ALAN WILSON
ATTORNEY GENERAL

August 20, 2012

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RE: State v. Joe Ross Worley – Appellate Case No. 2012-210646

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Strike and Require Filing of Amended Initial Brief of Appellant, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/erd
Enclosures

cc: Desa Ballard, Esquire
Harvey Watson, III, Esquire
Carson Henderson, Esquire
Billy J. Garrett, Jr., Esquire
Victim Services

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

MOTION TO STRIKE AND REQUIRE FILING OF AMENDED INITIAL BRIEF OF APPELLANT

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

In November of 2009, Appellant Joe Ross Worley was arrested and charged with three counts of assault and battery with intent to kill and three counts of possession of a firearm during the commission of a violent crime. In February of 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime. Subsequently, Appellant sought immunity from criminal prosecution pursuant to S.C. Code Ann. § 16-11-450, and a hearing on the immunity issue was commenced in the McCormick County court of general sessions on May 31, 2011, with the Honorable William P. Keesley, circuit court judge, presiding.

Following the hearing, Judge Keesley issued an order on July 5, 2011, denying Appellant's request for immunity from prosecution and recusing himself from further participation in the case. Appellant then promptly moved for reconsideration of Judge Keesley's ruling. On December 8, 2011, Judge Keesley issued an order affirming his earlier ruling and denying Appellant's motion for reconsideration. On January 18, 2012, Appellant filed a notice of appeal appealing Judge Keesley's ruling on the immunity issue.[1] Thereafter, on April 18, 2012, Appellant filed his Initial Brief of Appellant and Designation of Matter in this case.

Additionally, prior to Judge Keesley's ruling on the immunity issue, Appellant repeatedly petitioned Judge Keesley for pre-trial bail. On December 3, 2009, February 23, 2010, and August 11, 2010, Judge Keesley denied Appellant's requests for bail and determined Appellant was a danger to the community. Judge Keesley then recused himself from further involvement in Appellant's case on July 5, 2011, through his ruling on the immunity issue. Subsequently, Appellant moved for reconsideration of Judge Keesley's decision to deny bail. On September 23, 2011, a hearing on Appellant's motion was held in the McCormick County court of general sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. On October 3, 2011, Judge Addy issued an order denying Appellant's bond request. Subsequently, Appellant filed a notice of appeal dated October 12, 2011, and an amended notice of appeal dated October 27, 2011, appealing Judge Addy's ruling on the pre-trial bond issue.[2] Thereafter, on December 2, 2011, Appellant filed a "Petition for Certification Pursuant to S.C. Code § 14-8-210(B) or in

[1] A copy of the notice of appeal is attached to this motion as Exhibit "A." Because the State believes the document is unnecessary for resolution of this motion, the order attached to the notice of appeal has not been included. However, should it be desired, the State will promptly provide the document upon request from the Court.

[2] A copy of the notice of appeal and amended notice of appeal are attached to this motion as Exhibit "B." Because the State believes the documents are unnecessary for resolution of this motion, the orders attached to the notices of appeal have not been included. However, should they be desired, the State will promptly provide those documents upon request from the Court.

the alternative Petition for Writ of Habeas Corpus" in the Supreme Court.[3] In the petition, Appellant sought "an order from [the Supreme Court], certifying the instant appeal from the South Carolina Court of Appeals, expediting the matter, and establishing a procedure for consideration of pre-trial bond in cases involving application of the Castle doctrine, codified as the 'Protection of Persons and Property Act' at S.C.Code Ann. §16-11-401 et seq. and granting such other relief as may be warranted under the facts." (Exhibit "C" p. 1). On December 16, 2011, the State filed a return to Appellant's petition, and Appellant filed a reply to the State's return on January 3, 2012. On January 25, 2012, the Supreme Court issued an order transferring Appellant's appeal from the denial of bond to the Supreme Court, dismissing the appeal, and dismissing the petition for a writ of habeas corpus.[4] The next day, Appellant filed an Initial Brief of Appellant and Designation of Matter in this Court related to the appeal of Judge Addy's ruling on the bond issue.[5] Then, on February 2, 2012, Appellant filed a Motion for Reconsideration in the Supreme Court. Subsequently, on May 29, 2012, the Supreme Court issued an order denying Appellant's motion for reconsideration from the dismissal of the appeal of the bond issue.[6]

Motion to Strike Factual Assertions from Initial Brief of Appellant

In all cases, the trial judge is tasked with settling the lower court record. See China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) ("The issues on appeal must therefore be determined on the basis of the record as settled by the trial court."). Once a case has been

[3] A copy of the petition is attached to this motion as Exhibit "C." Due to the length of the exhibits originally attached to the petition, none of the exhibits attached to Appellant's petition have been included with this motion. However, upon request from this Court, the State will promptly supply any requested exhibits associated with the petition.

[4] A copy of the Supreme Court's order is attached to this motion as Exhibit "D."

[5] A copy of Initial Brief of Appellant and Designation of Matter related to the appeal of Judge Addy's ruling is attached to this motion as Exhibit "E."

[6] A copy of the Supreme Court's order is attached to this motion as Exhibit "F."

appealed from the trial court, the Record on Appeal can only contain matter presented to the trial judge. See Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Significantly, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR.

In the case sub judice, Appellant asserts portions of a transcript from an immunity hearing, including those portions containing his testimony, were lost by a court employee. (App. Br. p. 5). Due to the loss of those portions of the transcript, Appellant has included factual assertions regarding the substance of what he allegedly testified to during the immunity hearing throughout his Initial Brief of Appellant even though those assertions are admittedly not contained in the available portions of the hearing transcript. (App. Br. pp. 5-9). Notably, Appellant represents the factual assertions related to his alleged testimony are "based on information and belief, from trial counsel's trial notes." (App. Br. p. 5).

Because Appellant's factual assertions regarding his testimony are based on trial counsel's notes and recollections as opposed to the transcript of the immunity hearing, those specific factual assertions made in Appellant's initial brief are not contained in the trial court record and have not been presented to the trial judge to allow him to review them or determine their accuracy. Therefore, those assertions cannot appropriately be embodied in Appellant's initial appellate brief pursuant to our appellate court rules. See Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record."); South Carolina State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record."); see also Rule 210(h), SCACR ("[T]he appellate

court **will not consider any fact** which does not appear in the Record on Appeal." (emphasis added)). Accordingly, the State asks this Court to strike the factual assertions included in the Initial Brief of Appellant that Appellant concedes do not appear in the record of the trial court proceedings and to require the filing of an Amended Initial Brief of Appellant omitting reference to any facts not appearing in the trial court record.[7] See Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 333, n. 16, 696 S.E.2d 599, 608 (Ct. App. 2010) ("Under our appellate court rules, we may not consider any fact that does not appear in the record.").

Motion to Require Amended Initial Brief of Respondent Containing Citing References

The South Carolina Appellate Court Rules govern the form and content of appellate briefs. See Rule 208, SCACR (establishing the required format for initial briefs); Rule 211, SCACR (establishing the required format for final briefs). Pursuant to Rule 208(b)(4), SCACR, appellate briefs must contain references to transcripts or other matter supporting the facts alleged. "In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced[.]" Rule 208(b)(4), SCACR.

In the Initial Brief of Appellant, Appellant repeatedly cities to facts, testimony, and other documents allegedly presented during the trial court proceedings in his summary of the facts and

[7] Notably, there are remedies available to address the loss of a transcript of a trial court proceeding. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) ("Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed."), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see also Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 2003 (2002) (remanding a case to the circuit court for reconstruction of the trial record). However, the available remedies do not include permitting a party on appeal to simply unilaterally state what evidence and testimony the party believes or thinks was presented during a trial court proceeding. See Williamsburg, 367 S.C. at 571, 627 S.E.2d at 693 ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record."). Significantly, the necessity of reconstruction in the trial court exists because the trial judge as opposed to the parties or the appellate court is responsible for settling questions regarding what actually occurred in the trial court proceedings. See China, 251 S.C. at 334, 162 S.E.2d at 278 (instructing "the duty and responsibility" of settling the question of what the appellate record should contain rests upon the trial judge in a case where portions of the notes of the trial proceedings were lost before the court reporter was able to transcribe them). Thus, there are remedies available to Appellant to address the loss of portions of the hearing transcript should he choose to pursue them, but Appellant is not permitted to resolve the issue in the manner employed in his appellate brief.

in support of his appellate arguments. However, aside from two occasions in the brief, Appellant did not include any identifying references to the transcripts or other materials supporting those factual allegations. Instead, Appellant simply included a citation to the Record on Appeal with a blank space inserted to allow for the inclusion of a page number once a Record on Appeal is eventually prepared. However, Appellant's method of reference renders it entirely unclear as to which of the roughly thirty orders, motions, briefs, transcripts, exhibits, and other documents designated by Appellant for inclusion in the Record on Appeal Appellant is referencing in support of the various factual allegations included in his brief. Furthermore, such a method does not comport with the requirements of our appellate court rules. See Rule 208(b)(4), SCACR (outlining the required format for references to the record in appellate briefs); see, e.g., Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review."). Accordingly, the State asks this Court to require the filing of an Amended Initial Brief of Appellant containing identifiable references to the transcripts or materials being referred to in support of Appellant's factual allegations in a manner consistent with the requirements of our appellate court rules.

Motion to Strike Improperly Designated Matter and References to the Matter in the Initial Brief of Appellant

Rule 210(c), SCACR, provides that the Record on Appeal "shall include all matter designated to be included by any party under Rule 209. . ." Critically, the rule further provides that the Record on Appeal "shall not, however, include matter **which was not presented to the lower court or tribunal.**" Id. (emphasis added).

In the case at bar, Appellant has designated for inclusion in the Record on Appeal a Columbia Police Department incident report related to a theft and an unsigned memorandum from the court reporter who recorded the proceedings during the immunity hearing to an employee in Court Administration. Appellant appears to cite to this designated material in his initial brief to support his contention the State should have a negative inference drawn against it based on the loss of a portion of the immunity hearing transcript.[8] (App. Br. p. 11). The designated police report and memorandum do not appear to have ever been presented to the trial judge in Appellant's case and have not been filed with the McCormick County Clerk of Court in this case.

Because the police report and memorandum designated by Appellant were not presented to the trial judge, those documents cannot properly be included in the Record on Appeal. See State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot properly be included in the Record on Appeal."). Therefore, the State asks this Court to strike that matter from Appellant's Designation of Matter and the Initial Brief of Appellant and to require the filing of an Amended Initial Brief of Appellant containing no reference to the improperly-designated matter.

Furthermore, Appellant has designated for inclusion in the Record on Appeal a Motion Nunc Pro Tunc to Supplement the Record on Rehearing or Take Judicial Notice along with an attached exhibit. That motion was filed on February 23, 2012, which was thirty-six days **after** the notice of appeal was filed in this case. In his initial brief, Appellant cites to the motion and the attached exhibit in support of one of his appellate arguments. (App. Br. pp. 22-23).

[8] The Initial Brief of Appellant contains no specific reference to what documents or transcript citations Appellant is referring to when he references the police report and memorandum in his argument. (App. Br. p. 11). Instead, as with all but two of the citations to the record in Appellant's initial brief, Appellant cites to the Record on Appeal with no specific reference to any documents or page numbers. (App. Br. p. 11).

However, Appellant readily concedes the motion was not acted upon by the trial judge. (App. Br. p. 22).

Because Appellant filed the motion and exhibit after the notice of appeal was filed in this case, the trial judge no longer had jurisdiction in Appellant's case and had no jurisdiction to consider the motion or attached exhibit in relation to the ruling being appealed. See Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal[.]"). Additionally, based on the timing of the filing of the motion and exhibit, the documents could not have been before the trial judge at the time he issued the ruling being challenged on appeal because they were not filed until **after** the appeal was filed. See Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."); see also Rule 209(b), SCACR ("A party shall not include any matter in his Designation of Matter which in not relevant to the appeal."). Therefore, since the motion and attached exhibit were not before the trial court prior to the initiation of the appeal in this case, those documents cannot properly be considered on appeal or included in the Record on Appeal in Appellant's case. Accordingly, the State asks this Court to strike that matter from Appellant's Designation of Matter and the Initial Brief of Appellant and to require the filing of an Amended Initial Brief of Appellant containing no reference to the improperly-designated matter.

Motion to Strike Denial of Bond Issue from Initial Brief of Appellant

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, **or raised on appeal, but expressly rejected by the appellate court**." Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (emphasis added). "The law of the case applies both to those issues explicitly

decided and to those issues which were necessarily decided in the former case." Nelson v. Charleston W. Carolina Ry. Co., 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957).

In the present appeal, Appellant has filed an initial brief challenging Judge Keesley's ruling on the immunity issue **and** Judge Addy's ruling on the bond issue. (App. Br. pp. i-iii). However, Appellant previously raised the issue of the propriety of Judge Addy's ruling to the Supreme Court **and** in a different appeal to this Court. (Exhibit "C"; Exhibit "E"). Critically, the Supreme Court accepted jurisdiction of Appellant's appeal and **dismissed it** pursuant to Parsons v. State, 289 S.C. 542, 347 S.E.2d 504 (1986), which held that orders denying bail are not directly appealable. (Exhibit "D"; Exhibit "F").

Despite the fact that the Supreme Court dismissed Appellant's appeal after considering Appellant's challenge to Judge Addy's order denying bond and despite the fact the issue was raised in a different appeal filed in the Court of Appeals, Appellant has subsequently raised the issue for a third time in his initial appellate brief filed in this case. However, due to the Supreme Court's ruling in the earlier appeal on the same issue, which is the law of the case, Appellant is precluded from relitigating the issue again in this subsequent appeal. See Robert E. Lee & Co., Inc. v. Comm'n of Pub. Works of City of Greenville, 250 S.C. 394, 399, 158 S.E.2d 185, 188 (1967) ("This contention has been urged by the defendant from the inception of the litigation and is foreclosed by our decision on the prior appeal, which is binding upon the parties both as a precedent and as the law of this case."); see also Nat'l Bank of Newberry v. Livingston, 164 S.C. 2, 16, 161 S.E. 769, 774 (1931) ("The adjudication of the Court on the former appeal is binding on the Court on any successive appeal. It is well settled by numerous authorities that the judgment of the Supreme Court announced in any case on any former appeal is res adjudicata and must be followed throughout the trial of the case until it is finally disposed of."); see, e.g.,

State v. Tisius, 362 S.W.3d 398, 412 (Mo. 2012) ("The law of the case doctrine governs successive appeals and states that the same issues may not be relitigated in a subsequent appeal. The previous holding on those issues becomes the law of the case. Tisius previously raised this argument, and he many not raise it again in this appeal." (citations omitted)). Therefore, the State asks this Court to strike the portion of Appellant's initial brief challenging Judge Addy's order denying bond and to require the filing of an Amended Initial Brief of Appellant omitting any argument in regards to Judge Addy's previously-appealed ruling.[9]

WHEREFORE, Respondent prays that this Court will strike the portions of the Initial Brief of Appellant containing factual assertions not appearing in the record of the trial court proceedings; strike the portion of the Initial Brief of Appellant containing references to improperly-designated material not presented to the trial judge; strike the portions of the Initial Brief of Appellant raising an issue previously raised to, ruled upon by, and dismissed by the Supreme Court in another appeal in this case; strike all improperly-designated material from Appellant's Designation of Matter; require the filing of an Amended Initial Brief of Appellant containing no reference to the unsupported factual assertions, improperly-designated material, or previously-raised bond issue; require the filing of an Amended Initial Brief of Appellant complying with the requirements of Rule 208, SCACR; hold this appeal in abeyance pending a ruling on Respondent's motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

[9] The State further notes Appellant's notice of appeal regarding Judge Keesley's ruling does not set forth an appeal of Judge Addy's ruling on the bond issue or contain any reference whatsoever to Judge Addy. (Exhibit "A"). Accordingly, since the bond issue is not identified in the notice of appeal relating to the present appeal, that issue cannot be raised in the present appeal absent the grant of a motion for consolidation with the appeal filed from Judge Addy's ruling. See Rule 214, SCACR (addressing the authority of appellate courts to consolidate cases). However, that appeal notably has been dismissed by the Supreme Court. (Exhibit "D").

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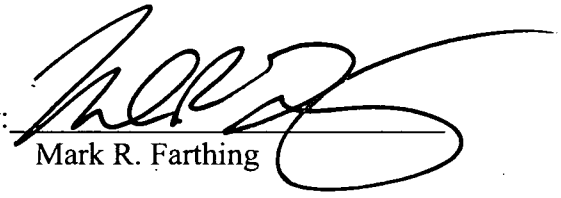
By: 
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August 20, 2012

EXHIBIT "A"

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY
Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Appellant Joe Ross Worley appeals the Amended Order on Reconsideration Denying Defendant Worley's Motion to Bar Prosecution, signed by Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit, filed December 8, 2011, but only served on Appellant's counsel on January 18, 2012. A copy of the order on appeal is attached hereto and incorporated by reference.

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ATTORNEYS FOR APPELLANT

January 18, 2012

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Attorneys for Respondents

EXHIBIT "B"

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY
Honorable Frank R. Addy, Jr., Circuit Judge, 8th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036561, J-036562, J-036563,

---

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Appellant Joe Ross Worley appeals the Order Denying Bond of the Honorable Frank R. Addy, Jr., Circuit Judge, 8th Judicial Circuit, filed October 3, 2011. A copy of the order on appeal is attached hereto and incorporated by reference.

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ATTORNEYS FOR APPELLANT

October 13, 2011

Other counsel of record:
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY
Honorable Frank R. Addy, Jr., Circuit Judge, 8th Judicial Circuit
Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

AMENDED NOTICE OF APPEAL

Appellant Joe Ross Worley appeals the Order Denying Bond of the Honorable Frank R. Addy, Jr., Circuit Judge, 8th Judicial Circuit, filed October 3, 2011. A copy of the order on appeal is attached hereto and incorporated by reference.

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ATTORNEYS FOR APPELLANT

October 27, 2011

Other counsel of record:
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Ervine J. Maye, Assistant Solicitor
Attorneys for Respondents

EXHIBIT "C"

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION SEEKING CERTIFICATION
OR WRIT OF HABEAS CORPUS

ON APPEAL FROM MCCORMICK COUNTY
TO THE SOUTH CAROLINA COURT OF APPEALS
Frank R. Addy Jr., Circuit Court Judge

Case No. J-035651, J-036562, J-036563, J-036564, J-036565, J-036566

JOE ROSS WORLEY,

PETITIONER,

VS.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR CERTIFICATION
PURSUANT TO S.C. CODE § 14-8-210(B)

or in the alternative

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Joe Ross Worley (hereafter "Worley") seeks an order from this Honorable Court, certifying the instant appeal from the South Carolina Court of Appeals, expediting the matter, and establishing a procedure for consideration of pre-trial bond in cases involving application of the Castle doctrine, codified as the "Protection of Persons and Property Act" at S.C.Code Ann. § 16-11-401 *et seq.* and granting such other relief as may be warranted under the facts.

In the alternative, Worley seeks a Writ of Habeas Corpus setting an amount of bond and remanding to the circuit court for implementation of the Writ, in such amount and under such conditions as determined by this Court.

PETITION FOR CERTIFICATION

In support of this petition, Worley would show:

1. He was arrested on or about November 9, 2009 and charged with three (3) counts of Assault and Battery with Intent to Kill and three (3) counts of Possession of Weapon during a Violent Crime arising from his firing of a rifle at unknown persons, one of whom was banging on his door at about 4:00 am[1].

2. Worley's shot struck the hand of a newly re-hired employee of the McCormick County Sheriff's Department, Robert Rushton, who (given an extended interim employment) had not completed all statutory prerequisites to reacquiring status as a duly qualified deputy sheriff for McCormick County, and had not been recertified as a law enforcement officer by the S.C. Criminal Justice Academy.

3. Rushton, whose uniform had been ordered but not yet arrived given his recent rehire, was wearing personally-obtained clothing in the nature of khaki colored pants and a green polo shirt, and acknowledged the only visible means of identification with, or employment by, the Sheriff's office was a small badge worn on his belt. Worley shot

[1] The precise facts of what occurred in the morning hours of November 15, 2009, are in great dispute, as evidenced by the Orders previously issued in this matter, which are exhibits to this petition. However, the following facts are not in dispute: there was no moon that night and the darkest night of the month; no outside lights were on at the Worley residence when Rushton approached; Rushton and fellow McCormick County Sheriff's Department employees Nick Moore and Sara McAllister, who arrived in three (3) separate police cars, each parked their cars in places that couldn't be seen by Worley from his placement within the house; none of the police cars had blue lights or sirens activated; no one called the Worley residence by telephone or used a loud speaker/bullhorn to identify their presence in the Worley yard; and Rushton's only item identifying himself as purported member of law enforcement was a small badge on his black belt. Rushton wore no clothing or hat typically worn by and identified with law enforcement officers.

only after Rushton drew and aimed his revolver at Worley, even though Worley was not committing any crime at the time, and while Worley had his rifle in the port position, pointing upward, when Rushton aimed his revolver at Worley.

4. On December 3, 2009, based in part on facts that are now known to be incorrect, Judge Keesley found that Worley was a danger to the community and denied pre-trial bond. (Exhibit A).

5. Defense counsel raised, as a defense to the charges, the immunity from criminal prosecution afforded by S.C.Code Ann. § 16-11-450.

6. On February 23, 2010, Judge Keesley again denied bond. (Exhibit B).

7. Defense counsel moved for an order setting the case for trial, which was denied. (Exhibit C, order dated August 11, 2010). In the same order, Judge Keesley again denied bond, but warned the prosecution that the case must be expedited. *Id.*

8. Judge Keesley held a hearing on the applicability of immunity provided by the Castle doctrine statute on May 31, 2011 and June 1, 2011. An incomplete transcript of this hearing is attached as Exhibit D.

9. On July 5, 2011, Judge Keesley issued an Amended Order on Motion to Bar Prosecution[2], denying Worley's defense of immunity from prosecution under the statute. (Exhibit E). In that order, Judge Keesley also recused himself from hearing any further proceedings in the action, and again denied Worley's request for bond. *Id.*

10. On July 6, 2011, Worley filed a Motion to Reconsider with Judge Keesley, addressing the Castle Doctrine and applicability of the statutory immunity. (Exhibit F). Worley

[2] The initial order was issued on June 24, 2011, but later amended to correct scrivener's errors. The original order is not included here.

also filed a Motion to Reconsider Denial of Bond (Exhibit G) and a Memorandum in Support of his Motion to Reconsider the Castle Doctrine immunity. (Exhibit H).

11. Both Judge Keesley and Judge McMahon, the Chief Administrative Judge for the 11th Circuit, recused themselves from hearing the bond reconsideration issue. Judge McMahon arranged for Judge Frank Addy Jr. to hear the reconsideration of bond.

12. Judge Keesley consulted with retired Professor John Freeman as to the propriety of him entertaining and ruling on the pending Motion to Reconsider regarding the Castle doctrine, given his earlier decision to recuse himself from further proceedings related to bond issues. (Exhibit I). Professor Freeman opined on October 1, 2011 that it was permissible for Judge Keesley to rule on that pending motion. *Id.*

13. On October 10, 2011, counsel for Worley provided Judge Keesley with a partial transcript of the proceedings held before him on May 31 and June 1, 2011 on the Castle doctrine immunity issue. (Exhibit J). The court reporter had earlier reported a theft from her car that prevented her from producing the entire transcript. Significantly, she lacked any record of Worley's own testimony. (Exhibit K; see also Court Reporter certification, Exhibit D).

14. Judge Frank Addy Jr. heard the motion to reconsider bond on September 23, 2011, and denied the motion. (Exhibit E). That order is the subject of an appeal currently pending at the South Carolina Court of Appeals, and it is that appeal which is the subject of this request for certification.

15. Judge Keesley has not yet ruled on the motion for reconsideration of his ruling on the applicability of the immunity provision of the Castle doctrine statute.

16. Assuming Judge Keesley affirms his previous denial of immunity under the statute, Worley will be required to appeal the ruling pretrial. State v. Duncan, __ S.C. __, 709 S.E.2d 662 (2011). That decision indicates that special circumstances are attendant to a denial of statutory immunity under the Castle Doctrine.

17. It is respectfully urged those same special circumstances make the issue of bond pending appeal in the context of a review pursuant to Duncan which has not previously been addressed by this Court in the Duncan decision or any other opinion, a novel issue of law requiring immediate intervention and direction from this Court.

18. Without such guidance, Worley will have no additional opportunity for consideration of bond during the pendency of the appeal of Judge Keesley's ruling on the Castle doctrine immunity.

19. Worley has already been in jail more than two (2) years without benefit of bond or trial. An appeal of Judge Keesley's order, even if expedited, could take at least another year.

20. The order on appeal, by Judge Addy, recognizes the procedural conundrum created by the convergence of events presented, *i.e.*, the inability of the present procedural framework to address the issue of bond pending an appeal under the Castle doctrine.

21. It is respectfully submitted that the instant appeal of Judge Addy's order should be certified to this Court for consideration, consolidated with any appeal of Judge Keesley's order, and expedited. It is further requested that, once certified, this Court address a motion for extraordinary relief that will allow a procedure to be established for setting of appeal bond for Worley under the novel circumstances presented here.

PETITION FOR WRIT OF HABEAS CORPUS

In the alternative, Worley seeks a Writ of Habeas Corpus from this Court in its original jurisdiction, pursuant to South Carolina Constitution Article IV, Section 5, to the circuit court of McCormick County, establishing conditions for Worley's release from custody either via order of this Court, or upon remand to the circuit court with specific directions to set a specific amount of bond. In further support, Worley would assert:

22. He incorporates each and every paragraph set forth above as fully as if repeated herein verbatim, where relevant.

23. It is respectfully asserted that the circuit court's refusal to set any amount of bond, in light of Worley's already lengthy pre-trial detention, which may well extend even longer in light of the possible appeal from the order of Judge Keesley, is a "denial of fundamental fairness shocking to the universal sense of justice." McWee v. State, 357 S.C. 403, 406, 357 S.E2d 456, 457 (2004), citing Green v. Maynard, 349 S.C. 535, 538, 564 S.E2d 83, 84 (2002), *other citations omitted.*

24. Worley would show that the unique circumstances of this case, which compel an interim appeal by him of a pretrial order, warrant extraordinary relief in the jurisdiction of this Court, in that other remedies available to him are "inadequate or unavailable," thus warranting this Court's intervention. *Id. See also* Gibson v. State, 329 S.C. 37, 495 S.E.2d 426.

Wherefore, having fully set forth the grounds for the relief sought, Worley moves for an order certifying the instant appeal to this Court and establishing a procedure for pre-trial bond to be determined under an appeal by an incarcerated but un-convicted defendant.

In the alternative, Worley seeks a Writ from this Court to the circuit court for McCormick County, establishing conditions for Worley's release from custody or remand to the circuit court with specific directions to set a specific amount of bond on such conditions as this Court deems appropriate.

Worley would ask this Court to determine whether oral argument would aid the Court in considering the issues presented and, if so determined, set a hearing for further consideration by this Court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

December 2, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION SEEKING CERTIFICATION
OR WRIT OF HABEAS CORPUS

ON APPEAL FROM MCCORMICK COUNTY
TO THE SOUTH CAROLINA COURT OF APPEALS
Frank R. Addy Jr., Circuit Court Judge

Case No. J-035651, J-036562, J-036563, J-036564, J-036565, J-036566

JOE ROSS WORLEY,

PETITIONER,

VS.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE:
PETITION FOR CERTIFICATION
PURSUANT TO S.C. CODE § 14-8-210(B)
or in the alternative
PETITION FOR WRIT OF HABEAS CORPUS

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on December 2, 2011, I served a copy of the **Petition for Certification Pursuant to S.C.Code Section 14-8-210(B) or in the alternative Petition for Writ of Habeas Corpus** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Donald V. Myers, 11th Circuit Solicitor
205 E. Mail Street
Lexington, South Carolina 29072

H. Franklin Young, Assistant Solicitor
205 E. Mail Street
Lexington, South Carolina 29072

Malory L. Hogg
Paralegal

December 2, 2011

West Columbia, South Carolina

EXHIBIT "D"

The Supreme Court of South Carolina

Joe Ross Worley, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Petitioner has filed an appeal in the Court of Appeals from an order of the circuit court denying bond. Petitioner requests the appeal be certified to this Court, or in the alternative, that this Court issue a writ of habeas corpus. The State has filed a return in opposition to the petition.

We hereby certify the appeal to this Court and dismiss it pursuant to Parsons v. State, 289 S.C. 542, 347 S.E.2d 504 (1986).

The petition for a writ of habeas corpus is denied. Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990); Parsons, supra.

IT IS SO ORDERED.

C. J.

J.

Donald W. Beatty J.

John K. Bregler J.

Kaye G. Hearn J.

Columbia, South Carolina

Janaury 25, 2012

EXHIBIT "E"

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable Frank R. Addy, Jr., Circuit Judge, 8th Judicial Circuit

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Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

INTIAL BRIEF OF APPELLANTS

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DOES APPELLANT HAVE THE RIGHT TO APPEAL HIS DENIAL OF BOND IMMEDIATELY WHEN CLAIMS FOR IMMUNITY PURSUANT TO STATUTE ARE RAISED AT THE TRIAL COURT BELOW?

II. WAS THE DENIAL OF BOND UPON MOTION TO RECONSIDER IMPROPER?

STATEMENT OF THE CASE

This matter is before the South Carolina Court of Appeals (Court) following Appellant Joe Ross Worley's arrested on or about November 9, 2009. Appellant was charged with three (3) counts of Assault and Battery with Intent to Kill and three (3) counts of Possession of Weapon during a Violent Crime arising from his firing of a rifle at an unknown person, later revealed to be a newly re-hired employee of the McCormick County Sheriff's Department.

On December 3, 2009, the Honorable William P. Keesley denied pre-trial bond despite defense counsel raising as a defense to the charges the immunity from criminal prosecution afforded by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter "the Act"). On February 23, 2010, Judge Keesley again denied bond. Defense counsel moved for an order setting the case for trial, which was denied by order dated August 11, 2010. In the same order, Judge Keesley warned the prosecution that the case must be expedited.

Judge Keesley thereafter held a hearing on the applicability of immunity provided by the Act on May 31, 2011 and June 1, 2011. On July 5, 2011, Judge Keesley issued an Amended[1] Order on Motion to Bar Prosecution, denying Appellant's assertion of immunity. In that order, Judge Keesley recused himself from further proceedings in the action, and again denied Appellant's request for bond.

On July 11, 2011, Appellant filed a Motion to Reconsider the denial of immunity, and a separate Motion to Reconsider Denial of Bond. Both Judge Keesley and the Honorable Knox McMahon, Chief Administrative Judge for the 11th Circuit, recused

[1] The initial order was issued on June 24, 2011, but later amended to correct scrivener's errors.

themselves from hearing the bond reconsideration issue. The Honorable Frank R. Addy Jr. was thereafter assigned to hear the reconsideration of bond, and hearing was held on the issue on September 23, 2011. On October 3, an order denying bond was filed by Judge Addy, from which Appellant filed a Notice of Appeal on October 14, 2011.[2] An Amended Notice of Appeal was filed on November 31, 2011, due to a scrivener's error in the caption.

Thereafter, on December 2, 2011, Appellant filed a petition for certification pursuant to S.C. Code Ann. § 14-8-210(B), requesting that the Supreme Court certify the current appeal, expedite the matter, and establish a procedure for consideration of pre-trial bond in cases involving claimed immunity under the Act. In the alternative, Appellant sought a Writ of Habeas Corpus, remanding the matter back to the circuit court with a writ requiring issuance of bond for Appellant under such terms and conditions as the Supreme Court desired. On December 16, 2011, Respondents filed a Return to that petition, and Appellants filed a Reply on January 3, 2012.

[2] Appellant has brought a second appeal to the Court of Appeals following receipt of a final amended order denying his request for reconsideration of Judge Keesley's denial of immunity.

STATEMENT OF FACTS

In the early hours of November 15, 2009, Appellant used a rifle to shoot and injure Robert Rushton, who was on the property of Appellant's mother in conjunction with two employees (Nick Moore and Sara McAllister) of the McCormick County Sheriff's Department investigating a report of shots being fired earlier that night. A hearing on the applicability of immunity provided by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* was held on May 31, 2011 and June 1, 2011. Unfortunately, only enough information to compile a partial transcript of this hearing survived a theft from the court reporter's records before a complete written transcript could be completed. This partial transcript was provided to the lower court prior to its consideration and ruling on denial of bond that forms the basis of this appeal.[3]

At that immunity hearing, Appellant testified that he had discharged his firearm in the area that evening, in an effort to protect his pet from a fox. (R. __). Neighbors further testified that they often heard gunshots in the area, although some when Appellant was not at home, and had relayed their objections to the noise to Appellant's mother. (R. __). Appellant testified that he wasn't aware that the neighbors had complained to his mother and there was no testimony or evidence indicating that Appellant was ever made aware of those complaints. (R. __). On the night in question, the neighbors contacted police regarding shots fired in the area. (R. __).

[3] Unfortunately, Appellant's testimony is among the missing portion of the transcript. Appellant's counsel recreated much of the testimony via factual recitations in pleadings and arguments made to the lower court considering immunity directly as well as Judge Addy for his reconsideration of bond. As reflected in the order being appealed herein, Judge Addy accepting those representations of counsel as a substitute for a verbatim transcript, and thus a consideration of the record for this appeal necessary includes those factual representations.

The neighbors did not notify Appellant of police involvement on the night of the shooting. (R. __). Testimony conflicted regarding the exact time of the shots, with the latest time estimated by a neighbor to be 3:30 a.m. (R. __). Police records reveal that the neighbors' call about "shots fired" was placed at 4:06:47 a.m., yet the first responder, Rushton, did not arrive until 4:29:56 a.m. (R. __). Moore and McAllister[4] arrived even later. (R. __).

Appellant testified that by the time of their arrival, he was sound asleep in his bed. (R. __). The neighbors who contacted police were expecting police presence and had their windows open. (R. __). Appellant's location, in contrast, had closed windows and was being actively heated by an HVAC unit on the November night in question. (R. __). He was located upstairs, inside of a dwelling that he testified was well insulated. (R. __).

Rushton admitted that he believed a deer poacher was active in the area and was responsible for the prior shots. (R. __). Rushton did not have on a uniform; instead he was wearing merely khaki pants, a green shirt, and a small badge on his belt. He was not wearing McCormick County's standard deputy uniform, any reflective items, or a hat identifying himself as law enforcement. (R. __).

Rushton, Moore, and McAllister did not telephone, or have dispatch call, the house in which Appellant was located. Rushton and Moore approached the house, under a covered porch, knocked on the door, and rang the doorbell. The ground level door that was knocked upon, which was where the doorbell was located and is the only entrance to the house, had no peephole or other means to examine the identity or appearance of the

[4] Entered into evidence was a document detailing the termination of Deputy McAllister from her prior employment with the SC Dept. of Natural Resources. She was fired because DNR discovered that she had participated in the destruction and concealment of critical evidence in a fatal accident investigation, only to then lie on three separate occasions about her actions during questioning by DNR officials.

person(s) on the other side. (R. __). There were no windows on the ground level, and no police cars could be seen from the upstairs windows. (R. __). Rushton's car, without blue lights or siren on, was parked on the other side of the house, out of Appellant's line of sight. (R. __). Moore's car and McAllister's car weren't parked on Appellant's property, and likewise did not have sirens or lights activated. (R. __).

Appellant testified that he was aware of home invasions having occurred in the rural area, that his mother's home had been burglarized at least once before successfully, and attempted burglaries had occurred on multiple occasions. (R. __). Appellant also presented evidence that the night in question was the darkest night of the month. (R. __).

Appellant testified that he did turn on a light while still inside the house, but did not see anyone and only saw total darkness. (R. __). Moore and McAllister testified that they saw the light come on initially as they were at the rear of Appellant's house getting ready to leave. (R. __). Rushton saw the light come on while walking from the neighbor's house to Appellant's house. (R. __). Appellant then testified that he then turned off the light. (R. __). Every witness is consistent in acknowledging the light was not on continuously. (R. __). Moore testified that he never had a clear look at Appellant, and McAllister said she never even saw Appellant. (R. __).

The shooting occurred immediately after Appellant stepped onto his balcony, with his weapon in the port position, not aimed at anyone. The State contends there was a verbal exchange prior to that shot wherein Appellant supposedly asked who was at his home, received a response that it was law enforcement, and replied with a statement of non-concern including profanity. (R. __). Appellant maintains no such verbal exchange occurred. (R. __).

Deputy Moore's claims a call of "Sherriff's office" and "gun!" were made, after which Appellant immediately fired at Rushton. (R. __). Rushton testified that he never ordered Appellant to drop his weapon. (R. __). Appellant does not recall hearing the words "Sheriff's Office" or "gun." (R. __). It is undisputed that the shooting happened almost immediate after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation between those involved. (R. __).

Appellant testified that he merely saw the plain-clothed Rushton, who yelled "freeze" and aimed his weapon at Appellant. (R. __). Evidence of the angle of trajectory and damage to Rushton's weapon and hand confirm that his weapon was aimed at Appellant when struck by Appellant's fired bullet. (R. __). Rushton's testimony confirms that he aimed his weapon at Appellant, despite no menacing, threatening, or illegal action having been taken by Appellant. (R. __).

Ruston testified the shot knocked him to the ground. (R. __). Although armed with a semi-automatic rifle at the time and therefore capable of doing so, there is no evidence that Appellant sought to hunt down or further injure the person he had just shot. Appellant fired a warning shot into the air and later searched the premises to ensure the person he believed to be a burglar has left. (R. __). Appellant's testimony was that he would not have shot Rushton if he had known Rushton was there on behalf of the police, which is not controverted with any evidence as to motive, substantial prior criminal history, or evidence of ill will towards law enforcement generally. (R. __).

Appellant's expert, Dr. George Kirkham, examined the premises at night and reviewed the actions of Rushton, Moore, and McAllister before testifying that the trio failed to follow proper procedures in many respects, and that the combined failures in

that and other respects made Rushton more than fifty (50%) percent responsible for being shot. (R. __). Dr. Kirkham even offered that had he been in Appellant's position, he would have shot Rushton as well, and that he would like to have a video of the shooting to demonstrate what police officers should not do. (R. __).

At the hearing and subsequently upon reconsideration, the issue of whether Rushton was a duly authorized deputy was disputed. (R. __). Rushton's own testimony was that he never took any oath of office, and that his appointment was never approved by any circuit court judge. (R. __). When the State produced an oath form signed by Rushton, Ruston testified only that his signature was on the document, not that he had taken the oath. (R. __).

ARGUMENT

I. GENERAL RULE PREVENTING IMMEDIATE APPEAL OF BOND DENIAL IS SET ASIDE BY THE SUBSTANTIAL RIGHTS AFFORDED APPELLANT BECAUSE OF HIS CLAIMS TO IMMUNITY PURSUANT TO S.C. CODE § 16-11-450.

It is a fundamental rule of appellate procedure that a judgment or order must be final before it can be appealed. See Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996). Rule 201(a) SCACR, provides: "Appeal may be taken, as provided by law, from any final judgment or appealable order." The rule seeks to prevent multiple appeals of non-final matters to promote judicial efficiency and orderly adjudication of disputes on appeal. Nevertheless, there are exceptions to that general rule, and certain interlocutory orders are immediately appealable. Appellant contends that he may immediately appeal his bond denial, despite the usual prohibition on doing so.

A. Denial of bond is usually an interlocutory order not immediate appealable.

Absent some a statute giving rise to such an immediate appeal, the immediate appealability of an interlocutory order depends on whether the order falls within one of several established categories of appealable orders listed in S.C. Code Ann. § 14-3-330. Woodard v. Westvaco Corp., 319 S.C. 240,460 S.E.2d 392 (1995). Immediate appeals under § 14-3-330(2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000). Where an error in the trial court's order can be corrected on appeal following the trial, the ruling does not affect a substantial right. Breland, 339 S.C.

89, 529 S.E.2d 11. The general rule is that an order denying bail is not immediately appealable. Parsons v. State, 289 S.C. 542, 347 S.E.2d 504 (1986).

B. S.C. Code § 16-11-450 creates substantial rights that allow immediate appeal of bond denial.

An order is immediately appealable if it decides some point that goes to the very root of the matter involved. Sease v. Dobson, 34 S.C. 345, 13 S.E. 530 (1890). An order that effectively forecloses a party from contesting the case on the merits affects a substantial right and is immediately appealable. McLaughlin v. Strickland, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983). Avoidance of trial is not a substantial right entitling a party to immediate appeal of an interlocutory order. See Shields v. Martin Marietta Corp., 303 S.C. 469, 402 S.E.2d 482 (1991). Nevertheless, the potential[5] applicability of the castle doctrine immunity provisions of S.C. Code § 16-11-450 creates immediate appealable interests, including avoiding trial and prosecution at all. Duncan v. State, 392 S.C. 404, 709 S.E.2d 662 (2011). Appellant has moved for dismissal of the prosecution against him pursuant to the statutory immunity provision, and thus is afforded the additional protections for criminal defendants recognized by the Supreme Court in Duncan.

The State will likely argue that the Court in Duncan did not create a category of immediately appealable orders, just recognized the nature of the order was an injunction, which was immediately appealable. However, the fixing of bail for any individual defendant must be based upon standards relevant to the "purpose of assuring the presence

[5] Appellant has filed a separate appeal of the denial of his claim to immunity under the statute, but as noted in Duncan, one need not be successful on initial claims of immunity to have immediate access to appellate courts to preserve the rights intended by the legislature not just to ultimate immunity, but avoidance of prosecution at all. Id. at 411, 665 (footnote 2).

of that defendant." Stack v. Boyle, 342 U.S. 1, 5 (1951). As our Supreme Court has stated, the purpose of bail is "to put the accused as much under the power of the court as if he were in the custody of the proper officer." State v. Gibbs, 353 S.C. 226, 229, 577 S.E.2d 454, 456 (2003). In simple terms, bail is an alternate means of maintaining a defendant's participation in the legal process without actual physical confinement.

If bond is denied in a non-immunity matter, the case would eventually proceed to trial and verdict. Defendants have no grounds to object to an otherwise properly imposed interim detention, or amount for basil as a substitute therefore, as the participation in the process regardless of verdict of guilty or not guilty is not curtailed by statute. But the immunity provision of S.C. Code § 16-11-450 applicable here creates rights that defendants under other statutes do not have. Immunity under that statute prevents a defendant from being subject to a full adjudicatory process, not just eventual fair trial, hence the Duncan requirement of immediate appeal of immunity determinations that must itself be made prior to trial.

A finding in Appellant's favor regarding immunity will result in a determination that he *should never have been a participant in the process all along*, not just that his prosecution must then be terminated. Given the intent of the legislature to avoid even requiring participation in the judicial process when immunity applies, and the procedures established by Duncan to lessen the impact of an initial wrongful denial of immunity, the assured availability of a reasonable bail via immediate appeal is the only remaining, necessary accommodation to honor the legislature's intent.

Furthermore, because of the immediate appealability Appellant believes is justified and necessary under the circumstances presented in this case, he may be required

to appeal immediately or lose his ability to challenge these matters later. Cf. Lesta v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997)(order denying a party a mode of trial to which he is entitled must be appealed immediately and cannot be challenged in an appeal from final judgment).

II. DENIAL OF BOND WAS AN ERROR OF LAW BASED ON THE FAILURE TO EXERCISE DISCRETION AND CONSIDER THE AVAILABLE INFORMATION INDEPENDENT OF PREVIOUS DECISIONS.

Appellant contends it was an error of law for the presiding judge to fail to use his own discretion as set forth in S.C. Code § 17-15-30. A person charged with a non-capital[6] offense has the right to be released pending trial "unless the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, or unreasonable danger to the community will result." S.C. Code Ann. § 17-15-10 (1976). The statutes of this State regarding bail treat all non-capital offenses in the same manner. State v. Hill, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994). Section 17-15-30 sets forth certain factors that may, and other factors that must, be considered by the presiding judge when setting bail. Information of probative value offered in connection with the setting of bail need not conform to the rules of evidence as in a court of law. S.C. Code Ann. § 17-15-60 (1976).

A failure to exercise discretion amounts to an abuse of that discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an

[6] The State Constitution gives a circuit court judge the discretion to grant bail to defendants facing capital crime charges as well. State v. Hill, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994).

equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.")).

As referenced in the Statement of Facts, Appellant's actions on the night in question had been thoroughly discussed and explored in court on several occasions prior to Judge Addy's consideration of the matter. Appellant's pleading that prompted the appealed order was captioned as a "Motion for Reconsideration." (R. ___). As such, Appellant should have received *de novo* review of issues, aided by the unusual wealth of evidence[7] and information available to the presiding judge at the time of his consideration of bail.

Instead, the presiding judge engaged in a quasi-appellate, deferential review of the prior considerations of bond. The final order cites the prior orders issued in this matter, and defers to the prior judge's credibility determinations contained therein. (R. ___). In Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990) the Court of Appeals had to correct a circuit judge that mistakenly believed he was bound by a prior ruling, in much the same way the underlying order in this case is obviously based on a mistaken duty to uphold the prior order instead of the required exercise of independent discretion.

III. DENIAL OF BAIL FOR APPELLANT BASED ON FINDING HE WAS AN "UNREASONABLE DANGER" WAS AN ABUSE OF DISCRETION.

An abuse of discretion occurs "when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual

[7] As noted in the court's order, footnote 1, only a partial transcript of the immunity hearing remains available after a theft of court reporter materials prior to the preparation of a final, complete transcript. (R. ____). Yet counsel cited portions of that testimony from their own recollection, which is proper for consideration, as § 17-15-60 allows use of any "information of probative value offered" without "need not conform to the rules of evidence."

conclusions, the ruling is without evidentiary support." State v. Allen, 370 S.C. 88, 634 S.E.2d 653, 656 (2006).

A. The presiding judge abused his discretion by relying upon an erroneous, as a matter of law, determination that Rushton was a member of law enforcement.

Appellant devoted much of his earlier efforts at obtaining immunity to defending against the State's invocation of the "law enforcement" exception to immunity found in § 16-11-440(B)(4). Appellant is informed and believes that he has made the requisite showing that the person shot, Robert Rushton, was not a member of law enforcement at the time of the incident, thus defeating that proffered exception to immunity. That contention forms a significant part of the basis for Appellant's separate appeal of the denial of immunity.

That issue was discussed in detail at the immunity hearing, a partial transcript of which was received and considered by Judge Addy. (R. ___). In addition, the issue was addressed in the motion for reconsideration of the order denying immunity, which Judge Addy also specifically referenced in his order denying bail as one item that was reviewed prior to issuance of his order. (Order Denying Bond, p. 1, para. 1). Additionally, the issue regarding Rushton's disputed status as a duly qualified "law enforcement officer" was noted at the bond hearing. (R.__).

Thus Judge Addy had all of the facts and information regarding that argument, yet the order denying bond ignored the issue completely, referring erroneously to Mr. Rushton as "deputy" through the order. (R. _____). Appellant contends that the unexamined treatment of Rushton as a duly appointed member of law enforcement was

an error of law.[8] Further, the reliance on that legal error amounted to an abuse of discretion by the presiding judge when considering the nature of the charges and underlying circumstances.

B. The presiding judge abused his discretion by reaching factual conclusions that are without evidentiary support.

As discussed supra, the presiding judge failed to make his own independent inquiry into the disputed facts of the underlying criminal case, instead relying on presumptions in favor of one view of facts promulgated during another judge's earlier analysis of the facts, and thus cannot be determined to have based his decision upon sufficient evidentiary support with the record at that time.

It is undisputed that it was the darkest night of the month. (R. ____). It is undisputed that Mr. Rushton had failed to follow statutory procedure for mandatory oaths prior to authorization to act as a deputy. (R. ___). It is undisputed that none of those responding to the scene on the night in question activated blue lights or sirens, attempted to call the residence they approached, or used any bullhorn or other amplified communication device while approaching the home in the pre-dawn hours. (R. ____). The final order noted the lack of any substantial prior criminal history, that there was no evidence of motive, nor of ill will towards law enforcement. (R. ____). There is also no evidence of any illegal activity taking place at the dwelling. (R. ___). The three responding to the call that night admitted they believed the call to have been generated in response to mere deer poaching. (R. ___).

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[8] Appellant contends, as shown by this discussion, that the denial of bond and immunity are interrelated matters that may be best served by consolidating the two appeals. By separate motion being filed, Appellant is seeking that relief, but is fully addressing the issues raised in this appeal at this time until consolidation is ordered.

To the extent Judge Addy did perform his own review of the facts, that is the information available and noted in his final order. But the judge's deference and reliance upon prior, non-binding credibility determinations amounted to an improper reliance on extraneous facts not properly within his review, and accordingly, resulted in an abuse of discretion that justifies reversal and remand with directions to set an appropriate amount of bond for Appellant.

CONCLUSION

As a threshold matter, Appellant respectfully submits that in the context of claimed immunity under S.C. Code Ann. § 16-11-450, the lower court's denial of bond satisfies the conditions necessary for immediate appeal despite the general rule prohibiting immediate appeal of bond. As to the denial itself, Appellant contends it was an abuse of discretion by virtue of a failure to exercise discretion by the lower court, who also abused its discretion by failing to base the opinion on the facts before it for consideration. As such, Appellant respectfully requests the denial of bond be reversed, with remand for the setting of a proper amount of bond for Appellant, and such other and further relief as this Court may deem necessary and proper.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

January 26, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable Frank R. Addy, Jr., Circuit Judge, 8th Judicial Circuit

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Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

APPELLANTS' INITIAL DESIGNATIONS

Pursuant to Rule 209(a) and (b), SCACR, Appellants hereby designate the following matter, which was before the lower court (as defined in Rule 202(b)(1)) to be included in the Record on Appeal in this matter. Appellants reserve the right to supplement these designations in conjunction with the submission of their initial reply brief.

All designated matter does not include proof of service or exhibits unless otherwise specified:

1. Order Denying Bond executed by Judge Keesley dated December 3, 2009.
2. Order of Reconsideration of Bond executed by Judge Keesley dated February 23, 2010.
3. Order on Reconsideration of Bond executed by Judge Keesley dated August 11, 2010.

4. Order on Defense Motion to Bar Prosecution executed by Judge Keesley dated June 24, 2011.
5. Amended Order on Motion to Bar Prosecution executed by Judge Keesley dated July 5, 2011.
6. Order Denying Bond executed by Judge Addy dated September 28, 2011 and filed on October 3, 2011.
7. Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution executed by Judge Keesley dated December 8, 2011.
8. Defendant's Motion to Reconsider filed July 6, 2011.
9. Defendant's Motion to Reconsider Denial of Bond filed July 6, 2011.
10. Defendant's Motion to Reconsider Denial of Bond filed July 27, 2011.
11. Defendant's Brief in Support of Motion to Reconsider dated July 29, 2011.
12. State's Reply to Motion and Brief for Reconsideration executed by Assistant Solicitor Franklin Young dated August 12, 2011.
13. Defendant's Motion to Supplement the Record on Rehearing or Take Judicial Note filed August 22, 2011.
14. Defendant's Second Motion to Reconsider filed on December 15, 2011.
15. Arrest Warrants J-036561, J-036562, J-036563, J-036564, J-036565, J-036566 dated November 15, 2009.
16. Bureau of Alcohol, Tobacco, Firearms and Explosives Field Report dated April 28, 2011.
17. Columbia Police Department Incident Report and Rema Thomas's Memorandum dated July 5, 2011.

18. Statement of Robert E. Rushton from Joe Ross Worley's Bond Hearing dated September 23, 2011.

19. Transcript of Record from Bond Hearing before Judge Addy dated September 23, 2011.

20. Transcript of Record from Immunity Hearing before Judge Keesley dated May 31, 2011, to June 1, 2011.

21. Court Reporter Rema Thomas List of Exhibits from June 1, 2011, Immunity Hearing before Judge Keesley.

The undersigned is informed and believes, and therefore certifies, that the matter designated is relevant to the appeal in this matter.

Respectfully submitted,

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January 26, 2012

ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable Frank R. Addy, Jr., Circuit Judge, 8th Judicial Circuit

---

Case No. J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on January 26, 2012, I served a copy of the **Appellant's Initial Brief and Appellant's Designation of Matter** in the above-captioned case on the following individuals by standard US Mail:

Donald V. Myers, 11th Circuit Solicitor
205 E. Mail Street
Lexington, South Carolina 29072

Ervine J. Maye, Assistant Solicitor
11th Circuit Assistant Solicitor
187 Saluda Airport Road
Saluda, South Carolina 29138

Gwendolyn D. Chiles
McCormick County Clerk of Court
133 S. Mine Street
Suite 102
McCormick, South Carolina 29072

Malory L. Hogg

January 26, 2012
West Columbia, South Carolina

EXHIBIT "F"

The Supreme Court of South Carolina

Joe Ross Worley, Appellant,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-203827

ORDER

By order dated January 25, 2012, this Court transferred appellant's appeal from the denial of bond to this Court and the appeal was dismissed. Appellant has filed a motion for reconsideration of that decision. The motion is denied.

C.J.

FOR THE COURT

Columbia, South Carolina

May 29, 2012

cc:
Billy J. Garrett, Jr.
Desa Allen Ballard
Harvey MacLure Watson, III
John W. McIntosh
Tanya Amber Gee
Carson McCurry Henderson
H. Franklin Young, III
Salley W. Elliott
Alan McCrory Wilson
Donald V. Myers

cc:
Claude Robin Chandler
Franklin Grady Shuler, Jr.
Ralph Nichols Riley, Jr.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE, Respondent,

vs.

JOE ROSS WORLEY, Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Motion to Strike and Require Filing of Amended Initial Brief of Appellant on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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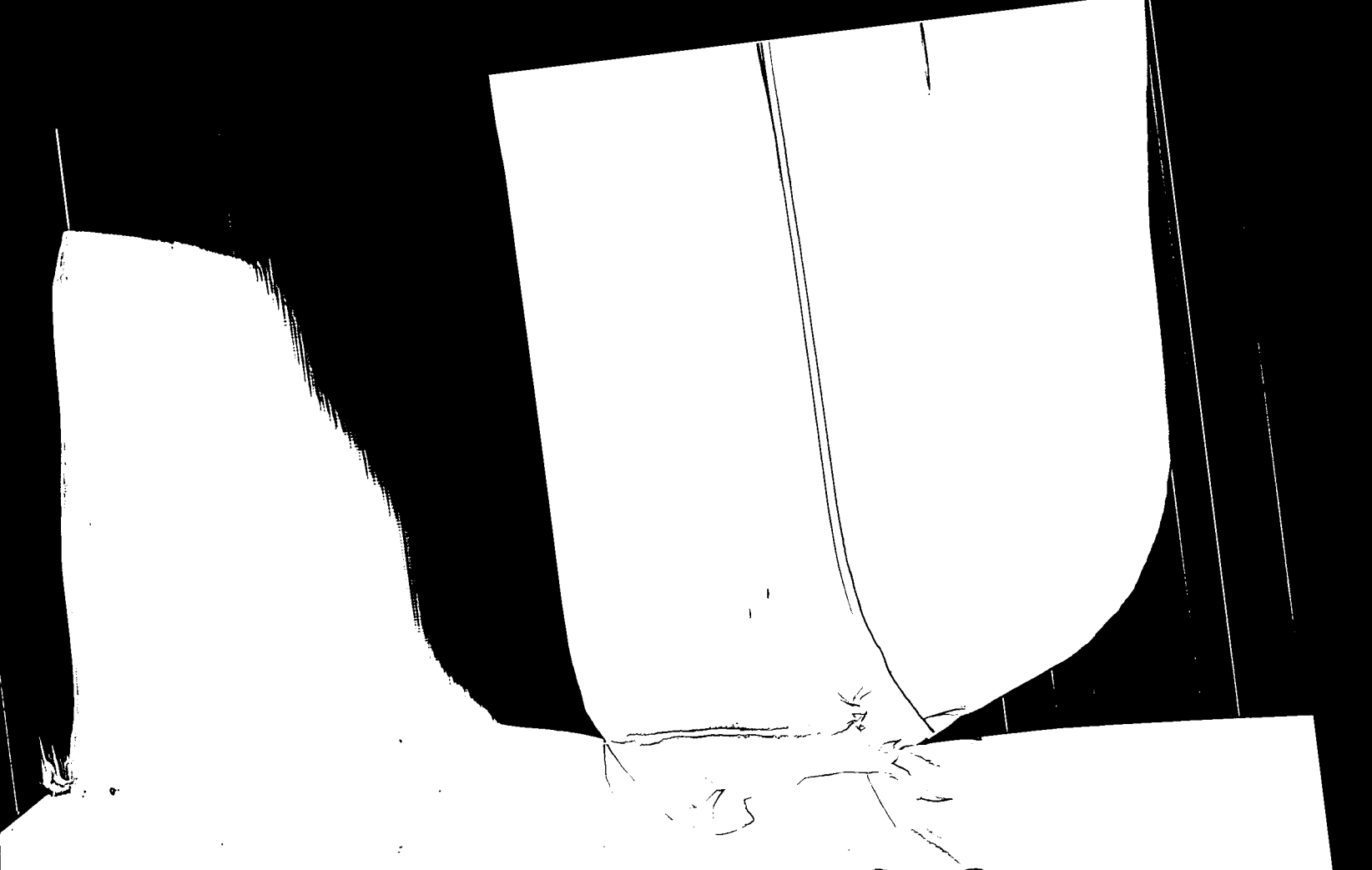
I further certify that all parties required by Rule to be served have been served.
This 20th day of August, 2012.



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