

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Sumter County

MAR 16 2017

Honorable William Jeffrey Young, Circuit Court Judge  
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JEFFREY DANA ANDREWS

APPELLANT

APPELLATE CASE NO 2015-001679  
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FINAL BRIEF OF APPELLANT  
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ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1.

Whether the court abused its discretion in denying appellant immunity where appellant had ordered the decedent to leave his home, the decedent attempted to reenter the house without permission, and forcefully, as in State v. Duncan, and appellant shot him, since appellant was lawfully repelling an aggressor in his own home, he was acting lawfully, he was in fear of great bodily harm, and the judge erroneously abdicated his responsibility to make credibility determinations as a trier of fact to the jury?

2.

Whether the court abused its discretion by refusing to recognize Investigator Terry Gainey as an expert in interrogation and force science to explain how immediately interrogating someone after a shooting can lead to fragmented description of what occurred, since Gainey was qualified by experience and training to be an expert, his testimony on this subject was needed, particularly where the court used the lack of expert testimony on this issue to determine appellant had not proved he was entitled to immunity by a preponderance of the evidence?

3.

Whether the court erred by allowing an EMS paramedic to testify appellant was shot on the porch where the witness was not an expert in crime scene reconstruction, and this opinion was highly prejudicial given the disputed evidence of what the decedent was doing and exactly where he was when he was shot?

## STATEMENT OF THE CASE

Appellant was indicted by the Sumter County Grand Jury for the crimes of murder and possession of a weapon during a violent crime. R. 620. His case was called to trial on July 20, 2015 before the Honorable W. Jeffrey Young, and a jury. Elaine Cooke represented appellant. John Meadors and Scott Matthews were the assistant solicitors. R. 1. After an immunity hearing, the judge ruled appellant was not entitled to immunity under the Castle Doctrine or the Stand Your Ground subsections of the statute.

The jury trial then began. On July 24, 2015 the jury found appellant guilty on both counts. R. 601, ll. 2-11. Judge Young sentenced appellant to thirty-year concurrent prison terms. R. 617, l. 21 – 619, l. 4. This appeal follows.

## ARGUMENT

1.

The court abused its discretion in denying appellant immunity where appellant had ordered the decedent to leave his home, the decedent attempted to reenter the house without permission, and forcefully, as in State v. Duncan, and appellant shot him, since appellant was lawfully repelling an aggressor in his own home, he was acting lawfully, he was in fear of great bodily harm, and the judge erroneously abdicated his responsibility to make credibility determinations as a trier of fact to the jury.

### **Relevant Facts**

Defense Counsel Cooke made a motion to find appellant immune from prosecution pursuant to South Carolina Code § 16-11-440 (a) & (c). She also specifically cited South Carolina Code § 16-11-440(c) and South Carolina Code § 16-11-450 on the common law provisions of self-defense and the defense of habitation., R. 2, ll. 8-14.

John Thomas Davis was a private investigator hired by the defense. He took photographs of the home where appellant lived. Appellant had told the police the decedent had come back into the home without permission after being told to leave because of his behavior. As will be seen infra, defense counsel would argue the facts of this case were very similar to those in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) where the Supreme Court held Duncan was entitled to immunity.

Davis testified that the latch on the door to the home was broken. Davis told the solicitor that Robert Andrews, appellant's father, informed him that the latch was broken on the day of the fatal encounter between the decedent and appellant. The latch on the door was not broken prior to that incident. R. 17, l. 20 – 18, l. 12.

Pathologist Dr. Janis Edwards Ross testified that the decedent was six feet tall and weighed about 180 lbs. He was 26 years old. He had a blood-alcohol content of .123, and had marijuana in his system when he was killed by a single gunshot. As will be seen infra, appellant was a much older, and smaller man. R. 32, l. 18 – 34, l. 25.

Dr. Ross testified that it was possible that the decedent could have seen a gun, stepped backwards, and fell backwards when he was shot in the head. R. 35, ll. 8-13. The decedent was shot just outside of his right eyebrow from two feet or more feet away. R. 36, ll. 2-19. The gunshot wound was consistent with a small caliber gun such as a .22. Dr. Ross opined that the gunshot wound would have caused “unconsciousness pretty immediately but death would take several minutes.”<sup>1</sup> R. 37, ll. 6-22.

Appellant testified during the immunity hearing that he lived at 12 Murphy Street in Sumter, the site of the fatal incident. He lived there with his wife and his father, Robert Andrews. R. 59, l. 12 – 60, l. 25. Appellant offered his driver’s license with the 12 Murphy Street address to prove that is where he lived. His father would also verify that fact. R. 60, ll. 21-25.

On the date of the incident appellant invited his cousin Virlyn over for a drink. They had a fifth of brandy. Appellant was celebrating because he had enrolled in school, “got some money back. And my wife and I were going to actually buy 1.5 acres of land. So we had some money, just kind of having fun and celebrating.” R. 61, ll. 1-20.

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<sup>1</sup> The GSR testimony during the immunity hearing -- while necessary to paint a full picture for the trial court -- was largely irrelevant since appellant admitted he shot the decedent, but strongly asserted that he did so in self-defense. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)

Appellant's father eventually wanted to get something to eat so appellant recalled they took the bottle of brandy, and put on the recliner on the back porch when they left. "That back porch is also used as a laundry room." R. 61, l. 1 – 62, l. 3.

Appellant said when they returned he noticed that the washer and dryer were on. There were only three other people who used the washer and dryer. They were their friends Shamar (the decedent), Erika Andrews (the decedent's girlfriend) and Jenny Bell (a good friend). R. 62, ll. 4-20. Erika Andrews was also appellant's cousin "but I call her my niece, because her dad and I grew up as brothers, more or less, you know." R. 62, ll. 16-20. Again, Erika Andrews was Shamar's girlfriend. R. 62, ll. 21-23.

Appellant called Jenny Bell on the telephone, but Bell said she was the person using their washer and the dryer at the time. Appellant then noticed Shamar's "sneakers on top of the dryer. And his clothes, him and Erika's clothes in the dryer." R. 62, l. 24 – 63, l. 10.

Appellant also noticed that the bottle of brandy was missing. Appellant and Virlyn walked down to the nearby trailer where Shamar and Erika lived. They were renting that trailer from appellant's father, Robert Andrews. R. 63, ll. 1-16.

Appellant knocked on the door "and asked Shamar and Erika did you all come by and . . . take the jug [of Brandy] off the porch, you know." Appellant recalled that they both acted as if they did not know what he was talking about. "And I just chalked it as the kids just being mischievous, you know . . . Virlyn and I left . . ." R. 63, l. 11 – 64, l. 8. Shamar and Erika were "quite younger than I am." Appellant said he brushed the loss off, and "I went to the bootlegger's house. Me and Virlyn went to the bootlegger's house, and got some more liquor, because the liquor store was closed." Appellant said they had also purchased some more beer to

drink along with the liquor. Once they were back at appellant's house he remembered that Erika came over about 15-20 minutes later. R. 64, l. 5 – 65, l. 7.

Appellant remembered the mood at that time was light-hearted. Shamar showed up at some point, and Shamar and Erika left after a while. R. 65, l. 3 – 69, l. 9.

Erika and Shamar came back to appellant's house a little later. Appellant remembered that Erika "started drinking real good. Shamar showed back up at the house. Again he wanted to stand up [rather than sit down], and he had what appeared to be a 40-ounce bottle in his hand." R. 69, ll. 2-18. This was apparently a 40-ounce bottle of beer.

Appellant recalled that as they were all drinking appellant and his father started making lighthearted remarks about the bottle of brandy having disappeared. R. 69, l. 25 – 70, l. 18. Appellant said Shamar at some point apparently thought they were being sarcastic, and Shamar said: "You all motherfuckers talking about me?" R. 70, ll. 19-23. Appellant told Shamar "Don't talk like that in front of daddy. What's going on?" Appellant testified that Shamar responded that appellant was calling him a liar, and "we're going to have to go outside. I'm going to take you outside. I said, slow down Shamar." R. 71, ll. 1-16.

However, as Shamar continued, Appellant finally said: "You damn right. In fact, Shamar, in fact we are talking about you. We think you took the liquor. We think you took the liquor. *Now it's time for you to go. You need to leave now.*" Appellant told Shamar: "Go around the house and **get your clothes and go home**. And we'll talk about this another time. But that didn't work out. And then everything just started." R. 71, ll. 1-16. (emphasis added).

Appellant remembered that Shamar was very angry at this point, and Erika supported Shamar in his "right" to be angry. Sizing up the situation, Appellant's father, Robert, then told Erika that she also needed to go home with Shamar. R. 71, l. 1 – 72, l. 17. However, Shamar

continued to curse at appellant. Shamar refused to leave and “Shamar actually told me he would fuck me up, because he was ready to fight me.” R. 73, l. 8 – 75, l. 10.

Appellant remembered that Shamar “appeared to be walking down the steps. I went back in.” Appellant also told Erika “it was time to go.” He grabbed Erika by her arm. Appellant remembered Shamar came “*back in the house*. Everybody is raising hell right now.” Appellant remembered he got hit in the face at that time. R. 75, l. 1 – 76, l. 15. (emphasis added). Appellant specifically recalled that Shamar’s face hit him during the altercation. Once Shamar was back outside again he began threatening appellant and cursing at him: “I’ll beat your punk ass. Motherfucker. You know, bad words. In my life, I’ve seen him act like this before. M.F. this. I’ll kick your punk ass, this and that. He got the bottle again . . . like he’s going to hit me with the bottle.” Appellant testified he again told Shamar to go home. Shamar warned or promised: “I’ll be back.” Appellant went into the house, and “*I locked the screen door*. Shamar did not come . . . .Shamar was outside on the porch . . . . *I locked the screen door, and I closed the big door. ... I closed the big door*. And I went . . . . scrambling for the telephone in my dad’s room.” Appellant planned to call the police at this point. R. 76, l. 2 – 77, l. 24.

While appellant was looking for the phone he noticed “Erika walking towards this door right here . . . . now I hear the commotion outside, but I don’t know, and I can’t say Shamar opened that door. I can’t say that ... and I know, I believe she [Erika] opened that door... the big door.” R. 79, ll. 1-21. Appellant was still looking for the phone when he heard Shamar taunting: “Jeffrey won’t come out here because he knows I’ll beat his ass. *And he snatched the door open. And the weapon was right here on this dresser, on the dresser drawer right by the T.V.... when he snatched that door open to come in* I thought Shamar was coming in there - - I thought Shamar was coming in there to hurt me, hurt us.” R. 79, l. 8 – 80, l. 2. Appellant also recalled:

*“When he snatched that door open, I was in fear of my life. But I was also in fear of my life when he came approaching me, when . . . he’s advancing toward me with a bottle in his hand.”* Appellant said he feared Shamar because: *“He snatched the door open. He wouldn’t leave. He was combative. He wanted to argue. He wanted to fight.”* R. 82, l. 14 – 84, l. 1. (emphasis added).

The following occurred on direct-examination of appellant:

Q. And where were you at this point **when he snatched the door open and is coming in?**

A. **When he was snatched the door open, I shot Shamar. I brandished that weapon. I picked that weapon up from by the TV, by the dresser drawer. By the TV right here.**

Q. And you are pointing to?

A. Exhibit No. 6 again.

Q. Defendant’s Exhibit No. 6. And where did you get the gun from, I’m sorry?

A. The weapon was by the TV right here on this dresser. On this dresser drawer right here. Right there.

Q. And what did you do?

A. *I grabbed the weapon. I brandished it, and I shot Shamar.*

Q. *Why did you shoot him?*

A. *Because he was entering the house, and I didn’t know what he was going to do. I was in fear of my life.*

Q. *When the police arrived, what did you tell them?*

A. So many police was talking to me. I mean they had a bunch of them talking to me.

R. 83, l. 25 – 84, l. 23. (emphasis added).

Appellant said he touched Shamar to see if he had a pulse “because I was going to attempt to put CPR on him.” R. 85, ll. 3-9. Appellant also recalled that Corporal Kelly came into the house, and asked: “Who is Jeffrey, and who shot?” Appellant readily admitted to the police that he shot the decedent. R. 85, l. 15 – 87, l. 17. Appellant also remembered at this time Erika was outside screaming: “Jeffrey shot him in the head.” R. 87, l. 24 – 88, l. 12.

On cross-examination, appellant told the solicitor he did not remember telling the police that “you shot him over liquor.” As will be seen infra, that would be the solicitor’s theme. That although it was undisputed appellant told the police he shot Shamar in self-defense because he was afraid, the solicitor would attempt to recast the issue as an argument over stolen liquor from appellant’s house. R. 88, l. 25 – 110, l. 4.

Appellant testified that he had never shot a person before, and he was overwhelmed after the shooting. He had “a lot of different mixed emotions. Anxious, nervous, scared. All of the above.” R. 110, l. 20 – 112, l. 14.

Appellant said once he was at the police station that he requested a lawyer. He told the police: “I need to talk about this in the morning. My mind is all mixed up.” This is relevant to issue two, infra. R. 112, l. 8 – 113, l. 8.

Appellant also recalled that Shamar had a reputation around the neighborhood, and that he was unsure what Shamar had in his hand at the time of the fatal altercation. “That’s the thing, *I didn’t know what Shamar had in his hand. Did he have a bottle. You know, I know a little bit about him. But I didn’t know if he had a bottle. I didn’t know what he was going to do.*” R. 113,

l. 2 – 115, l. 1. (emphasis added). Appellant repeated that he felt overwhelmed at the time, and that he did not want to talk to anyone. R. 114, l. 13 – 115, l. 12. Appellant remembered he told Investigator Dubose that he was also protecting his father against Shamar. R. 115, ll. 19-21.

### **The need for expert testimony**

The defense next called Terry Gainey. Gainey was a former police officer who was currently a private investigator. R. 116, l. 12- 117, l. 7. Gainey was also “a death investigator for the Darlington County Coroner’s Office.” He was the deputy coroner. R. 116, l. 22 – 117, l. 7.

Gainey confirmed that he was retained by the defense because he was certified through the Science Institute on various issues concerning police officers who were involved in shootings. The timeline and “when you should do interviews.” Gainey had attended a forty-hour class “consisting of bookwork and a lot of footwork there in a lab kind of environment.” That class was in November of 2014 at the Science Institute. R. 118, ll. 9-16.

The defense obviously maintained that the rules for when police officers should be interviewed after a shooting were also applicable to civilians such as appellant. Gainey testified that police officers should not be interviewed regarding shooting until forty eight hours “or two good sleep cycles before you gave an interview.” R. 118, ll. 1-21.

Gainey explained that “your mind just simply doesn’t rest. *It’s a type of event that causes memory fragmentation.* And after a couple of sleep cycles you’re usually able to consolidate your memories. *And it’s a little more of an event that you can somewhat remember more clearly.*” R. 118, l. 22 – 119, l. 3. (emphasis added).

Gainey testified that a person interviewed an hour and thirteen minutes after they shot someone would “**be completely fragmented. There would be things that make absolutely no**

**sense to them.** Some things they'll recall seemingly clearly. Some things they will have holes. They won't know exactly why they have holes. They'll have intrusive thoughts. They'll have things that just simply makes no sense whatsoever." R. 118, l. 17 – 120, l. 1. (emphasis added).

*Gainey said that someone would "absolutely not" be able to "tell events in chronological order" if interviewed shortly after the incident. Gainey explained:*

The mind itself, most people tend to think of it working in forms of a video camera. With an event starting at one end and ending in another. **When in reality, your memory tends to work as a still shot camera. It'll take a snap here and a snap here and a snap here, and snap throughout the entire event. So when you begin to try to recall what that event is, you may very well put those photographs in your mind in a different order.** Then just simply *you're not able to follow that chronological order at that moment until you've had that little bit of decompression time. You have an adrenaline issue. You have fear and anxiety. You have a lot of things going on in your own mind that are going to cause major, major problems for you to recall.*

R. 120, ll. 6-21. (emphasis added).

When Gainey went to explain gaps in a person's memory if interviewed too quickly, the solicitor asked if Gainey was going to be qualified as an expert. R. 120, l. 22- 121, l. 6.

Gainey then explained he had specialized training from the Force Science Institute that was "officially developed in 2004." Gainey told the judge that this institute "researched law enforcement related shootings to find out what is the general consensus of things that happen from a physiological standpoint what happens to the human body . . . . It's based on sport science. It's based on accident reconstruction. It's based on research throughout many, many years through a lot of areas of graduate level classes . . . . There's hundreds of different examples of where this type of science has been applied." R. 121, l. 9 – 122, l. 25.

The solicitor then did *voir dire* on Gainey. Gainey said he was an expert in the field of “Force Science on the use of force within law enforcement.” R. 123, ll. 10-14. Gainey acknowledged that one aspect of Force Science was interviewing, and different techniques in interrogation. R. 123, l. 18 – 124, l. 6. Gainey testified the class he attended on this specialized subject was a week-long class. Gainey said that although the specialty involved police officer involved shooting, the expertise was broader than that. “You’re dealing with the trauma of shooting as a whole.” R. 124, l. 13 – 125, l. 24. Gainey acknowledged this was the first time he was being qualified as an expert in a courtroom. R. 124, ll. 13 -18.

The solicitor objected to Gainey being qualified as an expert. The judge noted that Gainey had a one-week course, and twenty years of experience as a police officer. The judge said he wanted to know about Gainey’s college and post-graduate work. The judge observed: “It’s almost like I stayed in the Holiday Inn Express last night. And so therefore, I mean one week, are you kidding me? I mean is that correct? . . . No way. He can step down. He’s not an expert in this courtroom. He’ll have to wait until next time to be an expert.” R. 126, ll. 2-16.

When the judge was getting ready to rule whether appellant was entitled to immunity -- the subject of inconsistencies in some testimony was discussed. Defense Counsel Cooke explained that Erika had more inconsistent statements than could be attributed to appellant. Further, appellant’s testimony was corroborated by his father. Counsel began to explain that **appellant was not telling different versions of what occurred. “I believe his was more of a fragmented telling different pieces in time than telling different stories.”** The judge interrupted, and he told defense counsel that was her belief, *and that there was no evidence of that since “your expert was hardly an expert.”* R. 200, l. 21 – 202, l. 9. (emphasis added).

Robert Andrews had also been a defense witness at the immunity hearing. Robert was appellant's father. He had lived at 12 Murphy Street for the last fifty-five years. R. 127, l. 6 – 128, l. 2. Robert remembered on the day of the fatal incident he was at home with appellant, Virlyn Gardner, Erika and Shamar. R. 127, l. 13 – 128, l. 5.

Robert testified that he told Shamar two times to go home that day. "The last time he left, and the next thing I know, he was back again . . . he just snatched the front door open." Shamar snatched the latch -- breaking it from the wall. R. 128, l. 13 – 130, l. 9.

On cross-examination, Robert told the solicitor that he did not recall exactly what he told the police on the day of the shooting. Robert said when appellant gave him the gun after he shot Shamar he put it back in the dresser. Robert said his gun was on top of the dresser at the time appellant grabbed it, and shot Shamar with his gun. R. 130, l. 20 – 131, l. 21.

EMS Paramedic Kimberly Graham responded to the 911 call on March 25, 2014. She remembered the decedent's body had his "feet facing the front door. His arms were outstretched. His head was facing the railing." R. 136, l. 25 – 137, l. 21. As will be seen infra in issue three, Graham would go much further before the jury, and opine, even though she was not a crime scene reconstruction expert, that the decedent was shot while he was seemingly outside on the porch.

Investigator John Davis was also a defense witness. Davis used a demonstrative exhibit to attempt to show where the decedent was shot. Davis told the solicitor on cross-examination that the decedent was "outside when he was shot." R. 140, ll. 23-24. "His legs were about in the door. And his head was in this area here." However, Davis acknowledged he was not shown any "crime scene photos where anybody took a picture of the position of the body on the porch." R. 140, l. 23 – 141, l. 21.

Corporal Jerry Kelly was called as a state's witness. Kelly also attempted to show where the decedent's body was **after** he was shot. R. 144, l. 16 – 146, l. 17. Kelly said he entered the house with his weapon drawn and appellant "he held his hands up, he told me, it's me. You're looking for me." R. 146, ll. 7-16. Kelly arrested appellant and put him in the backseat of his police cruiser. Kelly read appellant Miranda warnings. Kelly remembered appellant responding: "I'll talk to you Kelly." R. 145, l. 22 – 147, l. 25.

Kelly said he asked appellant "What happened?" He also asked who was the "young lady on the porch" screaming and crying. Appellant told Kelly that was his niece, and appellant acknowledged that he shot the decedent who was his niece's boyfriend. "I said, why you shot (sic) him and he said he took something." Kelly maintained that on follow-up questioning Appellant said: "He took my liquor." "I said you shot him over a bottle of liquor. And he kind of looked down, and then he said, well I asked him to leave. I asked him to leave and he wouldn't leave, you know. What's a man supposed to do when you ask somebody to leave. You know, I've got to protect my house. You know, what am I supposed to do. And then I said well you can call us, we can make him leave. And then I shut the door." R. 148, l. 17 – 149, l. 5. Kelly claimed that appellant did not tell him he was in fear for his life or that the decedent "tried to tear down the door." R. 150, ll. 2-12.

However, on cross-examination, Kelly now admitted that appellant told him there was a physical confrontation and he said "that's the first thing he told me. I wish I didn't actually go that night. But that's what I put in my report." Kelly also seemed confused about what were the first things that appellant actually told him. However, he admitted appellant told him the decedent was pushing and hitting him, and that **he told the decedent to leave "over and over."** R. 152, l. 5 – 153, l. 7. (emphasis added). However, Kelly claimed that appellant did not tell him

he shot the decedent as a result of a physical altercation but rather because of the liquor. The solicitor then interjected that defense counsel was questioning Corporal Kelly from another officer's report. Defense counsel noted that the report was written by Officer Monohan, but Monohan was not available for whatever reason as a witness. R. 153, l. 15 – 154, l. 2.

The solicitor then called the decedent's girlfriend, Erika Andrews. Andrews testified that she thought when appellant and Gardner came to the home where she lived with Shamar that they were insinuating that she and the decedent had taken the bottle of liquor. R. 157, l. 2 – 158, l. 15. Andrews remembered that appellant and Gardner then left. However, appellant came back to their home, and he invited her and the decedent over to his house. Andrews said she went with appellant to a convenience store to purchase a twelve-pack of Budweiser bottles. R. 159, l. 4 – 160, l. 8.

Andrews remembered that while over at appellant's home they were all drinking. Andrews claimed, however, at one point that the decedent said he did not want a beer when offered one. The decedent had obviously been drinking and smoking marijuana given the toxicology report discussed supra. Andrews maintained that appellant brought up the missing liquor bottle again, and "Shamar was like, man, I didn't take it. I'm looking at Jeffrey like, we didn't take your liquor." Andrews claimed that appellant "gets real loud, so Uncle Robert tells everybody to leave. Get out of his house." Andrews claimed that appellant was angry about the missing liquor.

Andrews said: "Shamar is getting ready to walk out the door. He said Erika come on, let's go. Right before that, Jeffrey had walked into my Uncle Robert's room . . . he was in there for about ten, fifteen seconds maybe. Then he came back out. Shamar tells everybody bye. He's walking out the door. Jeffrey is right behind him. I'm getting up walking right by the

Cario . . . it's like a little cario with pictures in it, that my uncle had by the door. That's when I heard the gunshot. And when I heard the gunshot, I started running out the door. And that's when I seen Jeffrey holding up the gun." R. 162, l. 8 – 163, l. 22.

A major dispute arose regarding exactly what Andrews told Officer Dubose after the shooting. She said she told Dubose that the incident was *her fault*. Andrews claimed she only meant "because I'm the reason Shamar was in South Carolina. Shamar doesn't have any family down in South Carolina. He came down here just to be with me." Andrews said she told Dubose she heard the shot *not that she saw appellant shoot the decedent*. R. 173, l. 3 – 174, l. 24.

Andrews claimed she told the police that she explained that the decedent would not hit appellant "because Shamar would not do something like that." Defense counsel impeached Andrews with the fact that she and the decedent beat up "Teresa Williams just a few weeks before this incident." R. 174, l. 15 – 175, l. 5. Andrews maintained that she "beat up" Teresa Williams at that time, and not the decedent. R. 174, l. 15 – 175, l. 5.

### **Legal arguments**

Defense counsel argued that the defense had proved by a preponderance of the evidence that appellant was entitled to immunity pursuant to South Carolina Code § 16-11-440. Counsel said the evidence established that both appellant and his father told the decedent to leave and "at that point he was a trespasser. The door was shut and latched, and he forced himself in. Another element is that he was forcefully entering. Both Robert and Jeffrey testified he snatched the door and broke the lock that evening and that it has not been fixed since." Defense counsel also argued that appellant was entitled to the presumption of fear for his life or great bodily harm under Subsection (A) of 16-11-440. R. 182, l. 6 – 183, l. 13.

Defense counsel argued that appellant's testimony was consistent with the position of the body established by EMS and investigator John Davis. She noted that the decedent was six feet tall and his head was practically at the front door. In comparison appellant was only five foot six. She noted *this was a difference of six inches and thirty pounds* between appellant and the larger decedent. R. 184, l. 4 – 185, l. 9.

Defense counsel noted the discrepancies in Erika Andrews' claims. She reminded the judge the standard was only by a preponderance of the evidence "which is a paperclip on the scales of justice." Counsel argued this case was similar to State v. Duncan, and State v. Douglas where immunity was granted. Defense counsel noted that appellant's testimony was corroborated by his father, Robert. In contrast Erika Andrews had inconsistencies in her testimony that made her less credible. Under the applicable standard, the preponderance of the evidence, appellant was entitled to immunity. Pursuant to South Carolina Code § 16-11-440 (c) and South Carolina Code § 16-11-450 appellant was also entitled to immunity. Appellant was not engaged in an unlawful activity, and he was in a place where he had a right to be. The decedent snatched the door open and was forcibly entering the house. In addition, the decedent had a reputation for violence and he had been seen with a forty-ounce bottle in his hand. Counsel noted the age differences, the size differences, and the fact that the decedent had a forty-ounce bottle in his hand where he was drunk. High, and aggressive which made appellant's fear reasonable. R. 186, l. 17 – 188, l. 15.

Defense counsel compared this case to State v. Duncan where the decedent was ordered to leave, and the decedent was coming back and advancing when Duncan shot him. Duncan was granted immunity which was upheld by the Supreme Court. Defense counsel noted that appellant here told the decedent to leave several times. R. 188, l. 3 – 190, l. 12.

The solicitor claimed the evidence showed that the decedent was leaving on his own and that the evidence showed the decedent was starting to walk out when the decedent shot him. The solicitor noted there was conflicting evidence in this case, and inconsistencies about appellant's injuries. R. 190, l. 17 – 196, l. 16. The solicitor said that appellant's claim of self-defense should be decided by the jury and not the judge. R. 190, l. 17 – 197, l. 25.

Defense counsel responded that under the state's theory there would never be an immunity hearing, and that everything would be decided by the jury as to self-defense. The judge responded: “Well **how am I supposed to resolved the inconsistencies and conflicting testimonies in this situation, Ms. Cooke?**” Defense counsel responded that appellant's testimony had been corroborated by his father, Robert. Defense counsel also said that appellant did not say he shot the decedent “because he took my brandy. He said, many more time to the police officer right after this event happened, within two hours of this event happening, that he shot him because he was aggressive. That he shot him because he had a bottle; he shot him because he was fighting him in his house. He shot him because he snatched the door and was unlawfully entering the house.” Defense counsel also said the solicitor mischaracterized the evidence as to the broken latch on the door. R. 198, l. 5 – 201, l. 18.

Defense counsel also noted that there was nothing to corroborate Erika Andrews' testimony, and there was evidence to corroborate appellant's testimony. Defense counsel again noted appellant's fragmented statements to the police about the order of events and, as seen supra, the judge responded that *there was no expert testimony on this subject* since he had refused to recognize Gainey as an expert. R. 201, l. 19 – 203, l. 18.

After a lunch break, the judge ruled: “[I]n this situation from the testimony, there's a lot of questions that are unanswered thus making a clear case of self-defense a question for the jury

to decide.” The judge said the testimony had been inconsistent and he found appellant had not proved by a preponderance of the evidence he was entitled to immunity, and that he would let the jury decide the issue. R. 351, l. 22 – 353, l. 3.

### **Discussion**

In State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), the Supreme Court held a person’s residence is “another place, within the meaning of South Carolina Code § 16-11-440 (C).” The Supreme Court agreed with the trial judge that the hold otherwise would result in a nonsensical result. In Jones, the defendant killed her live-in boyfriend when he attacked her. The Supreme Court found that even though the decedent had a right to be in the house where he also lived, Jones was entitled to immunity where she was defending herself, and repelling his attack inside the home they both shared.

Here, the decedent was an invited guest of the appellant. However, as in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), his status changed when he was ordered to leave by the appellant. The invited guest in Duncan left the house as requested, but attempted to return and Duncan, acting on appearances, shot and killed the decedent when he thought he was attempting to reenter his home.

Defense counsel correctly argued that the situation here was not distinguishable from Duncan in any material way. There was evidence that the decedent, who had a reputation for violence, “snatched the latch” off the door when returning to appellant’s home after he had been ordered to leave by appellant and his father. Appellant shot and killed him at the moment this occurred.

Further, the judge, as the trier of fact at the immunity hearing, had the duty to make credibility findings where he found the evidence was not consistent. Instead, the judge found

that inconsistent testimony made this a “quintessential jury question.” That was an abdication of the judge’s duty to exercise his discretion, and make credibility findings. That failure to exercise discretion was in itself an abuse of discretion that constituted reversible error because it was a refusal to exercise discretionary authority. See State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992).

The state’s attempted to distinguish State v. Duncan, *supra*, and State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2015). Those attempts should have been unavailing to the trial court given the facts of those two cases. Duncan has been discussed above.

In Douglas, the Court of Appeals correctly held that the events that happened in Douglas’ home entitled him to immunity where he ended up killing his golfing buddy after an altercation ensued after an otherwise relaxing day. In Douglas, as in Duncan, the decedent was ordered to leave. In Douglas, the decedent refused to leave and a physical altercation ensued. Douglas shot and killed the decedent. The Court of Appeals held that Douglas was entitled to immunity because he was in “another place” where he had a right to be - - his home - - and he was not acting unlawfully.

Again, the situation in this case was not in any way meaningfully different than the facts of Douglas and Duncan. The decedent here was ordered to leave, and he finally left. However, he returned, was cursing at appellant, and challenging him to a fight. He was reentering the house, and the broken latch was forensic evidence of that fact. That was the point at which appellant shot and killed the decedent. Defense counsel correctly stressed to the judge that the standard of the proof was only a “preponderance of the evidence.”

As this record clearly shows, the solicitor throughout the immunity hearing talked about the trial going forward, and evidence before the jury, as if it was a foregone conclusion immunity

would be denied. Again, the solicitor's attempts to distinguish Duncan and Douglass should have been totally unavailing to the trial court. For a final time, the trial court abdicated its responsibility as a trier of fact in this case by finding inconsistent testimony meant the immunity question was moot, and self-defense therefore was only a jury issue.

Most cases are obviously going to have inconsistent testimony. This Court should now issue an order granting appellant immunity from prosecution pursuant to South Carolina Code § 16-11-440 and 16-11-450 for the reasons above.

The court abused its discretion by refusing to qualify Investigator Terry Gainey as an expert in interrogation and force science to explain how immediately interrogating someone after a shooting can lead to fragmented description of what occurred, since Gainey was qualified by experience and training to be an expert, his testimony on this subject was needed, particularly where the court used the lack of expert testimony on this issue to determine appellant had not proved he was entitled to immunity by a preponderance of the evidence

### **Relevant Facts**

As seen above at length, the judge refused to qualify Investigator Gainey as an expert witness on interviewing and interrogations after a shooting as a result of his training and education in Force Science. The judge then noted that lack of expert testimony on fragmented reporting during an interview following the shooting as a weakness in appellant's meeting his low burden of proving he had the right to immunity by a "preponderance of the evidence." The judge told defense counsel this "fragmented reporting" by appellant as a natural consequence of the police interview almost immediately after the shooting was now only counsel's *opinion* because there was not any expert testimony on the subject. Yet, it was the judge's erroneous refusal to qualify Gainey as an expert that led to the lack of expert testimony on the subject. The solicitor framed his whole case on the fact appellant allegedly told the police about the missing liquor bottle before he told them about fearing for his safety, and the safety of his father, and shooting the intruding decedent after he had been ordered out of his home.

Investigator Gainey had twenty-years in law enforcement experience. He had been to a forty-hour or one-week class or seminar on the subject of interviewing law enforcement officers following a shooting. The experiences of law enforcement officers were readily applicable to

civilians. In fact, it would appear common sense that since police officers know the possibility of having to shoot someone was a real danger when they go to work each day that the research of this “fragmented memory” reporting was equally if not more applicable to non-trained police officers. Unless someone is a hardened violent criminal shooting someone is a traumatic event. Investigator Gainey testified that is why the “golden rule” of this science was that the shooter should not be interviewed for forty-eight hours or two sleep cycles following the shooting.

Investigator Gainey also explained the problem of fragmentation if this rule was not followed. He explained, as seen supra, that the human mind does not remember events in chronological order. The mind was more snapshots of what occurred.

Yet, surely knowing this, the solicitor nonetheless framed his entire case around the fact that appellant talked to the police shortly after the shooting, and he allegedly mentioned the problem of the stolen liquor before discussing the fact that he ordered the decedent to leave his house, the decedent returned, and appellant feared for his life for the very reasons appellant articulated, and defense counsel argued in the court below.

Appellant was afraid of the decedent because the decedent was returning to forcefully enter. He had a forty-ounce beer bottle in his hands at a minimum, and appellant did not know if he also had a weapon. Appellant was in his home, where he had a right to be, and was acting lawfully. This was a case *that cried out for expert testimony on “fragmentation” caused by a traumatic shooting*, and the dangers inherent in interviewing or interrogating the shooter almost immediately after the shooting.

Yet, as seen above, the judge ridiculed Investigator Gainey as a “Holiday Inn Express” expert. It is cliché to say that every expert must be qualified as an expert for the first time at some point.

Instead of exercising his gatekeeper function under Watson v. Ford Motor Company, 389 S.C. 434, 699 S.E.2d 169 (2010), and State v. White, 382 S.C. 265, 376 S.E.2d 684 (2009), the judge would not qualify Gainey as an expert because it would be his first time in court, and he made fun of Gainey as the “Holiday Inn Express” expert.

Instead of addressing why he found Investigator Gainey’s testimony insufficient or not sufficiently reliable - - if indeed the trial court did that - - the court instead ridiculed Investigator Gainey as a fake television expert. Investigator Gainey’s testimony on fragmentation of memory following the declarant having experienced the traumatic act of having shot another person was necessary in this case.

Further, twenty years of experience in law enforcement, and a forty-hour, one-week course on this subject made Investigator Gainey a witness qualified as an expert by knowledge, skill, experience, training, or education where such scientific, technical or other specialized knowledge would have assisted the judge as a trier of fact in this case pursuant to Rule 702, SCRE.

The judge abused his discretion by refusing to qualify a qualified expert in this case. Investigator Gainey’s expert testimony was badly needed in this case. Further, as seen above, the judge then used the lack of expert testimony against defense counsel as she argued why appellant’s corroborated testimony should be accepted and found credible by the court.

Appellant respectfully submits that this court should reverse his convictions or, in the alternative, remand this case to the trial court for another immunity hearing where appellant will have the benefit of the expert testimony he should have had in this case.

The court erred by allowing an EMS paramedic to testify appellant was shot on the porch where the witness was not an expert in crime scene reconstruction, and this opinion was highly prejudicial given the disputed evidence of what the decedent was doing and exactly where he was when he was shot

### **Relevant Facts**

In the presence of the jury, the solicitor called Kimberly Graham as a witness. Graham testified that a paramedic and an EMT both ride in the rescue squad car. The EMT is there to assist the paramedic. R. 247, l. 23 - 248, l. 23. Graham testified she had responded to thousands of emergencies such as traffic accidents and gunshots since she began working in this area in 1992. R. 248, l. 6 - 249, l. 5. The solicitor offered Graham as an expert in the field of “emergency medical services.” Defense counsel did not object to her qualifications and the judge deemed her an expert in “emergency medical services.” R. 249, l. 13 - 250, l. 8.

Graham testified EMS arrived at appellant’s home at 10:35 in the evening on the night of the shooting. R. 250, ll. 5-21. When the ambulance arrived Graham remembered that she observed a police officer putting a man in his patrol car. She also remembered a woman “screaming and just yelling.” Graham also noticed “a black male who was lying on his back on the porch.” R. 251, ll. 8-18.

Graham remembered the decedent had a gunshot wound above his right eye. He was unconscious and unresponsive. He had no pulse. They started CPR and put an IV in his leg to administer drugs. Graham called the emergency room doctor to get permission to stop resuscitation. R. 253, ll. 2-17.

The solicitor asked Graham “excuse me if I am being ridiculous, but I mean could he have talked?” Graham responded that the decedent could not have talked, and that the amount of force from the bullet would lead him to drop to the ground wherever he was shot.

The solicitor asked if the “back of the head being mushy would be consistent with hitting the concrete.” Graham answered that it could be from the concrete but it also could be from the bullet going into the head. The solicitor asked Graham based on her observations where she thought the decedent was when he got shot. When the witness responded: “*He was standing on the porch,*” defense counsel objected, as the solicitor sought to enforce that this meant the decedent was “outside.” Counsel argued that “even as an expert, as an EMT, I don’t think she’s qualified with crime scene reconstruction.” The judge overruled the objection. Thus, Graham was allowed to testify over objection that in her opinion the decedent was standing on the porch when he was shot. R. 255, l. 7 - 256, l. 8.

In the presence of the jury appellant largely reiterated his testimony this court has seen above during the immunity hearing. Appellant testified that he ordered the decedent out of the house. Appellant told the jurors he felt threatened by the decedent who had a forty ounce beer bottle. The decedent advanced towards appellant with the beer bottle “and we’re about to fight. I ask him, it’s time to go, buddy. It’s time to go, and he kept cursing, kept cursing. Kept arguing. At that point Erica said something.” Erica was then ordered to leave with the decedent. R. 470, l. 1 - 471, l. 22.

Appellant remembered the decedent did not leave the first time and he said he asked him multiple times to leave the house: “I know I asked him at least three or four times to leave.” The decedent finally left and went out on the porch. The decedent continued to curse when he was

outside but “he appeared to be going. So my mind, I’m saying, one problem solved. I had to go back in. And I told Erica, Erica it’s time to go.” R. 472, ll. 4-25.

When Erica refused to leave appellant remembered the decedent was entering the house and there was a physical confrontation. Appellant went into his father’s room looking for a telephone to call the police. Appellant testified that the decedent “snatched the screen door open [and] was coming back into the house.” Appellant said he was wondering what the decedent was doing this time because it had seemed he had left twice “and I was thinking why is Shamar forcefully, unlawfully entering this house after I asked him to leave, you know.” Appellant testified he was afraid at the time and he grabbed the pistol that was sitting on the dresser by the TV and he shot the decedent. R. 475, l. 3 - 477, l. 2. Appellant said he shot the decedent because “I asked him to leave. I asked him to go home. He forcefully entered the house. I felt in fear of my life.” R. 476, l. 21 - 477, l. 2.

### **Discussion**

In State v. Ellis, 345 S.C. 175, 547 S.E.2d. 490 (2001), our Supreme Court held that a police officer who was qualified as an expert in *crime scene processing* was not qualified to testify as an expert with respect to *crime scene reconstruction*. The same error occurred in this case.

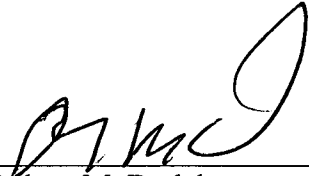
In Ellis, the trial judge allowed the Sergeant to give his opinion on the position of the victim wherein he imparted his conclusion to the jury that the decedent was on the bicycle at the time he was shot. Our Supreme Court held that this, in effect, allowed the Sergeant to give his opinion on the ultimate issue: Whether the defendant was acting in self-defense when he shot and killed the victim. The Supreme Court also found the error could not be deemed harmless

where the defendant's defense was self-defense, and, in essence, the witness opined that the victim was not a threat to Ellis at the time of the shooting.

Here, similarly, Graham's opinion far her expertise on emergency responding. She was much less qualified than even the expert in State v. Ellis to testify on crime scene reconstruction. Her opinion that the decedent was outside on the porch when he was shot was at minimum was going to be confusing to the jury. Where the decedent fell, where his head was, were all ripe to be taken out of context for the jury. This would be used by the state in closing to urge that the decedent was shot outside, he was not a threat to appellant because he was outside, and that he was not breaking in or entering when he was shot. The solicitor argued that the decedent "was gone," and appellant shot him anyway. R. 567, l. 7- 572, l. 25. The improper crime scene reconstruction testimony in this case, as in Ellis, was also not harmless. Appellant should be granted a new trial.

## CONCLUSION

By reason forgoing arguments, appellant should be granted immunity from prosecution by order of this Court. In the alternative, this case should be remanded for a new immunity hearing with instructions to allow the expert testimony. In the second alternative, appellant's conviction should be reversed and this case remanded to the Sumter County Court of General Sessions for a new trial.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of March, 2017.

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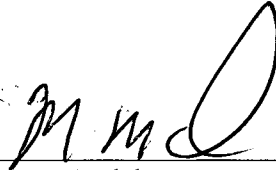
MAR 16 2017

CERTIFICATE OF COUNSEL

SC Court of Appeals

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

March 16<sup>th</sup>, 2017



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