

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to McCormick County

Honorable David P. Caraker, Jr, Circuit Court Judge

JOE ROSS WORLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000928

APPENDIX

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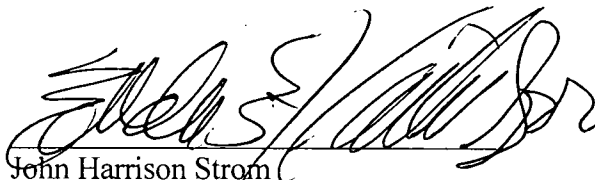
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CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 13th, 2017

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

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2002

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from McCormick County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

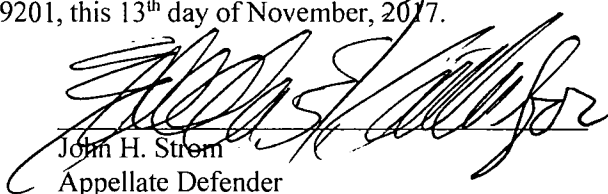
V.

JOE ROSS WORLEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of November, 2017.


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SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2017.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

SC Court of Appeals

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

JOE ROSS WORLEY, ...APPELLANT.

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

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THE STATE, ...RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court properly denied Appellant's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs where: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a de facto officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation.
2. Whether this Court must affirm the lower court's denial of Appellant's request for immunity from criminal prosecution under the Act because Appellant failed to challenge all of the court's reasons for finding he failed to carry his burden of proof, and whether the trial court properly found Appellant failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Appellant has challenged in this Appeal.
3. Whether the trial court properly denied Appellant's motion for a mistrial on grounds that the solicitor's closing argument included improper comments on Appellant's right to testify where those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant's failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument.

STATEMENT OF THE CASE

Appellant was indicted at the February 22, 2010 term of the grand jury for McCormick County for Assault and Battery with Intent to Kill (2010-GS-35-052) and Possession of a Weapon during a Violent Crime (2010-GS-35-049). He was represented by C. Lance Sheek, Esquire, Billy J. Garrett, Jr., Esquire, and Carson M. Henderson, Esquire, all of the Greenwood County Bar. Respondent (the State) was represented by Solicitor Donald V. Myers and Assistant Solicitors Ervin Maye and Frank Young, all of the Eleventh Circuit Solicitor's Office.

The case was set for trial for May 31, 2011, at the McCormick County Courthouse before the Honorable William P. Keesley. (R.p.1). Prior to the start of trial, Appellant made a motion to dismiss the charges pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2010) (the Act) and the procedures set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). On May 31-June 1, 2011, the circuit court conducted a pretrial immunity hearing. (R.p.1-p.231). At the close of that hearing, after taking testimony and hearing arguments from both sides, Judge Keesley took Appellant's motion under advisement and told the parties he would notify them of a decision in writing. (R.p.228). In an order dated July 5, 2011, Judge Keesley denied Appellant's request for immunity and recused himself from further participation in the case. Appellant promptly moved for reconsideration of Judge Keesley's ruling. In a twenty-four page written order dated December 6, 2011, and filed December 8, 2011, Judge Keesley affirmed his earlier ruling and denied Appellant's motion for reconsideration. In that order he found that Appellant had failed to establish he was entitled to immunity under the Act and ordered "that the motion to bar prosecution of these cases is denied." In reaching this conclusion, the court: (1) summarized Appellant's testimony from the immunity hearing (R.p.1755-p.1757); repeatedly found that testimony was not credible

(R.p.1756 & p.1760); found “[Appellant had] absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home.” (R.p.1759); noted: “The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so.” (R.1760); and found: “The overwhelming evidence is that Mr. Worley reasonably should have known that the person he was shooting was a law enforcement officer.” (R.p.1762). (R.p.1754-1777).

On January 18, 2012, Appellant served and filed a Notice of Appeal from Judge Keesley’s Order denying immunity, and on January 8, 2013, he filed an initial brief and designation of matter in support of his appeal. That initial brief focused in part on the fact that portions of the immunity hearing could not be transcribed, including the entirety of Appellant’s own testimony.¹ Appellant framed his first issue as follows: “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.” He argued that partial reconstruction was disfavored and that rather than remanding for an entirely new immunity hearing, he should instead receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. (R.p.757-794).

On February 7, 2013, the State submitted a motion to remand for reconstruction of the record and a motion to strike improperly designated matter from Appellant’s amended designation of matter. On February 15, 2013, Appellant filed a return and on February 20, 2013,

¹ Appellant testified on his own behalf at the immunity hearing; however, a transcript of his testimony was and still is unavailable due to a theft from the court reporter’s car. As explained by Judge Keesley in his report to this Court, the court reporter 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. Judge Keesley found absolutely no wrongdoing on the part of anyone other than the thief who stole the items from the court reporter’s vehicle. (R.p.1852-p.1853).

the State filed a reply. On March 6, 2013, Appellant then filed a motion to remand for a de novo immunity hearing. On March 18, 2013, the State filed a return to Appellant's motion and on March 25, 2013, Appellant filed a reply. In an Order filed March 28, 2013, this Court granted the State's motion to remand for reconstruction of the missing portions of the hearing transcript and denied Appellant's motion for a de novo hearing. The appeal was held in abeyance pending reconstruction.

On June 14, 2013, a reconstruction hearing was convened at the McCormick County Courthouse before Judge Keesley. Appellant was present and was represented by Desa A. Ballard, Esquire, Carson M. Henderson, Esquire, and Billy J. Garrett, Jr., Esquire. The State was again represented by Solicitor Myers and Assistant Solicitors Maye and Young. Assistant Attorney General J.C. Nicholson, III, Esquire, appeared on behalf of court reporter Rema Thomas and the Director of the Office of Court Administration, Desiree Rutledge Allen, both of whom were appearing as witnesses. The reconstruction court took testimony from Thomas, Allen, and the Honorable Gwendolyn Dorn Chiles, Clerk of Court for McCormick County. It was also provided with: (1) a copy of a September 7, 2013 affidavit from Appellant's immunity hearing attorneys, Garrett and Henderson, which gave a summary of the testimony given by Appellant at the May 31, 2011 immunity hearing; (2) Court's Exhibit #1 - notes from Assistant Solicitor Ervin Maye; (3) notes from Judge Keesley; (4) notes from the Deputy Clerk of Court regarding the order and time of witnesses; and (5) a copy of Judge Keesley's December 6, 2011 Amended Order, which included a factual summary of the immunity hearing. (R.p.1655-1777).

On August 21, 2013, the State filed a "Motion to Dismiss Appeal" with this Court arguing that our supreme court's published opinion in State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013), mandated dismissal of Appellant's appeal as an improper interlocutory appeal from

an order that is not immediately appealable. On the same date, this Court issued an Order finding the appeal should be dismissed because: “Appellant had filed a notice of appeal from the denial of his motion for immunity pursuant to the Protection of Persons and Property Act (S.C. Code §§ 16-11-410 to -450) and the denial of a request for immunity under the Act is not immediately appealable. State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed Aug. 21, 2013).”

This Court further noted that the appeal had been remanded for the reconstruction of the missing portions of the immunity hearing transcript but that since reconstruction would no longer be necessary, the previous remand order was rescinded. The Court ordered: “At trial, the parties should proffer to the court any testimony relevant to the immunity motion that is not presented to the jury.” (R.p.795-796). On August 23, 2013, Appellant petitioned for rehearing and in an Order from this Court filed October 21, 2013, rehearing was denied.

On December 16-19, 2013, the case proceeded to trial before the Honorable R. Lawton McIntosh. (SROA. p.1-14; R.p.797-p.1654). At the beginning of the proceeding, Appellant was given the opportunity to do more “reconstruction”; however, his attorney advised Judge McIntosh that reconstruction seemed to be done and instead simply introduced the transcript of the June 14, 2013 reconstruction hearing and the exhibits into the record as a Court’s Exhibit at trial. (R.p.797-p.798; R.p.1688-1777).

After hearing the evidence and the trial court’s charge on the law—which included a charge on self-defense and the absence of the duty to retreat because Appellant was on his own premises, as well as a charge on the defense of habitation—the jury found Appellant guilty of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. (R.p.1598-p.1640). The trial court delayed sentencing pending a presentencing investigation including a psychological evaluation. (R.p.1640-p.1653).

On June 30, 2014, Judge McIntosh reconvened the case to impose a sentence. The Court offered to allow the parties to present testimony and then heard arguments from both sides before sentencing Appellant to twenty (20) years' imprisonment for assault and battery with intent to kill and five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime. (R.p.1778-p.1798; SROA.p.15-16). On July 1, 2014, Appellant timely filed a notice of intent to appeal his conviction and sentence.

On May 4, 2016, Appellant filed a "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.)." (R.p.1799-1807). On May 6, 2016, the State filed a letter in lieu of a Return consenting to a remand to take the steps necessary, as determined by the lower court, to complete the reconstruction hearing that was held before Judge Keesley on June 14, 2013. On June 17, 2016, this Court filed an Order granting Appellant's motion and remanding the appeal to the McCormick County Court of General Sessions. The Court ordered: "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." (R.p.1808-1809).

Based on a review of the Order and an exchange of letters between the parties, Judge Keesley elected to re-convene the reconstruction hearing at the McCormick County Courthouse on October 25, 2016. Appellant was present and was represented by Assistant Appellate Defender John H. Strom, Esquire, and the State was represented by Senior Assistant Deputy Attorney General J. Benjamin Aplin, Esquire. The State raised several objections to the court taking any additional testimony or evidence in regard to reconstruction; however, those

objections were overruled and Appellant was allowed to present testimony from trial counsel Carson Henderson, Esquire. Reserving its objections to the proceeding, the State then elicited brief testimony from Assistant Solicitor Young before Judge Keesley took the matter under advisement and concluded the hearing. (R.p.1810-p.1846).

On December 30, 2016, Judge Keesley issued a fourteen page “Report Regarding Reconstruction of the Record.” That report included a procedural background, the standard for record reconstruction, a discussion of why the record was incomplete, a discussion of the missing sections of the record, a description of the materials obtained for the purpose of reconstruction, and ultimately a reconstruction of the missing sections. Judge Keesley concluded the report was submitted “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.” (R.p.1847-1860). This Court allowed the appeal to proceed and Appellant has now submitted a Brief in support of his Appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Summary: State’s Opening Statement

In his opening statement at trial, the solicitor gave a succinct factual summary of the incident which led to the charges against Appellant. He explained that in the early morning hours of Sunday, November 15, 2009, Alan and Gayle Sheffield, who lived on Thurmond Lake in the Little River subdivision in McCormick County, were awoken by the sound of gunshots in close proximity to their house. The Sheffields lived next door to Mary Worley and on many weekends during the fall of 2009 Worley’s son, Appellant, would come out to her house. He would occasionally be outside in the middle of the night “cussing,” talking loudly, and shooting a gun. The solicitor said the Sheffields had been down to the Sheriff’s Department in September

to complain and had also talked to Mary Worley about their concerns; however, when it happened again on November 15, 2009, they had enough and decided to call 9-1-1. They told the operator they had complained about Appellant shooting a gun from the Worley residence before and that he was at it again. (R.p.844-p.849).

At approximately 4 a.m., three officers from the McCormick County Sheriff's Department, Bobby Rushton, Nick Moore, and Melissa McAlister, were dispatched to investigate the call. The officers were in separate vehicles but showed up at nearly the same time. While Rushton walked over to talk to the Sheffields, Moore and McAllister walked around to the "back" of the Worley residence.² The solicitor explained it was a two-story structure in the back, with a garage door and an entry door below, and windows and a sliding glass door that opened onto a deck above. As Rushton was talking to the Sheffields, Moore began beating on the lower door, ringing the doorbell, and hollering "Sheriff's Office" but got no response. Rushton was still talking to the Sheffields when he noticed a floodlight come on at the Worley residence, lighting up the back yard all the way down to the lake, and then go back off. Assuming this meant someone was awake at the Worley residence, he walked back over and joined Moore where they resumed knocking on the door, ringing the doorbell, announcing "Sheriff's Office," and trying to get someone to respond. (R.p.849-p.852).

At that point, Rushton and Moore heard the sliding glass door opening from above. Rushton stepped back out from under the deck and peered up into the darkness where he saw a figure standing at the sliding door. After the incident, the figure was identified as Appellant. Rushton identified himself by saying "Sheriff's Office" while Moore was hollering "Sheriff's Office" from under the deck, to which Appellant responded: "I don't give a fuck." Rushton

² The house predominantly faced the lake, away from the road, so while the "front" of the house was on the road, the "back" of the house was where the doors, windows, and deck are located.

noticed Appellant was holding some kind of rifle or long gun so he hollered to Moore and McAlister, "Gun!" Rushton and Moore said "Drop the gun" and as Rushton began drawing his service weapon, the floodlight suddenly came on, blinding him. Appellant then fired his rifle at Rushton, hitting the Glock pistol in Rushton's hand. The single shot blew the Glock to pieces, shattered Rushton's hand, and knocked him flat on the ground. (R.p.529-p.854).

The solicitor explained that as Moore called out to Rushton to see if he was alive, Rushton came to and began crawling towards him. Moore then heard a second shot from the rifle. As Moore and McAlister assisted Rushton and all three officers began to flee, they heard Appellant say: "Where are you, you son of a bitch?" The officers got into one of the service vehicles, left the property, and radioed for help. A short time later, Sheriff Reid and Moore returned to the Worley property where they encountered Appellant and his mother walking around the yard with flashlights. Appellant told the Sheriff he had put his deputy's gun in his patrol car and admitted to the Sheriff that he was the one who had done the shooting. When the Sheriff told Appellant he shot a deputy, Appellant responded: "He didn't have any business ringing my damn doorbell." (R.p.854-p.862).

Pretrial Immunity Hearing

On May 31-June 1, 2011, the trial court conducted a pretrial immunity hearing.

Appellant testified on his own behalf; however, as noted in the procedural history, a transcript of his testimony is unavailable due to a theft from the court reporter's car. Appellant's testimony was subsequently reconstructed by Judge Keesley 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. 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.

(R. p.1857-p.1858). In a footnote Judge Keesley noted he was accepting the assertion by trial counsel Henderson in the October 2016 reconstruction hearing that the events happened rather instantaneously once Mr. Worley opened the sliding glass door and stepped outside with the rifle. The court accepted 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. (R. p.1858).

After offering his own version of events, Appellant elicited testimony from Deputy Robert "Bobby" Rushton, both about his qualifications as a law enforcement officer and about the incident. Rushton explained he had been a Sheriff's Deputy for about six years before resigning to take a job as an international police advisor in Iraq for four years, after which he returned to McCormick County and was rehired as a deputy. He identified the oath of office he took at his initial hire but testified he did not take a new oath when rehired after his return from Iraq. Rushton testified he had to update his training with the Criminal Justice Academy when he returned and that he did this in the two weeks between his rehire and the shooting incident. He then described the police issued clothing he was wearing the night of the shooting and acknowledged his polo shirt did not have an emblem of a badge; however, he explained he was wearing an actual badge on his belt. (R.p.6-p.30).

Rushton then gave detailed testimony about being dispatched to the Worley residence in response to the 9-1-1 call of shots being fired, including who responded, who arrived first, and

where each car parked. He described walking over to the Sheffield's residence to talk to the complainant while Moore went to the Worley residence and McAlister positioned herself in between. Rushton heard Moore knocking on the Worley's door and announcing "Sheriff's Office." As Moore was then walking towards McAlister and Rushton after getting no response, Rushton saw the Worleys' outdoor light come on. He told the Sheffield's to go inside and the three officers walked back towards the Worley residence, at which point the light went out. Rushton and Moore resumed knocking on the door and ringing the doorbell when they heard a voice yell: "Who is it?" The officers said, "Sheriff's Department" and the person responded, "I don't give a fuck." Rushton heard the sliding glass door over the deck opening, so he started walking backwards and looking up and saw Appellant standing in front of the upstairs windows. He recognized a weapon in Appellant's hands and yelled "Gun!" Rushton pulled his service weapon as he and Moore started yelling "Drop the gun!" He testified the lights then came on and he suddenly was face-first on the ground. Rushton testified he did not see or hear the flash from Appellant's gun but soon realized he had been shot in the hand. Rushton then described Moore's efforts to get him to come towards him, under the Worleys' deck, and how he heard Appellant fire a second shot as he was running for cover. (R.p.30-p.103). On cross-examination, Rushton testified that neither he nor Moore tried to forcefully enter the Worley residence at any time. He also identified his signature on an oath of office form and acknowledged he must have taken an oath upon his return to duty after his employment in Iraq. (R.p.103-p.109).

Appellant then called criminologist Dr. George Kirkham to the stand to offer expert testimony about the police response to the 9-1-1 call and the shooting incident. Kirkman was admitted as an expert in the area of criminology without objection. Based on his review of

statements given by the three responding officers, Kirkman opined they had made a number of mistakes including failing to get more detailed information from the Sheffields, failing to try to contact the Worleys by telephone, and failing to follow a number of fundamental principles of cover and contact. He testified that under the circumstances presented, it would be eminently reasonable for Appellant to not realize these were law enforcement officers outside of his house. (R.p.111-p.142).

Next, Appellant called Alan Sheffield to the stand. A portion of Sheffield's direct testimony and all of his testimony on cross-examination is also unavailable due to the theft. In the portion of his testimony that was transcribed, Sheffield described his relationship with the Worleys, the complaint his wife made to the Sheriff's Department about shots being fired at the Worley residence, and the talk he had with Mary Worley in which he asked her to share his concerns with Appellant. He said he has seen foxes out near the lake and had heard about the Worleys' cat, Sweet Pea, being hurt but had no recollection about how it happened. Sheffield then began describing the events of the night of November 15, 2009. He testified he heard the officers knock and announce their presence before hearing a gunshot and seeing Rushton go down. He said it all happened so quickly that he could not tell if Rushton pulled his weapon out or not. (R.p.148-p.159).

Although the remainder of Sheffield's testimony is omitted, Judge Keesley reconstructed it as follows:

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.

(R. p.1859-p.1860). Judge Keesley further noted: 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. (R. p.1860).

Appellant then called Deputy Nicholas Moore to the stand. On direct examination, Appellant used a written statement Moore had given to an Officer Stallo on Wednesday, July 21, 2010, to explore alleged discrepancies in the deputies' descriptions of the shooting incident. (R.p.160-p.173). On cross-examination, Moore explained he repeatedly beat on the downstairs door and called "Sheriff's Office" throughout the incident, before the floodlight came on the first time, after it came on and went out again, and after hearing the sliding door above the deck open. Moore heard Appellant respond, "I don't give a fuck," before Rushton stepped back, was blinded by the lights coming back on, and was shot in the hand. He also heard a second shot fired by Appellant and heard him say: "Where you at, you son of a bitch?" (R.p.173-p.177).

Finally, Appellant called Deputy Sara Melissa McAlister to the stand. Consistent with the testimony from Rushton and Moore, she testified that Moore and Rushton repeatedly announced their identity as law enforcement officers while knocking on the exterior door and ringing the doorbell. McAlister testified Appellant said, "I don't give a fuck," after Moore stated "Sheriff's Office" and that the light then came on and Rushton was shot. She testified she heard Moore and Rushton both tell Appellant to put his gun down before Rushton was shot. (R.p.188-p.209).

The hearing broke for the day and the following morning the parties made arguments about whether Appellant should be entitled to immunity under the Act. Appellant argued he had made a prima facie showing that Rushton was not a “qualified deputy” of McCormick County at the time of the incident, and that as a result Rushton could not be considered a “law enforcement officer” for purposes of the Act. First, he claimed Rushton was not qualified because he had not been approved by a circuit judge pursuant to section 23-13-10. Next, he claimed Rushton was not qualified because he had not taken the oath of office required by section 23-13-20. Appellant acknowledged Rushton had taken a constitutional oath but argued there was a second, statutory oath he had not taken. Finally, Appellant argued Rushton was not qualified because he had not provided a bond as required by section 23-13-20. Appellant argued that pursuant to section 16-11-440 of the Act and his own testimony, he should be “presumed to have a reasonable fear of imminent peril of death or great bodily injury” because Rushton, Moore, and McAlister were in the process of unlawfully and forcefully entering his residence. S. C. Code Ann. § 16-11-440(A) (Supp. 2009). He contended he should not be subject to the “law enforcement officer” exception to this statutory presumption because: (1) Rushton was not a qualified “law enforcement officer;” (2) Rushton was “entering or attempting to enter” his residence at the time of the incident; (3) as an unqualified officer, Rushton could not have been acting “in the performance of his official duties;” and (4) Rushton did not “identif[y] himself in accordance with applicable law.” S.C. Code Ann. § 16-11-440(B)(4) (Supp. 2009). Continuing to rely heavily on his own testimony, Appellant claimed he only heard the doorbell ringing prior to opening the door but never heard any knocking or voices announcing the people outside his home were officers. He complained Rushton was not wearing a hat or other clothing with either a badge or clear markings indicating he was law enforcement, and that none of the officers activated their blue

lights during the incident. Appellant noted the expert testimony from Dr. Kirkham about the officers' failure to follow fundamental principles of cover and contact and argued a reasonable homeowner in Appellant's position would not have known Rushton was a law enforcement officer and therefore Appellant was justified in doing what he did. He asked Judge Keesley to dismiss the indictments against him pursuant to the Act. (R.p.209-p.220).

In response, the solicitor argued Appellant had failed to present any evidence whatsoever that the three officers were acting unlawfully or were forcibly entering his residence. He also argued that even if the court construed the actions as a forcible entry, Appellant was not entitled to the presumption of reasonable fear in the statute because the "law enforcement officer" exception applied to eliminate such a presumption. The State argued the officers were acting lawfully and performing their official duties in responding to a 9-1-1 call and that Appellant had failed to prove otherwise. The solicitor noted the issue of whether the officers sufficiently identified themselves was a question to be answered by the jury and asked that immunity be denied. Judge Keesley took the matter under advisement. (R.p.220-p.228).

In a twenty-four page written order dated December 6, 2011, and filed December 8, 2011, Judge Keesley concluded Appellant failed to establish he was entitled to immunity under the Act and ordered "that the motion to bar prosecution of these cases is denied." In reaching this conclusion, the court summarized Appellant's testimony from the immunity hearing and specifically found that testimony was not credible. It found "[Appellant had] absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home" and that "The overwhelming evidence is that Mr. Worley reasonably should have known that the person he was shooting was a law enforcement officer." The court ultimately held: "The

defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so.” (R.p.1754-1777).

Trial

At trial, the State presented testimony from the witnesses described below.³ First, Deputy Nicholas “Nick” Moore described the November 15, 2009, incident which resulted in Appellant shooting Deputy Rushton in the hand. His testimony was consistent with the testimony he previously gave at the immunity hearing, with additional details. (R.p.872-p.921). Moore was cross-examined extensively by Appellant. (R.p.921-p.984). Next, the State called Donald Garman, the EMT who responded to the incident and treated Deputy Rushton’s after he was shot. (R.p.985-p.988). The State then called Dr. Robert Charles Densmore to the stand. He is a plastic and reconstructive surgeon who conducted four reconstructive surgeries attempting to repair Deputy Rushton’s severely injured right hand. (R.p.989-p.1008). Next, the State called the victim of the shooting, Deputy Bobby Rushton, to the stand. Rushton described the incident as he did at the immunity hearing, with additional details. (R.p.1008-p.1035). Rushton was then cross-examined by Appellant, with a significant number of questions directed at whether he had met various statutory qualifications for becoming a duly qualified sheriff’s deputy prior to the incident, including whether his appointment had been approved by a circuit court judge, whether he had posted a bond, whether he had taken a statutory oath, and whether he had completed the required course at the South Carolina Criminal Justice Academy to be recertified when he returned to the Sheriff’s Department following a break in service. (R.p.1036-p.1094).

After Rushton finished testifying, the State called Alan Sheffield to the stand. Sheffield was Appellant’s next door neighbor at the time of the incident and made the original 9-1-1 call to

³ Additional relevant details from the trial are described in Argument III below, as they relate to Appellant’s motion for a mistrial based on the solicitor’s allegedly improper closing argument.

report gunshots being fired from Appellant's house in the middle of the night. He provided details about the events leading up to his 9-1-1 call, as well as the events that transpired after the law enforcement officers arrived on the scene. Significantly, he corroborated the deputies' testimony about Appellant's outdoor light coming on and off during the encounter, as well as the fact that they were repeatedly knocking on Appellant's door and announcing their identity as deputies prior to the shooting. (R.p.1094-p.1121). Next, the State called Investigator Joseph E. Collier, Jr., of the McCormick County Sheriff's Department and offered him as an expert in small arms and ammunition. He was admitted without objection and offered testimony about his role in investigating the incident, with particular focus on examining Appellant's rifle and ammunition and the damage they could cause. (R.p.1121-p.1153; p.1170-p.1172). Collier was cross-examined about a variety of issues including his department issued law enforcement clothing. (R.p.1153-p.1170). The State then called agent Kenneth H. Whitler from the SLED Forensic Services Division to the stand. He was admitted without objection as an expert in firearms identification and described the testing he did on Appellant's gun and ammunition. (R.p.1172-p.1181).

Next, the State called McCormick County Sheriff George H. Reid to the stand. He identified Moore, Rushton, and Melissa McAlister, as deputies working for him at the Sheriff's Department at the time of the incident. (R.p.1182-p.1190). Sheriff Reid described responding to the Worley residence after the shooting incident, accompanied by Moore and McAlister. He encountered Appellant and his mother in the yard with flashlights and after identifying himself and determining who they were, talked to Appellant about the incident. Sheriff Reid testified Appellant said he put Rushton's gun in his car and then admitted he was the one who had been doing the shooting that night. When asked if he knew who shot Rushton, Appellant responded:

“He didn’t have no business ringing my damn doorbell.” (R.p.1182-p.1190). After Sheriff Reid was cross-examined, the State rested. (R.p.1190-p.1195).

Appellant was then sworn and questioned by the court to ensure he understood his right not to testify. The trial judge explained that if Appellant chose not to testify the court would instruct the jurors that they cannot consider his failure to testify, whatsoever. (R.p.1198-p.1200). Appellant then moved for a directed verdict and made a detailed argument focusing on a claim that where the State failed to show Rushton had met the statutory qualifications for becoming a duly qualified and certified deputy, the State had not presented sufficient evidence to take the case to the jury. The trial judge disagreed and denied the motion. (R.p.1200-p.1223).

Next, Appellant presented his defense. He first called his brother Robert Worley to the stand to offer testimony about the house where the incident took place. (R.p.1224-p.1286). Appellant then introduced the recording of the 9-1-1 call into evidence and it was played for the jury. (R.p.1291-p.1292). Appellant sought to recall Deputy Moore to the stand in regard to whether he was duly qualified as a deputy sheriff. The court allowed Appellant to proffer the testimony as it related to his directed verdict argument, and the State stipulated essentially the same testimony would be given by McAlister. (R.p.1293-p.1305).

Appellant then called criminologist Dr. George Kirkham to the stand. As at the immunity hearing, he was admitted as an expert without objection. Kirkham proceeded to offer similar testimony to what he gave at the immunity hearing, critiquing the police response to the 9-1-1 call and the procedures employed at the scene. He gave an opinion that Deputy Rushton’s actions were the significant and proximate cause of his getting shot by Appellant. (R.p.1305-p.1351; p.1424-p.1431). Dr. Kirkham was extensively cross-examined by the State in regard to his opinions and credibility as an expert. (R.p.1352-p.1423). Finally, Appellant called Bo Willis

in his defense. Willis is a City of McCormick police officer who assisted in the investigation, took photos of the scene, and drew a diagram of the house. (R.p.1433-p.1470). Appellant advised the trial court he would not testify in his own defense and the trial moved on to a charge conference and closing arguments. (R.p.1472-p.1578). As described in greater detail below, Appellant objected to a portion of the State's closing argument and moved for a mistrial; however, after hearing extensive arguments both at the time of the objection and before the jury charge, the trial court denied the motion. (R.p.1559-p.1561; p.1579-p.1598; p.1634-p.1637). The trial court gave a jury charge covering the State's burden of proof, the presumption of innocence, evidence, credibility of witnesses, reasonable doubt, the elements of the crimes and each of Appellant's defenses. (R.p.1598-p.1634). In regard to Appellant's decision not to testify the court charged: "Ladies and gentlemen, I'll also instruct you and tell you that - - and emphasize to you the fact that the defendant in this case did not testify is not and shall not be a factor that may be considered by you in any manner whatsoever in your deliberations." (R.p.1612, line23-p.1613, line 3).

ARGUMENT

I.

The lower court properly denied Appellant's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs because: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a de facto officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation.

Appellant argues the trial court committed an error of law by ruling he was not entitled to immunity from prosecution under the Act on the grounds that Rushton was a "law enforcement officer" within the meaning of the Act because: (1) Rushton's appointment as a deputy was never approved by a circuit court judge as required under § 23-13-10; (2) Rushton admitted he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and the State failed to present evidence of a bond or surety being on file with the clerk of court as required by § 23-13-20; and (3) Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident. The State disagrees and submits Appellant's arguments in this regard should be denied and dismissed for a host of reasons.

Findings not Necessary to the Ultimate Conclusion

First and foremost, this Court should decline to engage in any consideration or discussion of Appellant's myriad grounds for claiming Deputy Rushton was not a "law enforcement officer" within the meaning of the Act because the lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and that denial was solidly grounded in credibility findings and Appellant's abject failure to carry his burden of

proving the required elements of self-defense by a preponderance of the evidence. Indeed, the trial judge held: “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.” (R. p.1767). In other words, the lower court concluded Appellant failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. See State v. Curry, 406 S.C. 364, 371 n.4, 752 S.E.2d 263, 266 n.4 (2013) (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found “that the preponderance of the evidence is that the ‘difficulty’ was brought on by [Appellant’s] conduct.” (R. p.1774). These individual findings supported the lower court’s ultimate conclusion that “Appellant has not met his burden of proof” in establishing the elements of self-defense needed for a grant of pretrial immunity. (R. p.1773-p.1774). This ultimate conclusion is discussed in more detail in Argument II below, but for purposes of Appellant’s complaints about Deputy Rushton and his lack of statutory qualification, it serves to exonerate the viability of those complaints. If this Court disagrees and chooses to engage Appellant’s claims, the State submits the lower court’s overall rejection of those complaints was proper for several reasons.

Standard of Review

This Court reviews the trial court's pretrial determination of immunity for an abuse of discretion. Curry, 406 S.C. at 370, 752 S.E.2d at 266. In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see also State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

The Protection of Persons and Property Act

A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The Act provides that:

A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is

immune from 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 (Supp. 2009) (emphasis added). Thus, in the same provision the Act both creates immunity and carves out an exception so that immunity may be completely barred when the person against whom deadly force was used is a “law enforcement officer” and certain other circumstances are present. Our supreme court has further held that, consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 (“[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.”). One of the three remaining elements of self-defense is the requirement that 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. Id.

The Act creates a presumption that a person has proven this element of self-defense if certain conditions are met. It provides in part:

(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, or occupied vehicle . . . 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.

(B) The presumption provided in subsection (A) does not apply if the person:

....

(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.

S.C. Code Ann. § 16-11-440 (Supp. 2009) (emphasis added). Thus, in addition to the overall bar in section 16-11-450, the Act also eliminates the presumption of reasonable fear of imminent peril when the person against whom deadly force was used is a “law enforcement officer.”⁴ In the immunity hearing Appellant’s argument hinged on his contention that Deputy Rushton was not a “law enforcement officer” for purposes of the Act at the time of the incident, and therefore Appellant should not have been subject to the exception to immunity in section 16-11-450 or the exception to the statutory presumption in section 16-11-440. The State disagrees and contends that regardless of whether Deputy Rushton complied with every technical statutory requirement to become “duly qualified,” the lower court properly found he was a “law enforcement officer” for purposes of the Act.

Statutory Construction

The lower court’s overall rejection of Appellant’s claims was well-reasoned, supported by the evidence, and supported by established principles of statutory construction. Judge Keesley examined the specific statutes raised by Appellant in the context of the overall purpose and language of the Act to conclude that despite any technical statutory failures regarding circuit

⁴ It is unclear what purpose is served by the narrow section 16-11-440(B) exception to the statutory presumption when an officer is entering or attempting to enter a residence, where the broader language in section 16-11-450 completely bars immunity from prosecution for any action taken in the performance of the officer’s official duties.

court approval, oaths, or bonds, Deputy Rushton was a “law enforcement officer” for purposes of the Act.⁵ The court found: “The General Assembly recognized that exceptions [to the Act] had to be made for law enforcement personnel . . . [and] 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.” (R. p.1766).

The elementary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Branch v. City of Myrtle Beach, 340 S.C. 405, 409, 532 S.E.2d 289, 292 (2000); State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. Prince, 335 S.C. at 472, 517 S.E.2d at 232; Hay v. S.C. Tax Comm’n, 273 S.C. 269, 273, 255 S.E.2d 837, 840 (1979). The purpose of enactment always takes precedence over the language employed, and a court will not read into a statute something that is not within the manifest intention of the General Assembly. Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 549 (1956); Laird v. Nationwide Ins. Co., 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964). The Courts are permitted to look to existing circumstances at the time of enactment. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840, 845 (1938). Moreover, the meaning of a statute is not to be deemed to depend upon a single part or an isolated sentence. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409, 414 (1938). Legislative intent must always be gathered from the statute as a whole, read in light of all circumstances. Crescent Mfg. Co. v. S.C. Tax Comm’n, 129 S.C. 490, 124 S.E. 761, 765 (1924). An absurd result not possibly intended by the Legislature will be rejected. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Hamm v. S.C. Pub.

⁵ Judge Keesley did not rule on Appellant’s claim on appeal that Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident because that argument was not specifically raised at the immunity hearing. Consequently, it is not preserved for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

Serv. Comm'n, 287 S.C. 180, 182, 336 S.E.2d 470, 470 (1985). Thus, the true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). Every technical rule as to construction of a statute is subservient to and must yield to the expression of the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the interpreters in their endeavor to ascertain that intent. Id.

Here, Judge Keesley thoughtfully considered and construed the different statutes regarding the appointment and qualification of deputy sheriffs in the context of the legislative intent behind the Act and concluded the result sought by Appellant would be absurd. The plain language of the Act does not impose technical qualification requirements on who is considered a “law enforcement officer” for purposes of determining immunity. The lower court’s conclusion was reasonable, practical, and consistent with the purpose and policy of the Act. It was not controlled by an error of law; therefore, the denial of immunity, and Appellant’s convictions, should be affirmed.

Terms of the Act

Additionally, the lower court’s overall rejection of Appellant’s claims was proper where those claims were premised on the statutory requirements for a deputy to become “duly qualified,” but the actual terms of the Act do not use the phrase “duly qualified” or otherwise equate a “law enforcement officer” with a “duly qualified” deputy sheriff.

In regard to the appointment of deputies, the South Carolina Code provides:

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.

S.C. Code Ann. § 23-13-10 (2007). In regard to those deputies becoming “duly qualified” after appointment it then provides:

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.

S.C. Code Ann. § 23-13-20 (2007) (emphasis added).

The Code goes on to explain: “When duly qualified a deputy sheriff may perform any and all of the duties appertaining to the office of his principal.” S.C. Code Ann. § 23-13-50 (2007) (emphasis added). By comparison, the terms of the very next statute do not require a sheriff’s deputy to be “duly qualified” to exercise the power of arrest. S.C. Code Ann. § 23-13-60 (2007). Thus, where the Legislature intended a particular duty to be valid only for a “duly qualified” deputy, it explicitly said so. As in the statute about the power to arrest, the phrase “duly qualified” is conspicuously absent from the Act, which instead simply used the broad term “law enforcement officer.” The State submits that by failing to specifically tie a deputy’s statutory qualifications to his being considered a “law enforcement officer” under the Act, the

Legislature could not, as found by the lower court, have intended the result sought by Appellant—elimination of the law enforcement officer exception to immunity simply because an officer, acting in the performance of his official duties, did not meet the technical requirements of the statutes. Again, such a result would be absurd and was properly rejected by the lower court.

De Facto Officer

The lower court's overall rejection of Appellant's claims was also proper where Deputy Rushton's actions were legal under the doctrine of de facto officers. It has been found that, "[a] person who has been duly elected sheriff and exercises the duties of the office is sheriff de facto, even though the person's bond is defective." 80 C.J.S. SHERIFFS AND CONSTABLES § 5 (2013) (citing Cooper v. Ricketson, 80 S.E. 217 (Ga. 1913)). As explained by our supreme court: "The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers As nature abhors a void, the law of government does not ordinarily countenance an interregnum." Bradford v. Byrnes, 221 S.C. 255, 261-62, 70 S.E.2d 228, 231 (1952). Thus, "[o]ne in office, transacting the duties, is supposed to be rightfully there, and so far as third persons are concerned, that presumption legalizes his acts." Kottman v. Ayer, 34 S.C.L. 92, 95 (3 Strob. 1848). Indeed, "[i]t is the appointment that confers the office The omission to qualify by giving bond or taking the oaths is cause of forfeiture; but so long as the officer appointed continues to discharge the duties of his office, his official acts, as to third persons, are legal. The law which requires the bond, or the oath, is . . . merely directory." Id. at 94 (citing McBee v. Hoke, 29 S.C.L. 138 (2 Speers 1843));⁶ see also State v. Toomer, 41 S.C.L. 216, 227 (7 Rich. 1854) ("The statutory provisions

⁶ "The reason of the rule, and the rule itself, embrace every officer from the highest to the lowest. The acts of a king de facto are as binding as if he were in office by legal right, so long as those whom he governs acquiesce in his

prescribing the manner of executing the bond, suing out the commission, or taking the oaths of office, are merely directory. . . . So long as the officer appointed continues to exercise the duties of his office, his official acts as to third persons are legal.”). The State submits any other result would be absurd.

Here, Appellant presented no evidence to suggest anyone in the McCormick County community, from himself to the 9-1-1 operator, to the dispatcher, to the Sheriff or the officers themselves believed they were not legally qualified to approach his residence and attempt to make contact as part of their investigation of the 9-1-1 call. As set forth by the South Carolina Law Court of Appeals and Court of Errors, under circumstances where an individual was recognized by the community as an officer, “it would be attended with the most mischievous and pernicious consequences to hold his official acts, and the official acts of all who have acted under the like circumstances, to be void.” Kottman, 34 S.C.L. at 97 (3 Strob. 1848). In the absence of a showing of fraud, an individual holding an office and acting in the capacity of that office is a de facto officer and his failure to subscribe to the required oath of office will not vitiate his official acts. Davis v. Town of Cayce, 166 S.C. 372, 164 S.E. 883, 887-88 (1932). In addition, any defects in an officer’s title caused by the failure to comply with the provisions of a statute, such as executing or filing a bond or taking the oaths of office within a given time frame, may be cured, “and if he be already in office, his de facto title is immediately converted into a title de jure, and has relation back to the period of his [appointment and] . . . as against all the world, is unquestionable.” Toomer, 41 S.C.L. at 229 (7 Rich. 1954).

exercise of power.” Thus: “[W]here the electing or appointing power has conferred the office upon him, and he is in the actual discharge of its duties, without his title being questioned in any legal way, the community in which he lives have [sic] a right to regard him as a legal officer, and his acts, as to them, will be as valid as if he wore on his forehead, to be read by every one, the evidences of his appointment and qualification. If it were otherwise there could be no guaranty or security for the validity of the official acts of any officer.” Kottman, 34 S.C.L. at 94 (3 Strob. 1848).

Specifically in regard to the office of Sheriff, our courts have applied the doctrine of de facto officers. The Court of Constitutional Law held that the Act of 1795, which required Sheriffs to give bond to the “Treasurers of the state” was “merely directory, and . . . as long as he remained in office, he must be regarded as an officer, and his own failure to perfect his security cannot be pleaded in bar against the consequence of his misconduct, in not discharging his official duties.” Stevens v. Tresurers, 13 S.C.L. 107, 109 (2 McCord 1822). Later, in discussing the office of coroner, the court stated:

It is plain, from comparing these provisions, that the office of the Sheriff is much more hedged around with obstacles to entering upon it, without giving bond, than that of the Coroner; yet, I have no doubt, that if a Sheriff were to enter upon its duties, without giving bond, that all his acts, so far as third persons are concerned, would be good. The persons confiding or transacting business to or with him, finding him in office, would have the right to say, we did not enquire by what authority he exercised it. As to them, his acts for or against them, would be good.

McBee v. Hoke, 29 S.C.L. 138 (2 Speers 1843). In Appellant’s case, the deputies were clearly in office and were transacting their official duties of enforcing the laws of South Carolina by being dispatched in response to a 9-1-1 call about gunshots being fired in a residential area in the middle of the night. As de facto officers, their actions were legal in approaching Appellant’s residence and trying to make contact as part of their investigation, and Appellant’s argument was properly dismissed.

Dismissal of Charges not an Appropriate Remedy

Even if this Court concludes Deputy Rushton was not properly qualified under the relevant statutes, and that his action actions were also not “legal” as to Appellant and other third parties as a de facto officer, the lower court properly denied his request for immunity because it would have resulted in dismissal of the underlying charges, a remedy not warranted by a mere statutory infirmity. It is well established in South Carolina that the exclusionary rule does not

apply where there has merely been a violation of a statutory privilege and does not implicate a constitutional right. Hutto v. State, 387 S.C. 244, 250, 692 S.E.2d 196, 199 (2010); see also State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) (“[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations . . .”). Similarly, because Appellant’s challenges to the qualifications of the McCormick County deputies were based on sections 23-13-10 and 23-13-20 of the South Carolina Code and not a constitutional violation, the exclusionary rule would not apply and, as implicitly recognized by the lower court, a finding of immunity and the resulting dismissal of the charges against Appellant would not have been appropriate. For this reason, and all of the other reasons set forth above, the State submits Appellant’s overall argument about Deputy Rushton not being a “law enforcement officer” under the Act is without merit and should be denied and dismissed. For all of these reasons, the denial of immunity and Appellant’s convictions should be affirmed.

II.

This Court must affirm the lower court’s denial of Appellant’s request for immunity from criminal prosecution under the Act because Appellant failed to challenge all of the court’s reasons for finding he failed to carry his burden of proof. Additionally, the trial court properly found Appellant failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Appellant has challenged in this Appeal.

Appellant argues the trial court committed an error of law by ruling he was not entitled to immunity from prosecution under the Act. Specifically he contends the trial court erred in concluding that: (1) he failed to prove an entry or attempted entry into his dwelling, and (2) he failed to prove he was without fault in bringing on the difficulty. The State disagrees and submits Appellant’s arguments should be denied and dismissed on several grounds.

Initially, the State submits this Court should affirm based solely on the lower court's finding that Appellant failed to carry his burden of proving any of the elements of self-defense where he fails to challenge a critical portion of that finding in this appeal. As explained in Argument I above, one element of self-defense is that the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or that he actually was in such imminent danger. A related element of self-defense is that, 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, and if his defense is based on actual 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. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. Here, the lower court specifically held: "This court does not find that the defendant has proven any of the four elements of self-defense."⁷ (R. p.1774). Although Appellant now challenges the finding that he was not without fault in bringing on the difficulty, he fails to challenge the lower court's finding as to his failure to sufficiently prove the other elements of self-defense. Because Appellant has not appealed those findings, they are the law of the case and should not be considered by this Court. Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000). As a result, the denial of immunity must be affirmed.

The denial of immunity should also be affirmed because the lower court's findings have evidentiary support and are not controlled by an error of law. The lower court followed the appropriate procedure under rulings from this Court and our supreme court—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence, and ultimately finding Appellant did not carry his burden of proving he was entitled to immunity under the Act.

⁷ The duty to retreat need not be shown when seeking immunity under the Act.

Appellant's argument cannot prevail under this Court's standard of review. As in Curry, Appellant's claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court's findings that Appellant failed to carry his burden of proving there was an entry or attempted entry, and that Appellant failed to carry his burden of proving he was not without fault in bringing on the difficulty, have evidentiary support and are not controlled by errors of law. Therefore, the denial of immunity and Appellant's convictions should be affirmed.

The Protection of Persons and Property Act & Self-Defense

As explained above, the Act creates immunity from criminal prosecution when a person uses deadly force as permitted by the provisions of this article or another applicable provision of law and no exception to immunity applies. S.C. Code Ann. § 16-11-450 (Supp. 2009). A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. Curry, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. Id. at 372, 752 S.E.2d at 266-67 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.").

There are four elements required by law to establish a case of self-defense. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. First, the defendant must be without fault in bringing on the difficulty. Id. 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.

Id. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. Id. 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. Id. 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. Id. Again, the last element, i.e., the duty to retreat, need not be shown when seeking immunity under the Act. Id.

A person is entitled to the Act's presumption of a reasonable fear of imminent peril of death or great bodily injury 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, or occupied vehicle . . . 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 (Supp. 2009) (emphasis added).

Discussion / Analysis

Ample evidence supports the trial court's denial of immunity under the Act on both grounds now being challenged by Appellant. Indeed, the trial court's finding that Appellant failed to meet his burden of proving his claim of immunity by a preponderance of the evidence for each reason cited is supported by evidence in the record.

In regard to entry or attempted entry of Appellant's dwelling, the lower court's finding was twofold. First, Judge Keesley concluded: "The defendant has not established by the preponderance of the evidence that Deputy Rushton was doing anything unlawful." He further found: "[Appellant] has not proven that Deputy Rushton was entering or attempting to enter the

Worley residence, by force or otherwise.” Combining the two findings, the lower court concluded: “The failure of evidence regarding entry or attempted entry is fatal to the defendant’s argument concerning subsection (B).” (R. p.1768-p.1769). Appellant takes issue with this finding, arguing it constitutes an error as a matter of law because he proved Deputy Rushton had entered or was in the process of entering his dwelling.

At the immunity hearing, Appellant argued he reasonably believed somebody was in the process of unlawfully and forcefully entering his dwelling. He claimed that a reasonable person inside a home, in his position, would not have known Deputy Rushton was a law enforcement officer. However, the lower court found Appellant’s testimony in this regard was not credible. Under South Carolina law, the trial judge is in the best position to make credibility findings, not an appellate court. See State v. Smith, 383 S.C. 159, 167-68, 679 S.E.2d 176, 181 (2009) (“Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial.”); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) (“The trial judge, not this Court, is in the best position to be arbiter of [the witness’] credibility.”); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) (“The determination of a witness’s credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.”) This Court is bound by these findings of fact. See Reed v. Becka, 333 S.C. at 684, 511 S.E.2d at 400 (“In appeals of pretrial rulings, this Court is ‘bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.’”). Thus, any argument based on Appellant’s alleged beliefs should be disregarded.

Appellant also argued that regardless of his subjective belief, the evidence showed Deputy Rushton was in fact attempting to enter his residence. Appellant argued that because the door to the Worley home was in the porch area under the deck, it was part of the residence and therefore the officers' acts of coming under the deck to knock on the door and ring the doorbell constituted an entry. (R.p.931-p.938).

On appeal Appellant attempts to extend this line of reasoning to argue that since a dwelling includes the curtilage of the house, the area under the Worleys' "balcony roof" is the type of place a property owner has a right to be to the exclusion of the general public, and therefore Rushton had entered or was attempting to enter the dwelling. He relies in part on Duncan to argue the porch falls within the scope of the Act's definition of a dwelling. The lower court properly rejected this argument at the hearing, and this Court should do the same.

In Duncan, the victim was asked to leave the residence but returned a few minutes later and began opening the door to a screened porch. He continued to force his way onto the porch and advanced across the porch toward Duncan at which point Duncan fired the fatal shot. Duncan, at 406-07, 709 S.E.2d at 663. Our supreme court affirmed the trial court's grant of immunity. Here, there was no screened porch and Rushton never opened any doors. Instead, he approached the door, knocked, rang the doorbell, and repeatedly announced he was a law enforcement officer. This simply does not constitute an entry in the same manner as in Duncan. To interpret the Act to find that it does would be absurd because it would mean that every person, law enforcement or not, would be treated as having entered or attempted to enter a house simply by knocking on the door or ringing the doorbell.

Even if this Court finds Rushton had technically "entered" the Worley residence by knocking on the door and ringing the doorbell, there is no evidence whatsoever the act was

unlawful or forcible, regardless of whether he was a law enforcement officer or a regular citizen. The Act provides for the presumption of reasonable fear only if the entry or attempted entry is unlawful and forcible. Here, Rushton lawfully walked to the main entry door of Appellant's house, where there was a doorbell, and rang that doorbell. Mr. Sheffield, the neighbor, could easily have done the same rather than calling 9-1-1, and there is nothing to suggest either man's approach would be considered unlawful or forcible. Judge Keesley concluded: "The defendant has not established by the preponderance of the evidence that Deputy Rushton was doing anything unlawful." (R. p.1768-p.1769). Appellant does not appear to challenge this portion of the lower court's finding, instead focusing solely on whether there was an entry. By conceding this issue, Appellant effectively concedes the lower court's immunity finding was proper, and his argument regarding entry should be dismissed.

In regard to whether Appellant was at fault for bringing on the difficulty, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Appellant's] conduct." The overwhelming evidence supports this finding, particularly given the credibility findings of the lower court. The trial court carefully considered the conflicting testimony from Appellant and the officers, assessed their credibility, and concluded Appellant brought on the difficulty. Judge Keesley found Appellant knew or should have known that Rushton and the others were law enforcement officers because he asked who was there and when the officers responded they were law enforcement officers, Appellant yelled he did not give a fuck and exited the walls of his residence with a loaded rifle. (R. p.1774). These findings of fact are binding on this Court. See Reed v. Becka, 333 S.C. at 684, 511 S.E.2d at 400 ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial

when the findings are supported by the evidence and not clearly wrong or controlled by error of law.””).

“Any act of the accused in violation of the law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense.” State v. Douglas, 411 S.C. 307, 321, 768 S.E.2d 232, 240 (Ct. App. 2014) (quoting State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)). Here, there are sufficient grounds for affirming the trial court’s determination that Appellant did not deserve immunity under the Act. Appellant initially focuses on the gunshots that woke the Sheffields and argues that his firing of a gun at night in a rural part of South Carolina cannot, as a matter of law, be considered as reasonably calculated to bring on a violent confrontation with law enforcement. However, this argument misconstrues the lower court’s finding. Judge Keesley did not find the initial shots brought on the difficulty. Instead, he found it was Appellant’s actions in cursing at the officers after they had identified themselves and then coming out onto the deck with a loaded rifle that brought on the difficulty. It was these actions that precipitated the violent confrontation with Rushton.

Appellant further argues there was no way for him to definitively ascertain the identity of the individuals knocking without walking onto the balcony, because the officers did not follow proper police procedure by activating their blue lights or wearing clothing with better identification. Yet the lower court found Appellant did hear the officers identifying themselves and responded with an expletive and a loaded rifle. His attempt to justify his actions by claiming he could not “definitively” know they were law enforcement officers does not carry water because he could make the same claim even if they used blue lights and vests emblazoned with badges and the words “police.” An individual in Appellant’s position could simply claim he still could not “definitively” know they were not burglars in disguise. Whatever the case, the lower

court found Appellant was not credible and that he knew or reasonably should have known Rushton was a law enforcement officer, and his claim that he could not “definitively” know must be disregarded.

For all of these reasons, the trial court’s denial of immunity under the Act was not an error of law. Taken as a whole, the testimony and evidence presented at the immunity hearing supported the trial judge’s factual finding that Appellant failed to carry his burden of proof. Moreover, the trial judge was in the best position to weigh Appellant’s credibility and conclude that his version of events was not accurate. The case was properly submitted to the jury, with the claims of self-defense and defense of habitation being fully presented and the State having to disprove at least one element of self-defense beyond a reasonable doubt. The denial of immunity and Appellant’s convictions should be affirmed.

III.

The trial court properly denied Appellant’s motion for a mistrial on grounds that the solicitor’s closing argument included improper comments on Appellant’s right to testify because those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant’s failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument.

Appellant argues the trial court erred in refusing to grant a mistrial based on comments made by the solicitor during his closing argument because they were improper comments on Appellant’s right not to testify and impermissibly shifted the State’s burden of proof to Appellant. The State disagrees and submits Appellant’s argument is without merit. The State’s closing argument was in direct response to comments made during Appellant’s opening statement, Appellant’s attempts to substantiate those comments through the examination of other

witnesses, the resulting lack of evidence to support the comments in the opening statement, and Appellant's closing argument. The State's argument did not shift the burden onto Appellant, but instead merely made note of the lack of evidence as a whole in the record despite Appellant's opening statement suggesting such evidence would be forthcoming at trial.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); State v. Meggett, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. Inman, 395 S.C. at 565, 720 S.E.2d at 45. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. Meggett, 398 S.C. at 524, 728 S.E.2d at 496.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

Relevant Facts

During pretrial arguments about a defense request for a jury charge on modified ammunition, counsel for Appellant stated:

... [There is] no evidence whatsoever that [Appellant] was in any way mean-spirited towards anybody except trying to get rid of a fox earlier that evening.

He fired two shots at a fox. And he really wasn't trying to kill the fox; he was trying to motivate him out of there. The fox

had bothered his cat. The cat called Sweet Pea. And they had been having trouble with this fox. And that evening, earlier before this thing happened, he fired that thing from the same gun at a fox. And a fox sure isn't the police and certainly isn't a person.

And so - - on the same evening, he also fired it at two fox. But, again, it's an environmental bullet.

(R.p.824-p.825). Later, during preliminary remarks, the trial judge told the jury the parties would be making opening statements and instructed that whatever was said in those statements was not evidence. (R.p.839). In his opening statement, Appellant's counsel said in part:

Y'all may not understand this, but as you hear this case, it's horribly tragic, because it starts off with a cat by the name of Sweet Pea, and this cat was found, and it was a scraggly cat and it had a collar on it. And Mr. Worley's father took on the cat and protected this cat, and it became a cat here in McCormick.

And they'd been over on that property for over 40 years. The Worley family comes down here every weekend and has for 40 years. They've been broken into before.

This family is there with his mother, who is 84 years old at the time. Mr. Joe Worley and his mother, 84 years old, in their little garage apartment, and their cat, Sweet Pea. And when you go out there, if His Honor will let you go out there, there's and elaborate cathouse and catwalk that they built. They love their little cat.

Well, in September, when the Sheffields complained the first time, there's a fox - - actually, it was the Sheffields that told the Worleys that there was a fox out there - - and that fox had injured this cat, had injured it to the point they had to take it to the vet.

Now, Mr. Worley that evening, the 15th, November the 15th of 2009, goes out on his balcony, and he hears a noise. He flips on his light, and he sees movement out there, and he said, The dadgum fox again. So he's out there hollering at it and trying to get rid of it. He goes into his house and gets his father's - - his deceased father by now - - gets his gun, and he loads it with ammo that his father had. And he goes outside and he shoots towards the lake to motivate the fox that was bothering their cat to get out

there. He shot twice. He went on back to bed. And he might have hollered, but he shot twice and then went back to bed.

(R.p.833-p.834) (emphasis added).

Subsequently, during Appellant's cross-examination of Deputy Moore, counsel asked: "Well, you heard Joe testify that he shot it up into the air; right?" (R.p.978, lines 11-12). The State objected to the question and the jury was sent out. The parties then engaged in a discussion with the trial judge in regard to whether Appellant would be allowed to cross-examine other witnesses in regard to Appellant's testimony from the pretrial immunity hearing. The trial judge said it would be inherently unfair to allow Appellant to bring up the prior testimony and then to claim his privilege under the Fifth Amendment to not take the stand during trial. The trial court ruled it would not allow the defense to use Appellant's pretrial testimony during the examination of other witnesses, but that if Appellant chose to testify, the prior testimony might be admissible in cross-examination. Appellant said he understood the ruling but contended he may still be able to use the prior testimony in some fashion as it relates to his expert witness. The judge said he would address the issue of the expert witnesses using the prior testimony if it became an issue later during the trial. (R.p.978-p.983).

Later during trial, Appellant's neighbor, Alan Sheffield, took the stand. On cross-examination, he testified he knew the Worleys' cat Sweet Pea had been injured but he had no knowledge of how or why. Sheffield said he did not know anything about the cat having problems with a varmint and that while he had seen foxes in the area before, he does not remember ever having a conversation with Ms. Worley about a fox. (R.p.1114-p.1115). After the State rested, during arguments on Appellant's motion for a directed verdict, the trial judge said: "Well, there is - - the testimony was that Mr. Worley was shooting a gun at a fox. In other

words, he was hunting a fox at night. Regardless of whether it's to protect some Sweet Pea cat or whatever, he was hunting at night with a .30-06." (R.p.1204, lines 7-12).

Appellant then was sworn and advised of his right to testify and his right not to testify. He proceeded to call witnesses in his defense. First, he called his brother, Robert Worley, to the stand. Robert testified he was familiar with Sweet Pea and remembered that Sweet Pea had been injured two or three times over the years; however, he offered no testimony about how those injuries occurred and never mentioned a fox. (R.p.1253-p.1257). Appellant later called Dr. Kirkham to the stand. He was admitted as an expert criminologist without objection. (R.p.1305-p.1320). While discussing Deputy Rushton's initial thoughts about the 9-1-1 call, Kirkham commented that because it was a rural area, the gunshots could have been someone poaching deer, "or somebody shooting at foxes or whatever." (R.p.1325, lines 16-24). Later, during cross-examination, after having opined that it was reasonable for someone in Appellant's situation to have a fear of imminent peril or death, Kirkham was asked whether it also would then be reasonable for Appellant to have been home and afraid earlier that night when he was instead outside shooting his rifle. Kirkham responded: "No. He was doing what he was doing. He says he was trying to motivate a fox to leave his cat, Sweet Pea, alone." Kirkham clarified he was offering an opinion about a hypothetical and that he was only assuming Appellant was shooting at a fox. (R.p.1383, line 16-p.1384, line 1).

Appellant also called Officer Bo Willis of the McCormick Police Department to the stand. He helped investigate the shooting, drew a diagram of the property, and took photographs of the scene. (R.p.1433-p.1446). On cross-examination, while testifying about the rifle and ammunition used by Appellant, Willis said the bullet used by Appellant was "not a round you would shoot foxes with." (R.p.1457, lines 3-7). Before the defense rested, Appellant advised the

court he wished to exercise his rights under the Fifth Amendment and was not going to testify. (R.p.1472).

At the conclusion of the testimony and pursuant to a prior ruling, the jury was driven to see the Worley residence. The attorneys and the trial judge also went to the house. Upon returning, the trial judge held a charge conference to address the parties' requests to charge. (R.p.1477-p.1484). In regard to a particular request from Appellant in regard to night hunting, the trial judge commented: "I'm not going to charge number 7, because the law in this case under the statute that I found is the evidence presented was it was shooting at a fox. Even if it's night hunting, even if he was shooting at a fox, he can't use a .30-06; he's got to use a .22 or less." Ultimately the court changed its ruling and agreed to give the charge at the end of its charge on habitation, because the night hunting appeared to be permissible under a different subsection of section 50-11-710. (R.p.1506-p.1508).

After concluding the charge conference, the parties gave closing arguments. The solicitor closed on the law, followed by a closing argument from Appellant. (R.p.1513-p.1516). During Appellant's close, counsel said: "Unfortunately, for the Worley family, they had problems with a fox bothering their cat." (R.p.1518, lines 4-6). He later said: "Worleys [sic] having a problem with a fox trying to kill or injure their cat, Sweet Pea. Joe shoots at the fox and yells." (R.p.1520, lines 2-4). The solicitor objected, complaining that Appellant was not allowed to quote his prior statement. The jury was sent out and the solicitor explained he was objecting to Appellant making a statement from facts that were not in the record. He pointed out that Appellant did not testify and there was no trial testimony a fox was out there on the night of the incident or that Appellant shot at a fox. The trial court agreed, sustained the objection, and

directed counsel to make his argument based only on facts in evidence. (R.p.1520-p.1521).

Appellant completed his closing argument without further mention of a fox. (R.p.1521-p.1554).

The solicitor then presented a closing argument on behalf of the State. Shortly after starting his argument, the solicitor said:

Now, let's get all these, you know, like the traveling medicine man from Florida. All these hypotheticals and all these what ifs, and, of course, he's going to give everybody the benefit of the doubt. He's going to give these law enforcement officers the benefit of the doubt, the standards and procedures man.

And what did he 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. 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, you'd think after two months, he'd shot that fox. He's such a good shot, isn't he? Seems like the fox on the run would be dead if the fox was out there. That's for you to decide, but I ain't heard it. I tried to listen. I tried to listen.

....

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.

(R.p.1556-p.1559).

Discussion / Analysis

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being “compelled in any criminal case to be a witness against himself.”); S.C. Const. art. I, § 12 (“[N]or shall any person be compelled in any criminal case to be a witness against himself.”). Accordingly, this right forbids both comments by the prosecution on a defendant’s silence and instructions by the trial judge indicating a defendant’s silence constitutes evidence of guilt. Griffin v. California, 380 U.S. 609, 615 (1965). “As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.” State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor’s remarks constitute a comment on a defendant’s failure to testify, courts generally ask: “Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?” United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor’s remarks must be evaluated in the context in which they were made. See Weaver, 361 S.C. at 89, 602 S.E.2d at 794 (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”). “The relevant question is whether the solicitor’s comments so

infected the trial with unfairness as to make the resulting conviction a denial of due process.”

State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Initially, the solicitor’s statements that there was no testimony or evidence about a fox or Appellant going back to bed were simply comments on the evidence presented during trial in response to Appellant’s counsel’s argument. It was not a comment on Appellant’s constitutional right to remain silent and not present a defense. Indeed, contrary to the repeated assertion in his brief that the solicitor made a “direct comment” on his right to not testify, no such comment appears. (See Brief of Appellant, p.39-p.41). Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. See State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (“The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such.”). Looking to the context in which the remarks were made, the solicitor did not state Appellant failed to present any evidence, did not claim Appellant did not present a defense, did not shift the burden of proof onto Appellant, and did not suggest to the jury an adverse inference should be drawn against Appellant based on his failure to present evidence or failure to testify. See Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson’s failure to testify.”).

Viewed in the proper context, the solicitor’s remarks were designed to comment on Appellant’s counsel’s false promises from his opening statement, the evidence presented at trial, and the absence of evidence regarding a fox, and did not improperly shift the burden of proof or suggest Appellant’s guilt could be inferred from his failure to testify or present a defense. See State v. Shuler, 353 S.C. 176, 187, 577 S.E.2d 438, 443-44 (2003) (“In any event, the solicitor’s

statement did not refer to appellant's decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]"). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor's closing argument did not infringe upon Appellant's constitutional rights or render his trial fundamentally unfair.

In addition, Appellant's opening statement and closing argument injected the extraneous considerations of whether Appellant was shooting at a fox and whether he had actually gone back to bed between the time of the shooting and the arrival of the police. As a result, the solicitor was fully permitted to comment on the lack of evidence regarding these issues. See State v. Ellenberg, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant."); see also Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor's closing argument comments were an invited response and did not render the trial fundamentally unfair); State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor's statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant's guilt could be inferred from his failure to testify or present a defense).

Finally, even if the solicitor's remarks during his closing argument were somehow improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. See Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is

entitled to a fair trial, not a perfect one.”). Appellant’s counsel first claimed there would be evidence about Appellant shooting at a fox and going back to bed in his opening statement. He then repeatedly implied the existence of such evidence during examination of other witnesses. The solicitor merely responded to the argument. The comments, especially in light of the substantially consistent testimony from multiple witnesses, were entirely harmless and did not render the trial fundamentally unfair. Finally, the trial court thoroughly charged the jury on the burden of proof and Appellant’s presumption of innocence. It also specifically charged that Appellant’s failure to testify could not be considered. (R.p.1612-p.1613). Accordingly, the trial court did not abuse its discretion in denying Appellant’s motion for a mistrial. The comments did not unfairly shift the burden and Appellant was not prejudiced by the comments so as to receive an unfair trial. Appellant’s convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the denial of immunity from prosecution, the convictions, and the sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
November 13, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

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SC Court of Appeals

Appellate Case No. 2014-001497

THE STATE,.....RESPONDENT

v.

JOE ROSS WORLEY,.....APPELLANT.

CERTIFICATE OF COUNSEL

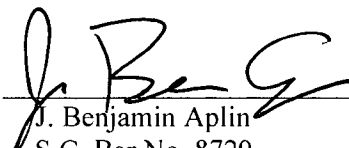
The undersigned hereby certifies this Final Brief of Respondent complies with Rule 211(b),
SCACR.

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
November 13, 2017

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

Appeal From McCormick County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2018-UP-327
Heard June 20, 2018 – Filed July 18, 2018

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General John Benjamin Aplin,
both of Columbia, and Solicitor Samuel R. Hubbard, III,
of Lexington, all for Respondent.

PER CURIAM: Joe Ross Worley appeals his convictions for assault and battery with intent to kill (ABWIK) and possession of a weapon during the commission of a violent crime, arguing the trial court erred in (1) ruling Worley was not entitled

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APPELLATE DEFENSE

to immunity from prosecution for ABWIK under the Protection of Persons and Property Act¹ and (2) not granting a mistrial when the solicitor made comments in his closing argument that constituted improper comments on Worley's right not to testify and impermissibly shifted the State's burden of proof to Worley.

We affirm and adopt the trial court's December 8, 2011 order pertaining to the court's determination that (1) Worley had the burden of proving his claim of immunity by the preponderance of the evidence, which he failed to do, and (2) the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify. *See Byrd v. Livingston*, 398 S.C. 237, 245, 727 S.E.2d 620, 624 (Ct. App. 2012) (adopting the trial court's order as to some issues); *Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

AFFIRMED.

SHORT, THOMAS, and HILL, JJ., concur.

¹ S.C. Code Ann. §§ 16-11-410 to 450 (2015).

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO 2014-001497

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2018-UP-327

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SC Court of Appeals

PETITION FOR REHEARING AND REQUEST FOR HOLDING ON FINAL ISSUE

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's holding on appeal that appellant failed to prove immunity under the Protection of Persons and Property Act by a preponderance of the evidence because the record showed that immunity was established, **and** counsel would request a holding on the issue of the solicitor's impermissible closing comments on appellant's right not to testify, which caused a shift in the burden of proof at trial **because the trial judge's December 8, 2011 Order, which this Court adopted as its holding in the case, did not address appellant's closing argument issue.** In support of this motion, counsel would submit the following information.

1.) FACTS & RELEVANT PROCEDURAL HISTORY

In the case at bar, appellant was convicted of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. Appellant stepped onto his balcony at around 4:00 a.m. on November 15, 2009, to find a man standing underneath it pointing a gun in his direction. Appellant responded by firing his weapon at this man who was acting on behalf of the McCormick County Sheriff's Department. The man, Bobby Ruston, whom the state claimed was a legitimate police officer, was struck by gunfire from appellant's rifle. Previously, appellant's neighbor called the police on that morning to report that appellant was in effect randomly firing gunshots from his balcony. Appellant explained that he was firing at a fox that had been fighting with his beloved cat. When police arrived at appellant's residence, he woke from his sleep and stepped onto his balcony to see who was ringing his doorbell and fired a shot after seeing a man in plain clothing (Rushton) pointing a weapon at him.

On appeal, appellant argued the following:

The trial court erred in ruling that appellant was not entitled to immunity from prosecution under the Protection of Persons and Property Act

The trial court erred in ruling that appellant was not entitled to immunity from prosecution for the charges under the Protection of Persons and Property Act with respect to its findings on proof of entry or attempted entry into a dwelling and on being without fault in bringing on the difficulty.

The trial court erred in finding no error regarding the solicitor's comments on appellant's failure to testify.

On July 18, 2018, this Court affirmed appellant's convictions and sentences in State v. Worley, Unpublished Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018), and **held that it adopted the rulings in the trial judge's Order filed on December 8, 2011, (signed on December 6, 2011), which including findings that appellant did not establish by a**

preponderance of the evidence that he was immune from prosecution under the Act, but note that there was no ruling by the trial judge in the Order that addressed the issue of the solicitor's impermissible remarks in effect on appellant's failure to testify at trial and how the same resulted in a shift of the burden of proof in the case at trial.

2.) LAW ENFORCEMENT EXCEPTION UNDER THE ACT

This Court adopted the trial court's ruling that the law enforcement exception under the Act precluded the grant of immunity to appellant because Rushton was a law enforcement officer at time of the shooting; and therefore, appellant could not claim the presumption under the Act that he acted in fear of death or great bodily injury. Relevant portions of S.C. Code. Ann. § 16-11-450 (A) and 16-11-440(B)(4), respectively, follow:

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.

[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.

Appellant's position addressed the **inapplicability** of the law enforcement exception in the case based on the following reasons:

A.) RUSHTON NEVER RECEIVED JUDICIAL APPROVAL

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 immunity to appellant because, among other reasons, the court believed that Rushton was a “law enforcement officer” within the meaning of the Act. R. 1762 – 1767.

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)). 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.*

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.” Thus, one class of deputies act as general agents of the sheriff, subject to the approval of the resident circuit court judge or judges, and a second class of deputies would not be subject to circuit court approval, but whose appointment is limited in scope and circumstance. Section 23-13-10 was violated and this Court erred in adopting the trial court’s reasoning that no violation of section 23-13-10 occurred and in denying relief to appellant under the Act per this reasoning.

B.) RUSHTON NIETHER TOOK THE OATH NOR POSTED BOND/SURETY

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. Hence, the failure to follow the statutory requirements surrounding the appointment and approval of sheriff’s deputies should have precluded the law enforcement officer exception under the Act to deny relief. R. 1767. This Court erred in adopting the trial court’s finding of no error under the oath and bond/surety requirements.

C.) RUSHTON’S RE-CERTIFICATION WAS NOT COMPLETE

Rushton was re-hired by the McCormick County Sheriff’s Department on November 1, 2009. Prior to re-joining 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* S.C. 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 and thus the McCormick County Sheriff's Department failed to follow the statutory requirements that would have allowed Rushton to be renewed an officer. This Court erred in adopting the trial court's ruling that no error in concluding that Rushton was a law enforcement officer within the meaning of the Act.

D.) UNLAWFUL ENTRY WAS ESTABLISHED UNDER THE STATUTE

Appellant proved that unlawful entry was attempted in his case; and thus, he was entitled to immunity as a result. S.C. Code Ann. § 16-11-440 (A) reads 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 danger of death or great bodily injury to himself or another person when issuing 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 had 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.

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).

This Court erred in adopting the trial court’s 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, this Court erred in adopting the trial judge's conclusion that there was no unlawful or attempted unlawful entry of Appellant's residence.

E) **APPELLANT DID NOT BRING ON THE DIFFICULTY**

In order to be granted immunity under the Act, a defendant must prove all 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). 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 and this Court erred in adopting the ruling of the trial court to the contrary. 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). This Court erred in adopting the trial judge's ruling appellant brought the difficulty as this was unsupported by the evidence and constituted an abuse of discretion.

F.) THE SOLICITOR'S REMARKS SHIFTED THE BURDEN OF PROOF

With respect to appellant's argument that the solicitor's comments were burden shifting in the case, this Court **in effect has not ruled on this issue as the trial court's order dated December 8, 2011, which was adopted by this Court as its holding, included no finding on this question.**

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. Note that he house was well-insulated. 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 in this case.

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.*

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

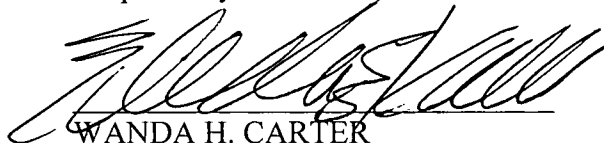
jury did not likely cure the error as the case was a credibility battle. *See, e.g. Id.; McFadden*, 342 S.C. at 642, 539 S.E.2d 394; *Sweet*, 342 S.C. at 349, 536 S.E.2d at 95 (holding the trial court's general jury charge on defendant's right not to testify was insufficient to cure the error when the 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.

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on the issue of whether this Court erred in upholding the trial judge's denial of relief on appellant's immunity request under the Protection of Persons and Property Act, and a ruling from this Court on the burden shifting and inflammatory closing remarks made by the solicitor at trial.

Respectfully Submitted,



WANDA H. CARTER

Deputy Chief Appellate Defender

This 1st day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

RECEIVED

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SC Court of Appeals

THE STATE,

RESPONDENT,

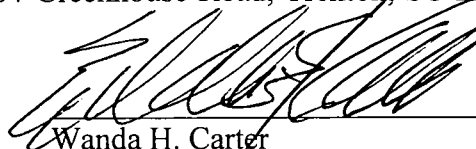
V.

JOE ROSS WORLEY,

APPELLANT

CERTIFICATE OF SERVICE

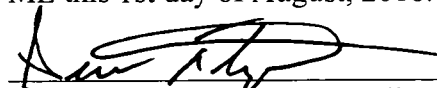
The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joe Ross Worley, #360529, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 1st day of August, 2018.



Wanda H. Carter

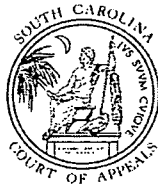
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of August, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: 10/30/2022



The South Carolina Court of Appeals

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August 14, 2018

Mrs. Wanda H. Carter, Esquire
Appellate Defense
PO Box 11589
Columbia SC 29211

Re: The State v. Joe Ross Worley
Appellate Case No. 2014-001497

Dear Counsel:

This will acknowledge receipt of your Petition for Rehearing.

By copy of this letter, opposing counsel is requested to file an original return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,

A handwritten signature in black ink that reads "V. Claire Allen, Deputy".

CLERK

cc: Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Samuel R. Hubbard, III, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

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AUG 24 2018

SC Court of Appeals

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

JOE ROSS WORLEY, ...APPELLANT.

**RETURN TO PETITION FOR REHEARING AND
REQUEST FOR HOLDING ON FINAL ISSUE**

On July 18, 2018, this Court issued an unpublished opinion that affirmed Appellant Joe Ross Worley's convictions for assault and battery with intent to kill (ABIK) and possession of a weapon during the commission of a violent crime. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018). On August 1, 2018, Appellant submitted a "Petition for Rehearing and Request for Holding on Final Issue" pursuant to Rule 221(a), SCACR. By letter dated August 14, 2018, this Court asked Respondent (the State) to file a return to the motion. This "Return to Petition for Rehearing and Request for Holding on Final Issue" now follows. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. First, in regard to the lower court's denial of immunity under the "Protection of Persons and Property Act" (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007), this Court affirmed and adopted the lower court's December 8, 2011 order, which itself employed a thorough and proper analysis of each of the arguments raised by Appellant at the immunity hearing before concluding Appellant did not carry his burden of proving he was entitled to immunity under the Act. The lower court followed the appropriate procedure—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence—and ultimately found Appellant did not carry his burden of proof. Appellant's arguments simply could not prevail under this Court's standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Appellant's claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court's findings that Appellant failed to carry his burden of proving there was an entry or attempted entry, and that Appellant failed to carry his burden of proving he was not without fault in bringing on the difficulty, had evidentiary support and were not controlled by errors of law.

Similarly, the lower court's December 8, 2011 order analyzed and rejected Appellant's myriad grounds for claiming Deputy Rushton was not a "law enforcement officer" within the meaning of the Act. The lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and as noted above, that denial was solidly grounded in credibility findings and Appellant's abject failure to carry his burden of proving the required elements of self-defense by a preponderance of the evidence. Indeed, the lower court

held: “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.” (R. p.1767). In other words, the lower court concluded Appellant failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found “that the preponderance of the evidence is that the ‘difficulty’ was brought on by [Appellant’s] conduct.” (R. p.1774). These individual findings supported the lower court’s ultimate conclusion that “Appellant has not met his burden of proof” in establishing the elements of self-defense needed for a grant of pretrial immunity. (R. p.1773-p.1774). For all of these reasons, the lower court’s denial of immunity and Appellant’s convictions were properly affirmed by this Court. Rehearing should be denied.

Second, in regard to the lower court’s refusal to grant a mistrial based on the solicitor’s comments in closing arguments, this Court adopted the trial court’s finding that: “the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify.” That finding was supported by evidence in the record and was properly affirmed by this Court.

In his petition for rehearing, Appellant contends this Court “in effect has not ruled on this issue as the trial court’s order dated December 8, 2011, which was adopted by this Court as its holding, included no finding on this question.” However, the State submits Appellant reads this

Court's opinion too narrowly. While this Court's opinion could be read to indicate it was adopting the trial court's written December 8, 2011 order as to both issues, this cannot be what was intended where that written order was issued well before closing arguments were ever made at the conclusion of trial. Instead, a reasonable reading of this Court's opinion is that the adoption of the written December 8, 2011 order only pertains to the immunity issue, while the trial court's **oral ruling** at the end of trial was adopted by this Court in regard to the mistrial issues. Consideration of the trial court's oral ruling confirms this more broad and reasonable interpretation.

Indeed, at the conclusion of trial, the trial court ruled as follows:

I had told counsel I was denying the motion [for a mistrial]. I want to put my grounds on the record. And the basis for me denying it is the *Meggett* case. I thought it was in line with what we had here. But I can tell you what I do recall, and I'll double check it, is, number one, **the comment was in response to information or issues that were placed in the record by defense in this matter. So it was commenting on the evidence or the lack of evidence.**

In no way was it burden-shifting commentary nor did it suggest or infer that the defendant is guilty because he failed to testify, and no comment on the defendant's failing to testify whatsoever. It was just simply commenting on the lack of evidence or - - that was raised by the defendant. And, as such, to the extent I have to do this, I find that the comment was harmless beyond a reasonable doubt, if that is, in fact, required. It's supposed to be an appellate court standard. If I need to make that finding, I've made it based on the fact that it is as I've stated.

(R.p.1636, line 23-p.1637, line 19) (emphasis added). The emphasized language is perfectly in line with the language used in this Court's unpublished opinion, clearly indicating it constitutes the findings that were actually adopted by this Court. Thus, this Court appropriately adopted the lower court's conclusions as to both issues, one by way of the written December 8, 2011 order, and the other by way of the oral ruling at trial. There is no basis for granting rehearing for purposes of obtaining any further ruling from this Court.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's petition for rehearing, deny Appellant's request for making an additional holding on his final issue, and let stand the unpublished opinion affirming Appellant's convictions and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 24, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

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Appellate Case No. 2014-001497

AUG 24 2018

SC Court of Appeals

THE STATE, ...RESPONDENT

v.

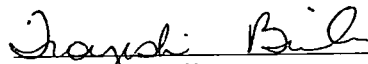
JOE ROSS WORLEY, ...APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return To Petition For Rehearing And Request For Holding On Final Issue*, dated August 24, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
Office of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 24th day of August, 2018.



Troyeshi Brailey
Legal Coordinator

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The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

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. The attached opinion is substituted for the previous opinion, which is withdrawn.

Paul E. Short, Jr. J.
Paul D. Thomas J.
Marlin J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Samuel R. Hubbard, III, Esquire
Wanda H. Carter, Esquire

FILED

Sept. 26, 2018

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

Appeal From McCormick County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2018-UP-327
Heard June 20, 2018 – Filed July 18, 2018
Withdrawn, Substituted and Refiled September 26, 2018

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General John Benjamin Aplin,
both of Columbia, and Solicitor Samuel R. Hubbard, III,
of Lexington, all for Respondent.

PER CURIAM: Joe Ross Worley appeals his convictions for assault and battery
with intent to kill (ABWIK) and possession of a weapon during the commission of

a violent crime, arguing the trial court erred in (1) ruling Worley was not entitled to immunity from prosecution for ABWIK under the Protection of Persons and Property Act¹ and (2) not granting a mistrial when the solicitor made comments in his closing argument that constituted improper comments on Worley's right not to testify and impermissibly shifted the State's burden of proof to Worley.

We affirm and adopt the trial court's December 8, 2011 order pertaining to the court's determination that Worley had the burden of proving his claim of immunity by the preponderance of the evidence, which he failed to do. *See Byrd v. Livingston*, 398 S.C. 237, 245, 727 S.E.2d 620, 624 (Ct. App. 2012) (adopting the trial court's order as to some issues); *Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

We also affirm the trial court's denial of Worley's motion for mistrial. The court found at trial that the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) ("[T]he comment was simply a statement of the evidence which was before the jury, rather than a comment on [the defendant's] failure to testify."). Therefore, the court found the comment was harmless beyond a reasonable doubt. "The decision to grant or deny a mistrial is within the sound discretion of the trial court" and "will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." *Id.* When a violation is alleged, this court must apply a harmless error analysis as set forth in *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996). "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." *Id.* at 531, 466 S.E.2d at 366. "[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *Id.*

AFFIRMED.

¹ S.C. Code Ann. §§ 16-11-410 to 450 (2015).

SHORT, THOMAS, and HILL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO 2014-001497

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2018-UP-327

2nd PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's holding on appeal that appellant failed to prove immunity under the Protection of Persons and Property Act by a preponderance of the evidence because the record showed that immunity was established, and on this Court's upholding of the denial of a mistrial after the solicitor made impermissible closing comments on appellant's failure to testify because this resulted in a shift in the burden of proof at trial. In support of this petition, counsel would submit the following information.

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SC Court of Appeals
RESPONDENT

1.) FACTS & RELEVANT PROCEDURAL HISTORY

In the case at bar, appellant was convicted of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. Appellant stepped onto his balcony at around 4:00 a.m. on November 15, 2009, to find a man standing underneath it pointing a gun in his direction. Appellant responded by firing his weapon at this man who was acting on behalf of the McCormick County Sheriff's Department. The man, Bobby Ruston, whom the state claimed was a legitimate police officer, was struck by gunfire from appellant's rifle. Previously, appellant's neighbor called the police on that morning to report that appellant was in effect randomly firing gunshots from his balcony. Appellant explained that he was firing at a fox that had been fighting with his beloved cat. When police arrived at appellant's residence, he woke from his sleep and stepped onto his balcony to see who was ringing his doorbell and fired a shot after seeing a man in plain clothing (Rushton) pointing a weapon at him.

On appeal, appellant argued the following:

The trial court erred in ruling that appellant was not entitled to immunity from prosecution under the Protection of Persons and Property Act

The trial court erred in ruling that appellant was not entitled to immunity from prosecution for the charges under the Protection of Persons and Property Act with respect to its findings on proof of entry or attempted entry into a dwelling and on being without fault in bringing on the difficulty.

The trial court erred in finding no error regarding the solicitor's comments on appellant's failure to testify.

On July 18, 2018, this Court affirmed appellant's convictions and sentences in State v. Worley, Unpublished Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018), and held that it adopted the rulings in the trial judge's Order filed on December 8, 2011, (signed on December 6, 2011), which included findings that appellant did not establish by a preponderance

of the evidence that he was immune from prosecution under the Act, and further upheld the denial of a mistrial after the solicitor made impermissible comments on appellant's failure to testify at trial, which in turn shifted the burden of proof in the case.

2.) LAW ENFORCEMENT EXCEPTION UNDER THE ACT

This Court adopted the trial court's ruling that the law enforcement exception under the Act precluded the grant of immunity to appellant because Rushton was a law enforcement officer at time of the shooting; and therefore, appellant could not claim the presumption under the Act that he acted in fear of death or great bodily injury. Relevant portions of S.C. Code. Ann. § 16-11-450 (A) and 16-11-440(B)(4), respectively, follow:

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.

[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.

Appellant's position addressed the **inapplicability** of the law enforcement exception in the case based on the following reasons:

A.) RUSHTON NEVER RECEIVED JUDICIAL APPROVAL

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 immunity to appellant because,

among other reasons, the court believed that Rushton was a “law enforcement officer” within the meaning of the Act. R. 1762 – 1767.

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)). 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.*

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.” Thus, one class of deputies act as general agents of the sheriff, subject to the approval of the resident circuit court judge or judges, and a second class of deputies would not be subject to circuit court approval, but whose appointment is limited in scope and circumstance. Section 23-13-10 was violated and this Court erred in adopting the trial court's reasoning that no violation of section 23-13-10 occurred and in denying relief to appellant under the Act per this reasoning.

B.) RUSHTON NIETHER TOOK THE OATH NOR POSTED BOND/SURETY

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. Hence, the failure to follow the statutory requirements surrounding the appointment and approval of sheriff’s deputies should have precluded the law enforcement officer exception under the Act to deny relief. R. 1767. This Court erred in adopting the trial court’s finding of no error under the oath and bond/surety requirements.

C.) RUSHTON’S RE-CERTIFICATION WAS NOT COMPLETE

Rushton was re-hired by the McCormick County Sheriff’s Department on November 1, 2009. Prior to re-joining 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* S.C. 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 and thus the McCormick County Sheriff's Department failed to follow the statutory requirements that would have allowed Rushton to be renewed an officer. This Court erred in adopting the trial court's ruling that no error in concluding that Rushton was a law enforcement officer within the meaning of the Act.

D.) UNLAWFUL ENTRY WAS ESTABLISHED UNDER THE STATUTE

Appellant proved that unlawful entry was attempted in his case; and thus, he was entitled to immunity as a result. S.C. Code Ann. § 16-11-440 (A) reads 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 danger of death or great bodily injury to himself or another person when issuing 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 had 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.

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).

This Court erred in adopting the trial court’s 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, this Court erred in adopting the trial judge's conclusion that there was no unlawful or attempted unlawful entry of Appellant's residence.

E) APPELLANT DID NOT BRING ON THE DIFFICULTY

In order to be granted immunity under the Act, a defendant must prove all 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). 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 and this Court erred in adopting the ruling of the trial court to the contrary. 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). This Court erred in adopting the trial judge's ruling appellant brought the difficulty as this was unsupported by the evidence and constituted an abuse of discretion.

2.) THE SOLICITOR'S REMARKS SHIFTED THE BURDEN OF PROOF

With respect to appellant's argument that the solicitor's comments were burden shifting in the case, this Court upheld held the trial judge's denial of a mistrial despite the solicitor's comments on appellant's failure to testify which in turn shifted the burden of proof at trial.

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. Note that he house was well-insulated. 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 in this case.

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. The Court of Appeals affirmed and addressed the issue on appeal as follows:

We also affirm the trial court's denial of Worley's motion for mistrial. The court found at trial that the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by

Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“[T]he comment was simply a statement of the evidence which was before the jury, rather than a comment on [the defendant’s] failure to testify.”). Therefore, the court found the comment was harmless beyond a reasonable doubt. “The decision to grant or deny a mistrial is within the sound discretion of the trial court” and “will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). “The granting of a motion for mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” *Id.* When a violation is alleged, this court must apply a harmless error analysis as set forth in *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996). “To be harmless, the record must establish the reference to the defendant’s right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant’s silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming.” *Id.* At 531, 466 S.E.2d at 366. “[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.” *Id.*

To the contrary, 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.

With respect to the showing under Pickens as cited to by this Court, there is no doubt that the showing was satisfied and 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. Also, the state’s case against appellant was **not overwhelming** and appellant’s theory of the case was **clearly 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.

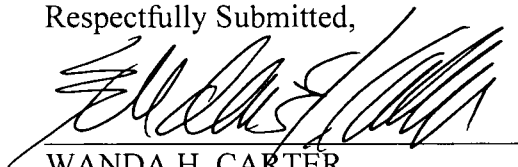
The state attempted to justify its comments as a legitimate attack on the credibility of a defense. R. 1578, l. 11 – 1597, l. 25. This argument is without merit. Criminal defendants have a right to both present a case and rely on their right not to testify. Boundaries governing proper closing argument 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.

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on the issue of whether this Court erred in upholding the trial judge's denial of relief on appellant's immunity request under the Protection of Persons and Property Act, and the denial of a mistrial after the solicitor commented on appellant's failure to testify at trial and thereafter shifted the burden of proof in the case.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

WANDA H. CARTER
Deputy Chief Appellate Defender

This 12th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

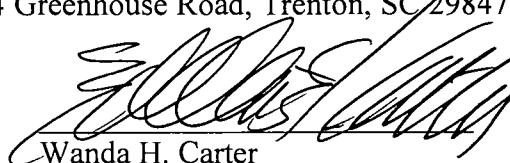
V.

JOE ROSS WORLEY,

APPELLANT

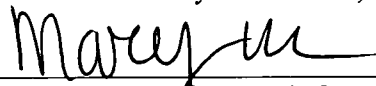
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the 2nd Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joe Ross Worley, #360529, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 12th day of October, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 12th day of October, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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October 16, 2018

Mrs. Wanda H. Carter, Esquire
Appellate Defense
PO Box 11589
Columbia SC 29211

Re: The State v. Joe Ross Worley
Appellate Case No. 2014-001497

Dear Counsel:

This will acknowledge receipt of your Petition for Rehearing.

By copy of this letter, opposing counsel is requested to file an original return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Samuel R. Hubbard, III, Esquire

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OCT 25 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
 In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
 William P. Keesley, Circuit Court Judge (Immunity Hearing)
 R. Lawton McIntosh, Circuit Court Judge (Trial)

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

JOE ROSS WORLEY, ...APPELLANT.

RETURN TO 2nd PETITION FOR REHEARING

On July 18, 2018, this Court issued an unpublished opinion that affirmed Appellant Joe Ross Worley's convictions for assault and battery with intent to kill (ABIK) and possession of a weapon during the commission of a violent crime. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018). On August 1, 2018, Appellant submitted a "Petition for Rehearing and Request for Holding on Final Issue" pursuant to Rule 221(a), SCACR. On August 24, 2018, Respondent (the State) filed a "Return to Petition for Rehearing and Request for Holding on Final Issue." On September 26, 2018, this Court withdrew, substituted, and refiled an unpublished opinion that again affirmed Appellant's convictions. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed September 26, 2018). On October 12, 2018, Appellant filed a "2nd Petition for Rehearing" pursuant to Rule 221(a), SCACR. By letter dated October 16, 2018, this

Court asked the State to file a return to the motion. This “Return to 2nd Petition for Rehearing” now follows. The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The Protection of Persons and Property Act

In regard to the lower court’s denial of immunity under the “Protection of Persons and Property Act” (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007), this Court affirmed and adopted the lower court’s December 8, 2011 order, which itself employed a thorough and proper analysis of each of the arguments raised by Appellant at the immunity hearing before concluding Appellant did not carry his burden of proving he was entitled to immunity under the Act. The lower court followed the appropriate procedure—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence—and ultimately found Appellant did not carry his burden of proof. Appellant’s arguments simply could not prevail under this Court’s standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Appellant’s claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court’s findings that Appellant failed to carry his burden of proving there was an entry or attempted entry, and that Appellant failed to carry his burden of proving he was not without fault in bringing on the difficulty, had evidentiary support and were not controlled by errors of law.

Similarly, the lower court’s December 8, 2011 order analyzed and rejected Appellant’s myriad grounds for claiming Deputy Rushton was not a “law enforcement officer” within the

meaning of the Act. The lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and as noted above, that denial was solidly grounded in credibility findings and Appellant's abject failure to carry his burden of proving the required elements of self-defense by a preponderance of the evidence. Indeed, the lower court held: "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." (R.p.1767). In other words, the lower court concluded Appellant failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Appellant's] conduct." (R.p.1774). These individual findings supported the lower court's ultimate conclusion that "Appellant has not met his burden of proof" in establishing the elements of self-defense needed for a grant of pretrial immunity. (R.p.1773-p.1774). For all of these reasons, the lower court's denial of immunity and Appellant's convictions were properly affirmed by this Court. Rehearing should be denied.

Mistrial – Solicitor's Closing Argument

In regard to the lower court's refusal to grant a mistrial based on the solicitor's comments in closing arguments, this Court affirmed, noting the trial court: (1) found "the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was

guilty because he failed to testify,” and (2) “[t]herefore the court found the comment was harmless beyond a reasonable doubt.” These findings were supported by evidence in the record and therefore were properly affirmed by this Court.

In his petition for rehearing, Appellant contends this Court should have reversed the convictions because the State’s closing argument “constituted a direct comment” on Appellant’s right to not testify. He argues that, with respect to the showing that must be made under the harmless error analysis set forth by this Court in *Pickens*, “there is no doubt that the showing was satisfied and appellant was denied a fair trial by the state’s impermissible comments and, thus, prejudiced.” Appellant claims the State “directly referenced appellant’s failure to testify multiple times” and that the solicitor “tied appellant’s failure to testify directly and inexorably to appellant’s self-defense, mistake, and accident theories. (Petition for Rehearing, p.19). The State disagrees and maintains its position that Appellant’s argument is entirely without merit. The State’s closing argument was in direct response to comments made during Appellant’s opening statement, Appellant’s attempts to substantiate those comments through the examination of other witnesses, the resulting lack of evidence to support the comments in the opening statement, and Appellant’s closing argument. The State’s argument did not shift the burden onto Appellant, but instead merely made note of the lack of evidence as a whole in the record, despite Appellant’s opening statement suggesting such evidence would be forthcoming at trial.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); *State v. Meggett*, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme

measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *Inman*, 395 S.C. at 565, 720 S.E.2d at 45. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *Meggett*, 398 S.C. at 524, 728 S.E.2d at 496.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

Relevant Facts

During pretrial arguments about a defense request for a jury charge on modified ammunition, counsel for Appellant stated:

. . . [There is] no evidence whatsoever that [Appellant] was in any way mean-spirited towards anybody except trying to get rid of a fox earlier that evening.

He fired two shots at a fox. And he really wasn't trying to kill the fox; he was trying to motivate him out of there. The fox had bothered his cat. The cat called Sweet Pea. And they had been having trouble with this fox. And that evening, earlier before this thing happened, he fired that thing from the same gun at a fox. And a fox sure isn't the police and certainly isn't a person.

And so - - on the same evening, he also fired it at two fox. But, again, it's an environmental bullet.

(R.p.824-p.825). Later, during preliminary remarks, the trial judge told the jury the parties would be making opening statements and instructed that whatever was said in those statements was not evidence. (R.p.839). In his opening statement, Appellant's counsel said in part:

Y'all may not understand this, but as you hear this case, it's horribly tragic, because it starts off with a cat by the name of Sweet Pea, and this cat was found, and it was a scraggly cat and it

had a collar on it. And Mr. Worley's father took on the cat and protected this cat, and it became a cat here in McCormick.

And they'd been over on that property for over 40 years. The Worley family comes down here every weekend and has for 40 years. They've been broken into before.

This family is there with his mother, who is 84 years old at the time. Mr. Joe Worley and his mother, 84 years old, in their little garage apartment, and their cat, Sweet Pea. And when you go out there, if His Honor will let you go out there, there's and elaborate cathouse and catwalk that they built. They love their little cat.

Well, in September, when the Sheffields complained the first time, *there's a fox* - - actually, it was the Sheffields that told the Worleys that there was a fox out there - - *and that fox had injured this cat*, had injured it to the point they had to take it to the vet.

Now, Mr. Worley that evening, the 15th, November the 15th of 2009, goes out on his balcony, and he hears a noise. *He flips on his light, and he sees movement out there, and he said, The dadgum fox again. So he's out there hollering at it and trying to get rid of it.* He goes into his house and gets his father's - - his deceased father by now - - gets his gun, and he loads it with ammo that his father had. *And he goes outside and he shoots towards the lake to motivate the fox that was bothering their cat to get out there. He shot twice. He went on back to bed. And he might have hollered, but he shot twice and then went back to bed.*

(R.p.833-p.834) (emphasis added).

Subsequently, during Appellant's cross-examination of Deputy Moore, counsel asked: "Well, you heard Joe testify that he shot it up into the air; right?" (R.p.978, lines 11-12). The State objected to the question and the jury was sent out. The parties then engaged in a discussion with the trial judge in regard to whether Appellant would be allowed to cross-examine other witnesses in regard to Appellant's testimony from the pretrial immunity hearing. The trial judge said it would be inherently unfair to allow Appellant to bring up the prior testimony and then to claim his privilege under the Fifth Amendment to not take the stand during trial. The trial court

ruled it would not allow the defense to use Appellant's pretrial testimony during the examination of other witnesses, but that if Appellant chose to testify, the prior testimony might be admissible in cross-examination. Appellant said he understood the ruling but contended he may still be able to use the prior testimony in some fashion as it relates to his expert witness. The judge said he would address the issue of the expert witnesses using the prior testimony if it became an issue later during the trial. (R.p.978-p.983).

Later during trial, Appellant's neighbor, Alan Sheffield, took the stand. On cross-examination, he testified he knew the Worleys' cat Sweet Pea had been injured but he had no knowledge of how or why. Sheffield said he did not know anything about the cat having problems with a varmint and that while he had seen foxes in the area before, he does not remember ever having a conversation with Ms. Worley about a fox. (R.p.1114-p.1115). After the State rested, during arguments on Appellant's motion for a directed verdict, the trial judge said: "Well, there is - - the testimony was that Mr. Worley was shooting a gun at a fox. In other words, he was hunting a fox at night. Regardless of whether it's to protect some Sweet Pea cat or whatever, he was hunting at night with a .30-06." (R.p.1204, lines 7-12).

Appellant then was sworn and advised of his right to testify and his right not to testify. He proceeded to call witnesses in his defense. First, he called his brother, Robert Worley, to the stand. Robert testified he was familiar with Sweet Pea and remembered that Sweet Pea had been injured two or three times over the years; however, he offered no testimony about how those injuries occurred and never mentioned a fox. (R.p.1253-p.1257). Appellant later called Dr. Kirkham to the stand. He was admitted as an expert criminologist without objection. (R.p.1305-p.1320). While discussing Deputy Rushton's initial thoughts about the 9-1-1 call, Kirkham commented that because it was a rural area, the gunshots could have been someone poaching

deer, “or somebody shooting at foxes or whatever.” (R.p.1325, lines 16-24). Later, during cross-examination, after having opined that it was reasonable for someone in Appellant’s situation to have a fear of imminent peril or death, Kirkham was asked whether it also would then be reasonable for Appellant to have been home and afraid earlier that night when he was instead outside shooting his rifle. Kirkham responded: “No. He was doing what he was doing. He says he was trying to motivate a fox to leave his cat, Sweet Pea, alone.” Kirkham clarified he was offering an opinion about a hypothetical and that he was only assuming Appellant was shooting at a fox. (R.p.1383, line 16-p.1384, line 1).

Appellant also called Officer Bo Willis of the McCormick Police Department to the stand. He helped investigate the shooting, drew a diagram of the property, and took photographs of the scene. (R.p.1433-p.1446). On cross-examination, while testifying about the rifle and ammunition used by Appellant, Willis said the bullet used by Appellant was “not a round you would shoot foxes with.” (R.p.1457, lines 3-7). Before the defense rested, Appellant advised the court he wished to exercise his rights under the Fifth Amendment and was not going to testify. (R.p.1472).

At the conclusion of the testimony and pursuant to a prior ruling, the jury was driven to see the Worley residence. The attorneys and the trial judge also went to the house. Upon returning, the trial judge held a charge conference to address the parties’ requests to charge. (R.p.1477-p.1484). In regard to a particular request from Appellant in regard to night hunting, the trial judge commented: “I’m not going to charge number 7, because the law in this case under the statute that I found is the evidence presented was it was shooting at a fox. Even if it’s night hunting, even if he was shooting at a fox, he can’t use a .30-06; he’s got to use a .22 or less.” Ultimately the court changed its ruling and agreed to give the charge at the end of its charge on

habitation, because the night hunting appeared to be permissible under a different subsection of section 50-11-710. (R.p.1506-p.1508).

After concluding the charge conference, the parties gave closing arguments. The solicitor closed on the law, followed by a closing argument from Appellant. (R.p.1513-p.1516). During Appellant's close, counsel said: "Unfortunately, for the Worley family, they had problems with a fox bothering their cat." (R.p.1518, lines 4-6). He later said: "Worleys [sic] having a problem with a fox trying to kill or injure their cat, Sweet Pea. Joe shoots at the fox and yells." (R.p.1520, lines 2-4). The solicitor objected, complaining that Appellant was not allowed to quote his prior statement. The jury was sent out and the solicitor explained he was objecting to Appellant making a statement from facts that were not in the record. He pointed out that Appellant did not testify and there was no trial testimony a fox was out there on the night of the incident or that Appellant shot at a fox. The trial court agreed, sustained the objection, and directed counsel to make his argument based only on facts in evidence. (R.p.1520-p.1521). Appellant completed his closing argument without further mention of a fox. (R.p.1521-p.1554).

The solicitor then presented a closing argument on behalf of the State. Shortly after starting his argument, the solicitor said:

Now, let's get all these, you know, like the traveling medicine man from Florida. All these hypotheticals and all these what ifs, and, of course, he's going to give everybody the benefit of the doubt. He's going to give these law enforcement officers the benefit of the doubt, the standards and procedures man.

And what did he 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. 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, you'd think after two months, he'd shot that fox. He's such a good shot, isn't he? Seems like the fox on the run would be dead if the fox was out there. That's for you to decide, but I ain't heard it. I tried to listen. I tried to listen.

....

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.

(R.p.1556-p.1559).

Discussion / Analysis

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. *See* U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself."); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Accordingly, this right forbids both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965).

“As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.” *State v. Weaver*, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor’s remarks constitute a comment on a defendant’s failure to testify, courts generally ask: “Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?” *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor’s remarks must be evaluated in the context in which they were made. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Initially, the solicitor’s statements that there was no testimony or evidence about a fox or Appellant going back to bed were simply comments on the evidence presented during trial in response to Appellant’s counsel’s argument. It was not a comment on Appellant’s constitutional right to remain silent and not present a defense. Indeed, contrary to the repeated assertion that the solicitor made a “direct comment” on his right to not testify, no such comment appears. (See Brief of Appellant, p.39-p.41; Petition for Rehearing, p.19). Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. *See State v. Pitts*, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (“The solicitor had a perfect

right to state his version of the testimony and to comment on the weight that should be given to such.”). Looking to the context in which the remarks were made, the solicitor did not state Appellant failed to present any evidence, did not claim Appellant did not present a defense, did not shift the burden of proof onto Appellant, and did not suggest to the jury an adverse inference should be drawn against Appellant based on his failure to present evidence or failure to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson’s failure to testify.”).

Viewed in the proper context, the solicitor’s remarks were designed to comment on Appellant’s counsel’s false promises from his opening statement, the evidence presented at trial, and the absence of evidence regarding a fox, and did not improperly shift the burden of proof or suggest Appellant’s guilt could be inferred from his failure to testify or present a defense. *See State v. Shuler*, 353 S.C. 176, 187, 577 S.E.2d 438, 443-44 (2003) (“In any event, the solicitor’s statement did not refer to appellant’s decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]”). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor’s closing argument did not infringe upon Appellant’s constitutional rights or render his trial fundamentally unfair.

In addition, Appellant’s opening statement and closing argument injected the extraneous considerations of whether Appellant was shooting at a fox and whether he had actually gone back to bed between the time of the shooting and the arrival of the police. As a result, the solicitor was fully permitted to comment on the lack of evidence regarding these issues. *See*

State v. Ellenberg, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) (“Once the defendant opens the door, the solicitor’s invited response is appropriate so long as it does not unfairly prejudice the defendant.”); *see also Patterson*, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor’s closing argument comments were an invited response and did not render the trial fundamentally unfair); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor’s statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant’s guilt could be inferred from his failure to testify or present a defense).

Finally, even if the solicitor’s remarks during his closing argument were somehow improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]lthough it is improper for the solicitor to indirectly comment on a defendant’s failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”). Appellant’s counsel first claimed there would be evidence about Appellant shooting at a fox and going back to bed in his opening statement. He then repeatedly implied the existence of such evidence during examination of other witnesses. The solicitor merely responded to the argument. The comments, especially in light of the substantially consistent testimony from multiple witnesses, were entirely harmless and did not render the trial fundamentally unfair. Finally, the trial court thoroughly charged the jury on the burden of proof and Appellant’s presumption of innocence. It also specifically charged that Appellant’s failure to testify could not be considered. (R.p.1612-p.1613). Accordingly, the trial court did not abuse its discretion in denying Appellant’s motion for a mistrial. The comments

did not unfairly shift the burden and Appellant was not prejudiced by the comments so as to receive an unfair trial.

This Court appropriately affirmed and adopted the lower court's conclusions as to Appellant's failure to carry his burden of proving his claim of immunity by the preponderance of the evidence, and it appropriately affirmed the trial court's denial of Appellant's motion for a mistrial in regard to the solicitor's closing argument. There is no basis for granting rehearing.

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's second petition for rehearing and let stand the substituted and refiled unpublished opinion affirming Appellant's convictions and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
October 25, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY
William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

RECEIVED

OCT 25 2018

SC Court of Appeals

Appellate Case No. 2014-001497

THE STATE, ...RESPONDENT

v.

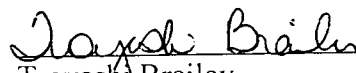
JOE ROSS WORLEY, ...APPELLANT.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return To 2nd Petition For Rehearing*, dated October 25, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
Office of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 25th day of October, 2018.


Troyeshi Brailey
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The South Carolina Court of Appeals

The State, Respondent,

v.

Joe Ross Worley, Appellant.

Appellate Case No. 2014-001497

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.

Paul E. Shortz Jr.

J.

Paul W. Thomas

J.

Man 1-

J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Samuel R. Hubbard, III, Esquire
Wanda H. Carter, Esquire

FILED

December 13, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 07 2019

SC Court of Appeals

Certiorari to McCormick County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2018-UP-327 (S.C. Ct. App. Filed September 26, 2018)

2010-GS-35-049; 052

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

PETITIONER

APPELLATE CASE NO 2014-001497

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the Court of Appeals' Opinion issued on July 18, 2018¹ affirming petitioner's convictions and sentences, a petition for rehearing was filed on August 1, 2018, after which time the South Carolina Court of Appeals issued a substituted and refiled opinion on September 26, 2018²; and that a second petition for rehearing was filed on October 12, 2018, which was denied by the South Carolina Court of Appeals on December 13, 2018.

¹ State v. Joe Ross Worley, Unpublished Opinion No. 2018-UP-327 (S.C.Ct. App. filed July 18, 2018)

² State v. Joe Ross Worley, Unpublished Opinion No. 2018-UP-327 (S.C.Ct. App. Withdrawn, Substituted and Refiled September 26, 2018)

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in upholding the trial judge's ruling that petitioner was not entitled to immunity from prosecution under the Protection of Persons and Property Act?
- II. Did the Court of Appeals err in upholding the trial judge's ruling that no error occurred with respect to the solicitor's improper comments made at closing regarding petitioner's failure to testify?

STATEMENT OF THE CASE

On February 22, 2010, the McCormick County grand jury indicted petitioner 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.

Petitioner 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 petitioner. On July 5, 2011, Judge Keelsley denied petitioner immunity in a written order.³ Petitioner moved for reconsideration of the order. On December 8, 2011, Judge Keesley issued an order affirming the denial of immunity.

On December 16-20, 2013, petitioner 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 petitioner.

Petitioner was convicted on both charges. *Id.* at p. 1638, l. 21 – 1639, l. 8. On June 30, 2014, Petitioner was sentenced by Judge Macintosh to a combined sentence of twenty years imprisonment. R. 1795, l. 24 – 1797, l. 6. After a reconstruction hearing was held on pretrial immunity hearing, Judge Keesley submitted his report regarding the same on December 30, 2016. Petitioner appealed his trial court convictions and sentences.

³ The order was first issued on June 24, 2011, but later amended to correct scrivener’s errors.

After appellate briefs were filed by both sides on direct appeal, the case was set for oral argument on June 20, 2018. On July 18, 2018, the South Carolina Supreme Court issued an opinion affirming petitioner's convictions and sentences (App. 1-2), and on September 26, 2018, the Court issued a refiled substituted opinion in the case. See State v. Worley, Unpublished Opinion No. 2018-UP-237 (S.C. Ct. App. filed September 26, 2018). App.32-34. This petition for writ of certiorari requesting a review of the Court's decision in this case follows.

QUESTION I

The Court of Appeals erred in upholding the trial judge's ruling that petitioner was not entitled to immunity from prosecution under the Protection of Persons and Property Act.

1.) FACTS & RELEVANT PROCEDURAL HISTORY

In the case at bar, petitioner was convicted of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. Petitioner stepped onto his balcony at around 4:00 a.m. on November 15, 2009, to find a man standing underneath it pointing a gun in his direction. Petitioner responded by firing his weapon at this man who was acting on behalf of the McCormick County Sheriff's Department. The man, Bobby Ruston, whom the state claimed was a legitimate police officer, was struck by gunfire from petitioner's rifle. Previously, petitioner's neighbor called the police on that morning to report that petitioner was in effect randomly firing gunshots from his balcony. Petitioner explained that he was firing at a fox that had been fighting with his beloved cat. When police arrived at petitioner's residence, he woke from his sleep and stepped onto his balcony to see who was ringing his doorbell and fired a shot after seeing a man in plain clothing (Rushton) pointing a weapon at him.

On appeal, petitioner argued the following:

The trial court erred in ruling that petitioner was not entitled to immunity from prosecution under the Protection of Persons and Property Act

The trial court erred in ruling that petitioner was not entitled to immunity from prosecution for the charges under the Protection of Persons and Property Act with respect to its findings on proof of entry or attempted entry into a dwelling and on being without fault in bringing on the difficulty.

The trial court erred in finding no error regarding the solicitor's comments on petitioner's failure to testify.

On July 18, 2018, this Court affirmed petitioner's convictions and sentences in State v. Worley, Unpublished Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018), and held that it adopted the rulings in the trial judge's Order filed on December 8, 2011, (signed on December 6, 2011), which included findings that petitioner did not establish by a preponderance of the evidence that he was immune from prosecution under the Act, and further upheld the denial of a mistrial after the solicitor made impermissible comments on petitioner's failure to testify at trial, which in turn shifted the burden of proof in the case.

2.) LAW ENFORCEMENT EXCEPTION UNDER THE ACT

This Court adopted the trial court's ruling that the law enforcement exception under the Act precluded the grant of immunity to petitioner because Rushton was a law enforcement officer at time of the shooting; and therefore, petitioner could not claim the presumption under the Act that he acted in fear of death or great bodily injury. Relevant portions of S.C. Code Ann. § 16-11-450 (A) and 16-11-440(B)(4), respectively, follow:

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.

[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.

Petitioner's position addressed the **inapplicability** of the law enforcement exception in the case based on the following reasons:

A.) RUSHTON NEVER RECEIVED JUDICIAL APPROVAL

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 immunity to petitioner because, among other reasons, the court believed that Rushton was a “law enforcement officer” within the meaning of the Act. R. 1762 – 1767.

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)). 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.*

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.” Thus, one class of deputies act as general agents of the sheriff, subject to the approval of the resident circuit court judge or judges, and a second class of deputies would not be subject to circuit court approval, but whose appointment is limited in scope and circumstance. Section 23-13-10 was violated and this Court erred in adopting the trial court’s reasoning that no violation of section 23-13-10 occurred and in denying relief to petitioner under the Act per this reasoning.

B.) RUSHTON NIETHER TOOK THE OATH NOR POSTED BOND/SURETY

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 petitioner's 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 petitioner 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. Petitioner’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, petitioner moved to bar prosecution under the Act. Petitioner 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 petitioner’s favor and against state. Hence, the failure to follow the statutory requirements surrounding the appointment and approval of sheriff’s deputies should have precluded the law enforcement officer exception under the Act to deny relief. R. 1767. This Court erred in adopting the trial court’s finding of no error under the oath and bond/surety requirements.

C.) RUSHTON’S RE-CERTIFICATION WAS NOT COMPLETE

Rushton was re-hired by the McCormick County Sheriff’s Department on November 1, 2009. Prior to re-joining 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 and thus the McCormick County Sheriff's Department failed to follow the statutory requirements that would have allowed Rushton to be renewed an officer. This Court erred in adopting the trial court's ruling that no error in concluding that Rushton was a law enforcement officer within the meaning of the Act.

D.) UNLAWFUL ENTRY WAS ESTABLISHED UNDER THE STATUTE

Petitioner proved that unlawful entry was attempted in his case; and thus, he was entitled to immunity as a result. S.C. Code Ann. § 16-11-440 (A) reads 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 danger of death or great bodily injury to himself or another person when issuing 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 had 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.

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).

This Court erred in adopting the trial court's ruling that petitioner failed to prove entry or

attempt at entry into petitioner's dwelling. Section 16-11-430 defines "dwelling." The Worley residence was, without any dispute, petitioner'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 petitioner's premises at 4:30 a.m. Accordingly, this Court erred in adopting the trial judge's conclusion that there was no unlawful or attempted unlawful entry of Petitioner's residence.

E) PETITIONER DID NOT BRING ON THE DIFFICULTY

In order to be granted immunity under the Act, a defendant must prove all 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). 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, petitioner was without fault in bringing on the difficulty and this Court erred in adopting the ruling of the trial court to the contrary. 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).

Petitioner 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 petitioner. Crucially, they did not activate their blue lights. Rushton was not in uniform and had no apparel identifying him as law enforcement.

Petitioner 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). Petitioner 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 petitioner 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 petitioner, a man with no criminal record, had a reason to suspect his neighbors had decided to notify law enforcement.

Petitioner 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). This Court erred in adopting the trial judge's ruling petitioner brought the difficulty as this was unsupported by the evidence and constituted an abuse of discretion.

QUESTION II

The Court of Appeals erred in upholding the trial judge's ruling that no error occurred with respect to the solicitor's improper comments made at closing regarding petitioner's failure to testify.

With respect to petitioner's argument that the solicitor's comments were burden shifting in the case, this Court upheld held the trial judge's denial of a mistrial despite the solicitor's comments on petitioner's failure to testify which in turn shifted the burden of proof at trial.

As at the immunity hearing, Dr. Kirkham stated that, based on his expertise and experiments conducted at the house, petitioner likely would have been unable to see the police cars on the night of the shooting and that it was reasonable for Petitioner 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. Note that he house was well-insulated. R. 1229, l. 17 – 1248, l. 10. Petitioner's brother outlined for the jury in great detail how insulated and sound proof the house was in this case.

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 petitioner'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. Petitioner 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. The Court of Appeals affirmed and addressed the issue on appeal as follows:

We also affirm the trial court's denial of Worley's motion for mistrial. The court found at trial that the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“[T]he comment was simply a statement of the evidence which was before the jury, rather than a comment on [the defendant's] failure to testify.”). Therefore, the court found the comment was harmless beyond a reasonable doubt. “The decision to grant or deny a mistrial is within the sound discretion of the trial court” and “will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). “The granting of a motion for mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” *Id.* When a violation is alleged, this court must apply a harmless error analysis as set forth in *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996). “To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming.” *Id.* At 531, 466

S.E.2d at 366. “[W]here a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.” *Id.*

To the contrary, the state’s closing argument constituted a direct comment on petitioner’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: petitioner’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 petitioner 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; petitioner 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.

With respect to the showing under Pickens as cited to by this Court, there is no doubt that the showing was satisfied and petitioner 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 petitioner'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** petitioner's failure to testify directly and inexorably to petitioner's self-defense, mistake, and accident theories. Also, the state's case against petitioner was **not overwhelming** and petitioner's theory of the case was **clearly 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 petitioner'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 petitioner, despite having heard from his brother and Dr. Kirkham were totally improper. The solicitor deliberately reference to petitioner's failure to testify was a calculated trial tactic that transformed Petitioner'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 petitioner'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 petitioner'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 petitioner's defense was not credible defense because petitioner 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 petitioner 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.

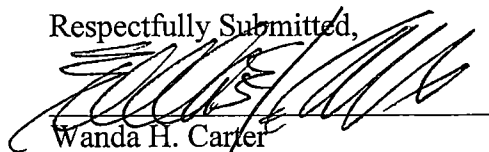
The state attempted to justify its comments as a legitimate attack on the credibility of a defense. R. 1578, l. 11 – 1597, l. 25. This argument is without merit. Criminal defendants have a right to both present a case and rely on their right not to testify. Boundaries governing proper closing argument 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

Based on the foregoing argument, counsel for petitioner requests that this Court grant this petition and allow full briefing on the above raised points.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 07 2019

SC Court of Appeals

Certiorari to McCormick County
Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2018-UP-327 (S.C. Ct. App. filed September 26, 2018)
2010-GS-35-049; 052

THE STATE,

RESPONDENT,

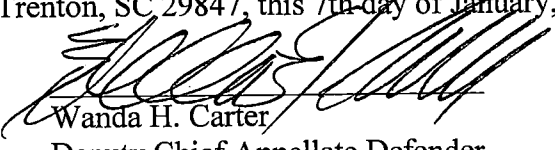
V.

JOE ROSS WORLEY,

PETITIONER

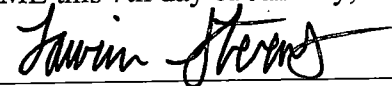
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joe Ross Worley, #360529, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 7th day of January, 2019.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of January, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 14 2019

S.C. SUPREME COURT

APPEAL FROM MCCORMICK COUNTY
Court of General Sessions

William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018,
withdrawn, substituted, and refiled September 26, 2018).
Appellate Case No. 2019-000026

The State, ... Respondent

v.

Joe Ross Worley, ... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the lower court's denial of Petitioner's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs where: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a de facto officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation. Furthermore, whether the Court of Appeals had no choice but to affirm the lower court's denial of Petitioner's request for immunity because Petitioner failed to challenge all of the court's reasons for finding he failed to carry his burden of proof. Finally, whether the Court of Appeals properly affirmed the denial of immunity where the trial court found Petitioner failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Petitioner challenged in this Appeal.
2. Whether the Court of Appeals properly affirmed the trial court's denial of Appellant's motion for a mistrial on grounds that the solicitor's closing argument included improper comments on Appellant's right to testify where those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant's failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument..

STATEMENT OF THE CASE

Petitioner was indicted at the February 22, 2010 term of the grand jury for McCormick County for Assault and Battery with Intent to Kill (2010-GS-35-052) and Possession of a Weapon during a Violent Crime (2010-GS-35-049). He was represented by C. Lance Sheek, Esquire, Billy J. Garrett, Jr., Esquire, and Carson M. Henderson, Esquire, all of the Greenwood County Bar. Respondent (the State) was represented by Solicitor Donald V. Myers and Assistant Solicitors Ervin Maye and Frank Young, all of the Eleventh Circuit Solicitor's Office.

The case was set for trial for May 31, 2011, at the McCormick County Courthouse before the Honorable William P. Keesley. (R.p.1). Prior to the start of trial, Petitioner made a motion to dismiss the charges pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2010) (the Act) and the procedures set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). On May 31-June 1, 2011, the circuit court conducted a pretrial immunity hearing. (R.p.1-p.231). At the close of that hearing, after taking testimony and hearing arguments from both sides, Judge Keesley took Petitioner's motion under advisement and told the parties he would notify them of a decision in writing. (R.p.228). In an order dated July 5, 2011, Judge Keesley denied Petitioner's request for immunity and recused himself from further participation in the case. Petitioner promptly moved for reconsideration of Judge Keesley's ruling. In a twenty-four page written order dated December 6, 2011, and filed December 8, 2011, Judge Keesley affirmed his earlier ruling and denied Petitioner's motion for reconsideration. In that order he found that Petitioner had failed to establish he was entitled to immunity under the Act and ordered "that the motion to bar prosecution of these cases is denied." In reaching this conclusion, the court: (1) summarized Petitioner's testimony from the immunity hearing (R.p.1755-p.1757); repeatedly found that testimony was not credible

(R.p.1756 & p.1760); found “[Petitioner had] absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home.” (R.p.1759); noted: “The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so.” (R.1760); and found: “The overwhelming evidence is that Mr. Worley reasonably should have known that the person he was shooting was a law enforcement officer.” (R.p.1762). (R.p.1754-1777).

On January 18, 2012, Petitioner served and filed a Notice of Appeal from Judge Keesley’s Order denying immunity, and on January 8, 2013, he filed an initial brief and designation of matter in support of his appeal. That initial brief focused in part on the fact that portions of the immunity hearing could not be transcribed, including the entirety of Petitioner’s own testimony.¹ Petitioner framed his first issue as follows: “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.” He argued that partial reconstruction was disfavored and that rather than remanding for an entirely new immunity hearing, he should instead receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. (R.p.757-794).

On February 7, 2013, the State submitted a motion to remand for reconstruction of the record and a motion to strike improperly designated matter from Petitioner’s amended designation of matter. On February 15, 2013, Petitioner filed a return and on February 20, 2013,

¹ Petitioner testified on his own behalf at the immunity hearing; however, a transcript of his testimony was and still is unavailable due to a theft from the court reporter’s car. As explained by Judge Keesley in his report to this Court, the court reporter 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. Judge Keesley found absolutely no wrongdoing on the part of anyone other than the thief who stole the items from the court reporter’s vehicle. (R.p.1852-p.1853).

the State filed a reply. On March 6, 2013, Petitioner then filed a motion to remand for a de novo immunity hearing. On March 18, 2013, the State filed a return to Petitioner's motion and on March 25, 2013, Petitioner filed a reply. In an Order filed March 28, 2013, the Court of Appeals granted the State's motion to remand for reconstruction of the missing portions of the hearing transcript and denied Petitioner's motion for a de novo hearing. The appeal was held in abeyance pending reconstruction.

On June 14, 2013, a reconstruction hearing was convened at the McCormick County Courthouse before Judge Keesley. Petitioner was present and was represented by Desa A. Ballard, Esquire, Carson M. Henderson, Esquire, and Billy J. Garrett, Jr., Esquire. The State was again represented by Solicitor Myers and Assistant Solicitors Maye and Young. Assistant Attorney General J.C. Nicholson, III, Esquire, appeared on behalf of court reporter Rema Thomas and the Director of the Office of Court Administration, Desiree Rutledge Allen, both of whom were appearing as witnesses. The reconstruction court took testimony from Thomas, Allen, and the Honorable Gwendolyn Dorn Chiles, Clerk of Court for McCormick County. It was also provided with: (1) a copy of a September 7, 2013 affidavit from Petitioner's immunity hearing attorneys, Garrett and Henderson, which gave a summary of the testimony given by Petitioner at the May 31, 2011 immunity hearing; (2) Court's Exhibit #1 - notes from Assistant Solicitor Ervin Maye; (3) notes from Judge Keesley; (4) notes from the Deputy Clerk of Court regarding the order and time of witnesses; and (5) a copy of Judge Keesley's December 6, 2011 Amended Order, which included a factual summary of the immunity hearing. (R.p.1655-1777).

On August 21, 2013, the State filed a "Motion to Dismiss Appeal" with the Court of Appeals arguing that this Court's published opinion in *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013), mandated dismissal of Petitioner's appeal as an improper interlocutory appeal from

an order that is not immediately appealable. On the same date, the Court of Appeals issued an Order finding the appeal should be dismissed because: “Petitioner had filed a notice of appeal from the denial of his motion for immunity pursuant to the Protection of Persons and Property Act (S.C. Code §§ 16-11-410 to -450) and the denial of a request for immunity under the Act is not immediately appealable. *State v. Isaac*, Op. No. 27302 (S.C. Sup. Ct. filed Aug. 21, 2013).” The Court of Appeals further noted that the appeal had been remanded for the reconstruction of the missing portions of the immunity hearing transcript but that since reconstruction would no longer be necessary, the previous remand order was rescinded. It ordered: “At trial, the parties should proffer to the court any testimony relevant to the immunity motion that is not presented to the jury.” (R.p.795-796). On August 23, 2013, Petitioner petitioned for rehearing and in an Order from the Court of Appeals filed October 21, 2013, rehearing was denied.

On December 16-19, 2013, the case proceeded to trial before the Honorable R. Lawton McIntosh. (SROA. p.1-14; R.p.797-p.1654). At the beginning of the proceeding, Petitioner was given the opportunity to do more “reconstruction”; however, his attorney advised Judge McIntosh that reconstruction seemed to be done and instead simply introduced the transcript of the June 14, 2013 reconstruction hearing and the exhibits into the record as a Court’s Exhibit at trial. (R.p.797-p.798; R.p.1688-1777).

After hearing the evidence and the trial court’s charge on the law—which included a charge on self-defense and the absence of the duty to retreat because Petitioner was on his own premises, as well as a charge on the defense of habitation—the jury found Petitioner guilty of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. (R.p.1598-p.1640). The trial court delayed sentencing pending a presentencing investigation including a psychological evaluation. (R.p.1640-p.1653).

On June 30, 2014, Judge McIntosh reconvened the case to impose a sentence. The Court offered to allow the parties to present testimony and then heard arguments from both sides before sentencing Petitioner to twenty (20) years' imprisonment for assault and battery with intent to kill and five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime. (R.p.1778-p.1798; SROA.p.15-16). On July 1, 2014, Petitioner timely filed a notice of intent to appeal his conviction and sentence.

On May 4, 2016, Petitioner filed a "Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Pre-Trial Hearing on Petitioner's Motion for Immunity from Prosecution Pursuant to the Protection of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.)." (R.p.1799-1807). On May 6, 2016, the State filed a letter in lieu of a Return consenting to a remand to take the steps necessary, as determined by the lower court, to complete the reconstruction hearing that was held before Judge Keesley on June 14, 2013. On June 17, 2016, the Court of Appeals filed an Order granting Petitioner's motion and remanding the appeal to the McCormick County Court of General Sessions. It ordered: "Counsel for Petitioner 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." (R.p.1808-1809).

Based on a review of the Order and an exchange of letters between the parties, Judge Keesley elected to re-convene the reconstruction hearing at the McCormick County Courthouse on October 25, 2016. Petitioner was present and was represented by Assistant Appellate Defender John H. Strom, Esquire, and the State was represented by Senior Assistant Deputy Attorney General J. Benjamin Aplin, Esquire. The State raised several objections to the court taking any additional testimony or evidence in regard to reconstruction; however, those

objections were overruled and Petitioner was allowed to present testimony from trial counsel Carson Henderson, Esquire. Reserving its objections to the proceeding, the State then elicited brief testimony from Assistant Solicitor Young before Judge Keesley took the matter under advisement and concluded the hearing. (R.p.1810-p.1846).

On December 30, 2016, Judge Keesley issued a fourteen page “Report Regarding Reconstruction of the Record.” That report included a procedural background, the standard for record reconstruction, a discussion of why the record was incomplete, a discussion of the missing sections of the record, a description of the materials obtained for the purpose of reconstruction, and ultimately a reconstruction of the missing sections. Judge Keesley concluded the report was submitted “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.” (R.p.1847-1860). The Court of Appeals then allowed the appeal to proceed. Petitioner submitted a Brief in support of his Appeal. The State filed a brief in response and on July 18, 2018, the Court of Appeals issued an unpublished opinion that affirmed Petitioner’s convictions. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018). (App.p.1-p.2). On August 1, 2018, Petitioner submitted a “Petition for Rehearing and Request for Holding on Final Issue” pursuant to Rule 221(a), SCACR. (App.p.3-p.24). On August 24, 2018, the State filed a “Return to Petition for Rehearing and Request for Holding on Final Issue.” (App.p.25-p.30). On September 26, 2018, the Court of Appeals issued an order finding no basis for granting a rehearing, but also withdrew, substituted, and refiled an unpublished opinion that again affirmed Petitioner’s convictions. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed September 26, 2018). (App.p.31-p.34). On October 12, 2018, Petitioner filed a “2nd Petition for Rehearing”

(App.p.35-p.57), and on October 25, 2018, the State filed a return. (App.p.58-p.72). In an order filed December 13, 2018, the Court of Appeals denied the petition for rehearing. (App.p.73). On January 7, 2019, Petitioner filed a Petition for a Writ of Certiorari in this Court. This Return to Petition for Certiorari, submitted on behalf of the State, now follows.

Due to a combination of the lengthy but necessary procedural history set forth above and the page limit set forth in Rule 242(f), SCACR, the State hereby incorporates by reference the statement of facts recited in the Final Brief of Respondent, which was submitted to the Court of Appeals.

CERTIORARI

The State submits that, pursuant to Rule 242(b), SCACR, there are no special and important reasons for this Court to exercise its discretion to grant certiorari and to review the decision of the Court of Appeals. Petitioner argues the Court of Appeals erred in upholding the trial court's ruling that he was not entitled to immunity under the Protection of Persons and Property Act. He further argues the Court of Appeals erred in upholding the trial court's ruling that no error occurred with respect to the Solicitor's allegedly improper comments during closing arguments regarding Petitioner's failure to testify. However, the Court of Appeals analysis on each issue was a straightforward exercise of reviewing the competent evidence that was admitted at the immunity hearing and the trial, as well as the particular facts and circumstances of Petitioner's case. As explained in detail below, Petitioner's arguments do not provide a basis for granting certiorari. For these reasons, the State respectfully asks this Court to deny the petition for a writ of certiorari.

ARGUMENT

I.

The Court of Appeals properly affirmed the lower court's denial of Petitioner's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs because: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a *de facto* officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation. In any event, the Court of Appeals had no choice but to affirm the lower court's denial of Petitioner's request for immunity because Petitioner failed to challenge all of the court's reasons for finding he failed to carry his burden of proof. Additionally, the trial court properly found Petitioner failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Petitioner challenged in this Appeal.

Standard of Review

The appellate court reviews the trial court's pretrial determination of immunity for an abuse of discretion. *Curry*, 406 S.C. at 370, 752 S.E.2d at 266. In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829; *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct.

App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); *see also Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

The Protection of Persons and Property Act

A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). The Act provides that:

A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from 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 (Supp. 2009) (emphasis added). Thus, in the same provision the Act both creates immunity and carves out an exception so that immunity may be completely barred when the person against whom deadly force was used is a "law enforcement officer" and certain other circumstances are present. This Court has further held that, consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. *Id.* at 372, 752 S.E.2d at 266-67 ("[I]mmunity is predicated

on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.”). One of the three remaining elements of self-defense is the requirement that 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. *Id.*

The Act creates a presumption that a person has proven this element of self-defense if certain conditions are met. It provides in part:

(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, or occupied vehicle . . . 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.

(B) *The presumption provided in subsection (A) does not apply if the person:*

....

(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.

S.C. Code Ann. § 16-11-440 (Supp. 2009) (emphasis added). Thus, in addition to the overall bar in section 16-11-450, the Act also eliminates the presumption of reasonable fear of imminent peril when the person against whom deadly force was used is a “law enforcement officer.”² In the immunity hearing Petitioner’s argument hinged on his contention that Deputy Rushton was not a “law enforcement officer” for purposes of the Act at the time of the incident, and therefore

² It is unclear what purpose is served by the narrow section 16-11-440(B) exception to the statutory presumption when an officer is entering or attempting to enter a residence, where the broader language in section 16-11-450 completely bars immunity from prosecution for any action taken in the performance of the officer’s official duties.

Petitioner should not have been subject to the exception to immunity in section 16-11-450 or the exception to the statutory presumption in section 16-11-440. The State disagreed and contended that regardless of whether Deputy Rushton complied with every technical statutory requirement to become “duly qualified,” the lower court properly found he was a “law enforcement officer” for purposes of the Act.

The Court of Appeals agreed with the State and rejected Petitioner’s argument. It affirmed and adopted the lower court’s December 8, 2011 order, which itself employed a thorough and proper analysis of each of the arguments raised by Petitioner at the immunity hearing before concluding Petitioner did not carry his burden of proving he was entitled to immunity under the Act. The lower court followed the appropriate procedure—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence—and ultimately found Petitioner did not carry his burden of proof. Petitioner’s arguments simply could not prevail under this Court’s standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Petitioner’s claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court’s findings that Petitioner failed to carry his burden of proving there was an entry or attempted entry, and that Petitioner failed to carry his burden of proving he was not without fault in bringing on the difficulty, had evidentiary support and were not controlled by errors of law.

Similarly, the lower court’s December 8, 2011 order analyzed and rejected Petitioner’s myriad grounds for claiming Deputy Rushton was not a “law enforcement officer” within the meaning of the Act. The lower court’s findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and as noted above, that denial was solidly grounded in credibility findings and Petitioner’s abject failure to carry his burden of proving the

required elements of self-defense by a preponderance of the evidence. Indeed, the lower court held: “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.” (R.p.1767). In other words, the lower court concluded Petitioner failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found “that the preponderance of the evidence is that the ‘difficulty’ was brought on by [Petitioner’s] conduct.” (R.p.1774). These individual findings supported the lower court’s ultimate conclusion that “Petitioner has not met his burden of proof” in establishing the elements of self-defense needed for a grant of pretrial immunity. (R.p.1773-p.1774). For all of these reasons, the lower court’s denial of immunity and Petitioner’s convictions were properly affirmed by the Court of Appeals. Certiorari should be denied.

II.

The Court of Appeals properly affirmed the trial court's denial of Appellant's motion for a mistrial on grounds that the solicitor's closing argument included improper comments on Appellant's right to testify because those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant's failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument.

In regard to the lower court's refusal to grant a mistrial based on the solicitor's comments in closing arguments, the Court of Appeals affirmed, noting the trial court: (1) found "the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify," and (2) "[t]herefore the court found the comment was harmless beyond a reasonable doubt." These findings were supported by evidence in the record and therefore were properly affirmed by the Court of Appeals.

In his petition for certiorari, Petitioner contends the Court of Appeal should have reversed the convictions because the State's closing argument "constituted a direct comment" on Petitioner's right to not testify. He argues that, with respect to the showing that must be made under the harmless error analysis set forth by this Court in *Pickens*,³ "there is no doubt that the showing was satisfied and Petitioner was denied a fair trial by the state's impermissible comments and, thus, prejudiced." Petitioner claims the State "directly referenced Petitioner's failure to testify multiple times" and that the solicitor "tied Petitioner's failure to testify directly and inexorably to Petitioner's self-defense, mistake, and accident theories. (Petition for Writ of Certiorari, p.21). The State submits Petitioner's argument is entirely without merit. The State's

³ *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996).

closing argument was in direct response to comments made during Petitioner's opening statement, Petitioner's attempts to substantiate those comments through the examination of other witnesses, the resulting lack of evidence to support the comments in the opening statement, and Petitioner's closing argument. The State's argument did not shift the burden onto Petitioner, but instead merely made note of the lack of evidence as a whole in the record, despite Petitioner's opening statement suggesting such evidence would be forthcoming at trial. The Court of Appeals appropriately affirmed the trial court's refusal to grant a mistrial.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); *State v. Meggett*, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *Inman*, 395 S.C. at 565, 720 S.E.2d at 45. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *Meggett*, 398 S.C. at 524, 728 S.E.2d at 496.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

Relevant Facts

During pretrial arguments about a defense request for a jury charge on modified ammunition, counsel for Petitioner stated:

... [There is] no evidence whatsoever that [Petitioner] was in any way mean-spirited towards anybody except trying to get rid of a fox earlier that evening.

He fired two shots at a fox. And he really wasn't trying to kill the fox; he was trying to motivate him out of there. The fox had bothered his cat. The cat called Sweet Pea. And they had been having trouble with this fox. And that evening, earlier before this thing happened, he fired that thing from the same gun at a fox. And a fox sure isn't the police and certainly isn't a person.

And so - - on the same evening, he also fired it at two fox. But, again, it's an environmental bullet.

(R.p.824-p.825). Later, during preliminary remarks, the trial judge told the jury the parties would be making opening statements and instructed that whatever was said in those statements was not evidence. (R.p.839). In his opening statement, Petitioner's counsel said in part:

Y'all may not understand this, but as you hear this case, it's horribly tragic, because it starts off with a cat by the name of Sweet Pea, and this cat was found, and it was a scraggly cat and it had a collar on it. And Mr. Worley's father took on the cat and protected this cat, and it became a cat here in McCormick.

And they'd been over on that property for over 40 years. The Worley family comes down here every weekend and has for 40 years. They've been broken into before.

This family is there with his mother, who is 84 years old at the time. Mr. Joe Worley and his mother, 84 years old, in their little garage apartment, and their cat, Sweet Pea. And when you go out there, if His Honor will let you go out there, there's and elaborate cathouse and catwalk that they built. They love their little cat.

Well, in September, when the Sheffields complained the first time, *there's a fox* - - actually, it was the Sheffields that told the Worleys that there was a fox out there - - *and that fox had injured this cat*, had injured it to the point they had to take it to the vet.

Now, Mr. Worley that evening, the 15th, November the 15th of 2009, goes out on his balcony, and he hears a noise. *He flips on his light, and he sees movement out there, and he said, The*

dadgum fox again. So he's out there hollering at it and trying to get rid of it. He goes into his house and gets his father's - - his deceased father by now - - gets his gun, and he loads it with ammo that his father had. And he goes outside and he shoots towards the lake to motivate the fox that was bothering their cat to get out there. He shot twice. He went on back to bed. And he might have hollered, but he shot twice and then went back to bed.

(R.p.833-p.834) (emphasis added).

Subsequently, during Petitioner's cross-examination of Deputy Moore, counsel asked:

"Well, you heard Joe testify that he shot it up into the air; right?" (R.p.978, lines 11-12). The State objected to the question and the jury was sent out. The parties then engaged in a discussion with the trial judge in regard to whether Petitioner would be allowed to cross-examine other witnesses in regard to Petitioner's testimony from the pretrial immunity hearing. The trial judge said it would be inherently unfair to allow Petitioner to bring up the prior testimony and then to claim his privilege under the Fifth Amendment to not take the stand during trial. The trial court ruled it would not allow the defense to use Petitioner's pretrial testimony during the examination of other witnesses, but that if Petitioner chose to testify, the prior testimony might be admissible in cross-examination. Petitioner said he understood the ruling but contended he may still be able to use the prior testimony in some fashion as it relates to his expert witness. The judge said he would address the issue of the expert witnesses using the prior testimony if it became an issue later during the trial. (R.p.978-p.983).

Later during trial, Petitioner's neighbor, Alan Sheffield, took the stand. On cross-examination, he testified he knew the Worleys' cat Sweet Pea had been injured but he had no knowledge of how or why. Sheffield said he did not know anything about the cat having problems with a varmint and that while he had seen foxes in the area before, he does not remember ever having a conversation with Ms. Worley about a fox. (R.p.1114-p.1115). After

the State rested, during arguments on Petitioner's motion for a directed verdict, the trial judge said: "Well, there is - - the testimony was that Mr. Worley was shooting a gun at a fox. In other words, he was hunting a fox at night. Regardless of whether it's to protect some Sweet Pea cat or whatever, he was hunting at night with a .30-06." (R.p.1204, lines 7-12).

Petitioner then was sworn and advised of his right to testify and his right not to testify. He proceeded to call witnesses in his defense. First, he called his brother, Robert Worley, to the stand. Robert testified he was familiar with Sweet Pea and remembered that Sweet Pea had been injured two or three times over the years; however, he offered no testimony about how those injuries occurred and never mentioned a fox. (R.p.1253-p.1257). Petitioner later called Dr. Kirkham to the stand. He was admitted as an expert criminologist without objection. (R.p.1305-p.1320). While discussing Deputy Rushton's initial thoughts about the 9-1-1 call, Kirkham commented that because it was a rural area, the gunshots could have been someone poaching deer, "or somebody shooting at foxes or whatever." (R.p.1325, lines 16-24). Later, during cross-examination, after having opined that it was reasonable for someone in Petitioner's situation to have a fear of imminent peril or death, Kirkham was asked whether it also would then be reasonable for Petitioner to have been home and afraid earlier that night when he was instead outside shooting his rifle. Kirkham responded: "No. He was doing what he was doing. He says he was trying to motivate a fox to leave his cat, Sweet Pea, alone." Kirkham clarified he was offering an opinion about a hypothetical and that he was only assuming Petitioner was shooting at a fox. (R.p.1383, line 16-p.1384, line 1).

Petitioner also called Officer Bo Willis of the McCormick Police Department to the stand. He helped investigate the shooting, drew a diagram of the property, and took photographs of the scene. (R.p.1433-p.1446). On cross-examination, while testifying about the rifle and

ammunition used by Petitioner, Willis said the bullet used by Petitioner was “not a round you would shoot foxes with.” (R.p.1457, lines 3-7). Before the defense rested, Petitioner advised the court he wished to exercise his rights under the Fifth Amendment and was not going to testify. (R.p.1472).

At the conclusion of the testimony and pursuant to a prior ruling, the jury was driven to see the Worley residence. The attorneys and the trial judge also went to the house. Upon returning, the trial judge held a charge conference to address the parties’ requests to charge. (R.p.1477-p.1484). In regard to a particular request from Petitioner in regard to night hunting, the trial judge commented: “I’m not going to charge number 7, because the law in this case under the statute that I found is the evidence presented was it was shooting at a fox. Even if it’s night hunting, even if he was shooting at a fox, he can’t use a .30-06; he’s got to use a .22 or less.” Ultimately the court changed its ruling and agreed to give the charge at the end of its charge on habitation, because the night hunting appeared to be permissible under a different subsection of section 50-11-710. (R.p.1506-p.1508).

After concluding the charge conference, the parties gave closing arguments. The solicitor closed on the law, followed by a closing argument from Petitioner. (R.p.1513-p.1516). During Petitioner’s close, counsel said: “Unfortunately, for the Worley family, they had problems with a fox bothering their cat.” (R.p.1518, lines 4-6). He later said: “Worleys [sic] having a problem with a fox trying to kill or injure their cat, Sweet Pea. Joe shoots at the fox and yells.” (R.p.1520, lines 2-4). The solicitor objected, complaining that Petitioner was not allowed to quote his prior statement. The jury was sent out and the solicitor explained he was objecting to Petitioner making a statement from facts that were not in the record. He pointed out that Petitioner did not testify and there was no trial testimony a fox was out there on the night of the

incident or that Petitioner shot at a fox. The trial court agreed, sustained the objection, and directed counsel to make his argument based only on facts in evidence. (R.p.1520-p.1521).

Petitioner completed his closing argument without further mention of a fox. (R.p.1521-p.1554).

The solicitor then presented a closing argument on behalf of the State. Shortly after starting his argument, the solicitor said:

Now, let's get all these, you know, like the traveling medicine man from Florida. All these hypotheticals and all these what ifs, and, of course, he's going to give everybody the benefit of the doubt. He's going to give these law enforcement officers the benefit of the doubt, the standards and procedures man.

And what did he 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. 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, you'd think after two months, he'd shot that fox. He's such a good shot, isn't he? Seems like the fox on the run would be dead if the fox was out there. That's for you to decide, but I ain't heard it. I tried to listen. I tried to listen.

....

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.

(R.p.1556-p.1559).

Discussion / Analysis

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. *See* U.S. Const. amend. V (prohibiting a criminal defendant from being “compelled in any criminal case to be a witness against himself.”); S.C. Const. art. I, § 12 (“[N]or shall any person be compelled in any criminal case to be a witness against himself.”). Accordingly, this right forbids both comments by the prosecution on a defendant’s silence and instructions by the trial judge indicating a defendant’s silence constitutes evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). “As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.” *State v. Weaver*, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor’s remarks constitute a comment on a defendant’s failure to testify, courts generally ask: “Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?” *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor’s remarks must be evaluated in the context in which they were made. *See Weaver*, 361 S.C. at 89, 602

S.E.2d at 794 (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Initially, the solicitor’s statements that there was no testimony or evidence about a fox or Petitioner going back to bed were simply comments on the evidence presented during trial in response to Petitioner’s counsel’s argument. It was not a comment on Petitioner’s constitutional right to remain silent and not present a defense. Indeed, contrary to the repeated assertion that the solicitor made a “direct comment” on his right to not testify, no such comment appears. (See Brief of Petitioner, p.39-p.41; Petition for Rehearing, p.19; Petition for Writ of Certiorari, p.21). Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. *See State v. Pitts*, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) (“The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such.”). Looking to the context in which the remarks were made, the solicitor did not state Petitioner failed to present any evidence, did not claim Petitioner did not present a defense, did not shift the burden of proof onto Petitioner, and did not suggest to the jury an adverse inference should be drawn against Petitioner based on his failure to present evidence or failure to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (“In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson’s failure to testify.”).

Viewed in the proper context, the solicitor’s remarks were designed to comment on Petitioner’s counsel’s false promises from his opening statement, the evidence presented at trial, and the absence of evidence regarding a fox, and did not improperly shift the burden of proof or

suggest Petitioner's guilt could be inferred from his failure to testify or present a defense. *See State v. Shuler*, 353 S.C. 176, 187, 577 S.E.2d 438, 443-44 (2003) ("In any event, the solicitor's statement did not refer to Petitioner's decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]"). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor's closing argument did not infringe upon Petitioner's constitutional rights or render his trial fundamentally unfair.

In addition, Petitioner's opening statement and closing argument injected the extraneous considerations of whether Petitioner was shooting at a fox and whether he had actually gone back to bed between the time of the shooting and the arrival of the police. As a result, the solicitor was fully permitted to comment on the lack of evidence regarding these issues. *See State v. Ellenberg*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant."); *see also Patterson*, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor's closing argument comments were an invited response and did not render the trial fundamentally unfair); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor's statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant's guilt could be inferred from his failure to testify or present a defense).

Finally, even if the solicitor's remarks during his closing argument were somehow improper, Petitioner did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is

improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”). Petitioner's counsel first claimed there would be evidence about Petitioner shooting at a fox and going back to bed in his opening statement. He then repeatedly implied the existence of such evidence during examination of other witnesses. The solicitor merely responded to the argument. The comments, especially in light of the substantially consistent testimony from multiple witnesses, were entirely harmless and did not render the trial fundamentally unfair. Finally, the trial court thoroughly charged the jury on the burden of proof and Petitioner's presumption of innocence. It also specifically charged that Petitioner's failure to testify could not be considered. (R.p.1612-p.1613). Accordingly, the trial court did not abuse its discretion in denying Petitioner's motion for a mistrial and the Court of Appeals properly affirmed. The comments did not unfairly shift the burden and Petitioner was not prejudiced by the comments so as to receive an unfair trial.

The Court of Appeals appropriately affirmed and adopted the lower court's conclusions as to Petitioner's failure to carry his burden of proving his claim of immunity by the preponderance of the evidence, and it appropriately affirmed the trial court's denial of Petitioner's motion for a mistrial in regard to the solicitor's closing argument. There is no basis for granting certiorari.

CONCLUSION

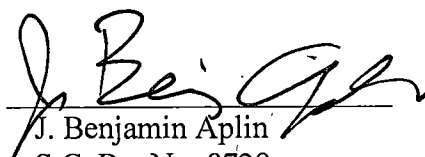
For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the substituted and refiled unpublished opinion of the Court of Appeals affirming Petitioner's convictions and sentence. If the Court grants Petitioner's petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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Attorney General

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Senior Assistant Deputy Attorney General

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BY: 
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ATTORNEYS FOR RESPONDENT/PETITIONER

Columbia, South Carolina
January 15, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 14 2019
S.C. SUPREME COURT

APPEAL FROM MCCORMICK COUNTY
Court of General Sessions

William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018,
withdrawn, substituted, and refiled September 26, 2018).
Appellate Case No. 2019-000026

The State, ... Respondent

v.

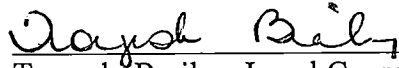
Joe Ross Worley, ... Petitioner.

PROOF OF SERVICE

I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return to Petition for Writ of Certiorari*, dated January 15, 2019, on Petitioner by depositing two copies of the Petition in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Deputy Chief Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 15th day of January, 2019.


Troyeshi Brailey, Legal Coordinator

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Joe Ross Worley, Petitioner.

Appellate Case No. 2019-000026

Trial Court Case No. 2010-GS-35-049

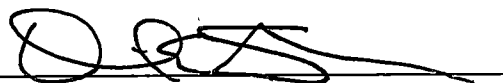
2010-GS-35-052

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

June 28, 2019

cc:

Wanda H. Carter, Esquire

Donald J. Zelenka, Esquire

The Honorable Gwendolyn D. Chiles

The Honorable Jenny Abbott Kitchings, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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December 06, 2019

The Honorable Gwendolyn D. Chiles
133 S Mine St Suite 102
McCormick SC 29835-8357

REMITTITUR

Re: The State v. Joe Ross Worley
Lower Court Case No. 2010GS3500049, 2010GS3500052
Appellate Case No. 2014-001497

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: Alan McCrory Wilson, Esquire
Samuel R. Hubbard, III, Esquire
Wanda H. Carter, Esquire
Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA)

County of McCormick)

IN THE COURT OF COMMON PLEAS

FILED

GWR: [unclear] FILES

2020 CP 35 00004

Full name and prison number (if any) of Applicant

JAN 14 P 1:52

Joe Ross Worley
360529CLERK OF COURT
McCORMICK COUNTY, SC

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Trenton Correctional
2. Name and location of Court which imposed sentence McCormick County
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) assault and battery with intent to Kill
 - (b) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) June 30 2014
- (b) _____
- (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
- ~~(b)~~ after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

- i. Court of Appeals
- ii. _____
- iii. _____

(b) the result in each such Court to which you appealed:

- i. Court to deny the petition for writ of Certiorari
- ii. _____
- iii. _____

(c) the date of each such result:

- i. _____
- ii. _____
- iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. _____
- ii. _____
- iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Broke no laws
- (b) Tryed to Kill me
- (c) Self Defence
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Broke no laws
- (b) Tryed to Kill me
- (c) Self Defence
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Not yet ASAP
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Court of APPEALS Case No 2014-001-001497
- ii. Supreme Court an unpublished letter opinion
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. 1000 Asseblly St. Room 519 Columbia S.C. 29201
- ii. _____
- iii. _____
- iv. _____

My Lawyer told me: A Federal Law enforce
 officer Question Nicholas Moore. He didn't say
 anything in there about Who are y'all or What y'all
 Want He didn't say Put your gun Down Put your gun
 Down. Happend real fast take a step that how fast.
 Tryed to Kill me. The Profession law enforcement
 people lost the dark Clothes.
Then my Lawyer told me.

Dr Kirkham professor emeritus Florida State
 University. Dr Kirkham holds a bachelor and Master's
 degree field Criminology California State University
 at San Jose and a Doctorate in Criminology from
 University of California Berkeley, Former Cop
 He ran Tests and more test,
 He analysis and analysis.
 He got his eyes checked
 He got his ears checked.

Dr Kirkham said He would have shot him

Joe Wanders who stole Joe Ross Vail
 Testimony

FILED
 WENDON CHILES
 2020 JAN 14 P 352
 CLERK OF COURT
 DECOIRICK COUNTY, NC

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____
 (b) your trial, if any? yes _____
 (c) your sentencing? _____
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

i. Lance Sheek
Billy J. Garrett Jr. } Greenwood County Bar
 ii. Carson M. Henderson
Desa Ballard 226 State Street West Columbia, SC 29169
 iii. Wanda H. Carter Division of Appellate Defense
John H. Strom 1330 Lady Street, Suite 401

- (b) the proceedings at which each such attorney represented you: Columbia, S.C. 29211-1589

i. _____

 ii. _____

 iii. _____

19. State clearly the relief you seek in filing this application:

Conviction should be reversed
Go to Federal Court

20. Are you now under sentence from any other court that you have not challenged?

STATE OF SOUTH CAROLINA)

County of _____)

VERIFICATION

I, Joe Ross Worley 360529, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Joe R. Worley 360529

SWORN to and subscribed before me this 9th
 day of January, 2020

[Signature] (L.S.)
 Notary Public

My Commission Expires:

10-7-2024

FILED
 GWENDDOLYN CHILES
 2020 JAN 14 P 1:52
 CLERK OF COURT
 MCCORMICK COUNTY, SC

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Joe R. Worley 360529, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Joe R. Worley
Applicant

Joe R. Worley 360529

SWORN or affirmed to and subscribed before me this
9th day of January, 2020

[Signature]
Notary Public

My Commission Expires: 10-7-2024

FILED
GWENDOLYN CHILES
2020 JAN 14 P 1:52
CLERK OF COURT
MCCORMICK COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MCCORMICK	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
Joe Ross Worley, #360529,	)	Case No.: 2020-CP-35-4
	)	
Applicant,	)	
	)	RETURN AND MOTION FOR A
v.	)	MORE DEFINITE STATEMENT
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The State (Respondent), making its return to the application for post-conviction relief filed by Joe Ross Worley (Applicant) on January 14, 2020, would respectfully show this Court:

I. Procedural History

Applicant is presently incarcerated according to orders of commitment of the McCormick County Clerk of Court. During its February of 2010 term, the McCormick County Grand Jury indicted Applicant for the possession of a weapon during the commission of a violent crime (2010-GS-35-49) and assault and battery with the intent to kill (2010-GS-35-52). Applicant was represented by C. Lance Sheek, Esquire, Billy J. Garrett, Jr., Esquire, and Carson M. Henderson, Esquire. Solicitor Donald V. Myers and Assistant Solicitors Ervin Maye and Frank Young, of the Eleventh Circuit Solicitor's Office, prosecuted the case. On May 31, 2011, through June 1, 2011, the Honorable William P. Keesley presided over a hearing on Applicant's motion to dismiss the indictments pursuant to the Protection of Persons and Property Act, as found in South Carolina Code Section 16-11-410 through Section 16-11-450, and in accordance with State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Judge Keesley denied Applicant's motion and recused himself

for further participation, and later denied Applicant's motion for reconsideration of the ruling.¹

On December 16, 2013, through December 19, 2013, Applicant proceeded to a jury trial with the Honorable R. Lawton McIntosh (trial court) presiding. At the conclusion of trial, the jury found Applicant guilty as indicted, and the trial court delayed sentencing so that the presentencing investigation, which included the psychological evaluation of Applicant, could be completed. On June 30, 2014, the trial court reconvened in order to impose its sentence. The trial court sentenced Applicant to imprisonment for twenty years for assault and battery with the intent to kill and to the concurrent term of five years for the possession of a weapon during the commission of a violent crime.

Henderson filed a timely notice of appeal. Appellate Defender John H. Strom (appellate counsel) represented Applicant on appeal. Senior Assistant Deputy Attorney General J. Benjamin Aplin represented the State. Appellate counsel argued the trial court erred in (1) ruling that Applicant was not entitled to immunity under the Protection of Persons and Property act and (2) denying Applicant's motion for a mistrial when the State made comments in closing that constituted improper remarks on Applicant's right to be silent at trial and shifted the burden of proof from the State to Applicant. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Worley, Op. No. 2018-UP-327 (S.C. Ct. App filed September 26, 2018), cert. denied, State v. Worley, S.C. Sup. Ct. Order filed June 28, 2019. The remittitur was issued on December 6, 2019.

¹ Applicant immediately appealed this ruling and the South Carolina Court of Appeals remanded the case to the Circuit Court in order for the reconstruction of missing portions of the transcript from the hearing. Ultimately, Court of Appeals dismissed the appeal because Judge Keesley's ruling was interlocutory and rescinded its order to reconstruct. State v. Worley, S.C. Ct. App. Order filed August 21, 2013, cert. denied, State v. Worley, S.C. Sup. Ct. Order filed June 25, 2014.

II. Current Application

Applicant filed his application for post-conviction relief on January 14, 2020. Applicant alleges therein that he is entitled to post-conviction relief on multiple grounds, which are as follows:

- 1) “Broke no laws”;
- 2) “Tried to kill me”; and
- 3) “Self Defence”.

Applicant prays the Court will grant post-conviction relief and reverse his conviction and writes he seeks to “go to Federal Court”. Attached to this return and incorporated by reference are the records of the McCormick County Clerk of Court regarding the subject convictions; the appellate records from Applicant’s interlocutory appeal; the appellate records from Applicant’s direct appeal, including the record on appeal and the supplemental record on appeal; Applicant’s records from the South Carolina Department of Corrections; and the application for post-conviction relief. Respondent reserves the right to amend this return upon its receipt of any relevant materials.

III. Motion for a More Definite Statement

Respondent moves for a more definite statement as to Applicant’s claims. Respectfully, the undersigned submits that the claims presented in the application for post-conviction relief are incomprehensible. Applicant fails to set forth with specificity any facts and circumstances upon which the claims are based. As it is, the undersigned is not able to understand what the claims are. Applicant also included a handwritten sheet with his application that does not shed light on the claims.

The Uniform Post-Conviction Procedure Act requires that Applicant must “specifically set forth the grounds upon which the application is based.” Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant

to make at least a prima facie showing which would entitle her to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). The Supreme Court of South Carolina has provided that:

[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of counsel is insufficient.

Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974).

Furthermore, Rule 8(a), SCRPC, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.”

Respondent moves pursuant to Rule 12(e), SCRPC, to require Applicant to provide a more definite statement of his claims. Respondent moves to require Applicant to file an amended application well in advance of any evidentiary hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

IV. Denial of All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

V. Future Amendments and the Discovery Process

Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant is represented by counsel, that attorney and not the Applicant is the only individual authorized to file amendments to this application for post-conviction relief. See Rule 11, SCRPC. Pro se filings will not be considered at the evidentiary hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice

to Respondent pursuant to Love v. State, Op. No. 27921 (S.C. Sup. Ct. filed October 2, 2019) (Shearouse Adv. Sh. No. 39 at 14), or, alternatively, Respondent will move for a continuance in the matter. See Love, at 24 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

VI. Conclusion

WHEREFORE, Respondent requests that the PCR court require Applicant to file an amended application that lays out his claims and is responsive to the motion for a more definite statement included herein before convening an evidentiary hearing.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General

By: s/Taylor Zane Smith
S.C. Bar No.: 103282
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
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May 28, 2020

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOR THE 11 th JUDICIAL CIRCUIT
COUNTY OF MCCORMICK	)	Case No.: 2020-CP-35-00004
Joe Ross Worley, #360529	)	
	)	
Applicant,	)	AMENDED POST-CONVICTION
	)	RELIEF APPLICATION
v.	)	
	)	
State of South Carolina.	)	
_____	)	

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on January 14, 2020, to add the following allegations:

1. Ineffective Assistance of Counsel of Billy J. Garrett, Jr. –

- a. Failure to move to have Applicant's statement given to police suppressed because it was given without Miranda warnings.
- b. Failure to object to Kirkman being admitted as an expert witness in criminology.
- c. Failure to object to Collier being admitted as an expert in small arms and ammunition.
- d. Failure to object to the SLED expert, Whittler, to being admitted as an expert in firearms identification.
- e. Failure to ensure that Judge Keesley ruled on the issue of whether or not Rushton was certified by the justice academy at the time of the shooting. Because of this, this issue was not preserved for appeal.

Furthermore, the Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



ASHLEY A. MCMAHAN

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Columbia, SC 29250

803-219-1110

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SC Bar No. 71676

ATTORNEY FOR APPLICANT

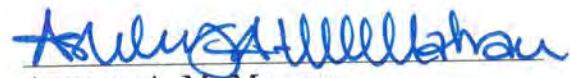
August 24, 2024
Columbia, South Carolina

CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Donald J. Zelenka
Deputy Attorney General
dzelenka@scag.gov

This 24th day of August, 2024.



ASHLEY A. MCMAHAN

Attorney for Applicant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF MCCORMICK) ELEVENTH JUDICIAL CIRCUIT

Joe Ross Worley,)
)
 Plaintiff,) Case No. 2020CP350004
)
 vs) August 26, 2024
) McCormick, South Carolina
 The State of South Carolina)
)
 Defendant.)

B E F O R E:

HONORABLE DAVID P. CARAKER, JR.

A P P E A R A N C E S:

ASHLEY A. MCMAHAN, ESQUIRE
 Attorney for the Plaintiff

DONALD J. ZELENKA, ESQUIRE
 Attorney for the State

LEGAL EAGLE

Post Office Box

Greenville, South Carolina 29606

(864) 467-1373 -- depos@legaleagleinc.com

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EXAMINATION

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EXHIBITS

(No Exhibits Were Marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTE MATERIAL. SUCH
MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 MR. ZELENKA: Your Honor, the next case is out of
2 McCormick County. It's Joe Ross Worley versus State of
3 South Carolina, civil action number 2020-CP-35-00004.
4 Mr. Worley, pro se, filed an application on January 14th,
5 2020. He's incarcerated pursuant to orders of commitment
6 from the Clerk of Court of McCormick County. During the
7 February term he was indicted for possession of a weapon
8 during the commission of a violent crime, and assault and
9 battery with intent to kill. Prior to the trial, he was
10 represented by Lance Sheek, Billy Garrett, and Carson
11 Henderson. He was prosecuted by Donald Myers and Ervin
12 Maye, and Frank Young, then of the 11th Circuit
13 Solicitor's office. On May 31, 2011 through June 1,
14 2011, the case was heard before Judge Keesley, concerning
15 the Protection of Persons and Property Act, as set out in
16 16-11-410 through 450 of the Code of Laws, and in
17 accordance with State v. Duncan the Supreme Court
18 decision that reflected how those matters should be
19 heard. Keesley denied the motion and recused himself
20 from further participation in the case and subsequently
21 denied a motion for reconsideration.

22 The trial was heard before Judge Lawton McIntosh,
23 December 16, 2013 through December 19 and he was found
24 guilty as indicted. There was a separate sentencing
25 proceeding, so that a pre-sentencing investigation could

1 be done, and he was sentenced on June 30, 2014 for 20
2 years for assault and battery with intent to kill on a
3 concurrent term of five years possession of a weapon
4 during the commission of a violent crime.

5 The matter was taken up on appeal before the South
6 Carolina Court of Appeals, and that matter raised issues
7 concerning whether he was entitled to immunity under the
8 Stand Your Ground Act, and denied a motion for mistrial
9 when the State made comments in the closing arguments,
10 which they asserted improper remarks concerning the
11 applicant's right to remain silent at trial and a
12 shifting of the burden of proof.

13 The Court of Appeals in a published decision on
14 September 26, 2018, denied the appeal and cert was sought
15 before the South Carolina Supreme Court and it was
16 denied.

17 Initially in the pro se application he contended
18 that he "Broke no laws." Number two, "He tried to kill
19 me." And number three, "self defense." Over the weekend
20 we received on the 24th an amended application for post-
21 conviction relief in which they allege the following,
22 ineffective assistance of counsel of Billy Garrett, Jr.;
23 failed to move to have applicant's statement given to the
24 police suppressed, because it was given without Miranda
25 warnings; failure to object to Kirkham, who was an expert

1 witness of the case, being admitted as an expert in
2 criminology; failure to object to Collier being admitted
3 as an expert in small arms and ammunition; and failing to
4 object to the SLED Agent Whitler for being as admitted as
5 an expert in firearms identification; and finally, for
6 failure to ensure that Judge Keesley ruled on the issue
7 as to whether or not Rushton, who was the officer that
8 showed up at the scene and was shot, was certified by the
9 Justice Academy at the time of the shooting. Because of
10 this, this issue was not preserved for appeal.

11 Those are the allegations raised. Mr. Garrett is
12 here and understand that the burden of proof is on the
13 Applicant to show by preponderance of the evidence
14 entitlement to relief, and the Guardian ad Litem Mike
15 Lifsey is here present in the courtroom also, as well as
16 the applicant.

17 MR. LIFSEY: Judge, for the record, my name is Mike
18 Lifsey, I was appointed to be the Guardian ad Litem in
19 this case. My understanding is there was some concerns
20 about his mental health status. I will tell you that I
21 went to Trenton Correctional on August the 14th of 2024
22 and met with Mr. Worley for, I guess, probably right at
23 an hour, maybe a little less than an hour.

24 I'll begin and tell you disclaimer that I'm --
25 obviously I'm not a psychiatrist, I'm a lawyer. But I

1 have represented over the years a number of people with
2 mental health problems and mental health defenses that
3 were asserted in court.

4 Based on my interview with him and his conversation
5 with me and his relation of his history with me, I don't
6 believe he suffers under any severe mental health
7 disability. He seemed -- in our conversation he seemed
8 oriented as to time and place. He knew where he was. He
9 knew who his lawyer was. He understood after I explained
10 to him who I was. He seemed to -- he knew who the
11 President was. He knew what day of the week it was.

12 As regards to PCR, the actual PCR hearing, he had a
13 -- a rough knowledge of what the hearing is about. He
14 understood in general it was a challenge to his
15 conviction. He -- I will tell you he seemed fixated on
16 certain factual defenses at his trial that would have
17 made him innocent if they had been believed by the jury.
18 You know, that's obviously not exactly the issue at a PCR
19 hearing, but to be honest with you that's not an uncommon
20 fixation in PCR clients. So, I guess from my standpoint,
21 with the disclaimer that obviously I'm not a psychologist
22 or a psychiatrist, he seems fine to me.

23 JUDGE CARAKER: Thank you, sir. Appreciate that.
24 Ms. McMahan anything to add to that?

25 MS. MCMAHAN: No, Your Honor. Just at this time the

1 Applicant calls Mr. Garrett.

2 BILLY GARRETT

3 Being duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 MR. GARRETT: My name is Billy Garrett and the
6 spelling of my last name is G-A-R-R-E-T-T.

7 BY MS. MCMAHAN:

8 Q. Mr. Garrett, were you appointed or retained to
9 represent Mr. Worley?

10 A. We were retained.

11 Q. And who else was retained along with you?

12 A. My recollection was Lance Sheek and Carson Henderson
13 and at some point I went ahead and hired, because this is
14 a new area of law at the time, the Castle Doctrine, and
15 so I hired Desa Ballard to come in to help us with the
16 appellate issues that might arise at trial to get ready
17 for, you know, an appeal later on if it was necessary.
18 So, there was a team. And then at sentencing I also
19 hired a fellow by the name of Beattie Ashmore.

20 Q. You kind of alluded to one of the issues, the Castle
21 Doctrine issue, could you kind of explain what that issue
22 was in this case?

23 A. It's basically the right to stand your ground.

24 Q. Well how did it apply specifically for Mr. Worley?

25 A. Mr. Worley shot a police officer that he didn't know

1 was a police officer, that he thought was a burglar, and
2 he used the word burglar a million times if he didn't use
3 it. He really thought the guy was a burglar.

4 Q. And did Mr. Worley live out kind of in the -- was he
5 staying at a cabin, for lack of a better word?

6 A. He was staying at his mother's cabin in McCormick
7 County. I think it was off of Holiday Road, in a home
8 that was built by, as I recall it was his father, who was
9 a nuclear scientist, had built that home.

10 Q. Was it on the lake?

11 A. It was on the lake.

12 Q. Did the situation arise because he was initially in
13 the middle of the night trying to shoot a fox away from
14 his house?

15 A. As I understand it the neighbor had told him about a
16 fox that had been out there, a fella by the name of Bill
17 Stephens, if my recollection is correct. And Mr.
18 Stephens, who is his neighbor, told him that there was a
19 wild fox and to be, you know, aware of him, because of
20 potential for rabies or whatever.

21 Anyway, he was aware of that and apparently he had a
22 cat and he was trying to protect his cat from this fox,
23 and apparently he shot that night early on. I don't
24 recall how many times he shot, but apparently he tried to
25 shoot at a fox earlier in the evening, and that's what

1 precipitated the neighbor calling law enforcement,
2 thought he might be out there drinking or drunk or
3 something like that.

4 Q. And you had a Castle Doctrine hearing --

5 A. We did.

6 Q. -- prior to trial?

7 A. In front of Judge Keesley.

8 Q. And that was denied?

9 A. That's correct, it was denied.

10 Q. And then he went to trial after that. What was your
11 main defense at trial?

12 A. Well, obviously that the person -- see there was one
13 exception -- or there are several exceptions in the
14 Castle Doctrine, one of them is is that if it's a police
15 officer, there's a police officer exception, so you don't
16 get the -- you don't get the defense if it's a police
17 officer.

18 Well, come to find out this police officer had not
19 been -- was not at the time, as we understood it, was not
20 certified because he still had a couple of courses to
21 take. He had previously been certified. He might've
22 been within the year without the year. We also found out
23 he had not been sworn in by the Clerk. We went into some
24 great technical terms to try to prove that he was not a
25 police officer, and that was our main defense is that he

1 had an absolute right, and the officer said he was going
2 to kill him with a gun.

3 So, it was just really, he shot first and when he
4 did it, it went literally into the trigger guard -- in
5 the middle of the trigger guard and blew his finger off.

6 Q. And then at some point did Mr. Worley walk around
7 his gun and find the gun?

8 A. Did he find the gun? Who?

9 Q. Mr. Worley, did he find the officer's gun?

10 A. He found the gun -- he found the gun as he walked
11 around on the outside after the shooting, that's correct.

12 Q. And then did he put it in the police car that was
13 still there?

14 A. He did.

15 Q. And at that time then officers showed back up on the
16 scene?

17 A. I think they were there. They were just -- had
18 stepped back -- they had gotten back, I think they were
19 trying to get him -- the officer who got shot, get him
20 some help.

21 Q. And then at some point I guess Mr. Worley just
22 stated that he's the one that shot?

23 A. Yeah. I mean, he acknowledged that he's the one
24 that -- that he shot the officer thinking that he was a
25 burglar.

1 Q. Did you see any reason to try to move to suppress
2 that statement?

3 A. No. Actually he wasn't going to testify. By the
4 time we got to trial he wasn't going to testify and we
5 felt like that statement didn't hurt us because, I mean,
6 he was trying to find out -- you know, he thought he
7 might've killed the person. So, I mean, that was his
8 statement, there's no question that he was one that did
9 the shooting, he didn't deny it.

10 Q. And Mr. Worley this whole time was trying to figure
11 out who this burglar was that had been standing outside
12 his house?

13 A. That's right. From his perspective it was the
14 burglar. There was a contest for the jury to decide
15 whether or not he had his holster on. According to Mr.
16 Worley the man did not have his holster on, did not have
17 his badge on. That was his position. When he shot the
18 man he said I shot the gun. So, he said when he saw the
19 gun he shot him. And he literally shot the gun 'cause he
20 really did do everything that he said he did.

21 We didn't have a problem with that testimony. We
22 could've done (inaudible) but why should we. I mean,
23 sometimes in the trial of cases if your client's not
24 going to testify sometimes it's better to go ahead and
25 get his statement out that he was cooperative and he told

1 them what happened, thought it was a burglar, and he shot
2 and then he went out and he found the police -- he found
3 the gun.

4 See then he had to walk around his house and he
5 actually said when he walked around that house he saw the
6 car and he said oh, my God, it's a police car, you know.

7 Q. There was a issue I think that you raised at the
8 preliminary hearing where there were some other officers
9 that were actually on the scene but Mr. Worley couldn't
10 see them?

11 A. He could not see them. From where he was at he
12 could not see the other officers. From the position he
13 stood on his balcony he could not see the other officers.
14 Now, they made testimony that they saw him. They also
15 had testimony that they called out police or sheriff --
16 Sheriff's office, Sheriff's office, numerous times. His
17 position, he never heard it and we tried to figure out
18 why he didn't hear it, and come to find out his father
19 had double insulated when he built this unique house on
20 the lake, as I said he's a nuclear scientist, and very
21 engineer to do things that way, and it was highly
22 insulated.

23 We actually had the jury go out and listen, because
24 once you close the door on the inside you can't hear
25 anything. So, all he and his mother heard that night is

1 my recollection is that the doorbell ringing. He did
2 hear the doorbell ring, that's what awoke them. And then
3 he -- he listened, he didn't hear anything. He said he
4 stepped out of the balcony, flipped his light on, he
5 stepped out of the balcony, he had his gun, and he said
6 all of a sudden he saw a man take a gun and point it at
7 him and when he did he shot him. And that was the facts
8 of the case, though the jury didn't take it that way but
9 that's what -- that's from his perspective what happened.

10 Q. So he was initially charged with assault with intent
11 to kill on the two other officers that he did not hit?

12 A. Right.

13 MR. ZELENKA: I'm sorry, I couldn't hear that.

14 BY MS. MCMAHAN:

15 Q. He was charged with assault with intent to kill on
16 the other two officers that he did not hit.

17 A. That's right.

18 Q. And that was one of the issues that you had raised
19 in the prelim?

20 A. That's right.

21 Q. And again you said ultimately the jury just didn't
22 agree?

23 A. The jury didn't agree, that's correct.

24 Q. So when it went up on appeal, there were some issues
25 related to the transcript, do you recall what those were?

1 A. I heard what has been said here, we tried that case
2 at least a whole day or maybe more in front of Judge
3 Keesley. And again, there was some question about how
4 that -- how the judge's are supposed to handle that at
5 the time and it subsequently got changed. But at the
6 time it was when the -- it was either case law or it was
7 a statute, I forgot which, but as a result the judge had
8 to do a preliminary hearing so to speak to determine
9 whether or not the Castle Doctrine applied.

10 And we made that argument and Judge Keesley rejected
11 that argument. We filed a motion for reconsideration
12 again and he rejected that argument. In here it says
13 that we didn't preserve the issue, I would really have to
14 go -- I just got this, I'd have to go back and look at my
15 record of that, but that was the whole reason we were
16 there we were arguing that he wasn't a police officer and
17 he had an absolute right to protect his house and his
18 mother and himself.

19 Q. And that issue was put before the jury too, so they
20 did consider that?

21 A. What? That --

22 Q. About Rushton not being certified yet.

23 A. Yeah, we got all that out.

24 Q. Do you recall though the court reporter's car being
25 broken into and losing part of the Castle Doctrine

1 transcript?

2 A. You know, there is something about that. That lady
3 was out of Columbia and there was something about -- it
4 got stolen out of her car?

5 Q. Yes, do you remember that?

6 A. I do remember something like. I'm sorry I don't
7 remember the details but it seems like -- let me see if I
8 can recall. And actually, I knew the husband of the
9 court reporter and that's why it comes to mind. She
10 apparently went to get her hair done, we were all waiting
11 on the transcript and apparently it got stolen out of her
12 vehicle. So we were never able to recover --

13 Q. Well there were parts of the transcript that were
14 recovered but Mr. Worley's testimony you recall was not
15 recovered?

16 A. That's right, because we couldn't use it. That was
17 another thing we would have loved to have used it.
18 Because I will tell you his mental position, his mental
19 acuity in my estimation, I put this on the record as
20 well, has lessened between the time of that hearing and
21 the subsequent -- I think it was two years later before
22 we finally got to try his case over in December.

23 So his mental acuity in my estimation had gone down
24 tremendously in those two years. But it wasn't enough to
25 reach M'Naghten, you know, I'm sorry. I mean, he as the

1 Guardian ad Litem said, he knew date, time, and place.
2 He knew right from wrong. So, it wasn't enough to
3 prohibit him from, you know assisting his defense as I
4 recall. I do remember that and that was bad because I
5 would've loved to have his testimony.

6 Q. Do you remember having to submit an affidavit of
7 what his testimony --

8 A. I think we did. We did submit an affidavit and I
9 think the judge rejected it.

10 Q. And there were some handwritten notes, I think from
11 Mr. Maye and from Mr. Henderson too?

12 A. Right, they both -- they both submitted what
13 handwritten notes they had from that. We tried to
14 recreate the record as best we could as I recall. Yeah,
15 that -- I remember that now, that was even worse because
16 we really wanted -- I mean, his testimony as far as I was
17 concerned was good as to his position.

18 By the time we got to trial the decision was made by
19 him mostly. Well, it's always on him, we gave him the
20 right to testify if he wanted to, but he asked us our
21 opinion and at that time he wasn't -- I don't think he
22 would have made a good witness.

23 Q. Okay. And as far as the State's expert witnesses,
24 did you see any reason to object to those being qualified
25 as experts?

1 A. No. For instance, if you go down the list, you
2 know, we know in South Carolina if you can blow on a
3 mirror and cause it to fog up you're probably are going
4 to get admitted as an expert. Kirkham clearly -- I don't
5 know of anybody who could've -- who could object to his
6 background. I think he had actually testified in several
7 cases before and had been approved.

8 Collier, I knew him personally. He had been a
9 deputy forever. I know he had given small arms training
10 in ammunition, whatnot, to the locals. So, I knew him.
11 I didn't know the Whitler to being an expert on -- expert
12 in firearms identification. I mean, anybody from south
13 Greenwood or McCormick area would know what a Woodsmaster
14 .742 thirty-aught-six was and know what the ammunition
15 looked like. I mean, that was a -- that's a common
16 hunting rifle that most of us use; we're right there at
17 the Sumter National Forest so most of us -- I mean, if
18 they identified that as that, well that's what it was,
19 everybody knew it the moment they pulled it out and
20 looked at it. So, I mean, again I didn't -- whether he
21 was an expert or not, if he said that's what it was,
22 that's what it was.

23 Q. And I don't think there was any dispute about the
24 type of firearm or -- and the ammunition that was
25 involved in this case?

1 A. There was a problem with the ammunition. And what
2 had happened was, this is difficult for a jury, but those
3 of us that hunt and whatnot and understand it, his father
4 was a nuclear scientist. His father did not like the
5 idea of lead being put into the woods or into the waters,
6 and so their family as tradition would take the lead out
7 and replace it with steel. He was a machinist and that's
8 what he did.

9 And so they would normally take their thirty-aught-
10 six rounds, remove the lead, and put in steel. Now,
11 unfortunately steel has more knockdown power
12 unfortunately than -- and so one could construe that as
13 being a cop killer bullet. Of course, that's what the
14 State wanted to say about it and his father was not alive
15 to show the tradition. But that's what it -- that was
16 his testimony. That was his statement and then there was
17 a box of -- in his possession, a box of those types of
18 bullets that actually had a steel projectile as opposed
19 to a lead projectile.

20 MS. MCMAHAN: The Court's indulgence, Your Honor.
21 Answer any questions the Attorney General may have.

22 CROSS-EXAMINATION

23 BY MR. ZELENKA:

24 Q. Mr. Garrett, how long have you been practicing law
25 in South Carolina?

1 A. It'd be 41 years this November.

2 Q. And as part of that practice have you handled major
3 felony cases?

4 A. I'm death penalty qualified.

5 Q. Have you handled major felony cases recently?

6 A. Yes, as a matter of fact I got one that went to the
7 Supreme Court recently, a felony DUI.

8 Q. Okay. And as part of your practice have you been
9 involved in situations where firearms had been reviewed,
10 identified, and ammo reviewed and identified?

11 A. Certainly.

12 Q. And you indicated that you knew Mr. Kirkham, who was
13 the criminologist who testified as a former police
14 officer and criminology professor about what a -- how an
15 officer was to reasonably act under those circumstances;
16 is that correct?

17 A. Yes, and again that's what our expert was saying is
18 basically that no reasonable or prudent police officer
19 would put himself in the line of fire as that person did
20 going to his character as a good police officer. In
21 other words, he shouldn't have put himself in that
22 position. And your expert, or the State's expert, was
23 saying that, you know, that was okay the way he did it.
24 And of course, our expert that the jury apparently didn't
25 believe said no, that's not a good idea the way he

1 positioned himself.

2 Q. Okay.

3 A. But anyway, those were facts for the jury, but those
4 were disputed.

5 Q. And you called Mr. George Kirkham twice during the
6 trial or during the proceedings, you called him in the
7 Stand Your Ground proceeding before Judge Keesley?

8 A. That's right.

9 Q. And at that time you offered him as an expert in
10 criminology; is that correct?

11 A. That's correct.

12 Q. And the State didn't object, did they?

13 A. They didn't.

14 Q. And did you lay out his qualifications as you knew
15 them at that time?

16 A. We did.

17 Q. And are you satisfied that he was appropriately
18 qualified upon your motion as an expert?

19 A. I was. We paid him too, so I mean he didn't do it
20 for free, we had to pay him for that piece of work.

21 MR. ZELENKA: Your Honor, the in-camera stipulation
22 is page 1121 through 1125 at trial, and the in-camera is
23 set out at 799 through 804 at trial, that's --

24 JUDGE CARAKER: Is that on --

25 MR. ZELENKA: Oh, that's on Collier, I apologize.

1 It's set out at 111 through 142 is the immunity hearing
2 and at the record on appeal 1305 through 1320 is that
3 testimony and that was the testimony before the Court.

4 BY MR. ZELENKA:

5 Q. And again with Mr. Collier, the expert in small arms
6 and ammo that was presented by the State, you allowed
7 that to go into the record; isn't that correct?

8 A. Without objection, that was -- everyone knew him in
9 the community. I mean, he had been there -- I don't
10 know, I mean, you go back and look at it, he had been
11 there I know 20 years or so, whatever it said.

12 Q. Let me show you an excerpt from that testimony, it's
13 1121 through record page 1126, ask you to quickly review
14 that and see if that refreshes your recollection.

15 JUDGE CARAKER: Mr. Zelenka, I'm not sure I can --
16 I'm matching up with your page numbers. Is that in the
17 4,100 page document that you're referring to?

18 MR. ZELENKA: That's the record on appeal which is
19 (inaudible) --

20 MS. MCMAHAN: It's 1121 on the record on appeal.

21 MR. ZELENKA: Volume three.

22 BY MR. ZELENKA:

23 Q. Have you had the chance to review it?

24 A. Yes, sir.

25 Q. Do you, upon your review of that document, see any

1 grounds that you could have objected to the
2 qualifications?

3 A. I knew him, okay, and he trained over in Greenwood
4 somewhat in our surrounding area, knew him and he -- and
5 everybody in the Plum Branch area where he said he was
6 born and he worked since '93, and this was what -- what
7 year was this that we were doing this, '17, '18.

8 Q. Let me ask you about Mr. Whitler. He had testified
9 for qualifications on record page 1172 through record
10 page 1175.

11 A. As I recall too, we did some additional work on him
12 because they named him earlier on in the case and so we
13 learned that he was qualified before he got up on the
14 stand, so.

15 Q. Let me ask you to review that and see if that
16 refreshes your recollection. And I've provided him 1172
17 through 1175. That's in volume three.

18 A. I've completed it.

19 Q. And reviewing that document prior to your
20 stipulations, disqualification, do you see anything in
21 the qualifications that were represented to the Court
22 that caused you to think that you should have objected to
23 those qualifications as an expert?

24 A. No. I will say again that we checked him out before
25 trial. He's qualified. He's an FBI -- eight years in

1 the FBI doing small arms work. So, having him qualified
2 for that purpose, and again it's not prejudicial, it was
3 a thirty-aught-six and it was carrying thirty-aught-six
4 bullets, the only difference is is that it was a steel --
5 it was a steel shot as opposed to a lead shot.

6 So, no, there was no -- in my opinion, and also
7 there were three other lawyers sitting at the table with
8 me. So, you know, there were none of us that believed
9 that he was not qualified as an expert, but we
10 stipulated.

11 Q. One of the other allegations that's been made is
12 failed to have the applicant's statement given to the
13 police suppressed because it was given without Miranda
14 warnings. The defendant and his wife approached the
15 Sheriff.

16 A. That was his mother.

17 Q. And his mother, thank you. Approached the Sheriff
18 directly themselves out at the scene; is that correct?

19 A. That's correct.

20 Q. And there was an issue as to who was shining the
21 flashlight at them, and he didn't know and they came up
22 to him, to the Sheriff; is that correct?

23 A. As I recall it was Sheriff Reid that actually talked
24 with him. Sheriff Reid was our sheriff at the time. He
25 wasn't on the scene, but had gotten to the scene by the

1 time that Mr. Worley and his mother went around where
2 they could actually see. You know, from where they were
3 at they couldn't see a blue light or a police car or
4 anything. They walked around that side of the house and
5 once they walked around the side of the house they saw
6 that police car there.

7 And I don't recall whether Mr. Worley had already
8 put the gun in the seat of the car and then got his mom
9 or whether they went out together, I don't recall that.
10 I'd have to go back and read that. But I do recall the
11 two of them went there and Sheriff Reid was there at the
12 time. So I think they made a statement to Sheriff Reid
13 both he and his mom.

14 Q. They were in custody at that particular time --

15 A. They were not in custody, no.

16 Q. So Miranda warnings would not have applied at that
17 time; is that correct?

18 A. It wouldn't -- what I'm trying to tell you is is
19 trial counsel sometimes we don't raise that. You know,
20 sometimes we want to get that evidence in. And it looked
21 to me like, especially if he's not going to testify, his
22 statement was as any concerned citizen would be, hey, I
23 thought this guy was a burglar it was a mistake, it was
24 an accident, it wasn't -- I didn't try to kill no police
25 officer. All I know is there's some guy with a gun

1 trying to kill me and he testified if he'd got his shot
2 off first he'd killed him.

3 Q. And is it correct that the State's theory was that
4 when the law enforcement officers approached the house
5 and knocked on the door that they had identified
6 themselves as law enforcement officers and that was a
7 major factual dispute in that case; isn't that correct?

8 A. There's no question about that. That was a big
9 issue, and so much so that the jury actually went out to
10 look at the house and to hear the acoustics. Because
11 again, you know, his position was he didn't hear anybody
12 say Sheriff's Department, Sheriff's Department, and
13 frankly I believed him and once you get in that house you
14 might believe it as well.

15 So, the jury went out there and actually -- and I
16 think it was on our motion that they did that. They went
17 out to be able to listen, you know. Of course nobody was
18 shooting a gun or anything like that or nobody was
19 hollering Sheriff downstairs or anything like that. But
20 the whole idea was is to demonstrate that on the second
21 floor it was so well insulated it would be difficult to
22 hear.

23 Q. And is it correct that under the State's theory the
24 defendant made statements to the victim and to the
25 victims that, to paraphrase, he didn't care who they

1 were, and that he understood that they were law
2 enforcement but he didn't want somebody knocking on his
3 door at the time; is that a fair --

4 A. Correct. And that -- also that discussion carried
5 on afterwards where there was this idea of, you know,
6 they didn't know he was -- they didn't know -- they
7 didn't realize it was the police and, you know, the
8 mother was there and she was, you know, she was scared.

9 The other thing, you know, historically there had
10 been a burglary at their house before and so that was
11 another concern that they had. Now, the police they --
12 they called out, called out, called out, and then he
13 allegedly came back around there and said where -- I
14 think they used the words where did you go, you S.O.B., I
15 think is -- is in the language there. At some point in
16 the trial of the case where --

17 Q. That's correct.

18 A. -- he came back around on the back side, he was
19 still searching for him and they were trying to hide from
20 him, is what they said.

21 Q. Right.

22 A. And apparently the jury believed that.

23 Q. For the Court's information that's in transcript
24 page 174, 196, and 199, and 235. As far as retaining Ms.
25 Ballard in the preparations for the appeal of the Stand

1 Your Ground case, this was a case that there was an
2 interlocutory appeal done initially by Ms. Ballard and
3 after the Supreme Court issued its opinion in State v.
4 (inaudible) saying interlocutory cases shall be blended
5 with the direct appeal if there is a conviction. That
6 case got remanded back and that was part of the delay
7 before the Stand Your Ground matter and the direct
8 appeal; is that correct?

9 A. My recollection it took two years, so there was a
10 long time between the time we finished that and the time
11 that we actually finally got to go to trial and I'll
12 just, you know, say for the record that, in my estimation
13 his recollection of events had somewhat diminished and
14 his ability to testify in my opinion had diminished.

15 And he was, as said he was, focused, hyper focused
16 on the word burglar and, you know, he would just say that
17 to himself and to others a lot of times. And so I think
18 in his mind he might've been in shock too. Again, all I
19 can tell you is is that he kept using the word burglar.

20 Q. And as to whether the judge adequately ruled on the
21 issue as to whether he was a police officer and how that
22 matter was carried on appeal, would the better evidence
23 be the Judge's order and the briefs that went up on
24 appeal and how that was raised?

25 A. She reminded me that his testimony is not -- is

1 lost. I've never had it happen in 41 years, never seen
2 that happen, but the testimony of Mr. Worley only, and a
3 small piece of another towards the end of the transcript
4 was lost, but the rest of it was there. Never seen that
5 happen before. But he did fully testify and, you know,
6 of course I'd have loved to have that testimony. But by
7 the time we got to trial he wasn't -- he wasn't in my
8 estimation, and again, we left it up to him, but we had
9 three other lawyers look at it and talk with him and came
10 to the same conclusion that he would hurt himself if he
11 testified.

12 Q. Okay. And during the trial you raised a directed
13 verdict motion based upon whether the individual was a
14 law enforcement officer, correct?

15 A. That's correct.

16 Q. And Judge Keesley in his order said that Rushton was
17 a law enforcement officer within the meaning of the act,
18 do you recall that?

19 A. I remember him saying that, of course I disagreed
20 with it, and I was hoping that that would be taken up on
21 appeal but --

22 Q. I understand that.

23 A. -- but he made his -- you know, he ruled and I'm
24 from the old school, when a judge rules, he's ruled, so
25 don't belabor it, you know.

1 MR. ZELENKA: Your Honor, Judge Keesley's order is
2 at 1754 through 1756 of the record on appeal, and the
3 directed verdict motion is at 1223, and the issue as to
4 whether the individual was a law enforcement officer was
5 the first issue briefed in the direct appeal, and I can
6 refer you to the Brief of Respondent, page 21 through 23,
7 that's before the Court as to when the State was making
8 its argument in the case, and the Court of Appeal's
9 decision speaks for itself on how they treated those
10 issues, which is a memorandum unpublished (inaudible). I
11 have no further questions for Mr. Garrett.

12 JUDGE CARAKER: Redirect?

13 MS. MCMAHAN: Judge, briefly.

14 RE-DIRECT EXAMINATION

15 BY MS. MCMAHAN:

16 Q. Mr. Garrett, is it safe to say that one of the
17 issues that Mr. Worley had was that he didn't see any
18 blue lights, also while that was --

19 A. Yes. That was a big issue and he couldn't see. And
20 I think we demonstrated that he could not see from the --
21 his bedroom window and the balcony was towards the back
22 of the house. He literally had to go around to the front
23 of the house because of the foliage and everything, he
24 literally had to go around the house to be able to see
25 even a car in his driveway.

1 And they didn't come into the normal driveway which
2 would've come up right beside the house. Instead they
3 parked way out near the road, near Holliday Road, as I
4 recall. And so, without them literally going around to
5 see, he didn't see the blue lights and he didn't see --
6 didn't see the car. He didn't have any idea it was a
7 police car until he got up to it, looked at it, and then
8 he realized it was maybe a police officer.

9 Q. And this was very late at night and it was very
10 dark?

11 A. It was 4:00 or 5:00 in the morning if my
12 recollection serves.

13 Q. And there was some issue about whether or not there
14 had been a light turned on and off, so it was really dark
15 when the shot was actually fired?

16 A. It was light immediately at the time the shot was
17 fired. The officer tried to make an argument that he
18 blinded him purposefully by flipping his light on.
19 There's a big light out there, I think it's a 500 watt
20 light, if I recall. There was some question why he had
21 such a big light out there but that's a big backyard.

22 But he, by his own admission, he flipped the light
23 on and stepped out, and when he did the officer said he
24 was blinded, yet he was pointing his gun right at him,
25 that's the only way that Mr. Worley could've shot him the

1 way he did it's because he had to be pointing it right at
2 him for him to be able to hit what -- as I recall it was
3 -- I'm trying to think whether or not it was scoped -- it
4 was a scoped or a non-scoped rifle, I'm sorry, I don't
5 recall that detail.

6 Q. And he wasn't in like a traditional Sheriff's
7 uniform?

8 A. No, he was not. There's no question about that.
9 And there was a question of whether or not he was even
10 dressed at all in anything other than street clothes. I
11 mean, they said that he was there. They said he was
12 wearing some type of khaki pants and whatnot, and they
13 said he had a t-shirt -- one of those shirts on that has
14 a badge on it, an old faded one, but of course Mr. Worley
15 didn't agree with that at all.

16 And then at one point they said he actually had a
17 belt on and he has his badge on the belt. And of course
18 we cross-examined that in front of the jury and
19 apparently the jury believed that. I don't know, you
20 know, there were secret decisions made by the jury. But
21 from his perspective the man was not a police officer.
22 The man was not dressed like a police officer. The man
23 was trying to kill him, and he did what he had to do to
24 sustain himself, to protect himself and his mother.

25 Q. About how many hours of work do you think you put in

1 on this case?

2 A. Ma'am, untold hours. We worked, you know, hours.
3 And actually, a lot of folks don't know this, but I
4 actually went out and tape recorded what it looked like
5 out there on the exact time a year later just to get --
6 to get a view for him of what it looked like, to try to
7 see what the officer experienced versus what he
8 experienced. Because I thought that would help, it
9 didn't add anything. I mean, we didn't use it, but just
10 to let you know we spent hours, and hours, and hours
11 trying to help Mr. Worley. We believed him. Still do.

12 MS. MCMAHAN: I have no further questions, Your
13 Honor.

14 JUDGE CARAKER: Thank you.

15 MS. MCMAHAN: At this time the Applicant rests.

16 JUDGE CARAKER: You can step down, sir, thank you.

17 MR. GARRETT: Thank you, Your Honor. With the
18 Court's permission, may I be excused?

19 JUDGE CARAKER: Any objection to that?

20 MS. MCMAHAN: Without objection.

21 MR. ZELENKA: No objection.

22 JUDGE CARAKER: You may be excused. Mr. Zelenka, do
23 you have anything? Did you say you rested?

24 MS. MCMAHAN: Yes, Your Honor.

25 JUDGE CARAKER: I just wanted to make I heard you

1 right.

2 MR. ZELENKA: Your Honor, we have no further
3 witnesses. The record is before the Court. For the
4 Court's information, in the box that I provided in the
5 back they have the separate volumes, volume one, two,
6 three, four, of the transcripts; the briefs on appeal;
7 the opinion of the South Carolina Court of Appeals in
8 this matter; and one of the motions and the pre-trial
9 proceedings separated out also. So you don't have to
10 work your way through the download of information but it
11 should all be there.

12 JUDGE CARAKER: Thank you, sir. Thank you, I'll
13 take the matter under advisement and I'll have a ruling
14 for you. Thank you.

15 MS. MCMAHAN: Thank you. I'll let you know as soon
16 as I know something, okay.

17

18

19 (THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)

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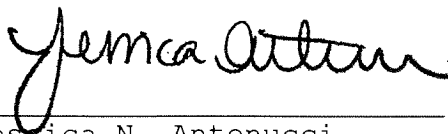
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State of South Carolina

County of McCormick

I, JESSICA ANTONUCCI, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had, and evidence introduced in the hearing of the captioned case, relative to appeal, in South Carolina Circuit Court 11, McCormick County, South Carolina, on the 26th day of August, 2024.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.



Jessica N. Antonucci

Transcriber

October 3, 2025

STATE OF SOUTH CAROLINA
COUNTY OF MCCORMICK

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT
)

Joe Ross Worley, #360529,

2025 APR 25 AM 11:01 Case No.: 2020-CP-35-00004

Applicant,

)
) **ORDER OF DISMISSAL**
)

v.

State of South Carolina,

Respondent.

This matter comes before this Court by a pro se application for post-conviction relief filed by Joe Ross Worley (Applicant) on January 14, 2020. On February 28, 2020, the Clerk of Court appointed Ashley A. McMahan to represent the Applicant. The Respondent made a Return and Motion for a More Definite Statement on May 20, 2020. On August 24, 2024, the Applicant, through counsel McMahan made an amended application for post-conviction relief.

On August 26, 2024, the matter was heard before this Court. The Applicant was present and represented by court appointed counsel McMahan. Also present for the Applicant as a Guardian ad Litem was Michael Lifsey. The State was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from former counsel Billy Garratt. At the conclusion of his testimony, the Applicant rested. The Court took the matter under advisement. This Order follows.

Procedural History

Applicant is presently incarcerated according to orders of commitment of the McCormick County Clerk of Court. During its February of 2010 term, the McCormick County Grand Jury indicted Applicant for the possession of a weapon during the commission of a violent crime (2010-GS-35-49) and assault and battery with the intent to kill (2010-GS-35-52). Applicant was

represented by C. Lance Sheek, Esquire, Billy J. Garrett, Jr., Esquire, and Carson M. Henderson, Esquire. Solicitor Donald V. Myers and Assistant Solicitors Ervin Maye and Frank Young, of the Eleventh Circuit Solicitor's Office, prosecuted the case. On May 31, 2011, through June 1, 2011, the Honorable William P. Keesley presided over a hearing on Applicant's motion to dismiss the indictments pursuant to the Protection of Persons and Property Act, as found in South Carolina Code Section 16-11-410 through Section 16-11-450, and in accordance with State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Judge Keesley denied Applicant's motion and recused himself for further participation, and later denied Applicant's motion for reconsideration of the ruling.¹

On December 16, 2013, through December 19, 2013, Applicant proceeded to a jury trial with the Honorable R. Lawton McIntosh (trial court) presiding. At the conclusion of trial, the jury found Applicant guilty as indicted, and the trial court delayed sentencing so that the presentencing investigation, which included the psychological evaluation of Applicant, could be completed. On June 30, 2014, the trial court reconvened in order to impose its sentence. The trial court sentenced Applicant to imprisonment for twenty years for assault and battery with the intent to kill and to the concurrent term of five years for the possession of a weapon during the commission of a violent crime.

Counsel Henderson filed a timely notice of appeal. Appellate Defender John H. Strom (appellate counsel) represented Applicant on appeal. Senior Assistant Deputy Attorney General J. Benjamin Aplin represented the State. Appellate counsel argued the trial court erred in (1) ruling that Applicant was not entitled to immunity under the Protection of Persons and Property act and

¹ Applicant immediately appealed this ruling and the South Carolina Court of Appeals remanded the case to the Circuit Court in order for the reconstruction of missing portions of the transcript from the hearing. Ultimately, Court of Appeals dismissed the appeal because Judge Keesley's ruling was interlocutory and rescinded its order to reconstruct. State v. Worley, S.C. Ct. App. Order filed August 21, 2013, cert. denied, State v. Worley, S.C. Sup. Ct. Order filed June 25, 2014.

(2) denying Applicant's motion for a mistrial when the State made comments in closing that constituted improper remarks on Applicant's right to be silent at trial and shifted the burden of proof from the State to Applicant. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Worley, Op. No. 2018-UP-327 (S.C. Ct. App filed September 26, 2018), cert. denied, State v. Worley, S.C. Sup. Ct. Order filed June 28, 2019. The remittitur was issued on December 6, 2019.

Matters before the Court

This Court has before it the records of the McCormick County Clerk of Court regarding the subject convictions; the appellate records from Applicant's interlocutory appeal; the appellate records from Applicant's direct appeal, including the record on appeal and the supplemental record on appeal; the trial transcript, and the pertinent records of the Department of Corrections

Issues for Relief before this Court

In the Applicant's *pro se* application for post-conviction relief on January 14, 2020, he alleged that he was entitled to post-conviction relief as follows:

- 1) "Broke no laws";
- 2) "Tried to kill me"; and
- 3) "Self Defence".

Applicant requested for the Court to grant post-conviction relief and reverse his conviction and asserted that he sought to "go to Federal Court". To those grounds, the State had made a motion for more definite statement on May 28, 2020.

Prior to the evidentiary hearing the Applicant, through counsel McMahan, made the following amended application:

I. Ineffective Assistance of Counsel of Billy J. Garrett, Jr.

- a. Failure to move to have Applicant's statement given to police suppressed because it was given without Miranda warnings.
- b. Failure to object to Kirkham being admitted as an expert witness in criminology.
- c. Failure to object to Collier being admitted as an expert in small arms and ammunition.
- d. Failure to object to the SLED expert, Whittler, to being admitted as an expert in firearms identification.
- e. Failure to ensure that Judge Keesley ruled on the issue of whether or not Rushton was certified by the justice academy at the time of the shooting. Because of this, this issue was not preserved for appeal.

Underlying Facts of the Case
Summary: State's Opening Statement

In his opening statement at trial, the solicitor gave a succinct factual summary of the incident which led to the charges against Applicant. He explained that in the early morning hours of Sunday, November 15, 2009, Alan and Gayle Sheffield, who lived on Thurmond Lake in the Little River subdivision in McCormick County, were awoken by the sound of gunshots in close proximity to their house. The Sheffields lived next door to Mary Worley and on many weekends during the fall of 2009 Worley's son, Applicant, would come out to her house. He would occasionally be outside in the middle of the night "cussing," talking loudly, and shooting a gun. The solicitor said the Sheffields had been down to the Sheriff's Department in September to complain and had also talked to Mary Worley about their concerns; however, when it happened again on November 15, 2009, they had enough and decided to call 9-1-1. They told the operator they had complained about Applicant shooting a gun from the Worley residence before and that he was at it again. (R.p.844-p.849).

At approximately 4 a.m., three officers from the McCormick County Sheriff's Department, Bobby Rushton, Nick Moore, and Melissa McAlister, were dispatched to investigate the call. The officers were in separate vehicles but showed up at nearly the same

time. While Rushton walked over to talk to the Sheffields, Moore and McAllister walked around to the "back" of the Worley residence.² The solicitor explained it was a two-story structure in the back, with a garage door and an entry door below, and windows and a sliding glass door that opened onto a deck above. As Rushton was talking to the Sheffields, Moore began beating on the lower door, ringing the doorbell, and hollering "Sheriff's Office" but got no response. Rushton was still talking to the Sheffields when he noticed a floodlight come on at the Worley residence, lighting up the backyard all the way down to the lake, and then go back off. Assuming this meant someone was awake at the Worley residence, he walked back over and joined Moore where they resumed knocking on the door, ringing the doorbell, announcing "Sheriff's Office," and trying to get someone to respond. (R.p.849-p.852).

At that point, Rushton and Moore heard the sliding glass door opening from above. Rushton stepped back out from under the deck and peered up into the darkness where he saw a figure standing at the sliding door. After the incident, the figure was identified as Applicant. Rushton identified himself by saying "Sheriff's Office" while Moore was hollering "Sheriff's Office" from under the deck, to which Applicant responded: "I don't give a fuck." Rushton noticed Applicant was holding some kind of rifle or long gun so he hollered to Moore and McAlister, "Gun!" Rushton and Moore said "Drop the gun" and as Rushton began drawing his service weapon, the floodlight suddenly came on, blinding him. Applicant then fired his rifle at Rushton, hitting the Glock pistol in Rushton's hand. The single shot blew the Glock to pieces, shattered Rushton's hand, and knocked him flat on the ground. (R.p.529-p.854).

The solicitor explained that as Moore called out to Rushton to see if he was alive, Rushton came to and began crawling towards him. Moore then heard a second shot from the

² The house predominantly faced the lake, away from the road, so while the "front" of the house was on the road, the "back" of the house was where the doors, windows, and deck are located.

rifle. As Moore and McAlister assisted Rushton and all three officers began to flee, they heard Applicant say: "Where are you, you son of a bitch?" The officers got into one of the service vehicles, left the property, and radioed for help. A short time later, Sheriff Reid and Moore returned to the Worley property where they encountered Applicant and his mother walking around the yard with flashlights. Applicant told the Sheriff he had put his deputy's gun in his patrol car and admitted to the Sheriff that he was the one who had done the shooting. When the Sheriff told Applicant he shot a deputy, Applicant responded: "He didn't have any business ringing my damn doorbell." (R.p.854-p.862).

Pretrial Immunity Hearing

On May 31-June 1, 2011, the trial court conducted a pretrial immunity hearing. Applicant testified on his own behalf; however, as noted in the procedural history, a transcript of his testimony is unavailable due to a theft from the court reporter's car. Applicant's testimony was subsequently reconstructed by Judge Keesley 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. 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.

(R. p.1857-p.1858). In a footnote Judge Keesley noted he was accepting the assertion by trial counsel Henderson in the October 2016 reconstruction hearing that the events happened rather instantaneously once Mr. Worley opened the sliding glass door and stepped outside with the rifle. The court accepted 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. (R. p.1858).

After offering his own version of events, Applicant elicited testimony from Deputy Robert "Bobby" Rushton, both about his qualifications as a law enforcement officer and about the incident. Rushton explained he had been a Sheriff's Deputy for about six years before resigning to take a job as an international police advisor in Iraq for four years, after which he returned to McCormick County and was rehired as a deputy. He identified the oath of office he

took at his initial hire but testified he did not take a new oath when rehired after his return from Iraq. Rushton testified he had to update his training with the Criminal Justice Academy when he returned and that he did this in the two weeks between his rehire and the shooting incident. He then described the police issued clothing he was wearing the night of the shooting and acknowledged his polo shirt did not have an emblem of a badge; however, he explained he was wearing an actual badge on his belt. (R.p.6-p.30).

Rushton then gave detailed testimony about being dispatched to the Worley residence in response to the 9-1-1 call of shots being fired, including who responded, who arrived first, and where each car parked. He described walking over to the Sheffield's residence to talk to the complainant while Moore went to the Worley residence and McAlister positioned herself in between. Rushton heard Moore knocking on the Worley's door and announcing "Sheriff's Office." As Moore was then walking towards McAlister and Rushton after getting no response, Rushton saw the Worleys' outdoor light come on. He told the Sheffield's to go inside and the three officers walked back towards the Worley residence, at which point the light went out. Rushton and Moore resumed knocking on the door and ringing the doorbell when they heard a voice yell: "Who is it?" The officers said, "Sheriff's Department" and the person responded, "I don't give a fuck." Rushton heard the sliding glass door over the deck opening, so he started walking backwards and looking up and saw Applicant standing in front of the upstairs windows. He recognized a weapon in Applicant's hands and yelled "Gun!" Rushton pulled his service weapon as he and Moore started yelling "Drop the gun!" He testified the lights then came on and he suddenly was face-first on the ground. Rushton testified he did not see or hear the flash from Applicant's gun but soon realized he had been shot in the hand. Rushton then described Moore's efforts to get him to come towards him, under the Worleys' deck, and how he heard

Applicant fire a second shot as he was running for cover. (R.p.30-p.103). On cross-examination, Rushton testified that neither he nor Moore tried to forcefully enter the Worley residence at any time. He also identified his signature on an oath of office form and acknowledged he must have taken an oath upon his return to duty after his employment in Iraq. (R.p.103-p.109).

Applicant then called criminologist Dr. George Kirkham to the stand to offer expert testimony about the police response to the 9-1-1 call and the shooting incident. Kirkham was admitted as an expert in the area of criminology without objection. Based on his review of statements given by the three responding officers, Kirkham opined they had made a number of mistakes including failing to get more detailed information from the Sheffields, failing to try to contact the Worleys by telephone, and failing to follow a number of fundamental principles of cover and contact. He testified that under the circumstances presented, it would be eminently reasonable for Applicant to not realize these were law enforcement officers outside of his house. (R.p.111-p.142).

Next, Applicant called Alan Sheffield to the stand. A portion of Sheffield's direct testimony and all of his testimony on cross-examination is also unavailable due to the theft. In the portion of his testimony that was transcribed, Sheffield described his relationship with the Worleys, the complaint his wife made to the Sheriff's Department about shots being fired at the Worley residence, and the talk he had with Mary Worley in which he asked her to share his concerns with Applicant. He said he has seen foxes out near the lake and had heard about the Worleys' cat, Sweet Pea, being hurt but had no recollection about how it happened. Sheffield then began describing the events of the night of November 15, 2009. He testified he heard the officers knock and announce their presence before hearing a gunshot and seeing Rushton go

down. He said it all happened so quickly that he could not tell if Rushton pulled his weapon out or not. (R.p.148-p.159).

Although the remainder of Sheffield's testimony is omitted, Judge Keesley reconstructed it as follows:

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.

(R. p.1859-p.1860). Judge Keesley further noted: 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. (R. p.1860).

Applicant then called Deputy Nicholas Moore to the stand. On direct examination, Applicant used a written statement Moore had given to an Officer Stallo on Wednesday, July 21, 2010, to explore alleged discrepancies in the deputies' descriptions of the shooting incident. (R.p.160-p.173). On cross-examination, Moore explained he repeatedly beat on the downstairs door and called "Sheriff's Office" throughout the incident, before the floodlight came on the first time, after it came on and went out again, and after hearing the sliding door above the deck open. Moore heard Applicant respond, "I don't give a fuck," before Rushton stepped back, was blinded by the lights coming back on, and was shot in the hand. He also heard a second shot fired by

Applicant and heard him say: "Where you at, you son of a bitch?" (R.p.173-p.177).

Finally, Applicant called Deputy Sara Melissa McAlister to the stand. Consistent with the testimony from Rushton and Moore, she testified that Moore and Rushton repeatedly announced their identity as law enforcement officers while knocking on the exterior door and ringing the doorbell. McAlister testified Applicant said, "I don't give a fuck," after Moore stated "Sheriff's Office" and that the light then came on and Rushton was shot. She testified she heard Moore and Rushton both tell Applicant to put his gun down before Rushton was shot. (R.p.188-p.209).

The hearing broke for the day and the following morning the parties made arguments about whether Applicant should be entitled to immunity under the Act. Applicant argued he had made a prima facie showing that Rushton was not a "qualified deputy" of McCormick County at the time of the incident, and that as a result Rushton could not be considered a "law enforcement officer" for purposes of the Act. First, he claimed Rushton was not qualified because he had not been approved by a circuit judge pursuant to section 23-13-10. Next, he claimed Rushton was not qualified because he had not taken the oath of office required by section 23-13-20. Applicant acknowledged Rushton had taken a constitutional oath but argued there was a second, statutory oath he had not taken. Finally, Applicant argued Rushton was not qualified because he had not provided a bond as required by section 23-13-20. Applicant argued that pursuant to section 16-11-440 of the Act and his own testimony, he should be "presumed to have a reasonable fear of imminent peril of death or great bodily injury" because Rushton, Moore, and McAlister were in the process of unlawfully and forcefully entering his residence. S. C. Code Ann. § 16-11-440(A) (Supp. 2009). He contended he should not be subject to the "law enforcement officer" exception to this statutory presumption because: (1) Rushton was not a qualified "law enforcement

officer;” (2) Rushton was “entering or attempting to enter” his residence at the time of the incident; (3) as an unqualified officer, Rushton could not have been acting “in the performance of his official duties;” and (4) Rushton did not “identif[y] himself in accordance with applicable law.” S.C. Code Ann. § 16-11-440(B)(4) (Supp. 2009). Continuing to rely heavily on his own testimony, Applicant claimed he only heard the doorbell ringing prior to opening the door but never heard any knocking or voices announcing the people outside his home were officers. He complained Rushton was not wearing a hat or other clothing with either a badge or clear markings indicating he was law enforcement, and that none of the officers activated their blue lights during the incident. Applicant noted the expert testimony from Dr. Kirkham about the officers’ failure to follow fundamental principles of cover and contact and argued a reasonable homeowner in Applicant’s position would not have known Rushton was a law enforcement officer and therefore Applicant was justified in doing what he did. He asked Judge Keesley to dismiss the indictments against him pursuant to the Act. (R.p.209-p.220).

In response, the solicitor argued Applicant had failed to present any evidence whatsoever that the three officers were acting unlawfully or were forcibly entering his residence. He also argued that even if the court construed the actions as a forcible entry, Applicant was not entitled to the presumption of reasonable fear in the statute because the “law enforcement officer” exception applied to eliminate such a presumption. The State argued the officers were acting lawfully and performing their official duties in responding to a 9-1-1 call and that Applicant had failed to prove otherwise. The solicitor noted the issue of whether the officers sufficiently identified themselves was a question to be answered by the jury and asked that immunity be denied. Judge Keesley took the matter under advisement. (R.p.220-p.228).

In a twenty-four page written order dated December 6, 2011, and filed December 8, 2011,

Judge Keesley concluded Applicant failed to establish he was entitled to immunity under the Act and ordered “that the motion to bar prosecution of these cases is denied.” In reaching this conclusion, the court summarized Applicant’s testimony from the immunity hearing and specifically found that testimony was not credible. It found “[Applicant had] absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home” and that “The overwhelming evidence is that Mr. Worley reasonably should have known that the person he was shooting was a law enforcement officer.” The court ultimately held: “The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so.” (R.p.1754-1777).

Trial

At trial, the State presented testimony from the witnesses described below.³ First, Deputy Nicholas “Nick” Moore described the November 15, 2009, incident which resulted in Applicant shooting Deputy Rushton in the hand. His testimony was consistent with the testimony he previously gave at the immunity hearing, with additional details. (R.p.872-p.921). Moore was cross-examined extensively by Applicant. (R.p.921-p.984). Next, the State called Donald Garman, the EMT who responded to the incident and treated Deputy Rushton’s after he was shot. (R.p.985-p.988). The State then called Dr. Robert Charles Densmore to the stand. He is a plastic and reconstructive surgeon who conducted four reconstructive surgeries attempting to repair Deputy Rushton’s severely injured right hand. (R.p.989-p.1008). Next, the State called the victim of the shooting, Deputy Bobby Rushton, to the stand. Rushton described the incident as he did at the immunity hearing, with additional details. (R.p.1008-p.1035). Rushton was then cross-examined by Applicant, with a significant number of questions directed at whether he had

³ Additional relevant details from the trial are described in Argument III below, as they relate to Applicant’s motion for a mistrial based on the solicitor’s allegedly improper closing argument.

met various statutory qualifications for becoming a duly qualified sheriff's deputy prior to the incident, including whether his appointment had been approved by a circuit court judge, whether he had posted a bond, whether he had taken a statutory oath, and whether he had completed the required course at the South Carolina Criminal Justice Academy to be recertified when he returned to the Sheriff's Department following a break in service. (R.p.1036-p.1094).

After Rushton finished testifying, the State called Alan Sheffield to the stand. Sheffield was Applicant's next door neighbor at the time of the incident and made the original 9-1-1 call to report gunshots being fired from Applicant's house in the middle of the night. He provided details about the events leading up to his 9-1-1 call, as well as the events that transpired after the law enforcement officers arrived on the scene. Significantly, he corroborated the deputies' testimony about Applicant's outdoor light coming on and off during the encounter, as well as the fact that they were repeatedly knocking on Applicant's door and announcing their identity as deputies prior to the shooting. (R.p.1094-p.1121). Next, the State called Investigator Joseph E. Collier, Jr., of the McCormick County Sheriff's Department and offered him as an expert in small arms and ammunition. He was admitted without objection and offered testimony about his role in investigating the incident, with particular focus on examining Applicant's rifle and ammunition and the damage they could cause. (R.p.1121-p.1153; p.1170-p.1172). Collier was cross-examined about a variety of issues including his department issued law enforcement clothing. (R.p.1153-p.1170). The State then called agent Kenneth H. Whitler from the SLED Forensic Services Division to the stand. He was admitted without objection as an expert in firearms identification and described the testing he did on Applicant's gun and ammunition. (R.p.1172-p.1181).

Next, the State called McCormick County Sheriff George H. Reid to the stand. He

identified Moore, Rushton, and Melissa McAlister, as deputies working for him at the Sheriff's Department at the time of the incident. (R.p.1182-p.1190). Sheriff Reid described responding to the Worley residence after the shooting incident, accompanied by Moore and McAlister. He encountered Applicant and his mother in the yard with flashlights and after identifying himself and determining who they were, talked to Applicant about the incident. Sheriff Reid testified Applicant said he put Rushton's gun in his car and then admitted he was the one who had been doing the shooting that night. When asked if he knew who shot Rushton, Applicant responded: "He didn't have no business ringing my damn doorbell." (R.p.1182-p.1190). After Sheriff Reid was cross-examined, the State rested. (R.p.1190-p.1195).

Applicant was then sworn and questioned by the court to ensure he understood his right not to testify. The trial judge explained that if Applicant chose not to testify the court would instruct the jurors that they cannot consider his failure to testify, whatsoever. (R.p.1198-p.1200). Applicant then moved for a directed verdict and made a detailed argument focusing on a claim where the State failed to show Rushton had met the statutory qualifications for becoming a duly qualified and certified deputy, the State had not presented sufficient evidence to take the case to the jury. The trial judge disagreed and denied the motion. (R.p.1200-p.1223).

Next, Applicant presented his defense. He first called his brother Robert Worley to the stand to offer testimony about the house where the incident took place. (R.p.1224-p.1286). Applicant then introduced the recording of the 9-1-1 call into evidence and it was played for the jury. (R.p.1291-p.1292). Applicant sought to recall Deputy Moore to the stand in regard to whether he was duly qualified as a deputy sheriff. The court allowed Applicant to proffer the testimony as it related to his directed verdict argument, and the State stipulated essentially the same testimony would be given by McAlister. (R.p.1293-p.1305).

Applicant then called criminologist Dr. George Kirkham to the stand. Consistent with the immunity hearing, he was admitted as an expert without objection. Kirkham proceeded to offer similar testimony to what he gave at the immunity hearing, critiquing the police response to the 9-1-1 call and the procedures employed at the scene. He gave an opinion that Deputy Rushton's actions were the significant and proximate cause of his getting shot by Applicant. (R.p.1305-p.1351; p.1424-p.1431). Dr. Kirkham was extensively cross-examined by the State in regard to his opinions and credibility as an expert. (R.p.1352-p.1423). Finally, Applicant called Bo Willis in his defense. Willis is a City of McCormick police officer who assisted in the investigation, took photos of the scene, and drew a diagram of the house. (R.p.1433-p.1470). Applicant advised the trial court he would not testify in his own defense and the trial moved on to a charge conference and closing arguments. (R.p.1472-p.1578). As described in greater detail below, Applicant objected to a portion of the State's closing argument and moved for a mistrial; however, after hearing extensive arguments both at the time of the objection and before the jury charge, the trial court denied the motion. (R.p.1559-p.1561; p.1579-p.1598; p.1634-p.1637). The trial court gave a jury charge covering the State's burden of proof, the presumption of innocence, evidence, credibility of witnesses, reasonable doubt, the elements of the crimes and each of Applicant's defenses. (R.p.1598-p.1634). In regard to Applicant's decision not to testify the court charged: "Ladies and gentlemen, I'll also instruct you and tell you that - - and emphasize to you the fact that the defendant in this case did not testify is not and shall not be a factor that may be considered by you in any manner whatsoever in your deliberations." (R.p.1612, line23-p.1613, line 3).

Summary of PCR Testimony of Billy Garratt

The Applicant called former counsel Billy Garratt to the witness stand. Counsel

testified that he had hired Lance Sheek and Carson Henderson to assist in the trial. He also retained Desa Ballard to assist. He indicated that the Stand Your Ground issue was the primary issue at trial because the defense asserted that Worley thought the law enforcement officer was a burglar. He stated that a neighbor told Worley about a wild fox running earlier in the evening and had shot at the fox which caused the neighbor to call law enforcement. Garratt stated that their main defense at trial was the police officer was not a certified police officer because he still had additional training classes to complete and was not sworn. They asserted that the officer threatened Worley first with the gun and shot first. Worley claimed he did not see other law enforcement officers there or the police cars until after the shooting. Worley claimed he could not hear "police" because the house was very insulated. Garratt testified that they did a jury view of the house to support that theory.

Garratt stated that the judge had to do a preliminary hearing on the Castle Doctrine. He determined that it did not apply, which was discussed in part with the jury. Garratt also stated that parts of the transcripts of the stand your ground hearing were missing and had to be submitted and decided through affidavits of Worley's testimony and which Garratt initially recalled was denied.

Garratt testified that he recalled the state's expert witnesses and stated he made no objection to their qualifications. Garratt declared that he knew most of them or their reputation as reputable. Concerning the shotgun, Garratt stated that the family had indicated that they allegedly always took out the lead bullets and replaced them with steel ones. However, his father had passed prior to the trial so they did not have a person to attest to the family tradition.

Garratt testified about his legal experience in the practice of criminal cases and with firearms cases in the past, as well as with "reasonableness of police officers. He stated that it was

his own opinion that it was not reasonable for a police officer to put himself in the line of fire. When asked about the qualifications of expert witnesses Kenneth Whitler found to be an expert in firearms identification, he acknowledged that he did not object to the qualifications because he was aware that he had a strong reputation in the community. See Tr.p. 456; R. 1174-1175. Similarly, counsel did not object to the qualifications of Investigator Joseph Collier of the McCormick County Sheriff's Department as an expert in "small arms and firearms and associated ammunition. Garratt asserted that there was no prejudice from admitting the expert nor that the expert was unqualified. Garratt testified that he had used Dr. George Kirkham before and was aware of his credentials and he was the one who presented him in this case. Garratt also knew SLED Agent Collier previously. In addition, Garratt indicated that he did not know SLED Agent Kenneth Whitler but understood his background and did not object.

Concerning a Miranda issue asserted in the application, Garratt testified that the Applicant was not in custody at the time of the discussion with law enforcement so that there was no Miranda violation. Garratt noted that Worley and his wife approached law enforcement on their own accord when he made the comment that was introduced into evidence.

Garratt also testified that it was their theory that the Applicant saw no blue lights in the area from the house and had to walk around to see the side driveway, whereas he recalled that the police had parked on the street. He testified that the officer was not in the traditional police uniform. Garratt stated that he visited the scene one year later and recorded the scene to help establish the view the Applicant would have had.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant failed to meet the high

burden required for a grant of post-conviction relief pursuant to Rule 71.1, SCRCP, and the Uniform Post-Conviction Procedure Act (the Act). For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

A. Ineffective Assistance of Trial Counsel, Generally

Applicant's claims of ineffective assistance of counsel are without merit. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence - a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. To obtain reversal of a conviction, the applicant must prove that (1) their attorney's performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the defendant of a fair trial (the prejudice prong). *Id.* at 690-95; Butler, 286 S.C. at 442, 334 S.E.2d at 814. The defendant's burden for proving both of these components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. Strickland, 466 U.S. at 690. Failure to make the required showing of either deficient

performance or sufficient prejudice defeats the ineffectiveness claim. *Id.* at 700.

The first prong - constitutional deficiency - is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, “does not guarantee perfect representation [-] only a ‘reasonably competent attorney.’” *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (*quoting* *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Harrington*, 562 U.S. at 110.

Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689; *see also* *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Thus, a fair assessment of attorney performance requires every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed at the time of counsel's conduct*." *Strickland*, 466 U.S. at 690. (*emphasis added*) An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (*emphasis added*). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. *Harrington*, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," *not* whether it deviated from best practices or most common custom. *Id.* (*quoting Strickland*, 466 U.S.

at 690) (emphasis added).

The second, or “prejudice” prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695.

Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding - counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 668. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Strickland, at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697. The

court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

A. Counsel's failure to move to have Applicant's statement given to police suppressed because it was given without Miranda warnings.

In his initial amended allegation, Worley asserts that counsel was ineffective in failing to move to suppress the statement of Applicant to the police because he was not given Miranda warnings. The record reflects that a statement of the Applicant was introduced at trial in the following manner. During the testimony of Sheriff George Reid, the following colloquy occurred after he saw two people walking toward him after the incident:

Q. What, if anything, did you say to them or what, if anything, did they say to you?

A. I said, Do not shine the flashlight in my face.

Q. Did anybody respond?

A. No, sir. Then I quickly asked, Who is you? Then it was respond back and said, Who is you? Then I identified myself as Sheriff Reid. So, by that time, we were walking towards each other at the time.

Q. And there was two people that you were coming in contact with?

A. That's correct.

Q. What happened when y'all got up face-to-face?

A. **When we got face-to-face, the defendant told me that, I put your deputy gun in his car.**

Q. **I put your deputy's gun in" his car?**

A. That's correct.

Q. And what was said next?

A. Then I said, Well, some shooting going on down here. Then he responded back, I did it.

Q. I did it?

A. I did it.

Q. And what did you say?

A. Then I said, Did you know you shot my deputy? Then he said, He didn't have no business ringing my damn doorbell.

Q. Said what now?

A. He didn't have no business ringing my damn doorbell .

Q. And what did y'all do then?

A. Then I placed him under arrest.

Q. And the person y'all arrested was who?

A. Was the defendant over there (indicating).

Q. Mr. Worley?

A. That's correct.

R. p. 1188 -1191.

This Court finds as a fact that this was a pre-arrest non-custodial voluntary admission. "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda" State v. Brewer, 438 S.C. 37, 45, 882 S.E.2d 156, 160 (2022) (quoting State v. Saltz, 346 S.C. 114, 135-36, 551 S.E.2d 240, 252 (2001)). State v. Lowery, 443 S.C. 473, 480, 905 S.E.2d 361, 364-65 (2024), reh'g denied (Sept.

17, 2024). “Miranda warnings must be administered prior to ‘custodial interrogation.’ ” Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). “A suspect is ... ‘in custody’ for Miranda purposes when placed under formal arrest or when a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.” *Id.* at 596. “Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.” J.D.B. v. N. Carolina, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011). “The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances.” U.S. v. Bengivenga, 845 F.2d at 596. “The relevant inquiry is whether a reasonable man in the suspect’s position would have understood himself to be in custody.” State v. Easler, 327 S.C. at 128, 489 S.E.2d at 621. Even if an officer focuses his inquiries on a suspect, Miranda warnings are not warranted if the setting is non-custodial. *Id.* at 127–28, 489 S.E.2d at 621. Miranda warnings were “not intended to hamper the traditional function of police officers in investigating crime.” *See* Miranda, 384 U.S. at 477, 86 S.Ct. 1602; State v. Barksdale, 433 S.C. 324, 332, 857 S.E.2d 557, 561 (Ct. App. 2021).

Custody for Miranda purposes requires a greater restraint on freedom than seizure under the Fourth Amendment. *See also* Berkemer v. McCarty, 468 U.S. 420, 437–38, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (holding Miranda warnings not required during traffic stop; finding brevity, spontaneity, and public-nature of stop, and small number of officers involved, rendered atmosphere insufficiently “police dominated” to be coercive). A determination of whether a

defendant is “in custody” for Miranda purposes depends on the “totality of circumstances.”

California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). See United States v. Hargrove, 625 F.3d 170, 181 (4th Cir.2010) (finding in-home interrogation non-custodial; noting “[the defendant] was permitted to move about his house”).

Here, at the time the inculpatory statement was made by Worthy he was freely walking around the property with his wife. There was no evidence to support any assertion that he was in custody at the time of the statement. Assuming arguendo that the Sheriff may have intended to arrest Worthy, an unarticulated plan has no bearing on whether the suspect was in custody at a particular time. Yarborough v. Alvarado, 1254 S.Ct.2140 (2004).

The Applicant has failed to show that counsel was deficient in failing to object on an assertion that the statement to the Sheriff should have been suppressed because he was not given Miranda warnings before his admission. No reasonable counsel was required to object under the same circumstances to a frivolous basis under the law.

Similarly no Sixth Amendment prejudice under Strickland has been shown. The Applicant has failed to prove that there is a reasonable probability that had counsel made an objection, the result of the proceeding would have been different.

This allegation of ineffective assistance of counsel must be denied.

Counsel's Failure to Object to experts Kirkham, Collier and Whittler being admitted as experts.

Mr. Garrett is an attorney with 40 years of experience handling criminal matters, including firearm and ammunition cases. He stated numerous strategic reasons for not challenging Worley's statement, and failure to object to Kirkham, Collier, and Whittlers qualifications as experts in their respective fields. This Court finds that he has failed in his burden of proof.

Rule 702 of the South Carolina Rules of Evidence provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” To admit expert testimony under Rule 702, the proponent—in this case the State with Collier and Whitler—must demonstrate, and the trial court must find, the existence of three elements: “the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1 at 20, 515 S.E.2d 508 at 518 (1999); *State v. Herrera*, 425 S.C. 558, 562, 823 S.E.2d 923, 925 (2019) (although the witness’s “qualifications as an expert present a close question, under our deferential standard of review, we find no abuse of discretion in qualifying him as an expert”). *See State v. Wallace*, 440 S.C. 537, 543, 892 S.E.2d 310, 313 (2023).

Dr. George Kirkham.

First, the Applicant’s allegation that he should have objected to the qualification of Dr. George Kirkham as an expert in criminology is wholly without merit. Dr. George Kirkham testified as a retained defense witness. Reasonable counsel practicing criminal law would not object to the qualifications of their own expert witness. Dr. Kirkham testified initially during the immunity hearing. The witness presented his credentials as a criminologist and professor emeritus at Florida State University, with a history as a probation counselor, a law enforcement officer, including a deputy sheriff and undercover officer, having testified in 1000 cases over 35 years involving police procedure and standards, and given opinions in court. He also testified that he had published 26 police training videos with grants from the U.S. Department of Justice. R.p. 112-113. Counsel Garratt moved to qualify the witness as an expert in criminology with was

granted without objection. R.p. 114.⁴

Dr. Kirkham also appeared again as a defense witness before the jury. Once again he was qualified as an expert in criminology. R.p. 1305-1320. In a more extensive qualification voir dire by the defense of Dr. Kirkham, it was noted that he had taught at the South Carolina Criminal Justice Academy⁶ and included his personal law enforcement experience. He testified that he had been in the U.S. District Court of South Carolina a few weeks prior and in civil cases before Judge Culbertson in Georgetown. In front the jury, Dr. Kirkham was qualified as an expert in criminology, with a particular area of practices and procedures of law enforcement. R.p. 1320. Kirkham proceeded to offer similar testimony to what he gave at the immunity hearing. He questioned the police response to the 9-1-1 call and the procedures employed at the scene. He gave an opinion that Deputy Rushton's actions were the significant and proximate cause of his getting shot by Applicant. (R.p.1305-p.1351; p.1424-p.1431). Dr. Kirkham was extensively cross-examined by the State in regard to his opinions and credibility as an expert. (R.p.1352-p.1423).

This Court finds that counsel was not deficient in failing to object to his own witness and his qualification to testify. The Applicant failed to assert any factual or legal basis for this assertion. This ground must be denied.

Investigator George Collier – Expert in Small Arms and Ammunition

In his third claim of ineffective assistance of counsel, the Applicant alleged that counsel should have objected to the qualifications of Investigator Collier as an expert in small arms and

⁴ Dr. Kirkham opined the officers made a number of mistakes including failing to get more detailed information from the Sheffields, failing to try to contact the Worleys by telephone, and failing to follow a number of fundamental principles of cover and contact. He testified that under the circumstances presented, it would be eminently reasonable for Applicant to not realize these were law enforcement officers outside of his house. (R.p.111-p.142).

ammunition. This Court finds that counsel was not deficient in not objecting to the qualifications of Investigator Collier to present expert opinion testimony related to the weapon used, its operation, and the types of ammunition. Further, Sixth Amendment prejudice has not been shown.

Counsel Garratt declared in this proceeding that he knew Collier. At the trial, Investigator Collier's background and law enforcement experience began after serving in the Navy when he became a police officer as a law enforcement officer in the McCormick City Police Department and then went with the Sheriff's Department in 1993. R.p. 1122. He worked in the narcotics task force for three (3) years and currently served as the departments training officer. He is also in charge of narcotics, special projects, and special operations at the department. He described his specialized training with being certified as a firearms training instructor in 1995 and certified by Blackwater International in 2001 as a technical carbine instructor, which includes M16, M4s and similar weapons. In 2004, Investigator Collier was also certified by the National Rifle Association as a law enforcement firearms instructor in handgun, shotgun, and tactical carbine or patrol rifle. He stated he was also certified as a Glock instructor. He further declared that his tactical training, being an ALERT instructor which involves active shooter training, tactical narcotics training, included firearms related training through the S.C. Criminal Justice Academy and the New Jersey Police Academy. He also declared that he was responsible for training all the investigators in the Eleventh Circuit Solicitor's Office, the investigators at the Ethics Commission, and various departments throughout the state. R.p. 1121-1124.

The State then moved for his qualification, without objection by the defense, as an expert in small arms and ammunition. R.p. 1125.

In front of the jury, Investigator Collier proceeded to testify about his role in

investigating the incident, with particular focus on examining Applicant's rifle and ammunition and the damage they could cause. (R.p.1121-p.1153; p.1170-p.1172). Collier was cross-examined about a variety of issues including his department issued law enforcement clothing. (R.p.1153-p.1170).

The Applicant has failed to show how counsel was deficient in failing to object to the qualification of Collier as an expert and his testimony. The investigator testified based upon his expertise in small arms and ammunition in describing how a Remington 742 rifle functioned as a semiautomatic rifle. R.p. 1132-1133. He also described the power of the rounds in this case, the .30-06 ammunition as a very powerful round and a popular hunting cartridge. He further described the various types of bullets, including full metal jacket versus a hollow point bullet, and the lethal power in each. R.p. 1136-38. He described how modifying a bullet with a steel rod or pin would mess up the design of the bullet and impact upon its accuracy from a distance, but not up close. R.p. 1139-40. Counsel objected to the testimony as lacking a foundation on whether it would take considerable skill and expertise to manufacture an armored piercing bullet, which was overruled. R.p. 1140-1142.

This Court finds that the witness was qualified to give an opinion under Rule 702 based upon his training and experience and it assisted the jury as a trier of fact. The Applicant has failure to show any additional basis for disqualifying the witness. Since the Applicant has the burden of proof in this setting, the Court must conclude that he has failed. Similarly, a review of the testimony shows this Court that the Applicant has failed to prove prejudice as it relates to Investigator Collier's expert opinion. His allegation must be denied.

SLED Agent Kenneth Whitler – expert in firearms identification.

In his fourth claim of ineffective assistance of trial counsel, the Applicant claims, again in

a conclusory fashion, that the counsel Garratt was ineffective in failing to object to SLED Agent Whitler being admitted as an expert in firearms identification. The Applicant's counsel did not object to Mr. Whitler's qualification after development of his training and experience. R.p. 1172-1175. This Court finds that the Applicant failed in his burden of proof in showing deficient performance or prejudice.

At trial, the State presented the following information in support of his qualification. Whitler presently worked in the SLED Forensic Science Department in the firearms department. He initially started his law enforcement career as a deputy in the Chester County Sheriff's Department in 1968 and then worked with the Attorney General's Office in the 1970's. In 1976, he joined the F.B.I. in the firearms lab until he retired in 1997. He then took a job in the firearms department at SLED. Whitler stated that there is no school to get a degree in firearms identification, but it is learned from other qualified examiners. He stated that at the FBI lab there was a two to two and one-half year training program where they worked with qualified trained examiners on real cases and fake cases and complete research. He stated they shoot many firearms, look at fired bullets and cartridge cases and do comparisons. At the end of the F.B.I. program when you have reached a level of expertise, the agent must take three proficiency tests. If the agent passes the tests, they are allowed to conduct examinations for the F.B.I. R.p. 1174. Whitler stated he completed the program in 1991 and qualified to conduct the examinations. He testified that he presently conducts firearms examinations as an expert. R.p. 1174.

At that point, the court qualified Agent Whitler as an expert in firearms identification without objection. R.p. 1175.

SLED agent Whitler testified that he test fired the Remington 742 rifle, examined it and found it to be in working order. R.p. 1175-1176. He also examined the items in evidence related

to firearms. He opined that all of the shell casings found at the scene were from that Remington 742 rifle. R.p. 1176 -1179.

The Applicant has failed in his burden of proof in showing that the counsel was deficient in failing to object to Agent Whitler's qualifications. This Court finds that his experience and training in conducting firearms identification in either the F.B.I. or SLED since 1991 places Agent Whitler in the acceptable category as an expert in firearms identification. In this hearing, the Applicant has presented no cogent reason or evidence undermining that qualification nor a suggestion why reasonable counsel was under a duty to object. The Supreme Court has written that a petitioner must show that it is indisputable that Strickland required reliance on an expert rather than cross examination to discredit witnesses. See Harrington v. Richter, 131 S.Ct. 770, 791, 178 L.Ed.2d 624 (2011). The alleged failure to hire an expert on bullet impression failed to show prejudice where the petitioner offered no expert to show what would have been provided. Lamar v. Graves, 326 F.3d 983, 986 (8th Cir. 2003).

Similarly, the Applicant has failed to show Sixth Amendment prejudice. It must be noted that in the opening statement, counsel for Worley informed the jury that Worley shot the officer. R.p. 867-869. In addition, if there was an objection to the qualifications it would have been overruled. Under Strickland, the Applicant has failed to show a reasonable probability that, but for counsel's failure to object to the qualification of Agent Whitler the result of the trial would have been different. This allegation is denied.

Counsel's Alleged Failure to ensure that Judge Keesley ruled on the issue whether or not Officer Bobby Rushton was certified by the Justice Academy at the time of the shooting, therefore not preserving the issue on appeal.

In the final claim in the amended application, the Applicant asserts that counsel was deficient because he did not ensure that Judge Keesley ruled on the issue w of whether the victim

was a certified officer at the time of his shooting. This issue arises from the State's position in the appeal in p. 26, fn. 5 which stated:

n.5. Judge Keesley did not rule on Appellant's claim on appeal that Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident because that argument was not specifically raised at the immunity hearing. Consequently, it is not preserved for appellate review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

During the PCR action, counsel Garratt was of the opinion that whether the victim was certified by the academy at the time of the shooting was an important part of the case. This Court must find that the Applicant has failed to prove deficiency or prejudice under Strickland.

The issues as to whether Rushton was a law enforcement officer at the time of the shooting was thoroughly argued, as it was their main defense at trial. The judge held him to be an officer under the Act at the time, and submitted the case to the jury. The jury seems to have agreed with the judge on that call, finding Worley guilty.

The Applicant appears to contend that the issue was barred in the direct appeal because he asserts the judge did not make a specific find on whether he was a certified officer by the Academy at the time. However, the records shows that the Applicant made a motion for directed verdict at the conclusion of the States case asserting the following to then counsel Desa Ballard:

THE COURT: ...And I'm going to find for the record that the officer was certified and qualified based on what I heard. I know you have - - you challenge that, but I'm also finding that regardless of whether or not this officer was certified or qualified, under the facts of this case, it doesn't make a difference. And I think that you had two undisputed qualified, certified law enforcement officers at the scene . . . who are announcing, under the facts so far placed in the record, their presence. Even if Officer Rushton was not qualified or certified at the time, I don't think, under the facts, it makes a difference.

R.p. 1222-1223. Further, in Judge Keesley Written Amended Order On Reconsideration of the Defendant's Motion to Bar Prosecution filed December 8, 2011, Judge Keesley wrote :

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.

R.p. 1755-1756. Within that Order on December 8, 2011, Judge Keesley addressed whether Deputy Rushton was a law enforcement Officer under the Act. R.p. 1762-65. This portion is incorporated herein by reference.

In its brief on direct appeal, the State urged the following:

Findings not Necessary to the Ultimate Conclusion

First and foremost, this Court should decline to engage in any consideration or discussion of Appellant's myriad grounds for claiming Deputy Rushton was not a "law enforcement officer" within the meaning of the Act because the lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and that denial was solidly grounded in credibility findings and Appellant's abject failure to carry his burden of proving the required elements of self-defense by a preponderance of the evidence. Indeed, the trial judge held: "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." (R. p.1767). In other words, the lower court concluded Appellant failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. See *State v. Curry*, 406 S.C. 364, 371 n.4, 752 S.E.2d 263, 266 n.4 (2013) (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Appellant's] conduct." (R. p.1774). These individual findings supported the lower court's ultimate conclusion that "Appellant has not met his burden of proof" in establishing the elements of self-defense needed for a grant of pretrial immunity. (R. p.1773-p.1774). This ultimate conclusion is discussed in more detail in Argument II below, but for purposes of Appellant's complaints about Deputy Rushton and his lack of statutory qualification, it serves to exonerate the viability of those complaints. If this Court disagrees and chooses to engage Appellant's claims, the State submits the lower court's overall rejection of those complaints was proper

for several reasons.

Final Brief of Respondent, p. 21-22. See also *Final Brief of Respondent*, p. 23-32.

In its decision denying relief, the Court of Appeals adopted Judge Keesley's Order.

We affirm and adopt the trial court's December 8, 2011 order pertaining to the court's determination that Worley had the burden of proving his claim of immunity by the preponderance of the evidence, which he failed to do. See Byrd v. Livingston, 398 S.C. 237, 245, 727 S.E.2d 620, 624 (Ct. App. 2012) (adopting the trial court's order as to some issues); Grosshuesch v. Cramer, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

State v. Worley, No. 2014-001497, 2018 WL 4680012, at *1 (S.C. Ct. App. Sept. 26, 2018).

For all the above reasons, the Applicant has failed to prove deficient performance. The Applicant has also failed to show Sixth Amendment prejudice. Assuming that counsel was deficient in getting Judge Keesley to find more specifically as to whether Rushton was certified or not certified, Sixth Amendment prejudice was not proven because there is no reasonable probability that the result of the proceeding would have been different. The trial court's overall rejection of Applicant's claims was proper where those claims were premised on the statutory requirements for a deputy to become "duly qualified," but the actual terms of the Act do not use the phrase "duly qualified" or otherwise equate a "law enforcement officer" with a "duly qualified" deputy sheriff.

In regard to the appointment of deputies, the South Carolina Code provides:

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.

S.C. Code Ann. § 23-13-10 (2007). Concerning whether those deputies becoming "duly qualified" after appointment it then provides:

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.

S.C. Code Ann. § 23-13-20 (2007) (emphasis added).

The Code goes on to explain: "When duly qualified a deputy sheriff may perform any and all of the duties appertaining to the office of his principal." S.C. Code Ann. § 23-13-50 (2007) (emphasis added). By comparison, the terms of the very next statute do not require a sheriff's deputy to be "duly qualified" to exercise the power of arrest. S.C. Code Ann. § 23-13-60 (2007). Thus, where the Legislature intended a particular duty to be valid only for a "duly qualified" deputy, it explicitly said so. As in the statute about the power to arrest, the phrase "duly qualified" is conspicuously absent from the Act, which instead simply used the broad term "law enforcement officer." The State submits that by failing to specifically tie a deputy's statutory qualifications to his being considered a "law enforcement officer" under the Act, the Legislature could not, as found by the lower court, have intended the result sought by Applicant—elimination of the law enforcement officer exception to immunity simply because an officer, acting in the performance of his official duties, did not meet the technical requirements of the statutes. Again, such a result would be absurd and was properly rejected by the lower

court.

The Act provides that:

A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from 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 (Supp. 2009) (emphasis added). Thus, in the same provision the Act both creates immunity and carves out an exception so that immunity may be completely barred when the person against whom deadly force was used is a “law enforcement officer” and certain other circumstances are present.

The Act creates a presumption that a person has proven this element of self-defense if certain conditions are met. It provides in part:

(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, or occupied vehicle . . . 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.

(B) The presumption provided in subsection (A) does not apply if the person:

....

(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.

S.C. Code Ann. § 16-11-440 (Supp. 2009) (emphasis added). Thus, in addition to the overall bar in section 16-11-450, the Act also eliminates the presumption of reasonable fear of imminent peril when the person against whom deadly force was used is a “law enforcement officer.”⁵ In the immunity hearing Applicant’s argument hinged on his contention that Deputy Rushton was not a “law enforcement officer” for purposes of the Act at the time of the incident, and therefore Applicant should not have been subject to the exception to immunity in section 16-11-450 or the exception to the statutory presumption in section 16-11-440. The State disagrees and contends that regardless of whether Deputy Rushton complied with every technical statutory requirement to become “duly qualified,” the lower court properly found he was a “law enforcement officer” for purposes of the Act.

De Facto Officer

The trial court’s overall rejection of Applicant’s claims and the Court of Appeals adoption was also proper where Deputy Rushton’s actions were legal under the doctrine of de facto officers. It has been found that, “[a] person who has been duly elected sheriff and exercises the duties of the office is sheriff de facto, even though the person’s bond is defective.” 80 C.J.S. SHERIFFS AND CONSTABLES § 5 (2013) (citing Cooper v. Ricketson, 80 S.E. 217 (Ga. 1913)). As explained by our supreme court: “The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers As nature abhors a void, the law of government does not ordinarily countenance an interregnum.” Bradford v. Byrnes, 221 S.C. 255, 261-62, 70 S.E.2d 228, 231 (1952). Thus,

⁵ It is unclear what purpose is served by the narrow section 16-11-440(B) exception to the statutory presumption when an officer is entering or attempting to enter a residence, where the broader language in section 16-11-450 completely bars immunity from prosecution for any action taken in the performance of the officer’s official duties.

“[o]ne in office, transacting the duties, is supposed to be rightfully there, and so far as third persons are concerned, that presumption legalizes his acts.” Kottman v. Ayer, 34 S.C.L. 92, 95 (3 Strob. 1848). Indeed, “[i]t is the appointment that confers the office The omission to qualify by giving bond or taking the oaths is cause of forfeiture; but so long as the officer appointed continues to discharge the duties of his office, his official acts, as to third persons, are legal. The law which requires the bond, or the oath, is . . . merely directory.” Id. at 94 (citing McBee v. Hoke, 29 S.C.L. 138 (2 Speers 1843));⁶ see also State v. Toomer, 41 S.C.L. 216, 227 (7 Rich. 1854) (“The statutory provisions prescribing the manner of executing the bond, suing out the commission, or taking the oaths of office, are merely directory. . . . So long as the officer appointed continues to exercise the duties of his office, his official acts as to third persons are legal.”). The State submits any other result would be absurd.

Here, Applicant presented at trial or in this PCR proceeding no evidence to suggest anyone in the McCormick County community, from the 9-1-1 operator to the dispatcher, to the Sheriff or the officers themselves believed they were not legally qualified to approach his residence and attempt to make contact as part of their investigation of the 9-1-1 call. As set forth by the South Carolina Law Court of Appeals and Court of Errors, under circumstances where an individual was recognized by the community as an officer, “it would be attended with the most mischievous and pernicious consequences to hold his official acts, and the official acts of all who

⁶ “The reason of the rule, and the rule itself, embrace every officer from the highest to the lowest. The acts of a king de facto are as binding as if he were in office by legal right, so long as those whom he governs acquiesce in his exercise of power.” Thus: “[W]here the electing or appointing power has conferred the office upon him, and he is in the actual discharge of its duties, without his title being questioned in any legal way, the community in which he lives have [sic] a right to regard him as a legal officer, and his acts, as to them, will be as valid as if he wore on his forehead, to be read by every one, the evidences of his appointment and qualification. If it were otherwise there could be no guaranty or security for the validity of the official acts of any officer.” Kottman, 34 S.C.L. at 94 (3 Strob. 1848).

have acted under the like circumstances, to be void.” Kottman, 34 S.C.L. at 97 (3 Strob. 1848). In the absence of a showing of fraud, an individual holding an office and acting in the capacity of that office is a de facto officer and his failure to subscribe to the required oath of office will not vitiate his official acts. Davis v. Town of Cayce, 166 S.C. 372, 164 S.E. 883, 887-88 (1932). In addition, any defects in an officer’s title caused by the failure to comply with the provisions of a statute, such as executing or filing a bond or taking the oaths of office within a given time frame, may be cured, “and if he be already in office, his de facto title is immediately converted into a title de jure, and has relation back to the period of his [appointment and] . . . as against all the world, is unquestionable.” Toomer, 41 S.C.L. at 229 (7 Rich. 1954).

Specifically in regard to the office of Sheriff, our courts have applied the doctrine of de facto officers. The Court of Constitutional Law held that the Act of 1795, which required Sheriffs to give bond to the “Treasurers of the state” was “merely directory, and . . . as long as he remained in office, he must be regarded as an officer, and his own failure to perfect his security cannot be pleaded in bar against the consequence of his misconduct, in not discharging his official duties.” Stevens v. Treasurers, 13 S.C.L. 107, 109 (2 McCord 1822). Later, in discussing the office of coroner, the court stated:

It is plain, from comparing these provisions, that the office of the Sheriff is much more hedged around with obstacles to entering upon it, without giving bond, than that of the Coroner; yet, I have no doubt, that if a Sheriff were to enter upon its duties, without giving bond, that all his acts, so far as third persons are concerned, would be good. The persons confiding or transacting business to or with him, finding him in office, would have the right to say, we did not enquire by what authority he exercised it. As to them, his acts for or against them, would be good.

McBee v. Hoke, 29 S.C.L. 138 (2 Speers 1843). In Applicant’s case, the deputies were clearly in office and were transacting their official duties of enforcing the laws of South Carolina by being dispatched in response to a 9-1-1 call about gunshots being fired in a residential area in the

middle of the night. As de facto officers, their actions were legal in approaching Applicant's residence and trying to make contact as part of their investigation, and Applicant's argument was properly dismissed by the trial court and appellate court.

Even if we assume that trial counsel was deficient in more clearly pointing out an argument that Rushton was not yet "certified" by the Criminal Justice Academy, he has failed to prove prejudice under Strickland. Judge Keesley, at the trial, specifically found Rushton was a qualified officer subject to the protections of the Act. Further, it cannot be questioned that Rushton was at least a de facto law enforcement officer. Further, In its opinion, the Court of Appeals never adopted the position of the Respondent that the "certified" issue was procedurally barred. The Applicant has failed to show that there was a reasonable probability that had the Applicant's counsel specifically ruled that at the immunity hearing that Rushton was not certified at the time of the incident, that the result of the proceeding would have been that he was granted immunity since Rushton would still have been at least a de facto officer. Further, the trial court later also rejected a directed verdict issue on the issue. When the issue was squarely raised. R.p. 1221-1223. His allegation must be denied.

Pro Se Allegations

In his remaining allegations in the original *pro se* application, the Applicant alleged the following conclusory statements: "broke no law," "Tried to kill me," and "self-defense." Each of these conclusory statements suggest that the Applicant is asserting that he is innocent of the charges, and at best, the evidence was insufficient to convict him. These assertions must be dismissed as failing to set forth a cognizable claim under the PCR Act. S.C. CODE ANN. § 17-27-20(a)(6) (2003) ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."); Simmons v. State, 264

S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims). The allegations must be dismissed.

CONCLUSION

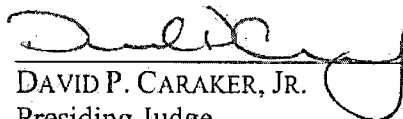
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application and vacate his conviction. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant is returned to the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22nd day of April, 2025.


 DAVID P. CARAKER, JR.
 Presiding Judge
 Eleventh Judicial Circuit

Lexington, South Carolina

WITNESSES

BROCK

MCSO

ARREST WARRANT NUMBERJ036561

ACTION OF GRAND JURY*True Bill*

Carol Dyerill

Foreperson of Grand JuryDate: FEB 22 2010

VERDICT

Foreperson of Petit Jury

Date:

FEB 22 2010

DOCKET NO. 2010-GS-35- 052

The State of South Carolina

County of MCCORMICK

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2010

THE STATE

vs.

JOE ROSS WORLEY

CDR#0014

Indictment for

ASSAULT AND BATTERY WITH
INTENT TO KILL

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF MCCORMICK)

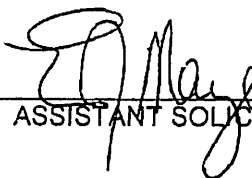
INDICTMENT FOR

ASSAULT AND BATTERY
WITH INTENT TO KILL

At a Court of General Sessions, convened on February 22, 2010 the Grand Jurors of McCormick County present upon their oath:

That JOE ROSS WORLEY, did in McCormick County on or about November 15, 2009, with malice aforethought, commit an assault and battery with intent to kill the victim, Robert Rushton, in that the defendant, Joe Ross Worley, did shoot a rifle at the victim and striking him in his right hand, with the intent to kill the victim, Robert Rushton, in violation of the Common Law of South Carolina, with punishment provided for in Section 16-3-620 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

BROCK

MCSO

ARREST WARRANT NUMBER

J036564

ACTION OF GRAND JURY

True Bill

Carl Dyer

Foreperson of Grand Jury

Date: FEB 22 2010

VERDICT

Foreperson of Petit Jury

Date:

FEB 22 2010

DOCKET NO. 2010-GS-35- 049

The State of South Carolina

County of MCCORMICK

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2010

THE STATE

vs.

JOE ROSS WORLEY

CDR#0549

Indictment for

POSSESSION OF A WEAPON
DURING A VIOLENT CRIME

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF MCCORMICK)

INDICTMENT FOR
POSSESSION OF A WEAPON
DURING A VIOLENT CRIME

At a Court of General Sessions, convened on February 22, 2010 the Grand Jurors of McCormick County present upon their oath:

That JOE ROSS WORLEY, did in McCormick County on or about November 15, 2009, unlawfully have in his possession a firearm, Remington rifle, during the commission of the violent crime of Assault and Battery with Intent to Kill, in violation of Section 16-23-490 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF McCormick

STATE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2010-GS-35-00052

AW#:

J036561

Date of Offense:

11/15/2009

S.C. Code §:

16-03-0620

Code #:

0014

VS.

Joe Ross Worley

AKA:

Race:

Sex:

M

Age:

52

DOB:

SS#:

Address:

City, State, Zip:

DL#

SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

CONVICTED OF or ☐ PLEADS

TO:

In violation of §

of the S.C. Code of Laws, bearing CDR Code #

☐ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)

The charge is:

☐ As indicted,☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury,☐ Negotiated Sentence,☐ Recommendation by the State.

(def.'s initials)

The plea is:

☐ Without Negotiations or Recommendation,

ATTEST:

Solicitor

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the

☐ State Department of Corrections☐ County Detention Center,for a determinate term of 20 days/months/years or☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of

_____ days/months/years and or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for

_____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State

Department of Corrections. (from NOV 15, 2009)

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$

plus 20% fee:

\$

_____ days/hours Public Service Employment

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

\$

§14-1-206 (Assessments 107.5%)

\$

§14-1-211 (A)(1)(Conv. Surcharge)

\$100

\$

100.00

§14-1-211 (A)(2)(DUI Surcharge)

\$100

\$

§56-5-2995 (DUI Assessment)

\$12

\$

§56-1-286 (DUI Breath Test)

\$25

\$

Proviso 47.9 (Public Def/Prob)

\$500

\$

§14-1-212 (Law Enforce. Funding)

\$25

\$

25.00

§14-1-213 (Drug Court Surcharge)

\$150

\$

§50-21-114 (BUI Breath Test Fee)

\$50

\$

§56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$

Proviso 90.5 (SCCJA Surcharge)

\$5

\$

5.00

§44-53-450(C) (Conditional Discharge)

\$350

\$

3% to County (if paid in installments)

\$

3.90

TOTAL

\$

133.40

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA217 (06/2010)

SENTENCE SHEET

Presiding Judge

Judge Code:

Sentence Date

A TRUE COPY
Dwain D. Gail
Clerk of Court, McCormick County

Sentence

2155
12-19-13
Sentenced 6-30-14
*AWM

2292

STATE OF SOUTH CAROLINA

COUNTY OF McCormick

STATE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010-GS-35-10049

J036564

11/15/2009

16-23-0490

0549

JUL 07 2014

VS.
Joe Ross Worley

AKA:

Race:

Sex: M

Age: 52

DOB:

SS#:

Address:

City, State, Zip:

DL# *

SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Possession of a Weapon During the Commission of a Violent Crime

In violation of § of the S.C. Code of Laws, bearing CDR Code #

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45The charge is: ☐ As indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)The plea is: ☐ Without Negotiations or Recommendation,☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections (from Nov 15, 2009)☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient:

*Fine: \$ _____

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00

\$14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

\$14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

\$14-1-213 (Drug Court Surcharge) \$150 \$ _____

\$50-21-114 (BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00

\$44-53-450(C) (Conditional Discharge) \$350 \$ _____

3% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90Clerk of Court/Deputy Clerk Aven ChildsCourt Reporter: Tara T Scott

SCCA217 (06/2010)

Presiding Judge [Signature]Judge Code: 2155Sentence Date 12-19-13* Sentenced 6-30-14
(Paw MK)A TRUE COPY
Wendalyn S. Childs
Clerk of Court, McCormick County