-35-0052

December 16 - 20, 2013
McCormick, South Carolina

B E F O R E:

The Honorable R. Lawton McIntosh, Judge; and a jury.

A P P E A R A N C E S:

Donald V. Myers, Solicitor
Ervin J. Maye, Assist. Solicitor
Attorneys for the State

Billy J. Garrett, Jr., Esquire
Carson M. Henderson, Esquire
Desa Ballard, Esquire
Attorneys for the Defendant

Stacy L. Sheppard, RPR
Circuit Court Reporter

I N D E X

I N D E X

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.
S-1	Aerial Map	154	154
S-2	Aerial Map	156	156
S-3	Magazine and Bullets	85	188
S-4	Diagram	159	163
S-5	Photograph	167	167
S-6	Remington Rifle	183	183
S-7	Photograph	184	184
S-8	Photograph	184	184
S-9	Photograph	184	184
S-10	Photograph	184	184
S-11	Shell Casings	189	191
S-12	Photograph	189	189
S-13	Photograph	189	189
S-14	Photograph	189	189
S-15	Eight Bags of Unfired Rounds	193	193
S-16	Photograph	194	194
S-17	Photograph	194	194
S-18	Photograph	194	194
S-19	Photograph	195	195
S-20	Photograph	197	198
S-21	Photograph	285	286
S-22	Photograph	285	286
S-23	Bullet Fragments	285	286

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.
S-24	Measurement Report	406	410
S-25	Photograph	410	410
S-26	Shell Casings	412	412
S-27	Nicholas Moore's Statement	433	433
S-28	Incident Report	433	433
S-29	SLED Report	461	461
S-30	Photograph	467	467
S-31	Photograph	467	467
S-32	Photograph	467	467
S-33	Police Magazine	656	656
D-1	Dispatch Log	200	203
D-2	Timeline	200	203
D-3	Timeline	200	203
D-4	Oath of Office	319	320
D-5	Training Records	325	326
D-6	Criminal Justice Academy Records	327	327
D-7	Gun	358	358
D-8	Photograph	566	566
D-9	Photograph	566	566
D-10	CD	572	573
D-11	Diagram	714	725
C-1	Defendant's Voir Dire Request	73	

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.
C-2	Record Reconstruction	200	
C-3	Nicholas Moore's Statement	250	
C-4	Incident Report	250	
C-5	Civil Lawsuit	372	
C-6	Code of Laws	493	
C-7	Oath of Office	582	
C-8	Oath of Office	582	
C-9	Oath of Office	585	
C-10	Oath of Office	585	
C-11	Defendant's Requested Jury Charges	760	
C-12	Defendant's Witness List	917	
C-13	Jury Note	917	

(The following proceedings were held on December 16, 2013.)

THE COURT: All right. My understanding -- and y'all correct me -- is that there are some matters or whatever that need to be placed on the record because of the status of this case and there's a prior appeal.

Ms. Ballard --

MS. BALLARD: Yes, Your Honor.

THE COURT: -- do you have some things you wanted to bring up on that?

MS. BALLARD: That's correct.

THE COURT: And I also understand that there's some motions in limine in this case; is that correct?

MR. HENDERSON: Just very quickly, Your Honor, yes, sir.

THE COURT: Okay. Ms. Ballard, I'm going to go ahead and hear from you first.

MS. BALLARD: Mr. Worley is not here yet. I'm not sure --

THE COURT: Thank you. I'm sorry.

MS. BALLARD: We've been wondering. We don't know whether --

THE COURT: I assume that y'all have checked to

make sure he was properly attired?

MS. BALLARD: He was first up today, so he should have been here first thing this morning.

(A brief conversation was held off the record.)

MS. BALLARD: Your Honor, I'll hand you up this petition. This is --

MR. MYERS: On the defendant's pre-trial motions in limine.

THE COURT: Okay. This will just be the petition that was filed by Ms. Ballard on behalf of the defendant seeking the court -- Supreme Court to take this case certiorari.

MS. BALLARD: That's related to the appeal, Mr. Myers.

THE COURT: Do you want to see a copy of this?

MR. MYERS: Is it about the appeal?

THE COURT: Yes, sir.

MR. MYERS: No, sir.

(Pause.)

(Mr. Worley enters the courtroom.)

THE COURT: Before we get started, I just want to make sure just for the sake -- out of abundance of caution that no jurors summoned for this term of court are in the courtroom today.

(There was no response.)

THE COURT: Okay. Ms. Ballard, that being done, I'll be glad to hear from you.

MS. BALLARD: Thank you very much, Your Honor.

I am not Mr. Worley's trial counsel. I'm handling some appellate issues. And the reason I wanted to address the Court is to tell you where we are with the appeal because it's had somewhat of an unusual path to get where we are today.

Mr. Worley was arrested originally in November of 2009 and bond was denied. He's been in jail all of this time. The Supreme Court of South Carolina decided the Duncan case in May 2011. The Duncan case was the case that said that a pretrial determination under the Castle Doctrine, since it involved immunity, had to be appealed immediately. So Judge Keesley had the Castle Doctrine hearing in this case in that same month that began on May 31st of 2011. And Judge Keesley issued an order -- there were two orders, but the final one was on July 6th, 2011, in which he denied Mr. Worley the right to immunity under the Castle Doctrine Statute.

So based on the Duncan case, Your Honor, we took an appeal at that time. When we appealed the case, we learned that the transcript of the

proceeding before Judge Keesley was incomplete. What was missing, interestingly enough, was Mr. Worley's own testimony. Everybody else's is here with the exception of, I think, cross-examination of one of the other witnesses, but Mr. Worley's testimony was missing.

There were petitions to the Court of Appeals, and the matter was remanded to Judge Keesley to reconstruct the record. We had a hearing in front of Judge Keesley in June of this year. It was a full-day hearing for judge -- the purpose of which was to reconstruct Mr. Worley's testimony from the Castle Doctrine hearing for purposes of the eventual appeal. Well, for purposes of the appeal that was then pending.

Two months after we had the hearing, while Judge Keesley was still reconstructing the record, and he had obtained the Solicitor's notes from trial, he obtained the affidavit from the trial counsel as to what the testimony was and the clerk's notes, he obtained all of that information to reconstruct the record, and then in August of 2013, the South Carolina Supreme Court decided the Isaac decision, which said, Well, what we meant to say in Duncan was that if it's a defendant who's appealing,

he can appeal after final judgment.

So on that same day, the Court of Appeals, Judge Few, issued an order dismissing Mr. Worley's appeal. There was language in that order -- and that order is dated August 21st, 2013 -- it indicated -- and it should be in the Court's file. It indicated that the reconstruction of the missing portion of the Castle Doctrine hearing was no longer necessary. And it proceeded to go on to say that the parties should proffer to the court, meaning at trial, proffer to the court any testimony relevant to the immunity motion that is not presented to the jury.

We took issue with that, Your Honor, because it purported to instruct Your Honor what to do at this trial, and we petitioned the Court of Appeals and asked for reconsideration of that issue. Our motion for reconsideration was denied. And we have filed a petition with the Supreme Court seeking certiorari to address the issue of what we believe was a statement by the Court of Appeals that went beyond the issues that were before it.

But the gist of where we are is that we are about to proceed in the trial. We have to preserve testimony regarding the Castle Doctrine hearing that

was held in May 2011, and we don't have a reconstruction of Mr. Worley's testimony. So Mr. Garrett and Mr. Henderson are going to deal with that at trial.

But the point I wanted to make to Your Honor is we filed the petition for writ of certiorari and a petition for writ of prohibition with the Supreme Court. The State's response to that is due today, but there is nothing that prevents the trial from proceeding. I think the trial judge just has to be aware of the Court of Appeals' order, which I think directs how the preservation of the record is supposed to occur with reference to the immunity issues under the Castle Doctrine.

THE COURT: Well, educate me again exactly what the Court of Appeals has ord -- I do not have that opinion in front of me and I would like to get a copy of it, but --

MS. BALLARD: It should be in the clerk's file, but I'll read it to you, Your Honor, and I'll get you a copy of it. What it said is, This court notes -- this is Judge Few's order -- This court notes that this appeal has been remanded for the reconstruction of the missing portions of the immunity hearing transcript.

I'm on the second paragraph, Your Honor.

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.

THE COURT: So it's just a matter of making a record and preserving that issue for appeal is what I'm --

MS. BALLARD: That is the issue for purposes of should there be an eventual appeal following these proceedings, Your Honor. It's a question of we were not -- we didn't finish the reconstruction process. We were right in the middle of it when the decision came out in Isaac, and so the Court of Appeals sua sponte dismissed it. And Judge Keesley had begun the draft of the order to reconstruct the testimony but had not completed it. We took issue with the fact that reconstruction was no longer necessary, because we knew we had a trial coming, and eventually, an appeal, should that become necessary.

But I wanted you to be aware that that order was out there, and we have petitioned for cert, but under the appellate court rules, that doesn't prohibit you from proceeding to trial. And that's

what I wanted to bring to Your Honor's attention.

THE COURT: All right. Let me ask you this --

MS. BALLARD: Yes, sir.

THE COURT: -- and thank you for doing that, but from a practical matter, from -- so the parties can preserve what issues need to be preserved at this juncture --

MS. BALLARD: Yes, sir.

THE COURT: -- are the parties -- maybe you're not the right person for me to ask this question to -- is the appellant ready to present, the State ready to present what portions of the testimony they think should be made a part of the record as a court exhibit, not to go to the jury?

MS. BALLARD: What I think would be appropriate, Your Honor, is to put in this record all of the information that was introduced before Judge Keesley. And what he had at that point was information from the Solicitor's Office, I believe it was Mr. Maye's notes, he had his own notes, his hand notes, Judge Keesley's notes, and he had the sworn testimony from Mr. Garrett and Mr. Henderson as to their contemporaneous notes regarding what Mr. Worley's testimony had been, and we have a transcript of the hearing on June 14th, 2013.

I would propose that be made a part of this record as well so that it can all go up together. And I think that will enable us to have as much of a record as we can have to reconstruct that testimony.

THE COURT: Okay. And just so I'm clear, in reading the order denying the immunity from prosecution, it sounded as if there was two days of full trial testimony taken by Judge Keesley.

MS. BALLARD: Yes, sir. It's a rather large record.

THE COURT: Right. And I think what you're saying is turn in the transcript of that, any supplemental notes or records you think you need to add, but you're not seeking to reconstruct the actual hearing itself.

MS. BALLARD: No, sir. What I'd like to do is put in the reconstruction hearing, which was the transcript --

THE COURT: Sure.

MS. BALLARD: -- from the June 14th hearing, plus all of the exhibits. And I can't refer you to exhibit numbers because the way we did it is, at the hearing, Judge Keesley kind of explored what might be out there. And he had the clerk send her notes and Mr. Maye sent his notes, and we had already

introduced into testimony {sic} Mr. Worley's testimony. But an order never came about because we didn't finish the proceedings on remand.

So I think the best thing I can do, to protect my client, is to introduce the June 2013 hearing before Judge Keesley and all of the exhibits from that in order to satisfy the Court of Appeals' order.

THE COURT: Mr. Myers.

MR. MYERS: We have no objection.

MS. BALLARD: Thank you, Your Honor. I'll get those things marked, and we'll have them made part of the record.

THE COURT: Thank you.

MS. BALLARD: Thank you.

THE COURT: Anything further with regard to the issue of preservation?

MS. BALLARD: Nothing for the defendant, Your Honor.

THE COURT: Do you think it's a good time to go ahead and go through the pretrial motions in limine from the defense at this stage? Any reason why we can't?

Well, it's 15 till 1:00. We've got the jury coming in at 2:00; is that right?

THE CLERK: Yes, sir.

THE COURT: What would be the -- how long do you anticipate your case in chief to be, Mr. Myers?

MR. MYERS: We should finish tomorrow afternoon.

THE COURT: Tomorrow afternoon?

MR. MYERS: Yes, sir.

THE COURT: And I know this is a soft question, but, roughly, do you anticipate, if you were to present evidence, how long it would be?

MR. HENDERSON: And I'm assuming Mr. Myers is starting tomorrow morning, because I assume the jury qualification would take up all afternoon.

THE COURT: Well, that's not necessarily a safe assumption.

MR. MYERS: We can start this afternoon, whatever Your Honor would like.

MR. HENDERSON: That's --

THE COURT: I'm trying to get that in mind right now for me so I can tell...

MR. HENDERSON: At least a day, Your Honor.

THE COURT: At least a day?

MR. HENDERSON: Yes, sir.

THE COURT: If you present some -- okay. Let's do this then: Let's go ahead and pick our jury this

afternoon. Let's try to do pretrial motions after we get through, then start it tomorrow afternoon. That makes the most sense to me at this stage. Any reason why that wouldn't be appropriate from the State's position?

MR. MYERS: No, sir. You want us to go ahead and take up everything today and start the case in the morning?

THE COURT: Yes, sir.

MR. MYERS: That would be fine.

THE COURT: I think that would work.

MR. HENDERSON: That would be fine with us as well, Your Honor.

THE COURT: Unless somebody's got a better suggestion, let's go ahead and do that.

MS. BALLARD: No, sir. And just to explain my absence, I was day one in a nonjury in Richland County today, so my partner went, and I have to attend a status conference tomorrow morning, but I'll get here as soon as I can tomorrow. They can certainly proceed without me; I'm simply the appellate counsel.

THE COURT: Very good. All right. We'll be in recess until two o'clock.

MR. HENDERSON: Thank you.

Exhibit K

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
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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

The Supreme Court of South Carolina

RECEIVED
JUN 26 2014
SC Court of Appeals

The State, Respondent,

v.

Joe Worley, Petitioner.

Appellate Case No. 2013-002477
Lower Court Case Nos. 2010-GS-35-00049, -00050, -00051, and -00052,

---

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

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

JOE ROSS WORLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion to hold appeal in abeyance and motion to remand for reconstruction of pretrial hearing on appellants motion for immunity from prosecution pursuant to the protection of persons and property act in the above referenced case has been served upon opposing counsel, J. Benjamin Aplin at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Esquire and Joe Ross Worley, #360529 at McCormick Correctional Institution this 4th day of May, 2016.

Susan B. Hackett for
John H. Strom
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 4th day of May, 2016.

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

My Commission Expires: May 12, 2025

ALAN WILSON
ATTORNEY GENERAL

May 6, 2016

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Joe Ross Worley
Appellate Case No: 2014-001497

Dear Ms. Kitchings:

I am in receipt of Appellant's May 4, 2016 "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.)" in the above-referenced case. Please accept this letter in lieu of a formal response. To the extent a formal return is required by the Court, the State would ask permission to submit such return upon request.

In large part the State consents to the relief requested in Appellant's motion, with one point of clarification: that the order from this Court would only require the parties take steps necessary, as determined by the lower court, to complete the reconstruction hearing that was already held before Judge Keesley on June 14, 2013 (See paragraphs 12 through 14 of Appellant's Motion), but would not require the parties to conduct an entirely new reconstruction hearing or to repeat any portions of the hearing that have already been completed.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No: 8729

JBA/ab

cc: John H. Strom, Esquire
Ms. Trisha Allen

SCCID
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

ORIGINAL

May 20, 2016

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: The State v. Joe Ross Worley

Dear Ms. Kitchings:

Please allow this correspondence to serve as a response to Respondent's May 6, 2016 letter and to clarify Appellant's position regarding how best to attempt to reconstruct the missing portions of the immunity hearing. As an initial matter, Appellant agrees with Respondent's contention that the lower court is the proper tribunal to determine the steps necessary to reconstruct the record.

At a minimum, it will be necessary to examine, under oath, the Appellant, the defense attorneys, and the solicitors about the missing testimony. Appellant has no objection to the use of the various parties' contemporaneous notes of the hearing to also aid the lower court in its attempted reconstruction.

Counsel for Appellant has no desire to duplicate past efforts. In the event that this Court would prefer a formal response, Appellant would ask permission to submit such a reply upon request. If you have any questions or concerns regarding this case, please do not hesitate to contact me.

Sincerely,

John H. Strom
Appellate Defender

JHS/css
cc: J. Benjamin Aplin, Esquire
Mr. Joe Ross Worley

The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

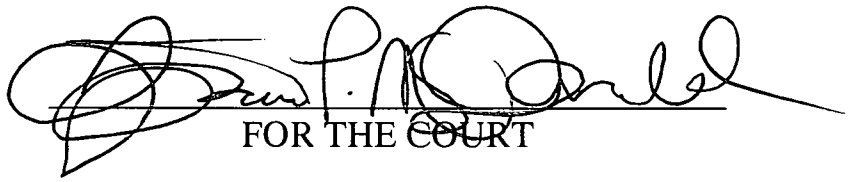
ORDER

Appellant filed a notice of appeal from his convictions for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. Appellant asserts the trial court erred in denying his motion for immunity pursuant to the South Carolina Protection of Persons and Property Act. *See* S.C. Code Ann. § 16-11-450 (2015).

Previously Appellant filed a notice of appeal from the circuit court's denial of his motion for immunity. During the pendency of that appeal, the court reporter's tapes were stolen and only a partial transcript of the immunity hearing was available. This court remanded the case to the circuit court to reconstruct the record. After the circuit court held its reconstruction hearing, but before the circuit court issued its order, the South Carolina Supreme Court issued its decision in *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013), finding the denial of a motion for immunity is not immediately appealable. This court rescinded the remand and dismissed Appellant's appeal. Appellant was subsequently tried and convicted.

Appellant now files a motion to hold this appeal in abeyance and remand the case to the circuit court for a reconstruction of the record. The motion is granted and this case is remanded to the McCormick County Court of General Sessions. Counsel for Appellant is ordered to contact counsel for Respondent and the circuit court judge, the Honorable William P. Keesley, within fifteen days of this order to determine if any additional hearings are necessary and whether the transcript can be reconstructed. Counsel for Appellant shall provide an update to the clerk of this

court no later than thirty days from the date of this order, with a copy to counsel for Respondent.



FOR THE COURT

Columbia, South Carolina

FILED

June 17, 2016

cc: The Honorable William P. Keesley
The Honorable Gwendolyn Dorn Chiles
Alan McCrory Wilson, Esquire
John Harrison Strom, Esquire
John Benjamin Aplin, Esquire

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF McCORMICK	)	
STATE OF SOUTH CAROLINA,	)	
	)	
-vs-	)	REPORT REGARDING RECONSTRUCTION
	)	OF THE RECORD
JOE ROSS WORLEY,	)	
	)	(Appellate Case Number: 2014-001497)
Defendant,	)	Case Numbers: 2010-GS-35-00049;
	)	2010-GS-35-00050; 2010-GS-35-00051; and,
	)	2010-GS-35-00052

The South Carolina Court of Appeals instructed this court to attempt to reconstruct the record from a hearing related to a claim of immunity under the Defense of Persons and Property Act (the Act), S.C. Code Ann. §16-11-410, *et seq.* The original immunity hearing was held on May 31 and June 1, 2011.[1] The court submits this report in order for the appellate court to evaluate whether meaningful appellate review can be had based on the reconstructed record and the degree of prejudice, if any, to the defendant from the loss of portions of the record.

Procedural Background

Following this court's decision to deny immunity in 2011, an immediate appeal was taken. The procedure at that time was thought to be that the appeal from a denial of immunity took place prior to the criminal trial proceeding. An appeal was filed (Old Appellate Number: 2012-210646), and it was determined that a complete transcript of the immunity hearing could not be prepared because someone had broken into the court reporter's vehicle and stolen

[1] Because of the fact-intensive findings required to decide the immunity issue, the undersigned judge had recused himself from the case. After obtaining an ethics opinion indicating that the undersigned judge had the right and the obligation to hear a previous reconsideration motion after recusal, the parties agreed that the same logic extends to the remand for reconstruction of the record. There was no objection to the undersigned judge acting in this capacity, despite the previous recusal, at either of the reconstruction hearings. The matter was discussed on the record and any issue regarding the recusal was waived.

equipment and recordings. By order filed March 28, 2013, the Court of Appeals issued its original remand to reconstruct the record. Upon receiving notice, the court first had to determine what portions of the proceeding were missing. The parties were given an opportunity to amass information regarding the record. The defendant moved to have a *de novo* hearing to consider immunity under the Act, but the Court of Appeals denied that motion.

The first reconstruction hearing was held on June 14, 2013. Present for the State were the same attorneys who were present at the 2011 immunity hearing: The Honorable Donald V. Myers, Solicitor of the 11th Judicial Circuit, and Assistant Solicitors Ervin J. Maye and H. Franklin Young, III. Notice was sent to the appellate attorney for the State, Assistant Attorney General Mark R. Farthing, who chose not to appear. The defendant was present, along with his counsel, Billy J. Garrett, Esquire and Carson M. Henderson, Esquire (both of whom were present at the immunity hearing), as well as Desa A. Ballard, Esquire, who was one of the attorneys hired to assist with the first reconsideration effort and the appeal.

The defendant called witnesses regarding why portions of the record were missing. The court reporter for the immunity hearing, Rema Thomas, testified, as well as Desiree Allen, Manager of Court Reporting and Court Interpreters for South Carolina Court Administration. The Clerk of Court for McCormick County, The Honorable Gwendolyn D. Chiles, also testified. The Clerk's notes about the order of the presentation of the case were made part of the record at that hearing. Julius C. Nicholson, III, of the Office of the South Carolina Attorney General was present representing the court reporter.

After the first reconstruction hearing, but before the issuance of a report, *State v. Isaac* was decided. Based thereon, the old appeal of the denial of immunity was determined to be interlocutory. By order filed August 20, 2013, the South Carolina Court of Appeals directed the

undersigned judge to cease the reconstruction effort. Specifically, the Court of Appeals vacated that portion of the remand that gave the circuit court the authority to conduct the reconstruction, and stated:

> The 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.** [Emphasis added.]

Counsel for Mr. Worley asked the Court of Appeals to reconsider its ruling. That request was denied, and this court was divested of jurisdiction. Following the criminal trial and conviction, this appeal was taken, resulting in this second remand. A second reconstruction hearing was conducted on October 25, 2016.

At the beginning of the second reconstruction hearing, the State argued that there should be no additional proceedings. First, it was asserted that the reconstruction hearing held on June 14, 2013 was sufficient. The court finds that the second reconstruction hearing should be allowed, the matter having been remanded to this court for that purpose. Secondly, it was asserted that this court should not hold an additional reconstruction hearing for the following reasons.

1) Laches was raised based on the argument that the defendant opposed the State's efforts for two years. The State argued that, to the extent that a meaningful reconstruction of the record might not be accomplished, the delay caused by the defendant must be held against him. The court finds no basis to cease the reconstruction hearing due to laches.

2) The State also argued that the second reconstruction hearing is not appropriate because the order of the Court of Appeals specifically provided that

the defense attorneys should make a proffer of the immunity issues at the criminal trial. That trial was held on December 16 through 19, 2013. The transcript of the criminal trial reflects that the trial judge gave the defense attorneys the opportunity to put up additional evidence on the question of immunity by proffer. At the criminal trial, the defense submitted the transcript of the first reconstruction hearing as a proffer. The State's argument on this issue appears to relate more to a preservation question that is more appropriately addressed to the Court of Appeals. Moreover, the order of the Court of Appeals suggests that it was anticipated that evidence of self-defense would be submitted to the jury in the criminal trial, and that such evidence would overlap and be relevant to the issue of immunity. If convicted, a transcript of that evidence would be available on appeal, and there would be no need to have redundant testimony and evidence in a proffer. The specific language from the Court of Appeals stated: "At trial, the parties should proffer to the court any testimony relevant to the immunity motion **that is not presented to the jury.** [Emphasis added.] This court reads that language as an indication that the Court of Appeals, in assessing the immunity claim, intends to consider the evidence relevant to that issue that was presented to the jury, plus any proffer of things that were not presented to the jury. A remand was issued directing reconstruction, and this court's jurisdiction is limited. This court elects to go forward with the second reconstruction hearing, develop the record, and leave it for the appellate court to decide whether there was any waiver of opportunity to present further evidence on the immunity claim.

3) Finally, the State argued that this court repeatedly found that the testimony of the defendant was not credible in the immunity hearing. The State maintains that this court's order finding a lack of credibility cannot be changed and is conclusive on the issue. The appellate court will have the record of all the proceedings and the reconstruction submissions. The appellate court will also have the orders related to immunity. It is this court's view that the defendant should be given an opportunity to provide information concerning reconstruction of the missing portions of the record.

Therefore, the court directed the second reconstruction hearing to proceed.

Standard for Record Reconstruction

Where no transcript or record exists from a proceeding, the record may nevertheless be artificially "reconstructed." China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

In *State v. Ladson*, 644 S.E.2d 271, 373 S.C. 320 (S.C. App. 2007), our Court of Appeals held that a record may be successfully reconstructed only if it provides for "meaningful appellate review." Judge Kittredge further predicted that "[w]e 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."

Applying this standard, the Court of Appeals found that the appellant in *Ladson* established prejudice and that the reconstructed record failed to allow for meaningful appellate review. The court concluded that a reconstruction hearing that generated only "gratuitous references to generic motions and objections" could not adequately replicate Ladson's three-day

criminal trial. The gaps sought to be filled were simply too large to be replaced by a "bare bones summary of the evidence" and speculative conclusions of the trial participants.

In *Adams v. H.R. Allen, Inc.,* 726 S.E.2d 9, 397 S.C. 652 (S.C. App. 2012), the court stated:

> 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. China v. Parrott, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278 (1968). However, the reconstructed record must allow for meaningful appellate review. State v. Ladson, 373 S.C. 320, 321, 644 S.E.2d 271, 271 (Ct.App.2007). "A new trial [397 S.C. 657] 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. at 325, 644 S.E.2d at 274 (citations and internal quotation marks omitted).

Why the Record is Incomplete

Because this issue was the subject of testimony and evidence in the first reconstruction hearing, and because there seemed to be some insinuation of collusion or impropriety between the State and the Court Reporter in causing portions of the transcript to be missing, this court will address why the record of the immunity hearing is incomplete. The testimony of the Court Reporter who served at the immunity hearing is contained in the transcript of the first reconstruction hearing on June 14, 2013.

The Court Reporter explained that she used an outside typist to assist in preparing transcripts. She followed her standard practice of putting all of the materials to prepare the transcript into a briefcase and box that were inside her vehicle. A thief stole almost all of the materials, including the trial log, the stenograph notes and disk, and some backup tapes. From the backup tapes that were left, she created the transcript that has been filed, and she noted it was incomplete. She filed a statement about this, notifying Court Administration of the theft and the resulting gap. That statement is in the record of the first reconstruction hearing.

To the extent that this court was to evaluate whether any improprieties existed by any court officials or the prosecutor's office that caused any loss of the record, the court finds absolutely no wrongdoing on the part of anyone other than the thief who stole the items from the court reporter's vehicle.

The Missing Sections

The first task in the effort to reconstruct the record was to determine what sections of the record are missing. There is a partial transcript, so the record is not completely lost. There is no need to cover things that are included in the partial transcript or the exhibits that were admitted in the immunity hearing. The Clerk of Court's notes show the order of the witnesses. Despite any implications to the contrary, none of the exhibits admitted during the immunity hearing appear to be missing. They were filed with the Clerk of Court using a proper transmittal form.[2]

Loss of record concerning objections or legal rulings: The court does not recall any rulings on objections in the missing portions, nor does it recall any claim that there is an inability to preserve appellate issues due to missing transcription of any objections or rulings. If there was dialogue between counsel and the court regarding objections and rulings thereon, the court is unaware of that issue being raised, so this report does not address it except to state that the contemporaneous notes do not seem to indicate that there were legal rulings made during the missing portions of the immunity hearing transcript. The court believes that all legal issues raised were addressed in the final order that was issued by this court, following reconsideration.

[2] The attorneys for the appellant requested the Clerk of Court's records pursuant to the duties imposed upon the Clerks of Court in the manual issued by Court Administration and as required by South Carolina Code Ann. §§14-7-540(2) and (3), as well as §14-17-510 and §14-17-570.

However, when the immunity hearing was held, there was a brief discussion at the beginning about the procedure to be followed. The court does not believe that those are in the partial transcript. It was the first such hearing conducted in the 11th Circuit, and there was some question with the procedure outlined in *State v. Duncan*, 709 S.E.2d 662, 392 S.C. 404 (2011). This court is unaware of anything in those discussions that relates to any issue raised on appeal, and the court recalls that there was general unanimity as to how to proceed and the burden of proof being on the defendant. It seems clear that the only relevant things missing from the records of the hearings on May 31 and June 1 are the following sections of testimony from the transcript:

1) **the testimony of the first witness, the defendant, Mr. Joe Ross Worley, in its entirety; and,**
2) **portions of the testimony of a neighbor, Alan Sheffield, as noted by the court reporter in the transcript, beginning at or around page 159.**

Materials Obtained for Reconstruction of the Record

A. The affidavits of defense counsel, Mr. Garrett and Mr. Henderson: Billy Garrett, Esquire and Carson M. Henderson, Esquire represented Mr. Worley at the immunity hearing. They issued a joint affidavit on September 7, 2012, which set forth 93 separately-numbered paragraphs reciting their recollection of Mr. Worley's testimony at the immunity hearing. Mr. Garrett could not be present for the second reconstruction hearing, so he executed another affidavit dated October 20, 2016, and attached the prior affidavit from 2012.

    a. The main issue that this court has with these affidavits of defense counsel concerns the examination of Mr. Worley about whether he ever called out

demanding to know who was outside his home and the alleged verbal exchange that followed. He was questioned about whether he was told that they were law enforcement officers, and strongly questioned on cross-examination about whether he then said, "I don't give a f___k." The affidavits of defense counsel, in Paragraphs 84 and 87, state that Mr. Worley denied asking who was outside his home and denied that he said anything to anyone in the yard. That is correct, but the court's recollection is that these questions and answers were not that generic – they were pointedly related to whether he knew that these people were law enforcement officers. He was specifically asked in cross-examination about whether he called out asking who was ringing the doorbell, whether he was told that these were law enforcement personnel, and whether he responded that he did not care. He denied all of that.

b. The court does not take issue with the recitation in defense counsel's affidavits that Mr. Worley testified that he could have killed whomever was in his yard that night, if he wanted to do so; but, the court understood that to relate to opportunities after the initial shot was fired. The first shot was fired directly at the deputy.

    i. The testimony about Mr. Worley's second shot was that he fired a warning shot to try to get the person or persons out of his yard, instead of attempting to fire directly at anyone.

    ii. There was testimony that could support a finding of animosity or continued animosity by Mr. Worley or, in the defense's view, his continued belief that a burglary had been attempted. Specifically, there

was testimony that Mr. Worley yelled something to the effect of "Where are you, you son of a b*tch?" or "Where are you, you sons of b*tches?"

With those caveats, the court finds no substantial issue with the averments of Mr. Garrett and Mr. Henderson as to their recollection of the testimony of Mr. Worley. Their affidavit breaks the testimony down by direct and cross examination, and it is detailed.

B. The Court's Handwritten Notes (also typed for clarity)

i. To assist in review of the validity of this reconstruction, if deemed appropriate, the notes taken by the court concerning the testimony of Mr. Joe Ross Worley given on May 31, 2011, are included in the record.

ii. To assist in review of the validity of this reconstruction, if deemed appropriate, the notes taken by the court concerning the missing testimony of Mr. Alan Sheffield are included in the record.

C. Assistant Solicitor Maye's Handwritten Notes

To assist in review of the validity of this reconstruction, if deemed appropriate, a copy of the complete handwritten notes of Assistant Solicitor Ervin J. Maye related to the entire immunity hearing are included in the record. These include notations about his own observations, which normally would be protected from disclosure; but, the State has agreed to supply them in an unredacted fashion.

D. Transcripts and Exhibits from the June 14, 2013 and October 25, 2016 Reconstruction Hearings. These are part of the record on appeal.

REPORT ON MISSING SECTIONS OF THE IMMUNITY HEARING

MR. WORLEY'S TESTIMONY

Ladson points to the degree of information needed for meaningful appellate review. Unlike *Ladson*, here there is a partial transcript of the immunity hearing. There is also a transcript of the criminal trial in which the defendant was permitted to proffer evidence on the immunity issue and his overlapping claims of self-defense and defense of habitation. The immunity hearing was a swearing contest between Mr. Worley and the officers, with some bolstering of the officers' testimony coming from the neighbor, Mr. Alan Sheffield. The only part of their testimony that is missing is a small portion of the examination of Mr. Sheffield.

As the record shows, the gist of the officers' testimony was that they were adamant that they repeatedly announced their identity as law enforcement officers. They testified that they knocked on the exterior door and rang the doorbell many times. There was evidence that they never attempted to enter the home. They testified that Mr. Worley acknowledged their presence as law enforcement officers prior to his firing the shots. The officers testified that Mr. Worley asked them, from inside the home, who they were, that they identified themselves as law enforcement officers, and that Mr. Worley responded, "I don't give a f___k."

Diametrically opposed to the State's version were Mr. Worley's unshakable claims listed below. He testified as follows.

1) Mr. Worley was at his home/residence.
2) The residence is heavily insulated, making it almost soundproof.
3) It was a pitch-black night.
4) He was awakened by the repeated ringing of the doorbell for the entrance door on the first floor.
5) He was in a bedroom on the second floor.
6) He decided not to go downstairs to the door.
7) There had been previous burglaries and/or incidents in the neighborhood that caused Mr. Worley to have concern.
8) There is no peep hole or window near that entrance door.

9) He did not turn on the lights initially (there was uncertainty about when lights were turned on), but the appellate review may take whatever version is most favorable to Mr. Worley.
10) He did not see any blue lights or car lights.
11) No one called the residence to alert him to the officers coming over.
12) He did not call 911 to report someone at his door.
13) He had fired a weapon earlier trying to scare a fox that had injured the family cat.
14) He loaded the gun upon hearing the commotion of ringing the doorbell.
15) He put on his clothes.
16) He went out of the sliding glass door off his bedroom onto a deck above where the entrance door is located.
17) He saw the "burglar" running out with "a dinky" flashlight.
18) He told the "burglar" to freeze.
19) He saw the "burglar" aim a gun at him, and he fired a shot that turned the person around."[3]
20) The person then ran toward an embankment (the lake), turned, and ran back toward him.
21) Mr. Worley then fired a warning shot into the trees.
22) Mr. Worley went into the yard after the shooting and after the officers had fled. He yelled, "Where are you, you son of a b*tch," or "Where are you, you sons of b*tches." He shouted some kind of warning to the person or persons.
23) There were no visible police cars or identifying insignia observable that would put him on notice that these were law enforcement officers.
24) He thought the home was being burglarized (he repeatedly and consistently referred to the person or people outside as being a burglar or burglars).
25) He never heard anyone identified as a law enforcement officer before, during, or immediately after the shooting.
26) He never had a verbal exchange with the people during which he asked who they were, and he never heard anyone say that they were law enforcement officers prior to or during the incident.
27) He never said to the people outside that he did not give a f___k [that they were law enforcement officers].
28) He denies that he was ever instructed to put his weapon down by law enforcement officers.
29) He acted instinctively for his own protection and fired in the direction of the "burglar" who was pointing a gun at him.
30) He went out into the yard later and picked up the pistol and flashlight that the person had.
31) He eventually saw a Sheriff's vehicle at his neighbor's house, and he went up there and put the pistol into a patrol car.
32) He was in fear for his life before and at the time of the shooting, and immediately thereafter, and he fired to protect himself and his property.

[3] The court accepts the assertion by Mr. Henderson in the October 2016 reconstruction hearing that events happened rather instantaneously once Mr. Worley opened the sliding glass door and stepped outside with the rifle. The court accepts that the evidence indicates that Deputy Rushton spun out from underneath the deck area with his gun drawn, pointing it at Mr. Worley on the elevated deck, and Mr. Worley fired the first shot immediately upon seeing Deputy Rushton with the gun drawn. The first bullet was the only one that struck Deputy Rushton, blowing part of the Deputy's hand off.

MR. SHEFFIELD'S MISSING TESTIMONY

As noted above, much of Mr. Sheffield's testimony contained in the partial transcript. He began describing the events of that night on page 153. There is a gap in the transcript of the immunity hearing beginning on page 159, so the rest of Mr. Sheffield's testimony is omitted.

Mr. Alan Sheffield made the complaint that brought law enforcement to the scene. The court does not recall him providing any evidence on the reconstruction issue. The transcript includes his testimony related to his hearing the officers knock and announce their presence at the Worley residence, and the alleged discrepancy between what he told an ATF agent about the timing of the shots.

The court submits the following as a reconstruction of the missing section of the neighbor's testimony.

1) Mr. Sheffield testified that Mr. Worley's mother came over after the shooting of Deputy Rushton and appeared to be confused. [She was inside the home during the incident. She did not testify or present affidavits on the immunity issue in any of the proceedings before this court.]
2) Mr. Sheffield testified that he does not know if any shots were ever fired at his house or at him or his wife.
3) When Mr. Sheffield was being examined by the Solicitor's office, he testified that shots were fired around Labor Day. Then, a set of shots were fired each weekend until Deputy Rushton was shot in November. When re-examined by Mr. Garrett on reply, Mr. Sheffield stated that the shots may not have been every weekend, but on a lot of weekends between Labor Day and the date of the incident.

4) He testified that he discussed Mr. Worley's firing shots in the neighborhood with Mr. Worley's mother in an attempt to resolve it, and Mr. Sheffield and his wife were just hoping that Mr. Worley would stop shooting the rifle in the neighborhood.

Except for the reference to Mr. Worley's mother coming to the Sheffield home after the incident and appearing confused, none of the notes taken during the period of the missing gap in Mr. Sheffield's transcript appear to be describing what took place on the night of the shooting.

Conclusion

The court submits this report and the attachments thereto, along with the recitations in the orders from the immunity hearing, in order for the appellate court to assess whether it constitutes a meaningful reconstruction of the sections of the transcript that are missing and whether Mr. Worley suffers any prejudice in his appellate rights caused by the absence of these parts of the record.

Respectfully submitted,

December 30, 2016

_____
William P. Keesley
Circuit Judge

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 27, 2017

Mr. John Harrison Strom, Esquire
1330 Lady Street
Suite 401
Columbia SC 29201

Mr. John Benjamin Aplin, Esquire
PO Box 11549
Columbia SC 29211

Re: The State v. Joe Ross Worley
Appellate Case No. 2014-001497

Dear Counsel:

Please be advised that this case is no longer being held in abeyance. The Appellant's initial brief is due to be served and filed within 30 days of the date of this letter.

Very truly yours,

CLERK

cc: Alan McCrory Wilson, Esquire

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO. 2014-001497

MOTION TO PUT INTO ABEYANCE

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the undersigned counsel requests to put the above-captioned case into abeyance to obtain the transcript of the October 25, 2016 reconstruction hearing so that the Record on Appeal may be in accord with Rule 210(c) of the South Carolina Appellate Court Rules. In support of this motion counsel submits the following.

1. The Initial Brief Appellant and Designation of Matter in this case are due for filing on February 26, 2017. This case is on its third extension.

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.

4. On July 5, 2011, Judge Keelsey denied Appellant immunity in a written order.[1] Appellant moved for reconsideration of the order. On December 8, 2011, Judge Keesley issued an order affirming the denial of immunity.

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.

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. On March 28, 2013, this Court remanded the case for reconstruction of the missing portions of the hearing transcript.

8. 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

[1] The order was first issued on June 24, 2011, but later amended to correct scrivener's errors..

Young represented the State. Desa A. Ballard, Carson M. Henderson, and Billy J. Garrett represented Appellant.

9. 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." Appellant's motion for reconsideration was denied.

10. 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.[2]

11. 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. Appellant was convicted on all charges. On June 30, 2014, Appellant was sentenced by Judge Macintosh to a combined sentence of twenty years imprisonment.

[2] 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.

12. On May 4, 2016, undersigned counsel filed a motion to hold Appellant's appeal in abeyance and motion to remand for reconstruction of the pretrial immunity hearing. This Court remanded the case to Judge Keesley for reconstruction.

13. Judge Keesley convened a reconstruction hearing on October 25, 2016. On December 30, 2016, Judge Keesley submitted his report to this Court regarding the reconstruction. On January 27, 2017, this Court notified undersigned counsel by letter that the case had been taken out of abeyance and that Appellant's initial brief was due within thirty days.

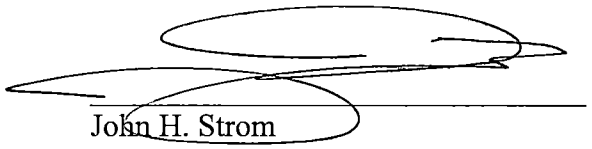
14. Counsel believes that the reconstruction hearing held on October 25, 2016 contains information relevant to Appellant's case that would need to be included in the Record on Appeal, pursuant to SCACR Rule 210(c).

15. Counsel therefore requests that Appellant's case be placed into abeyance pending receipt of the October 25, 2016 transcript. Counsel for the Attorney General's office consents to this request as shown by signature below. Counsel makes this request in good faith and not for purpose of delay.

16. Upon receipt of the missing transcript, Counsel does not anticipate requesting any additional extensions.

WHEREFORE, the undersigned counsel respectfully requests that the Court grant his motion to place the case into abeyance to obtain the October 25, 2016 reconstruction hearing transcript so that the Record on Appeal may be in accord with Rule 210(c) of the South Carolina Appellate Court Rules.

Respectfully submitted,

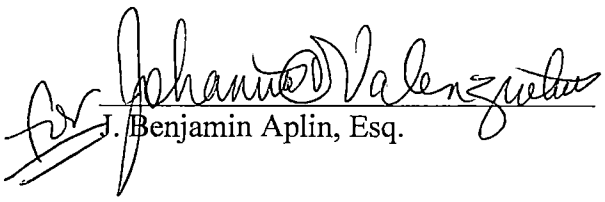


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of February 2017

I Consent:



J. Benjamin Aplin, Esq.

The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

The Honorable R. Lawton McIntosh
McCormick County
Trial Court Case No. 2010GS3500049, 2010GS3500052

ORDER

Counsel for the Appellant has filed a motion to hold the above-captioned appeal in abeyance pending the receipt of the transcript of the October 25, 2016, reconstruction hearing. Counsel for the Respondent consents to this motion. The motion is hereby granted for a period of ninety days. Counsel must notify this office once the transcript has been received.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
John Harrison Strom, Esquire
John Benjamin Aplin, Esquire

FILED
March 1, 2017

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO. 2014-001497

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because Robert Rushton was a law enforcement officer, within the meaning of the Act, where (A) Rushton's appointment as a Sheriff's Deputy was never approved by the circuit court as required under § 23-13-10; (B) where Rushton admitted that he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and where the State failed to present any evidence that a bond or surety was on file with the McCormick County Clerk of Court as required by S.C. Code Ann. § 23-13-20; and (C) Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident.

II.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because (A) Appellant had failed to prove entry or attempted entry into his dwelling and (B) Appellant had failed to prove that he was not without fault in bringing on the difficulty.

III.

The trial court reversibly erred in refusing to grant a mistrial when, in closing argument, the solicitor repeatedly asked jurors "Who said there was a fox out there?" and later stated "When the officers get out there -- now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that" as these statements constituted improper comments on the Appellant's right not to testify and impermissibly shifted the State's burden of proof to Appellant.

STATEMENT OF THE CASE

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.

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.

On July 5, 2011, Judge Keelsey denied Appellant immunity in a written order.[1] Appellant moved for reconsideration of the order. On December 8, 2011, Judge Keesley issued an order affirming the denial of immunity.

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.

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.

[1] The order was first issued on June 24, 2011, but later amended to correct scrivener's errors.

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.

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.

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. 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.

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.

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.

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." Appellant's motion for reconsideration was denied. R. 795 - 796.

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. 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.

On December 16-20, 2013, Appellant proceeded to trial on one count of assault and battery with intent to kill and one count of possession of a weapon during the commission of a violent crime before the Honorable R. Lawton McIntosh and jury. R. 797. 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.

Appellant was convicted on both charges. *Id.* at p. 1638, l. 21 – 1639, l. 8. On June 30, 2014, Appellant was sentenced by Judge Macintosh to a combined sentence of twenty years imprisonment. R. 1795, l. 24 – 1797, l. 6.

On May 4, 2016, Appellant filed a motion to hold Appellant's appeal in abeyance and motion to remand for reconstruction of the pretrial immunity hearing. This Court remanded the case to Judge Keesley for reconstruction. R. 1799 – 1807.

Judge Keesley convened a reconstruction hearing on October 25, 2016. R. 1810. On December 30, 2016, Judge Keesley submitted his report to this Court regarding the reconstruction. R. 1847 - 1860. On January 27, 2017 this Court ended the abeyance and remand. This appeal follows.

ARGUMENTS

I.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because Robert Rushton was a law enforcement officer, within the meaning of the Act, where (A) Rushton's appointment as a Sheriff's Deputy was never approved by the circuit court as required under § 23-13-10; (B) where Rushton admitted that he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and where the State failed to present any evidence that a bond or surety was on file with the McCormick County Clerk of Court as required by S.C. Code Ann. § 23-13-20; and (C) Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident.

Introduction

In the early hours of November 15, 2009, the darkest night of the month, Defendant used a rifle to shoot and injure Robert Rushton, who was on a the property of Appellant's mother in conjunction with two McCormick County Sheriff's deputies, Nick Moore and Sara McAllister, who were investigating a report of shots being fired earlier that night. R. 33, ll. 1-11. Appellant's bullet struck Ruston's gun, destroying it, and caused significant injury to Rushton's hand.

Immunity Hearing Held Pursuant to the Protection of Persons and Property Act

On May 31, 2011 and June 1, 2011, Judge Keesley presided over an immunity hearing held pursuant to the "Protections of Persons and Property Act". S.C. Code § 16-11-401, *et seq.* At the hearing it was established that the property owned by Appellant's mother where this tragic incident occurred is on Lake Thurmond in a rural section of McCormick County.

The 911 call concerning the gun shots was placed by Alan Sheffield, the next door neighbor, at the behest of his wife. This was the first time that Sheffield had requested the police address the night shooting. Sheffield claimed that he had filed a complaint with local law enforcement on a prior occasion, but there is no evidence that this complaint was ever communicated to Appellant. R. 148, l. 18 – 155, l. 7.

At the immunity hearing, Sheffield conceded that he often heard gunshots in the area, including at times when Appellant was not present, and that Appellant would frequently shoot a gun late at night. *Id.* Sheffield further admitted that, while he had asked Appellant's mother to speak with Appellant about the late night disturbances, he was uncertain if she did. *Id.*

Sheffield acknowledged that the Worley family cat, Sweet Pea, had been injured by a fox some months before the shooting. *Id.* On the night of the incident, Sheffield never attempted to notify Appellant or his mother that he had called the police. *Id.* While accounts differ, the call to 911 occurred sometime between 3:30 a.m. and 4:00 a.m. Rushton was first notified of the call sometime after 4:00 a.m. *Id.* at p. 30, l. 9 – 38, l. 22.

At 4:27 a.m., Moore reported to dispatch that he, Deputy McAllister and Rushton were still looking for the Worley residence. *Id.*; see also R. 203, l. 8 – 209, l. 15. Rushton stated at the hearing that it was so dark, both Moore and McAllister accidently drove past the Worley residence's driveway and, instead, stopped at the Sheffield residence. *Id.*

Likewise, Sheffield would testify that, even though he and his wife were expecting law enforcement to arrive and had their windows open; they were surprised when the deputies' and Rushton's cars finally pulled up. **Neither Rushton, nor the deputies activated their blue lights or sirens.** R. 87, l. 2 – 92, l. 25.

Neither of the deputies nor law enforcement dispatch nor Rushton attempted to contact Appellant's residence to advise them of their impending 4:30 a.m. arrival. *Id.* Rushton, who had only been rehired by the McCormick County Sheriff's Department on November 1, 2009, after a four year stint as private security contractor for DynCorp in Iraq, was wearing "military style" pants and a dark green collar shirt with no embroidered badge or other police markings on it. *Id.* at p. 8, l. 25 – 14, l. 16).

At the time of the incident, Rushton had not completed the re-certification classes required by the South Carolina Criminal Justice Academy. *Id.*; see also R. 1145, l. 5 – 1148, l. 17. While Rushton had completed a firearms recertification class, the McCormick County Sheriff's Department failed to transmit his employment information to the Criminal Justice Academy within the three working day statutory time limit that would have allowed Rushton to have the authority of a certified police officer while he waited to be certified by the Academy. *Id.*; see also S.C. Code Ann. § 23-23-43.

Rushton did not remember taking an oath to the South Carolina Constitution, although a written one was later produced with his signature on it. R. 232 – 235. However, he did not recall ever having taken the second, statutory oath specifically required of Sheriff's deputies prior to assuming their duties. R. 8, l. 25 – 14, l. 16. Nor did he know if there was a bond or surety on file with the McCormick County Clerk of Court. Finally, he did not recall ever having his appointment approved by a resident judge of the Eleventh Judicial Circuit. *Id.*

He had not been issued McCormick County's standard deputy uniform. Despite having them in his car, he was not wearing any reflective items such as a vest, a hat or a jacket that would identify him as law enforcement. *Id.* at p. 21, l. 13 – 25, l. 9. His badge was in a holder attached to his belt. Rushton parked his car behind a vehicle in Appellant's driveway. He then walked over to the Sheffields' house and spoke briefly with them. *Id.* at p. 92, ll. 11-12; p. 41, l. 1 – 44, l. 21.

Deputies Moore and McAllister approached the Worley residence, under a covered porch, knocked on the door and rang the doorbell. *Id.* The ground level door that the deputies knocked on, and where the doorbell is located, is the only entrance to the house. *Id.* The Worley residence, built by Appellant's father a career engineer at the Savannah River Site, was described

as a kind of garage with an apartment on top of it. The house is made out of concrete blocks and is heavily insulated. *Id.* at p. 213, l. 4 – 214, l. 9.

There is no window or peephole on the door. There are no windows on the side of the ground floor that the door is on. The only windows on the same side of the house as the door are located on the second story in front of a balcony. There is sliding glass door that leads on the balcony. The windows and the sliding glass door are oriented towards the lake; facing away from where the deputies and Rushton parked their cars. These windows are double planed glass. In front of the windows and the sliding glass door is a baloncy that extends out to the edge of the lower story and blocks a view of the ground level door from inside the house. *Id.*

Consistent with Appellant's reconstructed testimony, Deputies McAllister and Moore testified that they rang the Worley residence's doorbell and knocked on the ground level door repeatedly, all while purportedly identifying themselves as Sheriff's deputies. After receiving no response from inside the residence, McAllister and Moore walked around to the back of residence, away from the lake and were getting ready to leave, when the flood lights, which face the lake, briefly came on and off. Moore and McAllister then returned to the front door and began ringing the doorbell and knocking on the door. *Id.* at p. 40, l. 3 – 53, l. 9.

Rushton would testify that, when the flood light came on and then off, he stopped talking with the Sheffields and started walking towards the Worley residence. *Id.* at p. 162, ll. 6-25. He estimated that he talked to the Sheffield's for roughly three minutes. *Id.* at p. 43, l. 4 – 46, l. 14. Rushton walked one hundred thirty seven feet from the Sheffield's to the front door of the Worley residence. *Id.*

Rushton's and Deputies McAllister and Moore's Testimony

From this point, Appellant's account and the accounts of Rushton and the deputies begin to diverge. Rushton and the deputies claimed that – despite McAllister and Moore having previously knocked, rang the doorbell, and purportedly identified themselves as law enforcement without response – someone from inside the residence finally responded on this second attempt, asking "who is it?" *Id.* at p. 58, l. 7 – 59, l. 12. Deputy McAlister did not recall hearing any response from the house. *Id.* at 196, l. 16 – 202, l. 25.

Rushton and the deputies alleged that when they stated that they were the Sheriff's Department, someone inside the house responded, "I don't give a fuck." Rushton claimed that, after receiving this response, he heard the sliding glass door on the porch above them open. He decided to walk backwards, out from under the cover of the front door and into the yard so as to see who was stepping onto the balcony. As he walked backwards through the dark, he drew his gun. *Id.*

Next, Rushton claimed that he saw Appellant – through the near total darkness of a moonless night – step out from the doorway with a rifle in "the port position", pointing upward – not aimed at anyone. *Id.* Rushton admitted that Appellant did not point his gun at anyone until after the flood lights turned on and revealed that Rushton was already pointing his gun at Appellant. Rushton further conceded that Appellant never threatened to shoot anyone. *Id.*

Rushton averred that he was blinded by the flood lights coming back on. Deputy Moore would claim that a final call of "Sheriff's office" and "gun!" were made, after which Appellant immediately fired. It was undisputed that the shooting happened almost contemporaneous with Appellant opening the door and turning on the flood light. Rushton recalled that "it just happened so fast right then." *Id.*; *see also Id.* at p. 63, ll. 1-22.

Evidence presented at the hearing regarding the angle of trajectory and damage to Rushton's weapon and hand confirmed that his pistol was aimed at Appellant when Rushton was struck.

The force of the bullet's impact with Rushton's hand and gun knocked him to the ground. Despite being armed with a semi-automatic rifle capable of firing multiple rounds without reloading, Appellant did not immediately fire again. *Id.* at p. 46, l. 18 - 66, l. 6.

Instead, Rushton was able to crawl or run towards Deputy Moore, who was standing under the balcony of the Worley Residence by the front door. Appellant then fired a second time, but did not hit anything. Deputy Moore then helped Rushton flee towards McAllister's patrol car. McAllister who had been standing near the side of the Worley residence had run to her car after Rushton was shot. She made an "officer down" and "shots fired" call at 4:31 a.m., less than three minutes after the deputies and Rushton arrived.

As Rushton and Deputy Moore ran towards Deputy McAllister's waiting car, they claimed that Appellant shouted "where you at you sonofabitch?" or words to that effect. However, there were no additional shots after the first two and Rushton and the deputies were able to drive away.

Appellant's Reconstructed Testimony

Appellant's stated – based on a reconstruction of his testimony – that he had fired at a fox earlier in the night because he did not want the fox to attack Sweet Pea, the Worley family cat, again. R. 1854 - 1858. Appellant said that after the last time he fired at the fox he went to bed. He next awoke to the doorbell repeatedly ringing. *Id.*

He recalled that there had been attempted burglaries at the Worley residence before and other houses in the neighborhood had also been burglarized. Appellant decided not go downstairs to answer the door because there was no peephole or window near the entrance. Appellant did not turn on any lights. *Id.* at p. 8 – 12.

Instead, Appellant walked to the sliding glass door leading on to the balcony. Looking out, he could not see any blue lights or car lights. The night was almost totally black. When the

doorbell ringing continued, he decided to get dressed and load his father's old rifle. Appellant then returned to the sliding glass door and opened it. As he opened the door and prepared to step out on to the balcony, he turned on the flood lights and saw a burglar with a gun a "dinky flashlight". *Id.*

With respect to the shooting, in its reconstruction report, the trial court concluded that:

> [E]vents happened rather instantaneously once [Appellant] opened the sliding glass door and stepped outside with the rifle. The court accepted that the evidence indicates that . . . Rushton spun out from underneath the deck area with his gun drawn, point it at [Appellant] on the elevated deck, and [Appellant] fired the first shot immediately upon seeing . . . Rushton with the gun drawn.

R. 1858 n. 3. Disputing Rushton and Deputy Moore's accounts, Appellant was adamant that he never had a verbal exchange of any kind with Rushton and the deputies "during which he asked who they were, and he heard anyone say that they were law enforcement officers prior to or during the incident." *Id.* at p. 12-13. This conformed with Deputy McAlister's testimony at the hearing.

Appellant denied ever saying that he "did not give a fuck" that the people outside claimed to be law enforcement. Appellant stated that he acted "instinctively for his own protection" and was in fear for his life before and after the shooting. *Id.* Appellant also denied ever being told by law enforcement to put his gun down. *Id.*

Policing Expert Dr. George Kirkham's Testimony

The defense retained a policing expert, Dr. George Kirkham, a former police officer and current professor at Florida State University. Dr. Kirkham testified that, based on his review of the incident scene and Worley residence there was no way to see the police cars from the second story of the house. R. 115, l. 1 – 135, l. 12. Dr. Kirkham concluded that Rushton's car, without its blue lights or siren on, was parked on the other side of the house out of Appellant's line of sight. *Id.* at p. 137, l. 13 – 142, l. 14.

Similarly, Moore's car and McAllister's car were parked at the Sheffield residence and would have been out of Appellant's field of vision. Dr. Kirkham testified at length that Rushton's shooting was a tragic, but typical example of an accidental shooting that could have been avoided had Rushton and the responding deputies simply taken the time to assess the situation and properly plan an approach. *Id.*

Dr. Kirkham specifically highlighted the failure to effectively announce their presence by activating their patrol cars' blue lights. *Id.* at p. 115, l. 1 – 135, l. 12. He also explained that they should have called the Worley residence or used a public address system to speak with the residents of the house in order to have Appellant and his mother come speak with them. Instead, Rushton and the responding deputies unnecessarily placed themselves in an exposed position where Appellant could reasonably think they were burglars. *Id.*

Dr. Kirkham noted that there was no prior record of police contact with the Worley residence and no suggestion that Appellant harbored anti-government or anti-law enforcement views or was mentally ill. Further, while the 911 call reported gun shots, there was no active shooting when the police arrived. According to Dr. Kirkham, Rushton, McAllister, and Moore all failed to observe proper police procedure as set out by the South Carolina Criminal Justice Academy and that their failure to do so was the primary cause of the tragic confrontation and that it was reasonable for Appellant to doubt whether or not Moore, McAlister and Rushton were law enforcement. *Id.*; *Id.* at p. 138, l. 15 – 139, l. 20.

Investigation by McCormick County Sheriff's Department

Despite having an employee shot only hours before, McCormick County Sheriff George Reid along with Deputies McAlister and Moore, among others, drove to the Worley residence.

Sheriff Reid would testify at trial that Appellant and his mother were walking around their yard with flashlights as if they were looking for something. R. 1187, l. 1 – 1190, l. 14.

When Appellant shined his flashlight in Sheriff Reid's eye, the Sheriff nonchalantly asked him to point the light away from. Seemingly unafraid of Appellant, the Sheriff demanded to know if Appellant realized he had just shot one of his employees. *Id.* Appellant explained to the Sheriff that he had placed the remains of the Rushton's gun in his patrol car. Appellant then purportedly told Sheriff Reid that his deputies and employee had "no business" ringing his doorbell at 4:00 a.m. The Sheriff then placed Appellant under arrest without further interrogation. *Id.*

Notwithstanding their having been involved in the incident, Deputies McAllister and Moore both remained heavily involved in evidence collection at the incident scene and in the investigation into the shooting. *Id.* Curiously, McAllister had been fired from DNR for lying to investigators and obstructing an investigation into a fatal boating accident that she had been involved in. R. 190, l. 8 – 195, l. 1. She testified at the immunity hearing, but the State did not call her at trial.

Amended Order Denying Immunity

On December 11, 2011, the trial court issued a lengthy written order titled "Amended Order on Reconsideration the Defendant's Motion to Bar Prosecution" denying Appellant immunity. In denying Appellant immunity, the court concluded that – despite their inconsistencies and expert testimony regarding their deficient, reckless conduct – Rushton and the deputies' versions of events was "far more believable" than Appellant's testimony. R. 1758.

The court concluded that, as a matter of law, Appellant could not receive immunity under the Act because Rushton qualified as a law enforcement officer at the time of the incident. *Id.* at p. 7 – 14. The court observed that the Act made an exception when the person:

> [A]gainst whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his officials 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.

§ 16-11-450(A). The court summarily rejected the defense's argument that Rushton's failure to have his appointment approved by a circuit court judge as required by § 23-13-10 meant that he was not a law enforcement officer at the time of the shooting. *Id.*

Without citing to any legal precedent or authority, the Court opined that § 23-13-10, first enacted by the General Assembly in 1937, was unconstitutional: "[t]o 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." *Id.* at p. 10.

Having summarily exenterated statutorily mandated judicial oversight of deputy hiring, the court next eviscerated the requirement that a sheriff's deputy "shall" take a second, statutory oath found in § 23-13-40, "before entering upon the discharge of his duty." "The court concludes that the failure to take an additional or supplementary oath . . . does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive [Rushton] from asserting that he is law enforcement for purposes of the Act." *Id.* at p. 14.

The court identified no legal support for its contention that this oath was merely "additional or supplementary" to the more general oath required of all state office holders. *Id.* Likewise, the court ruled that the State's failure to provide any evidence that Rushton entered into a bond or that McCormick County had a blanket bond on file with the Clerk of Court, also required under § 23-13-20, was immaterial. Rather, the defense had failed to prove that the bond did not exist. *Id.* at p. 11.

The court also ruled that, as an additional or alternative ground for denying immunity, Appellant "has not established that he had a reasonable belief that he was not firing upon law enforcement." *Id.* at p. 14. The court reasoned that even if Rushton was not law enforcement due to the above referenced deficiencies, Appellant still would not be able to claim immunity as Rushton, McAllister, and Moore identified themselves as law enforcement at the time Appellant fired and it was not reasonable for Appellant, under the circumstances, to disbelieve them. *Id.* at p. 14.

The court further concluded that, because Rushton was a law enforcement officer, Appellant was also precluded from receiving the presumption that he acted in reasonable fear of death or great bodily injury that he would have been entitled to under § 16-11-440(A). *Id.* at p. 14 - 19. The court then reasoned that, since Rushton was law enforcement, his entrance or attempted entrance into Appellant's home was not unlawful. *Id.*

Next, the court found that Appellant's conduct brought on the difficulty. Again, the court found that Appellant "knew or should have known" that Rushton, standing in Appellant's yard at 4:30 a.m. and pointing a gun at him was a law enforcement officer because Rushton, McAllister, and Moore were purportedly yelling that they were. *Id.* at p. 21.

The court rejected the defense's argument that Rushton was at fault in bringing on the difficulty when he: pointed his pistol at Appellant; decided not to wear any visible signifiers of his possible law enforcement status; and when he failed to properly and effectively identify himself by activating his car's blue lights, using its PA system, or having dispatch make a telephone call.

Instead, Appellant was at fault for not simply taking Rushton, McAllister, and Moore's word that they were sheriff's deputies. The court reasoned that once an intruder claimed to be a law enforcement officer, the burden shifted to the homeowner to undertake an investigation to ascertain whether the intruder's claim is true before he can act in self-defense. *Id.*

The court absolved Rushton of any responsibility for the incident, noting that Appellant left the "security of the walls of his residence out onto his deck with a loaded rifle. Mr. Rushton acted appropriately in meeting that condition, and [Appellant] fired upon him." *Id.* Thus, the court concluded that Appellant was the aggressor, despite being in his "castle" at the time of the shooting.

Discussion

The Act provides that "[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: . . . (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." § 16-11-440(A)(2).

In addition, the Act provides states, "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . ***has no duty to retreat and has the right to stand his ground and meet force with force***, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself." § 16-11-440(C) (*emphasis added*).

In signing the Act into law, the General Assembly stressed 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***." § 16-11-420(E) (*emphasis added*). Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must prove all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).

Thus, to be entitled to immunity the defense must prove the following elements: (1) the

defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).

The Act contains specific exceptions where an individual uses force against a "law enforcement officer." For instance, the provision where an individual "is presumed to have a reasonable fear of imminent peril" when using force against a person attempting unlawful and forcible entry of the individual's residence, is inapplicable when the individual attempting the entry is:

> [A] law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle 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.

S.C. Code Ann. § 16-11-440(B)(4). Likewise, an individual who uses deadly force as permitted under the act is immune from civil or criminal prosecution:

> [U]nless 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.

§ 16-11-450(A). The Act does not define "law enforcement officer."

A. The trial court committed a reversible error of law by denying Appellant immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act on the grounds that Robert Rushton was a law enforcement officer where Rushton's appointment as a Sheriff's Deputy was never approved by the an Eleventh Judicial Circuit Court judge as required under S.C. Code Ann. § 23-13-10.

At the immunity hearing, Rushton testified that his appointment had never been approved by a circuit court judge as required by S.C. Code Ann. § 23-23-10. R. 103, ll. 4-16; *Id.* at p. 210, l. 5 – 220, l. 21; R. 727 - 756. Nevertheless, the trial court denied Appellant immunity because, among other reasons, the court believed that Rushton was a "law enforcement officer" within the meaning of the Act. R. 1762 – 1767.

The court concluded that § 23-13-10 was a "clear violation of the separation of powers" to the extent that it gave the judicial branch oversight of deputy hiring. *Id.* Thus, pursuant to the statutory exclusions included in the Act for force used against a law enforcement officer, the trial court ruled that Appellant could not claim immunity. *Id.* This ruling constituted an error of law.

Rules of Statutory Interpretation

Section 23-13-10 states: that "the sheriff may appoint one or more deputies **to be approved by** the judge of the circuit court or any circuit judge presiding therein." (*emphasis added*). The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)).

All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577

(Ct.App.1999) *cert. denied as improvidently granted, State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.*

In addition, courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577.

Finally, penal statutes must be strictly construed against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper construction should be resolved in favor of the citizen against the state. *State v. Cutler*, 374 S.C. 376, 264 S.E.2d 420 (1980); *see also Yates v. United States*, 135 S.Ct. 1074 (2015) (ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

The Act is a penal statute. It is listed in Title Seventeen of the South Carolina Code, which details criminal procedures for state courts. Any ambiguity regarding the meaning of the terms used in the Act should be determined in favor of the citizen claiming its protections. *State ex rel. Moody v. Stem*, 213 S.C. 465, 468, 50 S.E.2d 175, 176 (1948) ("The principle is well established that penal statutes are strictly construed, and one who seeks to recover a penalty for failure on the part of the defendant to discharge some duty imposed by law, must bring his case clearly within the language

and meaning of the statute awarding the penalty. Such laws are to be expounded strictly against the offender and liberally in his favor.").

Accordingly, an individual claiming to qualify as a law enforcement officer under the Act, negating all protections the Act would otherwise afford a citizen, should be required to prove strict compliance with all constitutional, statutory, and regulatory requirements relating to law enforcement.

The language of § 23-13-10 makes clear that the legislature intended that any deputies a sheriff wished to appoint be subject to the approval of the resident circuit court judges. By contrast, § 23-13-40 allows "**the sheriff, without seeking the approval of the circuit judge, may appoint special deputies** as the exigency of his business may require for the service of process in civil and criminal proceedings only." (*emphasis added*)

Harmonizing these two statutes strongly suggests that the legislature envisioned two kinds of deputies. One class of deputies acting as general agents of the sheriff, subject to the approval of the resident circuit court judge or judges, and a second class of deputies, not subject to circuit court approval, but whose appointment is limited in scope and circumstance. *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004) (holding that statutory terms must be construed in context and their meaning determined by looking at the other terms used in the statute).

Section 23-13-10 should be afforded its plain and obvious meaning: that the approval of a resident circuit court judge or judges is a prerequisite to a deputy's employment as an agent of the Sheriff and to the deputy's qualification as a law enforcement officer under the Act.

Section 23-13-10 and Separation of Powers

All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Davis v. County of Greenville,* 322 S.C. 73, 470 S.E.2d 94 (1996). A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. *Westvaco Corp. v. South Carolina Dep't. of Revenue,* 321 S.C. 59, 467 S.E.2d 739 (1995). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution. *Id.*

Contrary to the summary conclusion of the trial court, imposing judicial oversight on the power of an executive branch officer does not violate the separation of powers doctrine. R. * (Amended Order p. 10). Similar oversight and confirmation requirements are an integral part of South Carolina law that "prevents concentration of power in the hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis*, 278 S. C. 307, 312, 295 S. E. 2d 633, 636 (1982). The state constitution mandates that:

> There **shall** be elected in each county by the electors thereof a . . . sheriff . . . All of these officers **shall** serve for terms of four years and until their successors are elected and qualify. **The General Assembly shall provide by law for their duties and compensation.**
>
> **The General Assembly also may provide by law for the age and qualifications of sheriffs . . . and the selection, duties, and compensation of other appropriate officials to enforce the criminal laws of the State**, to prosecute persons under these laws, and to carry on the administrative functions of the courts of the State.

S.C. Const. Art. V, § 24 (*emphasis added*).

Thus, the legislative branch is specifically empowered to define the duties of sheriffs and "of other appropriate officials." *Gentry v. Taylor*, 192 S. C. 145, 152, 5 S. E. 2d 857, 859 (1939) (stating that "it is not within the province of the courts to change the clear meaning of any

constitutional provision by construing the language in order to give it a different meaning from that which is clearly intended"). Concomitant with the authority to define a position's power and duties is the power to impose limitations on that position's exercise of discretion.

Moreover, the power to appoint public officials, defined as those "individuals charged with duties involving an exercise of some part of the sovereign power" of the State, is commonly divided between the three branches of state government. *Sanders v. Belue*, 78 S.c. 171, 58 S.E. 762 (1907) (defining "public official"). This division of appointment power continues at the county and local government level.

The most frequent division of appointment power is between the Governor and one or both houses of the General Assembly, most commonly the Senate. For instance many state agency directors and other appointed officials "must be appointed by the Governor with the advice and consent of the Senate." *See* § 24-21-10(A),(B) (controlling the appointment of Board and Director of Probation, Parole, and Pardon Services); *see also* § 22-1-10(A) (controlling the appointment of magistrate court judges).

The power to remove appointed officials is follows a similar division of authority. S.C. Const. Art. V, § 24; S.C. Const. Art. XV, § 3; *see also* § 1-3-240(A),(B). Importantly, the constitution and the General Assembly limit the executive branch's power to remove certain appointed or elected officials without the agreement of the General Assembly and a hearing for the officer sought to be removed. *Id.*

While the division of appointment power between Governor and the General Assembly is the most common division, it is far from the only division of power. In areas of judicial concern, such as the state's indigent defense system, the legislature has given all three branches of

government a share in the power to appoint and remove officials. *See* § 17-3-310(A),(B) (providing for the appointment of members of the Commission on Indigent Defense).

For appointed officials whose remit only extends to one or two counties, it is common for the Governor to appoint them on the recommendation of a majority of the relevant counties' legislative delegation." *See Russell v. Lyon*, 90 S.C. 5, 72 S.E. 496 (1911) (holding that rural policeman recommended by legislative delegation, but not appointed by governor are not qualified to act as policemen); *see also State v. Verdier*, 91 S.C. 394, 74 S.E. 934 (1912) (holding that officers appointed as township commissioners by governor without recommendation from county legislative delegation were "mere usurpers"); *see also* § 4-23-10, *et seq.* (creating multiple county fire safety districts).

When evaluated pursuant to S.C. Const. Art. V, § 24 and in light of the other divisions of appointment power found in our state government, prior judicial approval of potential sheriff's deputies by the resident circuit court judges is constitutional. At a minimum, it is not patently unconstitutional. *Cf. Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (enjoining referendum on video game machines on grounds that statute authorizing referendum was an unconstitutional delegation of legislative authority to the people).

The sheriff is an elected county executive position. The sheriff is, for the most part, not accountable to county government. *See* § 4-9-650; *see also* § 4-9-33; *see also Botchie v. O'Dowd*, 299 S.C. 329, 384 S.E.2d 727 (1989) (holding that deputy not entitled to discharge hearing before county council). The Sheriff cannot be removed from office except by impeachment or by the Governor with the concurrence of two thirds of both houses of the General Assembly. *See* S.C. Const. Art. XV§ 1-3.

Therefore, the only branch capable of exercising an effective, short-term check on the Sheriff's hiring decisions when there are "cases of fraud, clear abuse of power, or where unreasonable or capricious acts have occurred," are the resident circuit court judges. *S.C. Elec. & Gas Co. v. S.C. Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777 (1949) (affirming that generally "courts will not interfere with such discretionary powers of a subordinate governmental agency except in cases of fraud or clear abuse of power or where unreasonable or capricious."

Under S.C. Const. Art. V, § 24, the General Assembly acted within its power in passing § 23-13-10 requiring resident circuit court judges approve sheriff's deputies prior to their appointment. Accordingly, the trial court erred in ruling that § 23-13-10 violated the separation of powers and erred as a matter of law in concluding that Rushton was a law enforcement officer within the meaning of the Act when Rushton's appointment had not been approved by a circuit court judge. R. 1763.

B. The trial court committed an error of law by denying Appellant immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act on the grounds that Robert Rushton was a law enforcement officer where Rushton admitted that he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and where the State failed to present any evidence that a bond or surety was on file with the McCormick County Clerk of Court as required by S.C. Code Ann. § 23-13-20.

As discussed *supra*, the Act is a penal statute that must be strictly construed in favor of the accused. At the immunity hearing, Rushton testified that he did not recall taking any oath prior to being re-hired by the McCormick County Sheriff's Department on November 1, 2009. R. 6, l. 24 – 18, l. 24; *Id.* at p. 103, ll. 4-21.

Rushton also stated that he did not know if there was a bond on file with the McCormick County Clerk of Court so as to insure "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." *Id.* at p. 210, l. 5 – 211, l. 18; *see also* § 23-13-20.

In response the State produced a piece of paper signed by Rushton that they claimed satisfied the requirement under S.C. Const. Art. VI, § 5 that Rushton take an oath to the state constitution. *Id.* at p. 107, l. 9 – 109, l. 3; *see also* R. 232 - 235. The piece of paper did not include the second oath specifically required of sheriff's deputies by § 23-13-20. The State produced no evidence that any bond or surety was on file with the Clerk of Court. *Id.*

In denying Appellant immunity by concluding that Rushton was a law enforcement officer within the meaning of the Act, the court ruled that the statutory oath was merely "an additional or supplementary oath" to the constitutional oath. R. 1767. Without elaboration, the court reasoned that Rushton's failure to take the oath required by law of sheriff's deputies, "does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive [Rushton] from asserting that he is law enforcement for purposes of the Act" *Id.*

Despite the State having earlier produced Rushton's signed constitutional oath from the Clerk of Court's Office while simultaneously failing to produce any documentation that the bond existed, the court held that the defense failed to prove that a bond did not exist. *Id.* Accordingly, the court determined that Appellant could not claim immunity from prosecution because Rushton was a law enforcement officer and, thus, exempt. *Id.*

Section 23-13-20 requires that all deputy sheriffs:

> **[S]hall 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.

(*emphasis added*). There is little case law regarding the impact of the failure to take either of the two required oaths on the authority of a purported sheriff's deputy.

In *Town of Denmark v. Corley*, the Supreme Court affirmed the grant of a new trial for the defendant, in part, because arresting officers "had not qualified or taken the constitutional oath" in S.C. Const. Art. III, § 26. 100 S.C. 433, 433, 84 S.E. 884, 884 (1915):

> The court is of the opinion that **the record having disclosed the fact that the officers of the town not having taken the constitutional oath, as required by the Constitution**, as aforesaid, and **not holding over, having been just elected, they are not officers *de facto***, and this exception is sustained.

Id. at 433, 84 S.E. at 885 (*emphasis added*). By contrast, in *State v. McGraw*, the Supreme Court held that a sheriff's deputy, who had never taken the oath of office and never had his appointment approved by the circuit court, was "at least a *de facto* officer" for the limited purpose of summoning jurors. 35 S.C. 283, 283, 35 S.C. 630, 631 (1892); *see also* § 23-13-40 (statute authorizing special deputies).

More recently, this Court decided in *State v. Griffin*, that the failure of the Georgetown Sheriff's deputy hiring process to follow any of the requirements of § 23-13-10 and § 23-13-20

did not render a traffic stop unlawful. 413 S.C. 258, 776 S.E.2d 87 (Ct. App. 2015) *affirmed as modified* 413 S.C. 258, 776 S.E.2d 87 (2016). Relying on *McGraw*, this Court concluded that the deputies conducting the traffic stop was a *de-facto* officers as they had all been employed with the department for a significant amount of time ranging from eight to twenty eight years. *Id.* at 264, 776 S.E.2d at 90.

However, the Supreme Court modified this opinion in *State v. Griffin*, 416 S.C. 266, 785 S.E.2d 786 (2016). The Supreme Court excised the portions of this Court's opinion addressing the failure to comply with the statutory requirements, determining "such an analysis unnecessary" in light of well-established precedence holding that the illegality of an initial arrest does not bar later prosecution. *Id.* at 268, 785 S.E.2d at 787.

Here, the trial court erred, as a matter of law, in ruling that the statutory oath is merely "additional or supplemental" to the constitutional oath and had no impact on whether Rushton qualified as a law enforcement officer under the Act. Appellant's case is procedurally distinguishable from the *Griffin* cases.

Griffin dealt with the impact of a potentially illegal arrest on the defendant's later prosecution. As the Supreme Court noted, "it is well established that 'the illegality of an initial arrest [does] not bar the accused person's subsequent prosecution and conviction for the offense charged.'" *Griffin*, 416 S.C. 266, 267, 785 S.E.2d 786, 786. In addition, the deputies in *Griffin* had all been working for the department for a significant period of time, a key factor in determining whether an individual qualifies as a *de facto* officer. *Corley,* 100 S.C. at 433, 84 S.E. at 884.

Here, Appellant moved to bar prosecution under the Act. Appellant was not challenging the legality of his arrest. He was asserting that he was entitled to immunity from prosecution. As discussed at length *supra*, the Act is a penal statute. As such, the term "law enforcement officer"

should be construed in Appellant's favor and against state. This means that the failure to follow the statutory requirements surrounding the appointment and approval of sheriff's deputies should have precluded Rushton from taking advantage of the exceptions given to "law enforcement officers" under the Act. R. 1767.

C. The trial court committed an error of law by denying Appellant immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act on the grounds that Robert Rushton was a law enforcement officer where Rushton's certification as a Class I law enforcement officer had lapsed, and the training necessary to recertify was not completed prior to the incident.

Rushton was rehired by the McCormick County Sheriff's Department on November 1, 2009. Prior to rejoining the department, Rushton worked for DynCorp as a private military contractor and police trainer for four years. R. 6, l. 24 – 16, l. 6. This was not military service. Rushton was an employee of a government contractor.

During his time as a private military contractor, Rushton allowed his law enforcement certification to lapse. Upon being rehired, he "had to catch up all the training hours I had missed for the previous four years." *Id.* at p. 9, ll. 11-12. Rushton alleged that he had "requalified" with his pistol and had taken "legal updates" and "criminal domestic violence updates." *Id.* at p. 13, ll. 1-22.

However, no record of any such training is listed on Rushton's training report that the defense entered into the record at the immunity hearing. R. 757 - 794. The training report states that Rushton was certified as a Class I officer on June 26, 2010, nearly seven months after the incident. *Id.*

Investigator Joseph Collier, the officer responsible for training, testified that Rushton's hiring date was November 1, 2009 and that he submitted all of Rushton's paperwork to the South Carolina Criminal Justice Academy on November 5, 2009. R. 1146, l. 2 – 1147, l. 25. Collier also

claimed that the Academy notified him that Rushton's time working for DynCorp could qualify as a military service.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid–State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Id.* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

The South Carolina Law Enforcement Training Council has the authority to "certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the [C]ouncil." S.C. Code Ann. § 23-23-80(6). A law enforcement department is not allowed to hire an officer unless that officer has been certified by the Council. S.C. Code Ann. § 23-23-40; *see also* SC. Code Ann. § 23-23-10(E) (defining "law enforcement officer" as an "appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed.").

South Carolina law requires all law enforcement officers be certified prior to an employee having the authority to "perform any of the duties of a law enforcement officer" with respect to the general public:

> No law enforcement officer employed or appointed on or after July 1, 1989, by any public law enforcement agency in this State is authorized to enforce the laws or ordinances of this State or any political subdivision thereof **unless he has been certified as qualified by the council**, except that any public law enforcement agency in this State may appoint or employ as a law enforcement officer, a person who is not certified if, within one year after the date of employment or appointment, the person secures certification from the council; provided, **that if any public law enforcement agency employs or appoints as a law enforcement officer a person who is not certified, the person shall not perform any of the duties of a law enforcement officer involving the control or direction of members of the public or exercising the power of arrest until he has successfully completed a firearms qualification program** approved by the council; and provided, further, **that within three working days of employment, the academy must be notified by a public law enforcement agency that a person has been employed by that agency as a law enforcement officer, and within three working days of the notice the firearms qualification program** as approved by the director must be provided to the newly hired personnel.
>
> Notwithstanding another provision of law, **in the case of a candidate for certification who begins one or more periods of state or federal military service within one year after his date of employment or appointment, the period of time within which he must obtain the certification required to become a law enforcement officer is automatically extended for an additional period equal to the aggregate period of time the candidate performed active duty or active duty for training as a member of the National Guard, the State Guard, or a reserve component of the Armed Forces of the United States, plus ninety days.**

S.C. Code Ann. § 23-23-43 (*emphasis added*). In addition, officers must be re-certified every three years. § 23-23-60(C); *see also* S.C. Code Ann. Regs. 37-006(D)(4) (requiring a law enforcement candidate with a break in service of three years or more to complete all the requirements of § 23-23-60).

Investigator Collier's testimony makes clear that Rushton's hiring date was November 1, 2009. Rushton's first three working days were November 2-4, 2009. Collier did not submit

Rushton's application to the Academy and Council until November 5, 2009. R. 1146, l. 2 – 1147, l. 25. This was beyond the three day statutory window that allows a non-certified officer to exercise the authority of a certified law enforcement officer during his first year of employment. § 23-23-43.

Nor does Rushton's four year employment with DynCorp somehow "froze" his certification status as the State contended at trial. R. 6, l. 20 – 20, l. 22. A plain reading of the law enforcement certification statutes only allows an officer's certification requirements to be suspended in the event that they are called to "active duty or active duty for training as a member of the National Guard, the State Guard, or a reserve component of the Armed Forces of the United States." S.C. Code Ann. § 23-23-43.

DynCorp is not a branch or component of the Armed Forces of the United States. It is a privately owned military contractor. Rushton quit the McCormick County Sheriff's Department and went into private employment for four years. On his return to public employment, he was required to be completely recertified.

Even if the Council approved Rushton's time with DynCorp as equivalent to military service, the clear, unambiguous terms of the certification statutes do not give the Council authority to do so. *See Triska v. Dept. of Health & Environmental Control,* 292 S.C. 190, 355 S.E.2d 531 (1987) (holding that an administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.).

Rushton's certification as a Class I law enforcement officer had lapsed. The McCormick County Sheriff's Department failed to follow the statutory requirements that would have allowed Rushton to exercise the duties of a law enforcement officer prior to being recertified. Accordingly, the trial court erred in concluding that Rushton was a law enforcement officer within the meaning of the Act.

II.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because (A) Appellant had failed to prove entry or attempted entry into his dwelling and (B) Appellant had failed to prove that he was not without fault in bringing on the difficulty.

A. Appellant established that an unlawful entry was being attempted and was entitled to the presumption afforded to him under the Act and immunity.

The Act provides that "[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 . . . (2) [and the person]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." § 16-11-440(A)(1)-(2).

The trial court erred as a matter of law in ruling that Appellant failed to prove entry or attempt at entry into Appellant's dwelling. Section 16-11-430 defines "dwelling." The Worley residence was, without any dispute, Appellant's dwelling. Under common law, the protected area where a dwelling's resident has no duty to retreat extends to the dwelling's curtilage. *State v. Sampson*, 12 S.C. 567, 1880 WL 5588 (1880) (an outhouse is considered part of a dwelling); *see also State v. Osbourne*, 200 S.C. 504, 21 S.E.2d 178 (1942) (resident "may repel trespassers in or upon the house . . . as if he were under his own doors.").

Rushton had entered or attempting to enter the dwelling, given that he was standing in the middle of the night under the balcony roof of the house. This is very type of place "where the property owner alone has the right to be, to the exclusion of the general public" at 4:30 a.m. By

contrast, in *Duncan*, the deceased was only on the porch of the shooter's residence, which the Court 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.

As detailed *supra,* Ruston's entrance was unlawful because he was not a law enforcement officer and thus could not have been acting within the proper scope of his duties while on Appellant's premises at 4:30 a.m. Accordingly, the court erred as matter of law in concluding that there was no unlawful or attempted unlawful entry of Appellant's residence.

B. Appellant established that he was without fault in bringing on the difficulty that precipitated the incident.

An individual who provokes or initiates an assault may not assert self-defense. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *Id.*

Here, Appellant was without fault in bringing on the difficulty. The Act provides 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" and that "persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes." § 16-11-420(B) and (D).

Appellant stated, in testimony corroborated by Sheffield, that he was attempting to shoot at a fox that had injured his cat. The Worley residence is located in a rural, unincorporated part of McCormick County. Sheffield further testified that he regularly heard gun shots. Even Rushton admitted that when he first received the 911 call, he believed that someone was likely poaching deer. R. 36, l. 2-23. It simply cannot be said that, as a matter of law, firing a gun at night in a rural

part of a South Carolina is reasonably calculated to bring on a violent confrontation with law enforcement. *See State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232, n. 8 (2014) ("[o]ne who merely does an action that affords an opportunity for conflict is not thereby precluded from claiming self-defense.").

It was undisputed that the layout of the Worley residence was such that, in addition to being highly insulated, there was no way to definitively ascertain the identity of the individuals knocking at the ground level door without walking out onto the balcony. Dr. Kirkham's testimony makes clear that Rushton and Deputies Moore and McAllister did not follow proper police procedure and needlessly risked themselves and Appellant. Crucially, they did not activate their blue lights. Rushton was not in uniform and had no apparel identifying him as law enforcement.

Appellant has no criminal record and there was no evidence of any motive for the shooting. *Cf: State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) (holding that defendant not without fault when he entered an on-going fight he was previously not involved in with a loaded weapon). Appellant simply attempted to visually identify the individuals ringing his doorbell at 4:30 a.m. *State v. Wiggins,* 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n. 15 (1998) (holding the absence of a duty to retreat also extends to the curtilage of one's home, which includes the dwelling's yard).

He was not armed in anticipation of a confrontation. He was armed out of a sense of self-preservation. *See State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("the defense of habitation provides, defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection." (*citing State v. Bradley*, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)) .

Even in a light most favorable to the State, all Appellant could determine from looking through his house's window was that one or more people were claiming to be law enforcement. He

saw no blue lights. He knew that he had not called the police. His neighbors had never before called the police about his shooting a gun. He knew that that there had been burglaries in the area. There was nothing to suggest that Appellant, a man with no criminal record, had a reason to suspect his neighbors had decided to notify law enforcement.

Appellant had no duty to retreat in his own house in the face of an unlawful attempted entry and did not "bring on the difficulty". § 16-11-440(A)(2). The court's determination that Appellant had brought the difficulty was unsupported by the evidence and constituted an abuse of discretion.

III.

The trial court reversibly erred in refusing to grant a mistrial when, in closing argument, the solicitor repeatedly asked jurors "Who said there was a fox out there?" and later stated "When the officers get out there -- now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that" as these statements constituted improper comments on the Appellant's right not to testify and impermissibly shifted the State's burden of proof to Appellant.

Relevant Facts

Appellant's trial proceeded in similar fashion to his immunity hearing. In addition to Dr. Kirkham, Appellant's brother also testified about the construction and layout of the Worley residence. R. 1229, l. 17 – 1248, l. 10. Appellant's brother outlined for the jury in great detail how insulated and sound proof the house was. *Id.*

As at the immunity hearing, Dr. Kirkham stated that, based on his expertise and experiments conducted at the house, Appellant likely would have been unable to see the police cars on the night of the shooting and that it was reasonable for Appellant to believe Rushton and the deputies were burglars. *Id.* at p. 1323, l. 10 – 1350, l. 9.

Dr. Kirkham further testified that he could not hear anything from the outside when he went to the house. *Id.* As at the immunity hearing, he explained the numerous ways in which Rushton and the deputies failed to follow proper police procedure and how those failures were primarily responsible for the incident. *Id.* Petitioner did not testify. *Id.* at p. 1471, l. 8 – 1472, l. 21.

State Closing Arguments

Circuit Solicitor Donnie Myers gave the final closing arguments for the State. From the onset, Solicitor Myers heaped insults on the defense's case. "Oh, what a tangled web we weave when first we begin to deceive." *Id.* at p. 1555, ll. 12-17. He called Dr. Kirkham a "traveling medicine man" from Florida and then asked jurors:

And what did [Kirkham] tell you? Well, what about this? Well, what about that?

Well, let's look at what's not here. First of all, didn't that medicine man -- **that traveling medicine man talk about a fox? There's a fox out there**. There's an old country and western song, A fox on the run. **Who saw a fox? Who got on that stand and said, on November the 15th of 2009,between two o'clock in the morning and four o'clock there was a fox out there?**

Well, **the brother testified**, and he's in Florida. The traveling medicine man is in Palm Beach in that big ol' house down there. **[Police Officer] Bo Willis testified. That's their three witnesses. Who said there was a fox out there?**

If y'all heard it, disregard what I say and hold it against me. I'm bad, too; I'm the Solicitor. **But who said there was a fox out there? I'm half deaf, but I swear I didn't hear it.**

Oh, but the fox been out there before, the fox on the run. **I just didn't hear anybody say there was a fox out there that night.**

You know, they said at the beginning, Mr. Worley had only shot one other time, in September. Well, that ain't right.

Mr. Sheffield right here, what did he say? He started coming out, cussing, yelling, shooting around the lake. They didn't want to confront Joe Worley because he said Joe Worley's eccentric. We'll talk to the reasonable person. We'll talk with Mrs. Worley. . . .

November the 15th, here we go again: Cussing, yelling, shooting. And I think -- and y'all take this right -- I think, from what I heard Mr. Sheffield say, it started about 2:30, three o'clock in the morning. You take what he heard.

Here we go again. Light's on. Twenty minutes later, shooting again, cussing again. I ain't going to wait for the third shot. We have filed a report with the sheriff and said, don't do anything, we just want y'all to know what hell we're living under out there in our neighborhood on the weekends. The rest of the time, everything's nice, but on the weekends, we just want to let you know what's going on.

Well, he ain't going to wait for the third shot. And you know what? Alan Sheffield, what a scoundrel he is, because he didn't go over

> there and talk with Joe Worley. What good would it have done? Already talked with mama. Already begged and pleaded.
>
> So they call the sheriff's department. The light's still on. **When the officers get out there -- now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that.**

Id. at p. 1556, l. 23 – 1559, l. 21. Defense counsel immediately objected and moved for a mistrial, noting that Solicitor Myers had just repeatedly mentioned Appellant's failure to testify. *Id.* at p. 1559, l. 22 – 842, l. 3.

The trial court took the motion under advisement and allowed the parties to finish closing arguments. *Id.* The trial court continued to delay its ruling on the mistrial motion while the jury deliberated. Appellant renewed his motion for a mistrial prior to the jury returning its verdict. *Id.* at p. 1636, l. 22 – 1637, l. 19.

Forced to rule, the Court denied the motion for a mistrial. The court found that "in no way was [the comment] burden-shifting nor did it suggest or infer that the defendant is guilty because he failed to testify." *Id.* at p. 1637, ll. 8-19. In so ruling, the court specifically cited *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 516 (Ct. App. 2012) for the proposition that the solicitor's comments were simply addressed to the lack of evidence that there was a fox on the night in question. *Id.*

Discussion

The State's closing argument constituted a direct comment on Appellant's right to not to testify. Generally, "the State may not comment on a defendant's exercise of a constitutional right." *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). (citing *Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000)). The propriety of a solicitor's closing argument is left to the trial

court's discretion, including the decision of whether to grant a defendant's motion for mistrial. *State v. Copeland,* 321 S.C. 318, 468 S.E.2d 620 (1996).

However, prosecutorial comment, whether direct or indirect, on the defendant's failure to testify is impermissible. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Cooper,* 334 S.C. 540, 514 S.E.2d 584 (1999). "Where the solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify." *State v. Sweet,* 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct.App.2000).

Here, the State both indirectly and directly commented on precisely what it was forbidden to address: Appellant's exercise of his right not to testify. *See Id.*; *see also Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.").

This trial tactic by the State was an impermissible comment on the defense's failure to testify because only Appellant could have supplied the information necessary to rebut the State's straw man argument. *See McFadden*, 342 S.C. at 640, 539 S.E.2d 391, 393. Unlike, in *Meggett*, where presumably others could have testified that the victim was a prostitute, if she in fact was; Appellant was truly the only one who could have given first-hand testimony as to whether or not he shot at a fox on the night in question. 398 S.C. 516, 523, 728 S.E.2d 492, 497.

Appellant was denied a fair trial by the State's impermissible comments and, thus, prejudiced. *State v. Brown,* 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct.App.1998) (holding that, "any alleged impropriety must be examined on appeal in light of the entire record."). The State directly referenced Appellant's failure to testify multiple times before concluding with "**I don't know because there ain't no testimony to that.**" R. 1559, ll. 16-21. Solicitor Myers tied Appellant's

failure to testify directly and inexorably to Appellant's self-defense, mistake, and accident theories. Appellant's theory of the case was plausible and was supported by defense witnesses. *See Sweet*, 342 S.C. at 348-349, 536 S.E.2d at 94.

The solicitor making the closing arguments deliberately chose to reference Appellant's failure to testify despite having had several cases overturned on appeal because of his conduct, including during closing arguments. *Kelly v. State*, 534 U.S. 246, 122 S .Ct. 726, 151 L. Ed. 2d 670 (2002) (reversing conviction on the failure to give a jury instruction on parole ineligibility where Solicitor Myers placed defendant's future dangerousness at issue during penalty phase, including when he called defendant "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid" in closing); *Bennett v. Stirling*, 170 F. Supp. 3d 851, 862 (D.S.C. 2016) (granting federal habeas relief where Solicitor Myers referred to black defendant as "King Kong," a "monster," a "cave man," and a "beast of burden" in during closing arguments front of an all-white jury, in addition to several other racially charged remarks); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (reversing death penalty where Solicitor Myers' declared in closing arguments that it would be "open season on babies in Lexington County if death penalty was not returned, repeatedly told jurors he "expects" the death penalty, and where he produced a large black shroud and draped it over victim's crib and wheeled crib from the courtroom in a staged funeral procession); *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) (reversing conviction and disqualifying Solicitor Myers' officer where senior deputy solicitor participated in clandestine videotaping of defendant's conversations with his attorney); *see also In re Myers*, 355 S.C. 1, 584 S.E.2d 357 (2003) (Solicitor Myers issued a letter of caution for failing to supervise senior deputy that engaged in clandestine videotaping of defendant's conversation with attorneys and for failing to alert defendant's attorneys of videotaping).

The State's comments regarding jurors having not "heard" from Appellant, despite having heard from his brother and Dr. Kirkham were totally improper. The solicitor deliberately reference to Appellant's failure to testify was a calculated trial tactic that transformed Appellant's exercise of a constitutional right into a weapon for the State. Such comments improperly injected fact and opinion to the jury not arising from testimony or other evidence presented in the current trial. *See Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75 ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.").

Finally, comments on Appellant's failure to testify, were made in the context of an appeal to the jury's emotions and attempt to induce the jury to identify with Rushton. The inflammatory comments on Appellant's reliance on a constitutional right rendered that appeal improper. *See Liberte*, 336 S.C. at 654 n.2, 521 S.E.2d at 747 n.2 (Ct. App. 1999) (noting a closing argument by the solicitor improperly appealed to the jury's emotions and attempted to induce the jury to identify with the law enforcement officers in the case).

As previously indicated, the evidence was less than overwhelming in this case which, at bottom, was founded upon the credibility of Rushton and Moore, both of whom had made inconsistent statements and failed to follow police procedure. Ultimately, whether the State intended to inflame the jury's passions or prejudices by its comments is irrelevant. *Id.* 336 S.C. at 657, 521 S.E.2d at 749.

What is relevant is that the comments encouraged the jury to believe that Appellant's defense was not credible defense because Appellant did not personally explain his actions to them. *State v. Brown*, 289 S.C. 581, 589-90, 347 S.E.2d 882, 887 (1986). The trial court's general charge to the jury did not likely cure the error as the case was a credibility battle. *See, e.g. Id.*; *McFadden*, 342 S.C. at 642, 539 S.E.2d 394; *Sweet*, 342 S.C. at 349, 536 S.E.2d at 95 (holding the trial court's

general jury charge on defendant's right not to testify was insufficient to cure the error when the evidence in the case was less than overwhelming). Thus, the State's closing argument prejudiced Appellant by "so infect[ing] the trial with unfairness as to make the resulting conviction a denial of due process." *Liberte,* 336 S.C. at 658, 521 S.E.2d at 749.

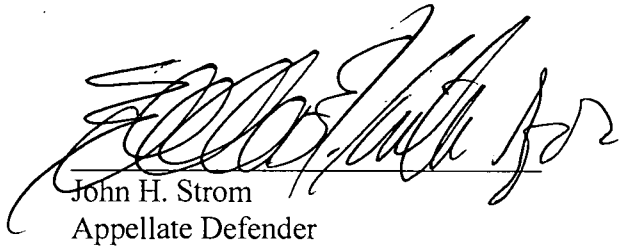
The State attempted to justify its comments as a legitimate attack on the credibility of a defense. R. 1578, l. 11 – 1597, l. 25. This argument is without merit. Criminal defendants have a right to both present a case and rely on their right not to testify. Boundaries governing proper closing argument exist and must be enforced. *Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 747 ("In this case, however, the prosecutor's argument went far beyond the outer boundaries of proper closing argument.").

Accordingly, under the particular circumstances of this case, the trial court abused its discretion by refusing to grant a mistrial. R. 1634, l. 12 – 1638, l. 19.

CONCLUSION

By reason of the foregoing arguments, Appellant Joe Ross Worley's convictions should be reversed and his case remanded to the McCormick County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2017.