STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

RETURN TO APPELLANT'S MOTION TO SUPPLEMENT RECORD ON APPEAL AND EXPEDITE BRIEFING

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

Return to Appellant's Request for the Record on Appeal to Be Supplemented with the Proposed Supplemental Matter

In Appellant's Motion to Supplement Record on Appeal and Expedite Briefing, Appellant correctly asserts portions of the testimony presented during the pre-trial hearing on the immunity issue were not transcribed.[1] To correct this problem, Appellant asks this Court to allow him to supplement the Record on Appeal with a number of exhibits that were never presented to, reviewed by, or considered by the trial judge. Significantly, Appellant maintains there is no method to correct the incompleteness of the record other than through

[1] The portions of the testimony missing from the transcript were not transcribed because part of the record was stolen from the court reporter in a criminal act. (Exhibit "A" – Court Reporter Certification, Pre-Trial Hearing Transcript, p. 231).

supplementation. However, Appellant's contentions are wholly incorrect and are inconsistent with the mandates of our appellate court rules.

Rule 212(b), SCACR, allows a party to an appeal to supplement the Record on Appeal with additional supplemental material not previously included in the Record on Appeal after the party obtains consent from all of the other parties to the appeal or obtains approval from the appellate court. Thus, if a party fails to designate matter necessary for the proper resolution of an appeal until after the Record on Appeal is completed, Rule 212, SCACR, provides a procedure to remedy that error by allowing the supplemental matter to be included in an Appendix to the Record on Appeal. See Rule 212(c), SCACR ("Supplemental materials filed under Rule 212(b) shall be included in an Appendix to the Record on Appeal."). Significantly though, Rule 212, SCACR, does **not** supplant Rule 210(c), SCACR, and permit parties to introduce matter into the appeal that was not previously 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."); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA (2nd ed. 2002) ("Rule 212(b), SCACR, must, of course, be read in conjunction with Rule 210(c), SCACR, which declares that the record cannot include matter that was not presented to the lower court or tribunal.").

In the case sub judice, Appellant requests permission from this Court to supplement the Record on Appeal with several exhibits pursuant to Rule 212(b), SCACR.[2] Specifically,

[2] Significantly, Appellant's request to supplement the Record on Appeal pursuant to Rule 212(b), SCACR, is premature at the current stage of the appeal because the Record on Appeal has not yet been filed. See Rule 210(a), SCACR ("Within thirty (30) days after service of the last brief, the appellant shall serve a copy of the Record on Appeal on each party who has served a brief."); Rule 210(c), SCACR ("The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267."). Thus, the appropriate procedure for supplementing the Record on Appeal would be to obtain leave from this Court to file an Amended Designation of Matter. However, regardless of whether Appellant seeks to supplement the record pursuant to Rule 212(b), SCACR, or by amending his designation of matter, Appellant cannot supplement the

Appellant asks to supplement the record with the following exhibits: (1) an unsigned and uncertified memorandum from Rema K. Thomas, the court reporter who recorded the pre-trial hearing in Appellant's case, to Desiree Allen, an employee in Court Administration, regarding a vehicle break-in; (2) a law enforcement incident report detailing a vehicle break-in that occurred on June 23, 2011; and (3) a purported summary of Appellant's testimony dated September 7, 2012.[3] However, in making that request, Appellant notably does not contend those proposed supplemental exhibits and documents were ever presented to or considered by the trial judge. The likely reason Appellant does not make such a representation is that those documents **were not** presented to the trial judge and, in the case of the purported summary of Appellant's testimony that was unilaterally created by Appellant in September of this year well after the notice of appeal was filed, **could not** have been presented to the trial judge. 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."); see also State v. White, 372 S.C. 364,

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record with matter that was never 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.").

[3] Significantly, the purported summary of Appellant's testimony contains no certification that it is a **complete** recitation of that testimony. (Motion to Supplement, Exhibit C, p. 7). Furthermore, the purported summary appears to paraphrase the alleged testimony in some portions while appearing to directly quote the testimony in other portions. (Motion to Supplement, Exhibit C, pp. 1-2). Specifically, at the beginning of the purported summary, the summary reads: "His background information – how old he is, his education, his work history, and where he lives." (Motion to Supplement, Exhibit C, p. 1). However, thereafter, the summary does not contain the details of the testimony that Appellant allegedly provided regarding his age, education, or work history and does not contain any explanation as to why those details were not included in the summary. Troublingly, the omission of those details establishes the purported summary clearly is not a complete recitation of Appellant's testimony as it obviously does not contain at least some details Appellant chose to omit, leaving it uncertain as to what other details, if any, were omitted by Appellant. Critically, the fact that one of the interested parties to an appeal may have an interest in not providing details potentially unfavorable to that party's case to the appellate court is the logical reason it is not the responsibility of any single interested party to unilaterally attempt to reconstruct missing portions of the trial court record. A trial judge's impartiality and lack of interest in a matter is the precise reason why the trial judge has the duty and responsibility of determining what matter was contained in the record when there is an incomplete transcript of the trial court proceedings. See China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) (instructing "the duty and responsibility" of settling the question of what the appellate record should contain rests upon the trial judge in a case where portions of the notes of the trial proceedings were lost before the court reporter was able to transcribe them).

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."). Accordingly, as those documents and exhibits were not presented to the trial judge, they cannot properly be included in the Record on Appeal or any supplement to the Record on Appeal pursuant to the requirements of our appellate court rules. See Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.").

Despite the fact that the proposed supplemental evidence and exhibits were not presented to the trial judge and, thus, cannot properly be included in the Record on Appeal, Appellant contends he should be permitted to supplement the Record on Appeal with that material because there allegedly is no method to correct the deficiencies with the transcript other than to allow him to supplement the record with matter never presented to or reviewed by the trial judge. In support of that position, Appellant claims the trial judge lacks any jurisdiction to reconstruct the trial court record in his case.[4] However, contrary to Appellant's contentions, there **is** an accepted and judicially-recognized method to correct issues stemming from a lost or destroyed transcript. Critically, the South Carolina Supreme Court has instructed: "Where a transcript has been lost or destroyed, **a court may remand to have the record reconstructed**." Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (emphasis added), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Thus, the appropriate remedy to correct the lack of

[4] In making that contention, Appellant claims the State "has argued in its Motion to Strike that the trial court has lost its jurisdiction to confirm the underlying record on appeal." (Motion to Supplement, p. 3). Although the State noted in its motion to strike that the trial judge had no jurisdiction to consider motions and exhibits presented to him after Appellant filed a notice of appeal in the case, the State **never** asserted this Court could not remand the case to the trial court for reconstruction of the record. See Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal[.]"). Instead, the State argued the exact opposite, noting the appropriate remedy to correct Appellant's asserted deficiencies with the transcript was for Appellant to ask this Court to remand the matter to the trial judge to reconstruct the missing portions of the transcript. (Motion to Strike, p. 5, n. 7). Significantly, the fact a notice of appeal has been filed does **not** prevent an appellate court from remanding a case to the trial court for reconstruction of missing portions of the record that were properly before the trial judge. See 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).

a complete transcript on appeal – the exact situation involved in Appellant's case – is for the appellate court to remand the matter to the trial court to allow the trial judge to attempt to reconstruct the missing portions of the record. See 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); see also China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) ("The issues on appeal must therefore be determined **on the basis of the record as settled by the trial court**." (emphasis added)). Such a remand would allow the neutral and impartial trial judge who presided over the pre-trial hearing in Appellant's case to determine the contents of the trial court record and confirm the completeness and correctness of that record, which is solely the trial judge's duty and responsibility, while also allowing all of the interested parties to the appeal, including Appellant, to mutually offer their assistance and input in reconstructing the record.[5] 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).

The proposed supplemental material offered by Appellant for inclusion in the Record on Appeal cannot properly be used to supplement the record and cannot properly be considered on appeal because it was never 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."); see also Tant v. Guess, 37 S.C. 489, 512-513, 16 S.E. 472, 480 (1892) ("[I]f the purpose was to ask

[5] Supporting the likelihood that the trial judge will be able to successfully reconstruct the missing portions of the pre-trial hearing transcript, the trial judge included a highly-detailed summary of the testimony presented during the hearing, including Appellant's testimony, in his order denying Appellant's request for immunity from prosecution. (Exhibit "B" – Amended Order on Motion to Bar Prosecution, pp. 1-7). Notably, in his order, the trial judge expressly found Appellant's testimony during the hearing not to be credible. (Exhibit "B" – Amended Order on Motion to Bar Prosecution, pp. 2-5; p. 7).

this court to consider facts not presented to the Circuit Court, . . . then it is clear beyond dispute that we cannot consider such facts. For, as is said by Taney, C. J., in Russell v. Southard, 12 How., at page 159: 'According to the practice of the Court of Chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal.' This court has, in numerous cases, recognized and affirmed this doctrine."). Accordingly, Appellant's motion to supplement the record pursuant to Rule 212(b), SCACR, should be denied. Thereafter, if Appellant desires to do so, Appellant can cure any deficiencies regarding the completeness of the transcript by asking this Court to remand the matter to the trial judge for reconstruction of the record.[6] See Koon, 358 S.C. at 367, 595 S.E.2d at 460 (instructing that the appellate court has the authority to remand the matter to the trial court for reconstruction of missing or destroyed portions of a transcript).

Return to Appellant's Request for the Appeal to Be Expedited

In Appellant's Motion to Supplement Record on Appeal and Expedite Briefing, Appellant asks this Court to establish an expedited briefing and argument schedule pursuant to Rule 240, SCACR. Appellant also asks this Court to, at a minimum, prohibit the State from seeking any further extension requests in this case. Those requests should be denied at this juncture.

In its discretion, an appellate court can extend or shorten the time period permitted for performing any act related to an appeal other than the filing of a notice of appeal. Rule 263(b),

[6] Notably, in his initial brief, Appellant noted he provided the trial judge with the partial transcript of the pre-trial hearing in October of 2011. (App. Br. p. 3, n. 2). Thus, Appellant was aware the transcript of the pre-trial hearing was incomplete while his case was still pending before the trial judge, but it does not appear Appellant asked the trial judge to attempt to reconstruct the missing portions of the transcript or to supplement the record with Appellant's missing testimony at that time. Instead, Appellant elected to go forward with the appeal with an incomplete trial court record while asserting the incompleteness of the transcript entitled him to receive favorable evidentiary inferences on appeal. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); see also State v. Williams, 321 S.C. 455, 464, n. 4, 469 S.E.2d 49, 55 (1996) ("The burden is on appellant to provide a sufficient record for review.").

SCACR. However, appellate courts will ordinarily only shorten the time periods associated with an appeal where there are extraordinary or exigent circumstances necessitating expedited consideration of the appeal. See George v. Mun. Election Comm'n of Charleston, 335 S.C. 182, 184, n. 1, 516 S.E.2d 206, 207 (1999) (expediting an appeal where the decision in the appeal was critical for determining the validity of a referendum and would have an impact on an upcoming election).

In the case at bar, Appellant has raised four issues related to the trial judge's denial of Appellant's Motion to Bar Prosecution pursuant to the "Protection of Persons and Property Act" and the trial judge's denial of Appellant's request for pre-trial bond. (App. Br. p. 1). Through the passage of the "Protection of Persons and Property Act," the South Carolina General Assembly codified the common law Castle Doctrine, extended that doctrine to include occupied vehicles and an individual's place of business, and granted immunity from prosecution to individuals acting in a manner consistent with the mandates of the Act. See S.C. Code Ann. § 16-11-420(A) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business."); see also State v. Duncan, 392 S.C. 404, 407, 709 S.E.2d 662, 663 (2009) ("[B]y using the words 'immune from criminal prosecution,' the legislature intended to create a true immunity, and not simply an affirmative defense."). Subsequent to the passage and implementation of that Act, our appellate courts have only interpreted the meaning and effect of the Act on a single prior occasion.[7] See Duncan, 392 S.C.

[7] Notwithstanding the analysis in Duncan, this Court previously found the "Protection of Persons and Property Act" did not apply retroactively in two separate cases without specifically addressing the substantive applicability of the Act to the facts of those cases. See State v. Bolin, 381 S.C. 557, 562, 673 S.E.2d 885, 887 (Ct. App. 2009) (finding the "Protection of Persons and Property Act" did not apply retroactively in light of the savings clause included in the Act); State v. Dickey, 380 S.C. 384, 404-405, 669 S.E.2d 917, 928 (Ct. App. 2008) (finding the "Protection of Persons and Property Act" did not apply retroactively to Dickey's case), rev'd on other grounds, 394 S.C. 491, 716 S.E.2d 97 (2011).

at 407, 709 S.E.2d at 663 (addressing whether the issue of immunity pursuant to the "Protection of Persons and Property Act" required a pre-trial determination and whether the trial judge erred in finding Duncan was entitled to pre-trial immunity). In doing so, the Supreme Court expressly recognized the novelty and significance of the Act.[8] See Id. at 409-411, 709 S.E.2d at 664-665 (recognizing the issues raised in the case were novel issues and issues of first impression in South Carolina and finding the legislature created a true immunity as opposed to simply an affirmative defense). In light of the novelty of the "Protection of Persons and Property Act" and the significance of the issues related to that Act, appeals involving an interpretation of the Act currently require extensive research and careful consideration to ensure the Act is properly interpreted and applied. For that reason, the schedule for appellate review of a case involving an interpretation of the Act should only be accelerated if the exigent and unique circumstances of a particular case clearly necessitate expedited briefing and priority consideration of the appeal.

In Appellant's case, the only exigent circumstances that Appellant has identified in support of request for this Court to shorten the normal time periods permitted for briefing and to expedite review of his appeal is that: (1) he was denied pre-trial bond; and (2) he raised a claim that he is entitled to immunity from prosecution and is appealing a trial judge's determination that his assertions of entitlement to immunity were incorrect.[9] (Motion to Supplement, p. 4). However, if being incarcerated during the pendency of an appeal from a trial judge's ruling or simply appealing a trial judge's rejection of a claim of entitlement to relief were the only

[8] In his initial brief, Appellant appears to recognize the unsettled and novel nature of appeals involving the "Protection of Persons and Property Act" and asserts even the issue of the appropriate standard of review in such cases has not yet been defined. (App. Br. pp. 11-13).

[9] Notably, the trial judge's determination that Appellant was not entitled to immunity from prosecution is presumed to be correct at the current stage of the proceedings. See Martin v. Carolina Water Servs., Inc., 273 S.C. 43, 46, 254 S.E.2d 52, 53 (1979) ("The order of the lower court is presumed to be correct."); Ehlke v. Nemec Constr. Co., Inc., 298 S.C. 477, 481, 381 S.E.2d 508, 510 (Ct. App. 1989) ("[T]here is a presumption in favor of correctness of an appealed order and the burden of showing error by the trial judge is on the appellant.").

exigencies required to warrant expedited appellate review of a criminal appeal, then virtually every criminal case would require such expedited review since appellants in numerous criminal case are incarcerated during the pendency of their appeals and typically claim their incarcerations or convictions were defective or wrongful in some respect. Accordingly, the particular circumstances identified by Appellant as warranting expedited review of his case do not make his case unique or more important than other appeals currently pending before this Court and do not sufficiently justify priority or expedited consideration of his case. Therefore, based on the significance and novelty of the issues raised in Appellant's appeal coupled with the lack of any unique exigent circumstances necessitating expedited briefing and review of Appellant's case, Appellant's request for the establishment of an expedited briefing and argument schedule should be denied at this juncture.[10]

Furthermore, Appellant's request that this Court prohibit the State from seeking any further extension requests should be denied. As previously stated, the issues involved in Appellant's appeal require the parties and this Court to interpret a legislative act that has not previously been addressed in substance by our appellate courts. Based on the novelty of the issues raised in the appeal coupled with the significance of those issues, Appellant's appeal has necessitated extensive research in order for the State to properly prepare the Initial Brief of

[10] Critically, this Court's denial of Appellant's request for an expedited briefing and argument schedule would **not** prevent Appellant from seeking an appeal bond to obtain his release from incarceration during the pendency of his appeal, which would minimize the hardship he has identified as warranting expedited review of his case. See In re Michael H., 360 S.C. 540, 552, 602 S.E.2d 729, 735 (2004) ("South Carolina Code Ann. § 14–8–200(a) (Supp.2003) states that the Court of Appeals shall have the same authority to grant petitions for bail as this Court would have in a similar case. Under South Carolina Code Ann. § 18–1–90 (1985), bail shall be allowed to the defendant in all cases in which the appeal is from the trial, conviction, or sentence for a criminal offense."); see also State v. Workman, 274 S.C. 341, 343, 263 S.E.2d 865, 866 (1980) ("The purpose of an appeal bond in a criminal case is to allow the defendant to go free during the pendency of the appeal while assuring his presence upon affirmance of his conviction or as the court may otherwise direct."). However, by noting Appellant has a means to obtain release from incarceration during the pendency of his appeal, the State is in no way suggesting Appellant should be granted that relief, and the State fully intends to object to any request by Appellant for such relief. See, e.g., Nichols v. Patterson, 202 S.C. 352, 355, 25 S.E.2d 155, 156 (1943) (" 'Important considerations in the discretionary allowance or refusal of bail pending appeal include the probability of reversal, the nature of the crime, the possibility of escape, and the charter and circumstances of accused.' " (citations omitted)).

Respondent and to fully and accurately respond to the issues raised by Appellant. Based on the work required by Appellant's appeal along with the work required in the other appeals assigned to the undersigned counsel, the State has requested additional time to complete the Initial Brief of Respondent and Designation of Matter from this Court on two prior occasions.[11] In making those requests, the State affirmed those requests were not made for the purposes of delay or with any improper or dilatory intentions, and, critically, Appellant has not suggested the State's two previous extension requests were made in bad faith or in an effort to delay the resolution of his appeal.[12] Accordingly, in the absence of any contention that the State is engaging in any improper dilatory tactics and in light of the significance of the issues raised in Appellant's appeal, the State does not believe there is any reason for this Court to restrict the State's ability to ask for any additional extension requests should they become necessary for the completion of the Initial Brief of Respondent. Therefore, Appellant's request that this Court prohibit the State from filing any further extension requests should be denied, and this Court should address the individual merits of any future extension request should any future and currently-hypothetical extension request be filed.

WHEREFORE, Respondent prays that this Court will deny Appellant's request for this Court to allow him to supplement the Record on Appeal pursuant to Rule 212(b), SCACR, with the exhibits attached to his Motion to Supplement Record on Appeal and Expedite Briefing; deny

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[11] Including the two extensions requested by the State, this Court has so far granted a total of four extensions of time for the preparation of the initial briefs to the parties involved in this appeal.

[12] Notably, the State has required additional time to prepare a response to Appellant's initial brief because the State determined Appellant's initial brief did not comply with the requirements of our appellate court rules, including the requirements regarding citation to the trial court record. See Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review."). For that reason, the State filed its motion asking this Court to strike numerous items from the Initial Brief of Appellant and Designation of Matter and to require the filing of an Amended Initial Brief of Appellant. (Motion to Strike, pp. 1-10). The State's motion is currently pending before this Court, and the State is presently awaiting a ruling on that motion.

Appellant's request to establish an expedited briefing and argument schedule; deny Appellant's request to prohibit the Respondent from seeking any additional extensions of time in the appeal; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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September 17, 2012

EXHIBIT "A"

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE BUT PARTIAL TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON MAY 31, 2011, IN MCCORMICK, SOUTH CAROLINA.

THIS RECORD IS INCOMPLETE DUE TO AN ILLEGAL BREAK-IN TO MY PERSONAL VEHICLE ON 6/23/2011, WHEREIN ITEMS WERE STOLEN FROM THE VEHICLE, INCLUDING PART OF THIS RECORD; COLUMBIA POLICE REPORT #110018381.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE TWENTY-EIGHTH DAY OF AUGUST 2011.

REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

EXHIBIT "B"

STATE OF SOUTH CAROLINA COUNTY OF McCORMICK	)	IN THE COURT OF GENERAL SESSIONS
STATE OF SOUTH CAROLINA, -vs- JOE ROSS WORLEY, Defendant.	)	AMENDED ORDER ON MOTION TO BAR PROSECUTION[1] Case Numbers J-036561, J-036562, J-036563, J-036564, J-036565, J-036566

The defendant moved prior to trial to bar the prosecution of these cases under the immunity provided in S.C. Code Ann. §16-11-410, et seq., the Protection of Persons and Property Act (the Act), which is South Carolina's codification of the common law Castle Doctrine. Pursuant to the holding in *State v. Duncan*, 2011 WL 1744209 (S.C.), the court conducted a full-day pretrial hearing and received testimony from various witnesses, including expert testimony for the defense. The motion is denied. Because of the extensive degree of factual determinations that are required to decide this motion, the court recuses itself from this case and any related civil lawsuit (2010-CP-35-00030). The motion to reconsider bond should be directed to The Honorable R. Knox McMahon for scheduling as Chief Judge for Administrative Purposes for General Sessions Court.

WPL #1

Synopsis of Factual Background

In November 2009, deputies with the McCormick County Sheriff's Department responded to a call of "shots fired" in a residential neighborhood on Lake Thurmond. One of the people who responded to the call, Robert E. Rushton, was injured by a shot

[1] The order of June 23, 2011, which was filed on June 24, 2011, is amended to correct minor typographical and grammatical errors. The attorneys were notified of the court's intent to amend by memo dated July 5, 2011. No substantive changes were made, and the court sees no need to modify the Motion to Reconsider.

fired by Mr. Worley using a high-powered rifle. The bullet from the rifle struck the pistol that Rushton was holding in his hand, blowing off part of his hand.

The defendant lives with his mother, who spends time at the lake house and at another home in another county. The court agrees that the home where Mr. Worley was staying that night qualifies as his dwelling and his residence under the definitions of the Act, specifically §16-11-430(1) and (3).

Mr. Worley admitted firing a weapon earlier in the evening. He testified that he had been trying to scare away a fox that he suspected had injured a pet, and that he had fired the weapon in that fashion on previous occasions. The neighbors are the Sheffields. Because of the previous incidents, Mrs. Gayle Sheffield had made a report to law enforcement months before, but did not want any charges to be brought at that time. Her husband, Mr. Alan Sheffield, testified credibly that he tried to handle the situation in a neighborly fashion. He communicated with Mr. Worley's mother, but the incidents continued to happen and Mr. Worley continued to create loud disturbances in the neighborhood, including firing a weapon at different times, late at night.

Finally, the situation got to the point that the November 2009 call to law enforcement was made. Mr. Worley testified that he had fired the shots to scare the fox on the evening of November 14, 2009, and that he had gone to bed sometime roughly around midnight. Regardless of why Mr. Worley was firing a weapon in a residential neighborhood, the more credible evidence from several prosecution witnesses is that this occurred much later and probably more than once, between 2:00 and 4:00 a.m. on November 15, 2009. Three people responded to the scene: Rushton, McAllister, and Moore, apparently in separate cars.

The defendant raises a claim that Mr. Rushton was a not a law enforcement officer under the Act. There does not appear to be any dispute as to whether McAllister and Moore were law enforcement officers, and the court finds that they were. The court also finds that the greater weight of the evidence supports the determination that Mr. Rushton was a law enforcement officer within the meaning of the Act at the time he was injured. The analysis of that issue is discussed below.

Mr. Worley presented evidence that the night in question was extremely dark, and the court has no reason to disbelieve that evidence. However, the court does not believe that the exterior lights were not turned on at some point prior to the shooting of Deputy Rushton. The court finds no reasonable explanation why a person in his home, perceiving this alleged threat from people who were in his yard, would not cut on exterior lights to see what was happening. Other witnesses testified far more credibly that the lights were turned on.

WPH #3

Mr. Worley's testimony is that he was awakened by a doorbell repeatedly ringing. He makes no assertion that anyone attempted to open a door or window, nor that he heard anyone inside his residence or attempting entry. The court finds no evidence that any of the deputies attempted to enter Mr. Worley's home.

Mr. Worley claims that the house has extensive insulation which prevents noise from being heard. Yet neighbors far away heard and saw a great deal. He denies ever hearing anyone identify himself or herself as a law enforcement officer. He denies seeing any marked patrol cars or blue lights or take-down lights. He denies seeing any badges. In short, he continued to refer to these officers throughout his testimony as burglars, and

emphatically denies that he knew or had any reason to know that the people in his yard were law enforcement officers. His testimony in that regard is not credible.

He states that he got a rifle and came onto his deck, which was on a level above the entry door where the doorbell was being rung. He claims that he saw a figure appear below in the yard, raising a gun and pointing a weapon in his direction. Again, Mr. Worley denies that there was any identification of the people as law enforcement officers, and Mr. Worley fired the rifle in response to what he alleges was an unprovoked threat of death or serious bodily injury. The evidence of damage to the pistol and the angle of the bullet from Mr. Worley's rifle support his position that Deputy Rushton was aiming his Glock pistol at Mr. Worley when the defendant fired.

Mr. Worley states that the impact of the bullet from the rifle spun the person around. The person then ran towards an embankment, realized that the embankment was too steep to safely traverse, and ran back in the direction of the house. People joined the injured person and they left. Mr. Worley said that he then went out into his yard, picked up the Deputy's weapon, and took it up to one of the empty patrol cars, leaving it inside.

Mr. Worley presented expert testimony in the field of criminology. The gist of the testimony related to whether Deputy Rushton and his fellow deputies followed proper police procedures. Expert testimony was elicited that it is probable that Mr. Worley would not have known that the people in his yard were law enforcement officers. It is the expert's opinion that a "shots fired" call is one that presents a very precarious situation of heightened alert. Once the officers determined that there was no active shooter, the proper procedure, according to the expert, was for the officers to stay a safe distance from the dwelling, cordon off the area, activate blue lights on their vehicles so that they would

be easily identified as law enforcement officers, use bullhorns or similar devices, and call the defendant's home to explain why they were there and to establish a dialogue with him. The defendant's expert did not seem to question the right of a law enforcement officer to draw his weapon and point it when he was presented with a person holding a weapon.

With all due respect to the expert, the evidence refuting Mr. Worley's assertions of what occurred is overwhelming and undermines the expert's conclusions. While there are inconsistencies in details and some deviation between the testimony presented and previous written statements of the prosecution's witnesses, the court's assessment is that the most essential elements of the prosecution's version of the events are consistent and far more rational. Defense counsel did a very thorough job of developing evidence, as well as bringing out the inconsistencies in the prosecution's case and attacking the credibility of its witnesses. Defense counsel has obviously done extensive work and research. However, having observed the witnesses and evaluated their credibility, the court finds that the prosecution's version of what happened is far more believable.

In an effort to avoid an unnecessarily lengthy recital of the facts, the following is a summary of what the greater weight of the evidence established. On the evening of the shooting, the neighbors had reached the point where they felt that they had to call law enforcement. Mr. Worley had been firing a weapon in the yard again, in a residential area, late at night, and creating another very troubling disturbance. Three law enforcement officers arrived on the scene around 4:00 a.m. They first spoke to the complaining party, then attempted to make contact with Mr. Worley. They rang the doorbell and knocked on the door. They repeatedly announced that they were law

enforcement officers. When no one answered, the deputies did not attempt to force their way into the home. They went back up to the home of the complaining parties. They saw lights come on at the Worley home and returned to it. The lights may have gone off for a period and come back on, and the court recognizes that there is a dispute in the evidence as to exactly when lights were turned on and where they were located. The court believes that is attributable to the traumatic events that were experienced that night.

Mr. Worley asked who was at his home, and he heard the response that these were law enforcement officers. His response was, "I don't give a f____." The evidence demonstrates very clearly that the officers knocked and announced repeatedly.

Instead of acting as a reasonable person would have done under the circumstances, including such actions as speaking with his mother who was also in the house, calling law enforcement on the phone, or engaging in some dialogue with the people on his yard until he was satisfied that the situation was safe, Mr. Worley's response was to come out on his deck above these officers holding a high powered rifle. The officers yelled, "gun." Deputy Rushton aimed his weapon at Mr. Worley, ordering him to drop the rifle (which he believed at that point was a shotgun). Deputy Rushton was not wearing a military style uniform, but had on clothing indicating he was a law enforcement officer and had his badge displayed.

It does not matter whether or not Deputy Rushton was blinded by a spotlight momentarily. He had every right to point his weapon at Mr. Worley under those circumstances. At the same time, at least one of the other officers was yelling, identifying himself as law enforcement and ordering Mr. Worley to drop the gun. Mr. Worley fired at Deputy Rushton, hitting the pistol and blowing off part of the deputy's

hand. He then fired an additional shot or shots. In the aftermath, he conducted himself as though he was searching for the injured party, not to aid him, but to inflict further harm. He made a statement to the effect of asking, "Where are you, you son of a b_____?" He had absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home. Shell casings were recovered from the deck. The rifle was in the house. The court does not recall any evidence that Mr. Worley attempted to call law enforcement before, during, or after he shot the deputy. It makes absolutely no sense that three law enforcement officers in a darkened area, responding to a "shots fired" call, would fail to identify themselves as law enforcement officers, loudly and emphatically. The court does not find Mr. Worley to be credible.

Analysis

The motion before the court is an assertion that the State is barred from prosecuting the defendant because he is entitled to immunity under the Act. The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so.

The critical statute is §16-11-450(A), which reads as follows:

> (A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

The inclusion of the words "another applicable provision of law" is troubling, because it can be read as requiring judges to have separate pretrial hearings in every case where it is asserted that there was a justifiable use of

deadly force. The legislature could not have intended such a broad reading of the statute granting immunity, and that issue does not appear to have been specifically raised here.

The greater weight of the evidence supports the conclusion that Deputy Rushton was a law enforcement officer acting in the performance of his official duties and identifying himself in accordance with applicable law. The overwhelming evidence is that Mr. Worley reasonably should have known that the person he shot was a law enforcement officer.

Was Deputy Rushton a Law Enforcement Officer?

Mr. Rushton had worked as a deputy, resigned to take a job in the Middle East training law enforcement personnel, and returned to work for the McCormick County Sheriff's Department shortly before this incident. The defendant elicited testimony from Mr. Rushton that he did not remember retaking an oath of office when he returned to employment in McCormick County. However, State's exhibit 1-A is a copy of an oath of office, sworn before Kathryne P. Butler, who was the Clerk of Court and a Notary Public, on November 2, 2009. The court finds that Robert Edward Rushton was appointed as a Deputy Sheriff of McCormick County to serve at the pleasure of the Sheriff, and that he was serving in that capacity at all times in question.

The defendant raises the issue that the oath taken is not the complete oath required for one to be considered a deputy, and the appointment was not approved by a circuit judge. Deputy Rushton signed the following oath on a form entitled "Oath for County and State Officers":

> First, I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the

> office to which I have been elected (or appointed), and that I will, to the best of my ability, discharge the duties thereof, and preserve and protect and defend the Constitution of this State and of the United States.
>
> So help me God.

The form indicates that it was to be sent to the Secretary of State's office. There is no evidence that it was not. The only reasonable interpretation is that this is the oath required under Article III, Section 26 of the South Carolina Constitution.

The defendant claims that this oath is inadequate because it does not contain the language required under two statutes. First, there is the assertion that Mr. Rushton's appointment had not been approved by a circuit judge. The defense is correct that §23-13-10 provides for a circuit judge to approve appointment of deputies.

> **SECTION 23-13-10.** Appointment; approval by court; responsibility of sheriff for acts of deputy.
>
> The sheriff may appoint one or more deputies to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall be evidenced by a certificate thereof, signed by the sheriff, and shall continue during his pleasure. The sheriff shall in all cases be answerable for neglect of duty or misconduct in office of any deputy.

WPA #9

To the extent that part of this statute provides for judicial approval of executive branch appointments, it is a clear violation of the separation of powers doctrine. It simply cannot withstand scrutiny. That being the determination of this court, the failure of a circuit judge to sign a form approving the appointment of a deputy cannot reasonably be construed to mean that the deputy is not a law enforcement officer within the meaning of the Act. To rule otherwise would allow the judicial branch to veto personnel decisions made by the Sheriff, a member of the executive branch.

The more seriously argued position relates to §23-13-20, a copy of which was entered as defendant's exhibit 1-A. It reads, as follows:

SECTION 23-13-20. Bond and oath.

Each deputy sheriff shall, before entering upon the discharge of his duty, enter into bond in the sum of one thousand dollars, with sufficient surety, to be approved by the sheriff of the county, conditioned for the faithful performance of his duties and for the payment to the county and to any person of all such damages as they or any of them may sustain by reason of his malfeasance in office or abuse of his discretion. He shall, in addition to the oath of office now prescribed by Section 26, of Article III, of the Constitution, take the following oath (or affirmation) to wit: "I further solemnly swear (or affirm) that during my term of office as county deputy, I will study the act prescribing my duties, will be alert and vigilant to enforce the criminal laws of the State and to detect and bring to punishment every violator of them, will conduct myself at all times with due consideration to all persons and will not be influenced in any matter on account of personal bias or prejudice. So help me, God." The form of such bond shall be approved by the county attorney and, with the oaths, shall be filed with and kept by the clerk of court for the county.
A blanket bond may be used in any county to fulfill the bond requirement of this section upon approval of the County Council and the County Attorney.

The issue related to the question of bond was touched upon at the hearing. The defendant has failed to prove that there was no blanket bond in effect sufficient to meet the bond requirement.

WA #10

The term "law enforcement officer" does not appear to be defined under the Act. So, the court is left to interpret the meaning of the words used in the statute. A word search was done to try to discover every section of the S.C. Code and Constitution that might attempt to define the term "law enforcement officer" or "deputy" or "sheriff." There are a couple of definitions in the Code, but they really do not add much to what one would understand through the common usage of the term.

Statutory interpretation is a matter of law. The oath prescribed by the Constitution was taken by Mr. Rushton.

In the recent case of *City of Rock Hill v. Harris*, 2011 WL 204799, the South Carolina Supreme Court discussed the interaction between constitutional provisions and legislative enactments. Clearly, Article V, Section 24 of the Constitution of South Carolina provides the General Assembly with authority to establish certain requirements governing sheriffs and their offices. *Harris* cites language from *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) which stands for the general proposition that the cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. The general proposition requires a court to refrain from statutory construction and apply the statute according to its literal meaning, where the terms in a statute a clear and unambiguous. *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). The *Harris* court explains further, however, that there is an exception.

WPM #11

> Absent ambiguity, the court will look to the plain meaning of the words used to determine their effect. Hodges, 341 S.C. at 85, 533 S.E.2d at 581. However, the plain meaning rule is subject to this caveat:
>
> > However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.
> >
> > Id. (quoting Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

The *Hodges* case also stands for a proposition that is critical to the court's analysis. Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. When the Act was written, the legislature set forth its legislative intent in §16-11-420, which reads:

§ 16-11-420. Intent and findings of General Assembly.

(A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.

(B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.

(C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.

(D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.

(E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

WPA #12

The court finds that the General Assembly recognized that exceptions had to be made for law enforcement personnel. Those exceptions are not without limitation, and they are addressed in the Act. The legislature left in place the ability to raise the issue of self-defense against a law enforcement officer and to have one's conduct evaluated in that context by a trial where the State bears the burden of proving beyond a reasonable doubt that the accused did not act in self-defense. The precise issue before the court is the immunity provisions which bar the State from any type of prosecution.

It is the court's finding that the General Assembly did not intend for the protections and restrictions related to using deadly force against law enforcement officers to be subject to the strict, technical evaluations argued by the defendant. In trying to

construe different statutes and examine the legislative intent, the court concludes that the failure to take an additional or supplementary oath in § 23-13-20 does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive the victim from asserting that he is a law enforcement officer for purposes of evaluating the applicability of the Act. In the context of interpreting the Act and evaluating it in light of other statutes, the court determines that the oath in §23-13-20 should be read as supplemental to the Constitutional requirement, where the deputy is swearing to uphold the law, and the failure to have those additional words included on a form should not be construed to deprive the State of the ability to prosecute the defendant.

Failure to Prove Reasonable Belief Regarding Law Enforcement Issue

Even if there is some problem in considering Deputy Rushton as a law enforcement officer because of a technical condition he had not fulfilled, the Act does not preclude prosecution. The defendant has not established that he had a reasonable belief that he was not firing upon law enforcement officers. There were three people in the yard (two of whom appear to have admittedly have been law enforcement officers) and they were repeatedly yelling out their identification as such. Mr. Worley's claim is that he did not know who he was shooting toward, but acted in self-defense when he saw a figure point a gun at him. The defendant may raise self-defense and any other applicable defenses, but the determination of the court is that the Act does not preclude prosecution.

No Proof of Entry or Attempted Entry

Regardless of the position taken on the preceding issue, the Act does not prohibit prosecution because none of the people in Mr. Worley's yard were attempting to enter the home. In order for the immunity to attach, §16-11-450(A) requires that Mr. Worley

establish that he was permitted to use deadly force by the provisions of §16-11-440 or "another applicable provision of law."

Section 16-11-440(A) reads, in part, as follows:

> § 16-11-440. Presumption of reasonable fear of imminent peril when using deadly force against another unlawfully entering residence, occupied vehicle or place of business.
>
> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence . . . ; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

WPR #14

The court concludes that the defendant has not established by the preponderance of the evidence that Deputy Rushton was doing anything unlawful. Mr. Worley has not proven that Deputy Rushton was entering or attempting to enter the Worley residence, by force or otherwise. He was there with the other officers, identifying himself as law enforcement, ringing the doorbell and knocking on the door.

Section 16-11-440(B) disallows the presumption of subsection (A), thus making the immunity inapplicable, where the person [subsection (1)] against whom the deadly force is used has the right to be in the dwelling; or, [subsection (4)] where the person against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling in the performance of his official duties, and he identifies himself in accordance with applicable law or the

person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

As to both subsections §16-11-440(B)(1) and (4), again, there is no evidence that Deputy Rushton or any of the other officers were in the residence or attempting to enter it. So, neither subsection would provide immunity from prosecution, in the court's determination.

The failure of evidence regarding entry or attempted entry is fatal to the defendant's argument concerning subsection (B). However, there was a great deal of focus in the testimony concerning subsection (B)(4) dealing with the defendant's assertion that Deputy Rushton either was not a law enforcement officer (an issue that was discussed previously) or that he did follow proper law enforcement procedures. So, the court will address those issues, as well, though it is probably unnecessary and redundant.

WM #15

The evidence, in the court's view, established that Deputy Rushton was clearly acting in accordance with his official duties and that he identified himself in accordance with applicable law. He was called to the scene and responded with other officers to a call of "shots fired." He spoke with the complaining parties, went to check on the person who was alleged to have fired the shots, and properly reacted when the defendant came out holding a gun. Even the defense's expert supported the assertion that an officer can point his weapon when confronted with someone holding a rifle under these circumstances.

To the extent that the defense expert testified that the deputies did not conduct themselves in accordance with applicable law, the court rejects that

conclusion. The officers repeatedly and consistently identified themselves as law enforcement officers. Law enforcement officers are permitted to "knock and announce," and the evidence indicates that they did that properly. Even under the defendant's version of the events, the people in his yard were announcing their presence by repeatedly ringing the doorbell. It is not a situation where anyone claims that there was a fear of people sneaking into a residence at night. Again, they did not enter the residence or attempt to do so. Thus, while this subsection does not provide immunity from prosecution in any event, the conclusion of the court is that the defendant has also failed to prove that he did not know or that he was reasonable in failing to know that the people in his yard, including Deputy Rushton, were law enforcement officers.[2]

THEREFORE, IT IS ORDERED that the motion to bar prosecution of these cases is denied.

#16

IT IS FURTHER ORDERED that the undersigned judge recuses himself from further involvement in this matter. The attorneys are to notify the Chief Judge for Administrative Purposes, The Honorable R. Knox McMahon, to have a hearing scheduled on the defendant's motion to reduce bond.

AND IT IS SO ORDERED.

July 5, 2011

William P. Keesley, Judge

[2] Though the court does not recall it being specifically raised, there is not immunity under §16-11-440(C), either. That provision does not appear to vary in any significant way from the typical self-defense situation. Mr. Worley was not in "another place." An appurtenant structure would be part of the dwelling, invoking the exclusions related to law enforcement officers. In the trial, Mr. Worley may raise self-defense.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Appellant's Motion to Supplement Record on Appeal and Expedite Briefing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Desa Ballard and Harvey M. Watson, III, Esquires
Ballard Watson Weissenstein
Post Office Box 6338
West Columbia, South Carolina 29171

Carson Henderson, Esquire
The Henderson Law Firm, PC
109-B Oak Avenue
Greenwood, South Carolina 29646

Billy J. Garrett, Jr., Esquire
The Garrett Law Firm, PC
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Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 17th day of September, 2012.

Ellen R. DuBois

ELLEN R. DuBOIS
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ALAN WILSON
ATTORNEY GENERAL

September 17, 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 Return to Appellant's Motion to Supplement Record on Appeal and Expedite Briefing, 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