VOLUME ONE OF FOUR

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM MCCORMICK COUNTY

R. Lawton McIntosh, Circuit Court Judge

RECEIVED
OCT 23 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO. 2014-001497

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF McCORMICK)

RECEIVED
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State of South Carolina,

PLAINTIFF,

-VS-

Joe Ross Worley,

DEFENDANT.

2010-GS-35-049, 050, 051, 052

TRANSCRIPT OF RECORD

BEFORE THE HONORABLE WILLIAM P. KEESLEY, JUDGE

MAY 31, JUNE 1, 2011

MCCORMICK, SOUTH CAROLINA

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Tuesday, May 31, 2011

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THE COURT: Call your next witness, please.

MR. GARRETT: Thank you, Your Honor. I call Mr. Rushton to the stand.

THE COURT: All right, come around, please.

(Whereupon, the witness was sworn.)

MR. GARRETT: Thank you, Mr. Rushton.

COURT REPORTER: What's his first name, please.

THE COURT: State your name for the record.

MR. RUSHTON: My name is Robert E. Rushton.

COURT REPORTER: Thank you.

ROBERT E. RUSHTON, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Mr. Rushton, you made an oath when you came onto the McCormick County Sheriff's Department,

did you not?

A I did.

Q I'd let to get you to review that oath.

(The witness reviews the document presented to him.)

Q Is that your oath?

A The best that I can remember. It was years ago.

Q How long ago was it when you took your oath of office?

A I couldn't tell you exactly which year it was.

Q Okay.

A It's been quite some time.

Q Help us understand a little bit about your employment with the McCormick County Sheriff's Department. When did you go to work for them?

A I couldn't tell you the exact year it was.

Q Okay. Have you been with them ten years, five years, four years?

A I believe it was somewhere around six years, and then I had to resign for about four years before I came back.

Q So you worked for about six years, then you resigned, and you were gone for four years?

A Yes, sir.

Q Officer Rushton, where were you gone during those four years?

A Iraq.

Q All right. And what were you doing in Iraq?

A I was an international police advisor.

Q And in Iraq, do you all have certain protocols or procedures, or were you all teaching the Iraqi police department how to be police officers or --

A It depended on where we were stationed at as to whether or not we were doing classroom teaching or doing advising at stations.

Q All right. So you were there four years. How many different stations, duty locations, did you have?

A It would be hard to give an honest answer, because at one station, at one location I was assigned, I may have had as many as 12 police stations.

Q All right. So a rather diverse group of things you had to do in Iraq, I'm assuming?

A Very diverse.

Q All right. And when did you come back to

the county, to McCormick?

A I believe my rehire date was November the first of 2009.

Q And this would be, what, 14 days prior to this accidental shooting?

A Yes.

Q All right. And did you go through any retraining or retesting or anything else before you went back on the active force with the McCormick County Sheriff's Department?

A I did. I had to catch up all the training hours that I had missed for the previous four years.

Q Okay. And when did you catch those hours up?

A Monday through Friday in the Sheriff's Office.

Q All right. So you had spent the first two weeks back on working in the Sheriff's Office with training, retraining --

A Yes, sir.

Q -- getting prepared? All right. And when did you give your new oath of office after having resigned from the prior?

A I don't recall coming back over and giving a new oath.

Q So prior to this hearing, you haven't given an oath of office to act as a law enforcement officer for the County of McCormick, State of South Carolina, is that correct?

A My understanding is the first oath I took, I took forever.

Q But you resigned, is that correct? You resigned?

A I resigned my position at the Sheriff's Office to go to Iraq.

Q All right. And what was your badge number, the old number?

A 104.

Q What's your badge number when you come back?

A 113.

Q So they changed your badge number, is that correct?

A Actually, before I left to go to Iraq, but my badge number changed numerous times over the years.

Q All right. And so you can be gone for four years, and what do you do, reapply? How do you get back to work?

A I did fill out a new application and came

back.

Q Okay. So you were no longer employed. You had terminated your services with the McCormick County Police Department at the time, when you were in Iraq?

A Yes, sir.

Q Not the Police Department, the Sheriff's Department?

A Yes, sir.

Q And so you made the application. And at some point in time, who told you that you would be a deputy?

A When I came back?

Q Yes, sir. Do you remember that?

A I don't remember if it was Investigator Collier or Sheriff Reid. I don't remember which one it was.

Q So there was no actual sit-down where they said, "Well, here's your badge, and here's your duty weapon," and that kind of thing?

A I did come in to speak with the sheriff prior to that, in the interview process.

Q Were you given a badge?

A Not that day.

Q Were you ever given a badge?

A Yes.

Q And when they handed you the badge, you didn't take an oath of office?

A As I stated, I assumed that the first oath of office I took was to protect the citizens of this county, and it was still good.

Q But you didn't take an oath?

A No.

Q All right.

A Not that I recall.

Q Now, you say you caught up on your training?

A Yes.

Q And who determined what training you needed to get caught up?

A Investigator Collier was also the training officer for the Sheriff's Office.

Q Okay.

A He had contacted the Academy, and they informed me of what I needed.

Q All right. And so you had in-service hours then --

A Yes.

Q -- for approximately two weeks?

A Yes.

Q Did you have any field training or field experience?

A During that two weeks?

Q During the two-week time, yes.

A Other than firearms. That was the only thing.

Q All right. So you had to requalify with your firearm?

A Yes.

Q All right. And then what about vehicle training? Did you do any vehicle training?

A No.

Q Other than the in-service training, do you recall the courses that you actually took?

A As far as in the in-service training?

Q Well, the two weeks that you called your retraining.

A You would have had the criminal domestic violence updates that I had to go back through and the legal updates. Exactly what each one pertained to, I couldn't tell you exactly what every one of them said.

Q Okay, domestic updates. And what else?

A Just the basic legal updates.

Q Legal updates -- law?

A Yes.

Q All right. So obviously if the law has changed since you were last at the Academy or last working during those four years, they had to update you on that?

A Yes.

Q All right.

A Laws change all the time.

Q It makes sense. All right, now, how much -- did they take you out and do any -- did you have to go under some other officer or work in the field for any period of time prior to that night? I'm talking about patrolling.

A No.

Q Was that the first night back?

A Yes.

Q Is it different working out of Iraq than in McCormick County as a police officer?

A As far as my job description?

Q No, just the environment.

A It's totally different.

Q Did you go through any type of psychological discussions or training when you got back to help you differentiate between your role as Iraqi police officer vis-à-vis a McCormick Sheriff's

officer?

A I was never an Iraqi officer. I would tour and advise and train in classrooms when necessary. But as far as going out here and for going out into Iraqi and patrolling the streets and things as a policeman --

Q Right.

A -- I did not do that, but I was on maneuvers with the military.

Q So the military -- the United States military -- would sometimes have police advisors go out with them into areas?

A Yes.

Q That would be areas where the Iraqis would not have sufficient police to cover those?

A No, we were there -- if we went out with them, we went with them to advise and critique the Iraqi police. Then we would go back to the station and tell them where we saw their problems.

Q To help train them?

A Yes.

Q So you trained them?

A Yes.

Q So you were a trainer?

A No, mentor and advise.

Q Mentor and advise. So you would not call yourself a trainer of police officers?

A Not in that scenario. But in the classrooms, where we did scenarios in the classroom, it was a controlled environment. It's a lot different.

Q A lot different, all right. Well, let's talk about the procedure you employed.

MR. GARRETT: Judge, I'd like to mark that, if I may. It's the oath of office.

THE COURT: Mark it before you enter it into evidence.

MR. GARRETT: Okay. While we're doing that, Judge, let me go ahead and mark this one, as well.

THE COURT: I said mark it. Just mark it for ID, I guess. I don't know exactly how this is going to proceed.

MR. GARRETT: Okay.

COURT REPORTER: Defendant's One for identification.

(Defendant's Exhibit Number One A, Westlaw, oath, deputy sheriff, was marked for identification purposes.)

THE COURT: Do you have another document?

MR. GARRETT: I do.

THE COURT: Let's mark that. Did you show it to them?

MR. GARRETT: I did, Your Honor. They have seen it.

THE COURT: Mark that, as well.

MR. GARRETT: Your Honor, at this time I'd move to submit the oath of office into the record.

THE COURT: It's marked for identification.

MR. GARRETT: I move at this time to introduce it. It's an oath that he didn't take. It's one that the law requires that he take.

THE COURT: Well, I'm a little bit confused. If I mark it into evidence and the trial proceeds, then --

MR. GARRETT: This is pre-trial, Judge, I think. I'm not sure what part --

MR. MYERS: Can he it as a Court's exhibit for the purpose of this?

THE COURT: I just told him to mark it for ID. That way, it would be preserved for any review. As I understand it -- and I may be wrong -- what I saw in that case that was cited to me this morning, if I were to rule against the defendant, it's

immediately appealed.

I don't want there to be any confusion. As long as you all are verifying that we're going to have separate exhibit numbers for the pre-trial than we do for the trial --

MR. GARRETT: Yes, sir. We'll stipulate that.

MR. MYERS: Yes, sir, we'll agree with that.

MR. GARRETT: Okay. What's easier for you?

COURT REPORTER: The date. I'll put the dates on this one, and I'll just make it One A and One B.

THE COURT: I'll do whatever she wants to do. They're both in evidence for the purposes of the pre-trial hearing.

COURT REPORTER: Okay, but I do need to put the stickers on.

THE COURT: Yes, ma'am.

(Defendant's Exhibit Number One A, Westlaw, oath, deputy sheriff; and Defendant's Exhibit Two A, Gun, photos, four pages, were marked for identification.)

COURT REPORTER: So we have Defendant's

One A and 2A from 5/31/11 that are in admitted for identification purposes.

THE COURT: Thank you, ma'am.

EXAMINATION CONTINUED

BY MR. GARRETT:

Q Now, I'll just show you this -- this is Two A -- and just ask you to review that to see if you recognize that.

A Glock 23 40-caliber pistol. I can't completely tell, but I believe it's the one I was carrying the night of February 15.

Q All right. This is your duty weapon that you had that evening?

A Yes.

Q And who provided this duty weapon for you?

A The McCormick County Sheriff's Office.

Q All right.

COURT REPORTER: Who?

MR. RUSHTON: McCormick County Sheriff's Office.

Q All right. Did you have any more than one weapon?

A No.

Q And would you agree that the weapon shows the impact of the 30.06 bullet into the handle that

caused the damage to your wrist?

A Yes.

Q And the bullet entry -- the entry of the bullet would be right there?

A Yes.

Q About where your middle finger would have been?

A Yes.

Q Now, the car that you were driving that night, who provided that car?

A McCormick County Sheriff's Office provided it.

Q All right. And did you take any training or any special training on how to respond to that car to emergency and/or non-emergency circumstances?

A I have in the past.

Q All right. When you got back, did you refresh on that issue?

A I do not recall.

Q So you think you may refreshed on that in those two weeks?

A I do not recall.

Q All right. And you mentioned gun training.

A Yes, sir.

Q And tell me about the county-issued uniforms that are required to be issued.

A There is not one that's required to be issued.

Q There's no required issue uniform for the County of McCormick?

A Not that I'm aware of.

Q So McCormick County doesn't have uniform that you as a deputy or as a law enforcement officer are required to wear under the law?

A Not that are required -- I mean, not that I know.

Q On the night in question, what were you wearing?

A I was wearing a 5-11 polo tactical shirt.

Q A polo type shirt?

A Polo type shirt, similar to what I have now. It was green in color with long sleeves.

Q Okay. Would it be drab, or would it be --

A It was more of a forest green.

Q Sir?

A More of a forest green.

Q Forest green, all right.

A And I was wearing a pair of khaki-colored very similar to what I have on now --

Q Okay.

A -- 5-11 tactical pants.

Q Tactical pants?

A Yes.

Q What else?

A I had my duty belt with my holster, badge, radio, cell phone, handcuffs attached to the belt. I had my microphone on. The 5-11 shirts actually have a place where I can put it, and my radio mike was clipped on right in front of me.

Q Okay. I see you've got a badge right there on this particular shirt. Did you have a badge on the shirt that you got shot in that night?

A No, I didn't.

Q All right. The shirt that you had, did you buy that shirt, or was it provided to you by the McCormick County Sheriff's Department?

A I had purchased that shirt.

Q Personally?

A Yes.

Q So, again, you can just wear whatever you want to wear?

A My uniforms had not come in at the time.

Q So you made a -- who made the procedural decision at the Sheriff's Department to allow you to

go out that evening without the proper uniform?

A As I stated, the Sheriff's Department does not have a set uniform.

Q Well, what were you waiting on that you didn't have that you said you were waiting on?

A I had just said that my uniforms that had been ordered had not come in.

Q All right. But what is the uniform?

A I don't know.

Q That would be the uniform, the shirt that you have today?

A Yes.

Q Can I just advise the Court for the record so the Court Reporter will note, would that be a gray shirt?

A Yes.

Q And that shirt has a badge or emblem of a sheriff's badge on it, is that correct?

A Yes.

Q In addition to that, I see you're wearing a belt, and you have your badge on your belt on the pants?

A Yes.

Q You've got tactical pants on?

A Yes, I do.

Q And what type of shoes are you wearing?
A 5-11 footwear. They're 5-11 boots, the boots for law enforcement.
Q You've got law enforcement boots. And what about a cap or a police officer's hat?
A I was not wearing any.
Q You don't wear any?
A I was not at that time.
Q Do you ever?
A I have one, but I'll wear it if it's raining or something. But I was not wearing one that night.
Q Is it part of the uniform?
A No.
Q What color is the hat you would normally wear?
A It's black with the word "Sheriff" written in white letters.
Q Why would you have a black hat with white across there saying "Sheriff"?
A In case it's raining.
Q In case it's raining. You're not trying to let people know that you are a sheriff?
A The badge speaks for itself, identifying myself.

Q If the badge is enough, then you wouldn't really need a Sheriff's Department hat, would you?

A I bought it because in inclement weather, I wouldn't get as wet.

Q I've seen police officers on the road when they've got an orange vest on or a vest on that says "Sheriff's Department." Do y'all have any of those vests in McCormick County?

A Yes, we do.

Q And do you have any other vests like that that you can wear to identify yourself as a sheriff's deputy?

A Some of our ballistic vests would have an outer shell that may have "Sheriff" or "Sheriff's Department" or "Police" or "Police Department" written on them.

Q When would you wear a ballistic vest?

A It depends on the situation. Some officers wear it the entire time they're on duty. Some don't wear it at all.

Q What about you?

A I don't wear one.

Q Ever?

A When I was in Iraq.

Q You haven't worn one since you've been

home?

A Once.

Q And after this, you haven't worn one?

A I didn't have one in the previous incident.

Q On that night, you didn't have one?

A No.

Q What other clothing -- you talked about these vests, and you talked about the hat. What other implements of clothing do you have or are available to you to wear at the department?

A I'm not really sure. Maybe my jacket.

Q Tell me about your jacket.

A It's just a dark navy-blue jacket. The outer shell has a badge on it for the emblem. But once I take the outer shell off, there is black fleece underneath it with nothing written on it.

Q Does it have a sheriff's badge on it?

A On the outer shell, but not the inner shell.

Q The outer shell. And is it similar to the badge you have on there?

A I believe so.

Q All right. Would you agree with me that if you had a light-colored shirt on versus a dark-

colored shirt on, if you had the mike on you that night, you could probably see that clearer?

A That particular night, the way the floodlights in the yard lit up, there was no mistaking me.

Q Let me ask you about that. Are you sure that's a floodlight?

A It's a square light, and I've called it a floodlight my entire life.

Q Okay. Is it possible that that is a spotlight as opposed to a floodlight?

A Very possible.

Q Y'all have been down there to investigate. Has anybody looked at up into that to see whether or not it's in fact a 300-watt spotlight, not a 500-watt floodlight?

A I personally did not.

Q All right. Nobody prohibited you from doing that, though, is that correct?

A I wasn't about to climb up there. I was in there to go into the residence. And the only way to tell would be to go into the residence and come all the way out and look at it.

Q All right, let's talk about your procedure that you used that evening. Just walk me through

it. Are you under somebody else's command that night? Are you by yourself? Are you in your own command? What's the deal?

A There was myself, Deputy Nick Moore, Deputy Melissa McAllister. We all actually arrived right about the same time.

Q Well, hold on before we get to there. I'm just talking about I'm trying to find out, who was the supervisor of that group?

A Emmanuel Crowder.

Q Emmanuel?

A Yes.

Q And what time had y'all started working that evening?

A I came in at 6 p.m. that evening. Melissa and Nick came in at 6 p.m. that evening.

Q Okay. What about Emmanuel?

A I believe he came in around 3 p.m.

Q And what time does Emmanuel get off?

A He got off about 3 a.m.

Q And what time do you get off normally on that shift?

A It would have been 6 a.m.

Q So you work from six to six?

A Yes.

Q All right. And Emmanuel works from three to three?

A Three.

Q And then who supervises during the three to six when Emmanuel is not there?

A There's not per se a supervisor on duty.

Q All right. But on this occasion, Emmanuel was your supervisor?

A He was the supervisor of that shift, yes.

Q All right. Who called -- just kind of walk me through it. Where were you at that evening? Where had you been earlier that evening?

A I had been all over the county.

Q All right. So you were doing general duty, general duty patrol?

A Yes.

Q Were you in your car by yourself, or were you with someone else?

A I was by myself.

Q All right. And I'm assuming the other two, Nick Moore and Melissa, were also?

A They were by themselves.

Q By their selves. What's your car number?

A Five twenty-four.

Q And is your call number the same thing as

your car number?

A No, it's not.

Q What's your call number?

A One thirteen.

Q And what's Melissa's call number?

A One twelve.

Q And what's Nick Moore's call number?

A I believe his is 107.

Q All right. Tell me, did you call from dispatch at some point in time?

A Somewhere after 4 a.m., yes.

Q Okay. You got a call from dispatch. I'm assuming y'all have some dispatch logs and what not?

A Yes, they call the radios, too.

Q Have you ever studied the dispatch logs for that night?

A No, I have not.

Q Would it surprise you if I told you there was an 18 or 19 minutes' period of time after y'all got on the scene versus the time y'all contacted Sheriff Reid here, who was on the place at that time, that there appears to be nothing on the dispatch log?

A I wouldn't know.

Q Do you have any idea why that would be?

A I wouldn't know.
Q So somebody told you to go there, to the location?
A Yes.
Q Who would it have been that told you to go to the location?
A I believe it would have been Joyce Fairfax, the dispatcher that works at night.
Q Okay. Did she call out the dispatch, and is she responsible to assign jobs, or does she just called it in and y'all decided who would go?
A Dispatchers may not know exactly where each deputy is at in the county. Sometimes they will give out just a general call, and which deputy is closest will respond to it.
Q Is that what you did?
A I had no idea where the other two deputies were at that night, so I just responded.
Q You didn't have anything particular to do at the moment?
A There was nothing going on at 4 a.m.
Q All right. So you responded?
A Yes.
Q All right. And I'm assuming -- where were you at when you got the call? Do you know about

where you were?

A On the four-lane of Number Eight.

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

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

Q Okay.

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

Q And that was your route?

A Yes.

Q And went on out to Little River?

A Yes.

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

A Actually, I was behind Melissa.

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

A She was in the road in front of me.

Q Yes, sir.

A And I caught up with her.

Q Uh-huh.

A And then Deputy Moore caught up with me.

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

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

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

A There was nothing else going on.

Q -- 4:00 in the morning?

A Yes.

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

A Yes.

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

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

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

A I don't believe I did.

Q Or the father?

A Don't believe I did.

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

Iraq?

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

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

A No, not particularly about him.

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

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

Q Okay.

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

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

A I know of them.

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

A I know of them.

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

A Yes.

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

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

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

A I would not say in that area.

Q Right.

A I'd say this entire county.

Q The entire county, poachers are bad?

A Yes.

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

A I've never caught one.

Q Okay.

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

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

A Yes, we do.

Q Now, so that's what you kind of had in mind, that's probably what it was, somebody had shot at a deer?

A Yes.

Q Okay. It's not uncommon in that area for somebody --

A I'm not saying in that area. I have not ever responded in that area --

Q Okay.

A -- to a deer poaching, but it would not be unlikely.

Q Because right around that bank, isn't there some houses, and then it's probably about a mile of undeveloped just land right there before you get to the next development, right down that road?

A Probably.

Q Right there on the right as you're coming down, before you get to the houses.

A Right next to the granite sign.

Q There are probably four or five lots in there that are undeveloped?

A Yes.

Q Okay, all right. So after having got the call, you got there or Melissa got there, you got

there and then Nick Moore got there?

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

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

A I had no idea what time they called dispatch.

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

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

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

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

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

in charge and who is not?

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

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

A Yes.

Q Okay. Was Melissa in charge of this situation?

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

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

A I got to the property first.

Q Okay. And where did you pull your car?

A Behind a vehicle that was parked in the yard.

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

A In the road.

Q In which direction was it pointing?

A Toward the lake.

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

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

exactly -- Ford or Toyota, I believe.

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

A I couldn't tell you.

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

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

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

A Yes.

Q Okay. And then where was your car at?

A In the Worleys' yard.

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

A Yes.

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

A No, I do not.

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

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

given the Worleys' last name.

Q Okay.

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

Q I've got you.

A And I immediately turned into that driveway.

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

A She went past me.

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

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

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

A No, not toward the front of the driveways.

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

A Yes.

Q And then where did y'all meet up?

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

Q Okay.

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

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

A Yes.

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

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

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

A I believed it would be something simple like that.

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

A No, it would not.

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

McCormick County year after year, don't you?

A Not that I'm aware of.

Q Really?

A There may be one or two cases, but it's not like an outbreak.

Q Have you read the actual reports?

A No.

Q Okay.

A But the ones that I've really looked at, there's maybe one or two cases a year.

Q Now, after you headed over to the Sheffields', is that correct?

A Yes.

Q Did you instruct the other two officers, Nick Moore and Melissa, what to do, or not?

A No, I didn't.

Q Okay. And because you were there on the Worley property first and although you were in command, you didn't tell them what to do or not to do?

A No.

Q All right. So who would -- they just did what they wanted to do?

A We did what we knew needed to be done.

Q All right. And what was that?

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

Q Okay.

A And Deputy McAllister stood between the two of us.

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

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

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

A No more than three minutes.

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

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

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

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

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

A Not that I'm aware of.

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

A More of a line.

Q Okay. After that, what happened?

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

Q Okay.

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

Q Okay.

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

Q Okay.

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

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

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

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

Q Okay.

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

Q Okay. Then what happened?

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

Q Okay.

A I started walking backwards.

Q Okay.

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

Q The door windows, you mean?

A No, the windows.

Q Windows, okay.

A Coming out the sliding glass door, he had

went to his right.

Q Okay.

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

Q Okay.

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

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

A Actually, I did not even hear it strike.

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

A No.

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

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

Q If we look at that --

A It was probably at least in this area

somewhere.

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

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

Q Did you have it on his body?

A I couldn't see him.

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

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

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

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

Q Okay. So you considered it a gunfight?

A Once I saw the weapon.

Q Okay.

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

fuck who we were.

Q Okay.

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

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

A No.

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

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

A I did speak with an ATF agent.

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

A At the time, I was actually shot?

Q Yes.

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

Q Where were you standing when you were hit?

A In front of the residence.

Q Where at in front of the residence?

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

Q Is that where you really believe you were?

A Yes.

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

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

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

A Where the rocks are at?

Q Uh-huh.

A I wouldn't doubt it was out there.

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

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

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

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

A Not all of it.

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

A I have no idea.

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

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

Q Plastic from your gun?

A Yes.

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

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

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

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

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

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

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

A It knocked me flat on my face.

Q Okay. Did it spin you there?

A Yes.

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

A Yes.

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

A No, I do not agree with that.

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

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

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

order to get another loaded, did he?

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

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

A My report said I was crawling?

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

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

Q Okay.

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

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

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

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

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

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

A Yes.

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

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

Q You do agree you were running?

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

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

A I have no idea.

Q It didn't hit you?

A No.

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

A Deputy Moore saw him.

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

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

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

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

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

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

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

Q Okay.

A And other deputy says the same thing.

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

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

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

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

Q Where did the lights come from?

A I couldn't say.

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

A And it came on.

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

A No, I did not.

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

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

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

A Yes, I did.

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

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

Q Okay. This position, did you say?

A Right.

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

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

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

A Not when I saw it.

Q All right. Now, how many seconds between

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

A There's no way to answer that.

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

A Yes.

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

A If that had --

Q There was no light there.

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

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

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

Q There wasn't.

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

Q What light came on, then?

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

Q It was already on.

A No, it wasn't.

Q Which one are you talking about now -- the one facing the house around the back from the lake to the house. The one that was on is the one on the left. Are you saying now that the one on the right came on?

A No, I'm saying the one that would have been at the left top corner --

Q Yes, sir.

A -- was off, and then it came on.

Q I understand that.

A And that would be the only --

Q When you walked out there.

A No. I walked out because I heard a sliding glass door.

Q Okay.

A And I walked backwards.

Q Okay.

A I saw him standing -- if you were facing the lake, he would have been to the right side of the sliding glass doors. I saw the gun. We were yelling "Gun, Sheriff's Department, drop the gun." I'm coming up with my gun. The light comes on and blinds me -- or a light comes on and blinds me.

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

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

Q It was already on, wasn't it?

A No.

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

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

Q Okay.

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

Q Okay.

A I hear the sliding glass door open up.

Q Okay.

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

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

A I did not see a muzzle flash.

Q Well, you know there was one there.

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

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

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

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

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

Beg the Court's indulgence, Your Honor.

THE COURT: Yes, sir.

Q Officer Rushton, do you recognize that document?

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

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

A Yes.

Q And it was witnessed by Mr. Collier?

A Yes.

Q Okay. I'd like to go over this with you. Let's start to the point where -- about six, seven, or eight lines -- "I told Deputy McAllister."

A Okay.

Q Why don't you read each of those sentences, and let's talk about each one of them at a time.

A "I told Deputy McAllister I was going to speak with the neighbors to see if they were the complainants."

Q Did you do that?

A Yes.

Q All right, go ahead.

A "While speaking with the neighbors, they informed me that they were the ones that called and made the complaints."

Q Okay. You confirmed that with them, that they had called in the complaint.

A "They informed me that suspect comes up on Thursdays or Fridays, and he's always coming outside in the early morning hours, yelling and discharging what they believe to be a firearm."

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

A No.

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

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

Q And whose residence are you speaking of then?

A The Worleys.

Q And which light are you talking about?

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

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

A A light.

Q Go ahead.

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

Q Okay.

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

Q Okay.

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

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

A It's off.

Q Go ahead.

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

Q Go ahead.

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

Q Okay.

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

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

A No.

Q Had a crime been committed in front of you?

A No.

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

A No.

Q Did he threaten to shoot anybody in the house?

A Not that I knew of.

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

A I never said that part.

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

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

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

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

A Four o'clock in the morning?

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

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

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

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

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

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

Q Yes, sir.

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

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

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

Q Okay.

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

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

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

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

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

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

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

A Anybody would try to.

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

if he didn't want to, though?

A I can't make him drop it.

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

A And, yes, to protect myself.

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

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

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

A Right.

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

A It was intentional.

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

A We identified ourselves.

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

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

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

Q Okay. Is that the way it happened?

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

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

A I did not warn him.

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

A No, I did not.

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

A Yes.

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

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

up.

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

A Yes.

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

A I had my badge properly displayed.

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

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

Q How do you know that?

A I was right in front of him.

Q Had you begun to turn around?

A And I stepped toward him with hands out.

Q Did you turn around?

A I'm sorry.

Q Did you turn around to shoot?

A My gun?

Q Did you point? How do you shoot? Do you shoot square, or do you shoot at angle?

A I step back with my right leg.

Q Your body too, like this?

A No, it would have been bladed.

Q Bladed, okay. If you're bladed, where is your belt? Where is this? If you're bladed to him, where is your badge?

A My badge would have been pointing toward him, because I carried it the same place it is right now.

Q Well, is that where it was on your --

A Yes, I've always carried my badge right there.

Q Okay. Did you shoot him from this direction, from the right, or did you shoot him from the left?

A It would be my left that would have been pointing toward him. I dropped my leg backwards, and then I fired.

Q You shot this away -- to your left?

A I shot like this.

Q I notice you come up with both hands.

A Right.

Q Did you use both hands that night?

A I don't recall. I could have dropped my flashlight. I could have shined my flashlight.

Q Well, there's a different police procedure on that. Let me ask you while you're standing there about that. Let's talk about that just a moment. There are two ways to shoot when you've got a flashlight, is that correct? There are several ways it's been taught, but there's two ways you're supposed to shoot with a flashlight?

A Yes, ever which is more comfortable.

Q Which is more comfortable with you? Show me.

A I can shoot both ways.

Q Well, give me -- show the Court the ways to shoot with a --

A The different ways?

Q Yes, the different ways.

A Pull your flashlight out to one side.

Q With the other arm?

A Yes.

Q With the other arm pointing towards the subject?

A Yes.

Q Okay.

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

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

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

Q It was dropped somewhere, is that right?

A Yes.

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

A I don't know.

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

A It gives a description of Mr. Worley.

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

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

Q Go ahead.

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

Q Okay.

A "I immediately yelled "Gun," letting the

other deputies know."

Q Okay.

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

Q Okay.

A Right.

Q Okay.

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

Q Okay.

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

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

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

Q How could another light have come on?

A Someone else could have turned it on.

Q Someone else could have turned it on.

A There was a -- his mother was there.

Q So now you're saying the mother turned the light on?

A I don't know who turned the lights on.

Q Go ahead and read on.

A "As it happened, I heard a gunshot and was hit in the right hand and was knocked to the ground."

Q As what happened? You wrote that.

A As I got shot?

Q Pardon?

A As I got shot?

Q I don't know. I'm asking out --

A That's when I heard a gunshot. It's in this here statement. I think I've already mentioned that.

Q In that one, you're saying that you heard it? Is it possible that you saw it -- saw the flash?

A I have played this night over in my head thousands of times.

Q Officer --

A I don't remember seeing the gunshot.

Q You don't remember seeing the gunshot?

A No, I didn't.

Q Go ahead, then.

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

Q Okay.

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

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

A I believe that was his name.

Q Tell me how that interview occurred.

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

Q About the incident?

A Yes.

Q And he's a federal officer?

A Yes.

Q You know the importance of giving a true

and correct statement to him?

A Yes.

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

A Okay.

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

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

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

We'll be at ease for ten minutes.

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

THE COURT: All right, are both sides ready?

MR. GARRETT: Yes, sir.

THE COURT: You may continue.

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

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

THE COURT: Back up and talk into this mike.

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

THE COURT: Hold on.

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

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

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

A Essentially?

Q Yes.

A But not word for word.

Q I understand. My question is, did you tell Stallo under any circumstances that Mr. Worley was already out on his deck when y'all got back to his house?

A No --

Q Did that happen or not?

A No, I did not.

Q All right. So if Stallo put that down there, that was a mistake?

A Yes, it was.

Q So that sentence is a mistake?

A Yes, it is.

Q All right, let's go on from there.

A "Deputy Rushton witnessed Worley walking on the second-story deck with a long gun in his hand. Deputy Rushton drew his firearm and yelled at Worley that he was from the Sheriff's Department."

Q All right, stop. Here he says -- did you tell Officer Stallo that you drew your gun and then yelled at Worley that you were from the Sheriff's Department?

A I do not recall saying that.

Q You were at this interview?

A Yes, I was. But as I said, these are his

words, not mine.

Q Okay.

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

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

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

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

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

Q Is that true?

A Yes.

Q Okay, go ahead.

A "Deputy Rushton fell to the ground and

immediately heard a second shot but was not struck."

Q Go ahead.

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

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

A About?

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

A I may have not said that.

Q Sir?

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

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

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

Q Okay, son of a bitches?

A Yes.

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

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

A It may have been omitted from the statement.

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

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

Q Okay.

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

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

A No, and it was omitted.

Q Okay.

A Not intentionally omitted.

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

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

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

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

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

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

A And apparently at some point you were informed --

Q What are you talking about?

A It says that.

Q Says what?

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

Q That's at a different time.

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

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

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

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

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

Q Okay.

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

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

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

Q All right.

A I'm really not sure.

Q All right.

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

THE COURT: Show it to the Solicitor.

MR. MYERS: No objection.

THE COURT: Mark that into evidence,

please.

COURT REPORTER: Defendant's Three A.

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

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

A I have briefly looked at them.

Q When did you do that?

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

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

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

Q Okay.

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

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

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

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

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

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

Q And if he says immediately a shot rang out?

A You'd have to ask him.

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

A They should be, but they're not.

Q Was this?

A Initially, no.

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

calls?

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

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

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

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

A I did.

Q What information did you gather from the Shepherds?

A Shepherds?

Q I'm sorry, the Sheffields.

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

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

A I have no idea.

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

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

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

A I don't believe he did.

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

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

Q Okay.

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

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

A There is a difference between concealment and cover.

Q Okay.

A And depending on the situation, different

situations dictate your actions.

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

A If possible.

Q If possible.

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

Q Why was it not possible?

A There was nothing there to hide behind.

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

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

Q Do what?

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

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

A I don't know.

Q I mean, do you have any evidence that he's crazy or he's involved in some kind of militia, or some kind of sovereignty group, or one of these gangs or something that has a problem with law enforcement?

A I have no proof that he doesn't, either.

Q Okay. So because you don't have any proof, you assume that he is. Is that what you're telling us?

A Not all the way.

Q So if there's anybody who doesn't do what you say -- "Drop that gun" -- you have a right to shoot them because you think they might be an anti-police person?

A Not necessarily.

Q Well, what is necessarily? Necessarily gives the right to shoot somebody on their own land.

A If he points the gun at me --

Q Okay.

A -- yes, I would have shot him.

Q He didn't do that, did he?

A Apparently, he did. I was shot.

Q Only after what?

A After I was blinded by the lights from his

balcony.

Q After what? What else transpired?

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

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

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

Q Well, where do you get that from?

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

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

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

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

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

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

A It was pretty fast.

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

flash you saw was that .06 shoot?

A No.

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

Q Like I told you, the floodlights blinded me.

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

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

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

on?

A Yes.

Q Did you have one in your car?

A Yes.

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

A That's one scenario.

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

A That's one scenario, yes.

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

A Yes.

Q You could have called them on the phone?

A Could have called the SWAT teams, too.

Q You could have.

A But that wasn't necessary, either.

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

A Yes, I did.

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

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

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

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

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

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

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

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

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

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

Q Did you talk --

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

Q Okay.

A I do not know.

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

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

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

A No, that's not true.

Q That's not true?

A No.

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

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

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

Q Okay.

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

Q Okay. You wouldn't do anything different?

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

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

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

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

A He fired some shots prior to us getting there.

Q Do you know what time?

A No, I do not.

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

A He could have been preparing.

Q Well, what are you trained -- that

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

A Jus thought he went back to bed or something.

Q Pardon me?

A Kind of thought he probably went back to bed.

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

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

Q Well, you did a good job --

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

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

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

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

THE COURT: Yes, sir.

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

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

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

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

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

THE COURT: Go ahead.

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

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

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

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

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

going to let you go ahead. Go ahead.

MR. GARRETT: Yes, sir.

EXAMINATION CONTINUED

BY MR. GARRETT:

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

A In certain circumstances.

Q I'm talking about this circumstance.

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

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

A Which we were trying to do.

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

A Which we were trying to make contact.

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

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

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

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

A I wasn't rushing that night.

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

A The cover was at the side of the house.

Q Okay.

A And then I had my flashlight.

Q And you left the cover?

A To go out to the scene.

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

A It depends on whose perspective you look at it.

Q I'm looking at yours.

A He could have shot through the floorboards, too.

Q Sir?

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

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

A He could have.

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

A I don't know that.

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

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

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

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

THE COURT: Go ahead.

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

A Those khaki pants were very visible.

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

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

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

A No, it is not.

Q All right. Who bought that light?

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

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

A Yes.

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

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

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

A No, it was not.

MR. GARRETT: Beg the Court's indulgence.

THE COURT: All right.

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

A Not that I'm aware of.

Q Sir?

A Not that I am aware of.

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

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

Q You've never seen one?

A No.

MR. GARRETT: Beg the Court's indulgence.

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

A I did not personally have anyone sign it.

Q Okay.

THE COURT: Questions for the witness?

MR. MYERS: Yes, sir.

CROSS-EXAMINATION

BY MR. MYERS:

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

A Yes.

Q Somebody's shooting in our neighborhood?

A Yes.

Q Firing a gun?

A Yes.

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

A Yes.

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

A Yes, sir.

Q You were out there with two other officers?

A Yes, sir.

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

A Yes, sir, he went to the door.

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

A Yes, sir.

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

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

A Yes.

Q You went back to the front door?

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

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

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

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

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

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

A No, sir.

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

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

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

MR. GARRETT: Yes, sir.

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

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

THE COURT: All right.

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

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

A Robert Edward Rushton.

Q What's your name?

A Robert Edward Rushton.

Q Appointed to what office?

A Deputy sheriff, McCormick County.

Q What address?

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

Q Whose address is that?

A That is the post office box for McCormick

Sheriff's Department.

Q Term to expire?

A Pleasure of the sheriff.

COURT REPORTER: Do what?

MR. RUSHTON: Pleasure of the sheriff.

Q This is the oath for county and state officers from the Secretary of State's Office. It says, "State of South Carolina, County of McCormick, first, I do solemnly swear or affirm that I am duly qualified according to the Constitution of this state, to exercise the duties of the office to which I have been elected or appointed; that I will, to the best of my ability, discharge the duties hereof to preserve, protect, and defend the Constitution of this state and of the United States, so help me, God." It is sworn to, subscribed to, on November 2, 2009. Whose signature is that on the bottom of that?

A It would be my signature.

Q And who was your notary?

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

Q And she was the McCormick County --

A Clerk of Court.

Q Does that mean you took the oath of office

when you came back from Iraq?

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

Q Thank you.

MR. MYERS: That's all I have.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. GARRETT:

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

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

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

A I believe it was --

Q -- and knocking?

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

Q But under the roof?

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

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

question, you and Officer Moore?

A Yes, we were standing on the front porch.

THE COURT: Further questioning of the witness?

MR. MYERS: No, sir.

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

MR. GARRETT: Nothing further.

THE COURT: Call your next witness, please.

MR. GARRETT: We call Mr. Kirkham.

THE COURT: Come around here, please.

(Whereupon, the witness was sworn.)

CLERK OF COURT: Thank you.

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

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

THE COURT: Do you need him to spell that?

COURT REPORTER: Your last name, please.

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

COURT REPORTER: Thank you, sir.

MR. GARRETT: May it please the Court?

THE COURT: Yes, sir.

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

DIRECT EXAMINATION

BY MR. GARRETT:

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

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

Q Please do.

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

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

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

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

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

A Yes.

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

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

Q Yes, sir.

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

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

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

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

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

Q Are you a published author, as well?

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

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

Q Is it fair to say you teach the teachers?

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

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

I was able to learn many more things and

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

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

THE COURT: Any voir dire?

MR. MYERS: No objection.

THE COURT: He is so recognized in that field.

MR. GARRETT: Thank you, Your Honor.

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

A Yes, I have.

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

A Yes, a very extensive case file.

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

A Yes.

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

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

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

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

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

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

MR. GARRETT: Your Honor --

THE COURT: Yes, sir.

MR. GARRETT: -- if I may?

THE COURT: Yes, sir.

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

Sheriff's Department?

A Yes, I did.

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

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

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

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

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

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

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

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

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

absorption of that material than to written policies.

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

A Right.

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

A And I'll try to do that --

Q -- to practice procedures.

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

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

DR. KIRKHAM: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statistics all over the country about it.

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

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

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

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

It's the other way around. We want the

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

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

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

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

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

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

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

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

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

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

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

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

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

is that you wind up killing an innocent person unwittingly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q All right.

A I know people do this.

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

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

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

Q What if there's no movement?

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

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

A Okay.

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

A Salt and pepper?

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

A Right.

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

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

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

A Yes.

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

A That would be --

Q Who wins? Who's supposed to shoot?

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

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

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

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

A Any sense in that situation -- I mean,

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

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

Q What does that mean?

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

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

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

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

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

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

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

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

In a situation like that, I have never in

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

Q No motive?

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

MR. GARRETT: Beg the Court's indulgence.

THE COURT: Yes, sir.

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

A That is absolutely correct, yes.

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

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

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

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

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

THE COURT: Very well.

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

A Okay.

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

officer?

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

Q And if the individual homeowner --

THE COURT: Wait. Had you finished your answer?

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

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

A Yes. Under those conditions you would, yes.

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

CROSS-EXAMINATION

BY MR. MYERS:

Q You reviewed all the material, Mr.

Kirkham?

A Yes, I have.

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

A The Sheffields' statements, yes.

Q And he was out there talking loudly --

A Yes.

Q -- and shooting a gun?

A Correct.

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

A That's correct.

Q It continued to happen, though?

A It happened, yes.

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

A I'm sorry?

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

A Yes.

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

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

REDIRECT EXAMINATION

BY MR. GARRETT:

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

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

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

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

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

A No risk. It would be the same situation.

MR. GARRETT: Beg the Court's indulgence.

THE COURT: Yes, sir.

MR. GARRETT: That's all.

THE COURT: Recross?

MR. MYERS: No.

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

DR. KIRKHAM: Thank you, Your Honor.

THE COURT: How many more witnesses do you have?

MR. GARRETT: Plaintiff's case,

petitioner's case.

THE COURT: All right.

How many witnesses are you calling?

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

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

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

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

MR. GARRETT: Your Honor --

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

THE COURT: Mr. Garrett?

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

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

expert witness just relied on them.

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

MR. GARRETT: We would obviously object.

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

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

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

THE COURT: You want to recall him?

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

DR. KIRKHAM: Yes, sir.

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

MR. GARRETT: They are not, Your Honor.

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

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

MR. GARRETT: No, no, no.

THE COURT: Okay.

You are still under oath.

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

RECALL EXAMINATION

BY MR. MYERS:

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

A Yes.

Q And you relied on that statement?

A Yes.

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

THE COURT: Any objection?

MR. GARRETT: No objection.

THE COURT: Mark it into evidence then, please.

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

THE COURT: What else?

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

A I did.

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

THE COURT: Any objection to this?

MR. GARRETT: Your Honor?

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

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

A Yes.

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

THE COURT: Any objection to any of these?

MR. GARRETT: Subject to the prior objection.

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

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

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

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

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Sheffield, and Reid, were received in evidence.)

MR. MYERS: That's all I have.

THE COURT: All right, questions of the witness?

MR. GARRETT: No further questions.

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

All right, anything else from the State?

MR. MYERS: No, sir.

THE COURT: Anything from the defense?

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

THE COURT: Did you say Sheriff Reid?

MR. GARRETT: Sir?

THE COURT: Did you say Sheriff Reid?

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

THE COURT: Sheffield?

MR. GARRETT: Mr. Alan Sheffield.

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

(Whereupon, the witness was sworn.)

THE COURT: If you would state your name,

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sir.

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

THE COURT: Wait.

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

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

COURT REPORTER: A-L-A-N?

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

THE COURT: Your last name?

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

THE COURT: Thank you.

All right, Mr. Garrett.

MR. GARRETT: Thank you.

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

DIRECT EXAMINATION

BY MR. GARRETT:

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

A No, sir.

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

A Yes.

Q And have you ever heard shots prior to

that fox out there on the Worleys' property?

A Yes.

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

A I'm really not sure.

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

A That was my wife.

Q Did you participate in that interview?

A No, sir.

Q You didn't?

A No, sir.

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

A I did not speak to Joe, no.

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

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

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

A She indicated some days later that she did.

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

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

A Yes, I was.

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

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

Q In '08.

A Yes.

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

A No.

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

A No.

Q None?

A No.

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

A No complaints, that's correct.

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

A No, sir.

Q Did you ever have the pleasure of meeting Ms. Worley?

A Yes, I did.

Q And is he a well-educated man?

A Appeared to be.

Q A nice guy?

A Yes, he's a nice guy.

Q And he's proud of his house down there?

A That never came up in discussion.

Q Y'all didn't talk about that?

A It was mostly just the neighborhood.

Q You didn't talk about the features of double-insulated in the home?

A No.

Q Have you ever seen any wild dogs down there, any coyotes?

A I have not ever seen coyotes, no.

Q Seen any fox?

A Yes, sir.

Q And is it kind of common knowledge that there are fox around there?

A I don't recall any conversations about the fox, no.

Q But there are foxes down there?

A Sure.

Q What about Sweet Pea?

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

Q They've got a cat named Sweet Pea?

A Correct.

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

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

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

A I don't know that.

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

A Correct.

Q Did you have your windows open?

A Yes.

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

A That's true.

Q Now, I did go back and read your

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

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

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

A It sounded like a gunshot.

Q It sounded like it?

A Yes, sir.

Q Did you see any flash?

A No.

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

A No, sir.

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

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

Q Okay. Out from the side of the house?

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

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

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

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

Q So you don't know?

A No, I don't know.

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

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

Q No way to know that.

A Yes.

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

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

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

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

shot?

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

Q Yes.

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

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

A Two.

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

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

Q Okay.

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

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

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

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

THE COURT: Are you abandoning your

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

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

THE COURT: Go ahead.

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

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

A The one in September?

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

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

Q Is that correct?

A Yes, we were interviewed.

Q He said that you said?

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

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

A Correct.

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

THE COURT: Let him read over it.

MR. GARRETT: Well --

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

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

Q A couple of minutes between the shots?

A Correct.

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

(The next available testimony is as follows.)

*****

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

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

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

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

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

All right, you wanted to call another officer?

MR. GARRETT: We call Deputy Moore.

(Whereupon, the witness was sworn.)

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

MR. MOORE: Nicholas Moore.

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

DIRECT EXAMINATION

BY MR. GARRETT:

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

A Yes, I did.

Q Okay. Are you familiar with that?

A Yes, sir.

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

A Uh-huh.

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

A Yes, sir.

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

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

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

A I would have been.

Q Okay. Were you wearing that outfit --

A Yes, I was.

Q -- or a similar outfit like that?

A Yes.

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

A Yes.

Q All right. And you would acknowledge that

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

A Yes.

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

A Yes.

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

A Yes.

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

A Yes.

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

A Was leaving the --

Q The area.

A -- the area of the door.

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

A Yes.

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

A Yes.

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

A At what point?

Q At that time.

A No.

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

A No, the door was opened first.

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

A Step out.

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

A Out to my right.

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

A I'm standing right against the doorway --

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

A -- outside the house.

Q And so he would be in your general area. At that time, was he walking backwards?

A No, forward.

Q Did he walk towards the house?

A Yes.

Q Okay. So did he come -- I'm trying to figure out how he came to the house. Did he come to the house along with y'all, or did he come from a different direction?

A I do believe he came with me and then walked out to the edge of the woods --

Q Okay.

A -- and then started to walk -- maybe not really walk but take a step towards to where he could see what was going on, when the lights came on.

Q So you would agree from your position you couldn't see Joe up on his balcony?

A I could see his silhouette, I'll say.

Q Okay. But you couldn't see -- his silhouette? In other words, you could see his general outline?

A Yes, him and his general features.

Q Okay. And was the light still on?

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

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

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

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

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

Q All right.

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

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

A No, sir.

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

A Yes.

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

A Yes.

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

A Yes.

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

A No, sir.

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

A No, sir.

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

A No.

Q All right.

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

guess I would say no.

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

A Uh-huh.

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

A Yes, sir.

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

A Yes.

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

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

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

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

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

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

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

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

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

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

A I don't recall.

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

A Two seconds.

Q Why didn't you shoot Joe?

A I didn't have a shot at him.

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

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

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

A Immediately.

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

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

the ground.

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

A I heard Rushton say something about a gun.

Q Okay. Then what did you do?

A There wasn't much of a conversation.

Q What happened?

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

Q Okay.

A There was never a conversation between anybody.

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

A If even that long.

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

A Heard a bang.

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

A That happened while we were beating on the door.

Q Well, if that door upstairs is not open,

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

A He must have been out there when it happened.

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

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

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

A I have no knowledge of what Rushton told Stallo.

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

A Him already on the deck?

Q Right.

A No, not when I first got there.

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

A Yes.

Q All right. And how many seconds was there

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

A One, if that many.

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

A Right.

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

A Yes.

Q Did he attempt to kill you?

A I don't know what his intentions were.

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

A No, never seen him before until then.

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

A I can't answer that question.

Q So why would Joe Worley intend to kill you?

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

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

A Well -- oh, well.

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

A Yes.

Q Get himself to get treatment at the Medical University, correct?

A Yes.

MR. GARRETT: That's all I have of this witness.

MR. MYERS: I have just a couple.

CROSS-EXAMINATION

BY MR. MAYE:

Q Officer, the bottom line is when y'all went out there, Bobby Rushton went over to the Sheffields' house -- that's right -- to check on the complaint, right?

A Yes, sir.

Q At some point in time when you were over there, you saw a light come on and go off on the Sheffields' house, right -- not on the Sheffields' house but on the Worleys' residence, right?

A Yes.

Q Y'all went over after the light went out, beat on the door, and continually announced "Sheriff's Office" over and over again --

A Yes.

Q -- did you not?

A Yes.

Q Okay. At some point in time -- now, there's no light on shining out in the yard. At some point in time, y'all heard the screen door or the sliding door open, is that correct?

A Yes.

Q Okay. And in response to that, you and Bobby are down on the ground level at the door, beating on it, steady calling "Sheriff's Office" and beating on the door, is that correct?

A Yes, I was.

Q Wherever you were or wherever he was at that point in time, Mr. Worley in this case, as y'all are hollering "Sheriff's Office," you clearly heard him reply back, in response to that, "I don't give a fuck," is that correct?

A Yes.

Q Okay. So in acknowledgement of what y'all said, you don't have any doubt that he responded, "I don't give a fuck," when you identified yourself as Sheriff's Office?

A No, sir, no doubt.

Q Okay. As Officer Rushton walked back out

into the yard and looked back up in this case, the light came back on and blinded him at some point in time, is that correct?

A Yes.

Q Because the light had been off and was not on as he walked down in front of the house, is that correct?

A Yes.

Q Okay. In response to Officer Rushton telling Mr. Worley or him crying out "Gun," y'all continued to cry out "Sheriff's Office" and identify yourself as law enforcement officers, and there was conversation about him dropping the gun, wasn't there?

A Yes.

Q Y'all made those demands to him continuously, didn't you?

A Yes.

Q Then he fired and struck Officer Rushton in this case?

A Yes.

Q Any doubt in your mind about that?

A No doubt.

Q He then -- you motioned for him to come to you, is that correct?

A Yes.

Q And he came to where you were?

THE COURT: Motioned for who to come?

Q Officer Rushton. You motioned for Officer Rushton to come to you once you realized he had been hit and fell to the ground, correct?

A Motioned and both probably told him to come.

Q Okay. And he did come to you at that point in time?

A Yes.

Q Okay. And a subsequent shot was fired by Mr. Worley --

A Yes.

Q -- at some point in time?

A At some point.

Q Okay. Now, after you attempted to get him to safety, what did you hear Mr. Worley say as he came back out of the house and onto the ground level, as y'all were fleeing and trying to get the officer to safety? What did you hear him say?

A "Where you at, you son of a bitch?"

Q Okay. So he was down -- was he in pursuit of y'all at that point in time?

A That's what I thought --

Q Okay.
A -- that he was coming after us.
Q Okay. Where was he at that point in time? Was he on the ground level and left the house at that point in time?
A He was ground level, would have been on the left side of the house.
Q And y'all's primary concern was for Officer Rushton's safety, and y'all got him out of there, correct?
A Yes.
Q In fact, you left your automobiles there, didn't you?
A Yes.
Q You only took one car, didn't you?
A Yes.
Q Because Officer Rushton was severely injured?
A Yes.

MR. MAYE: Nothing further.

THE COURT: Further questions of the witness?

MR. GARRETT: Yes, sir.

REDIRECT EXAMINATION

BY MR. GARRETT:

Q I'm just having trouble understanding. While ago, didn't you tell me the light remained on?

A The light?

Q When I read this to you awhile ago, where we talked about the light that had been on, had come off, and now it was on.

A Yes, the light went off, came on -- was off to begin with and came on, went off, and came back on.

Q Came back on?

A When the actual shot -- when those shots were fired, yes.

Q How is that possible?

A I guess he left it on.

Q He left it on when?

A The last time he turned it on.

Q All right. So you're not trying to say he went in there and turned the light off and then turned it on to blind Officer Rushton, are you?

A I don't know what his intentions were.

Q When Rushton was out there, was the light on or off?

A Both. It was off to begin with. It came back on.

Q Okay. When the shots occurred, were the

lights on or off?

A On, I do believe.

Q On, okay. So the lights didn't get turned off and turned on at the time he got shot. They were already on, isn't that true?

A To the best of my knowledge, I do believe they were.

Q Okay. That's inconsistent with what you just told Mr. Maye, that they were off, they came on about the time of the shot and blinded Officer Rushton. Did you see -- you already said you didn't see the flash, is that right?

A Yes, I don't think I did.

Q All right. And all these other statements that you say that happened out there, you didn't tell all that to the agent that was investigating this from the Bureau of Alcohol, Tobacco, and Firearms. You do agree with that, right?

A I don't know if I exactly agree with the fact that I may not have told him that. It's not written in the statement, but I can't say that I did or did not tell him that.

MR. GARRETT: I'm not sure if I marked this. I want to make sure I mark this, both for identification and submission. That's 143.

THE COURT: Is there any objection?

MR. MAYE: Nothing, Your Honor, for the purposes of this year, no objection.

THE COURT: Mark it in evidence.

COURT REPORTER: It's Defendant's Five A, Your Honor.

THE COURT: Thank you.

(Defendant's Exhibit Number Five A, Summary of events, Stallo, 7-22-10, was marked for identification.)

Q Nick, have you had an opportunity to read the other statements of the other officers in this matter?

A I may have at some point in time, but I have not recently.

Q Okay. And so you -- in preparation for this trial, nobody went over that statement with you in relationship to the other statements?

A I was told to go over my statement. I have never sat and read anybody else's statement.

Q Okay.

A Not lately.

Q All right. So at one time, you did?

A I'm sure when the incident first occurred, yes, I probably did.

Q And here's why I ask the question. Your last statement to the -- the statement that after you heard somebody coming out the door and then yelled "Where you at? Where y'all at?" or something to that effect.

Isn't it true that all of the statements say that any other statements were made while he was still up there, and that was made at or about the time of the second shot, hollering and telling them to get out of there, or "I'll get you," or "Get from here," or something to that effect? And that was never made -- y'all had already gone, had cleared the back, back there, before that statement was ever made?

A What exactly are you asking me? I'm a little confused.

Q Well, you said in your statement something to the effect of -- with the cross-examination just then -- that the officer -- that Joe made the statement after he had come down out of the house and was now on the ground, hollering "I'm going to get you, you sons of bitches," or "you son of a bitch," or something to that effect. What did you say he said?

A Yes, he said, "Where you at, you son of a

bitch?"

Q "Where you at, you son of a bitch?"

A Yes.

Q He didn't say "bitches," more than one?

A We're talking about 2009.

Q I understand. But you recognize it as singular as opposed to plural?

A I don't recall.

Q As best you recall, is that correct?

A Best I recall, I would say, "Where you at, you son of a bitch?"

Q All right. And then the timing of that, wouldn't that have been at or near the second shot?

A No, that was after, a good bit after.

Q All right. Is it true that Joe ran back towards the house after he was hit? I'm sorry, is it true that Officer Rushton ran back towards the house after he was hit?

A He ran towards me.

Q And where were you standing?

A The corner of the house.

Q So isn't it fair that he ran towards Joe, who was on the balcony of the same house that you were at the corner of?

A He ran towards the house, but Joe was up

on the top balcony. He couldn't have actually ran towards Joe.

Q Well, he ran towards Joe's position. Regardless of whether he was upstairs, he ran towards Joe's house and Joe's position.

A Okay.

Q Is that fair?

A Yes.

Q And is it further fair that he ran towards the door?

A Yes.

Q All right.

MR. GARRETT: No further questions.

THE COURT: Anything else?

MR. MAYE: Just one.

RECROSS EXAMINATION

BY MR. MAYE:

Q The bottom line is this statement here, this line about "I'm going to get you son of a bitches" is included in the ATF agent's statement. So whether or not you told him, Worley told him -- I mean, you told him, Bobby told him, or Melissa told him. After he interviewed all of you, he did include this in his statement, correct?

A Yes.

Q All right. I'm going to make sure -- I know you've been through this over and over again -- but when Bobby was over talking to the Sheffields in this case, y'all saw the lights come on. Y'all had already gone over and beat on the door of this house, right?

A Yes.

Q You saw the lights come on. Y'all then went back over to the Worleys' residence, right?

A Yes.

Q But that light went off, is that right?

A I never actually left the Worleys' residence.

Q Okay. You stayed over there in the yard?

A Pretty much. I was proceeding to -- I was fixing to leave, but I never actually got out of his yard, and the light came back on.

Q As Bobby was over there, the light came on, then it went off, right?

A Yes.

Q Okay. Y'all went back down there and beat on the door over and over again. The light's off at this point --

A Yes.

Q -- right?

A Yes.

Q As Bobby leaves the position of where you two are beating on the door and announcing "Sheriff's Office" and walks back out into the yard, the light comes on and blinds him --

A Yes.

Q -- right?

A Yes.

Q You're absolutely certain that that's the order?

A Yes.

Q Okay.

MR. MAYE: Nothing else.

THE COURT: All right, anything else?

MR. GARRETT: I'm having difficulty understanding.

FURTHER REDIRECT EXAMINATION

BY MR. GARRETT:

Q Was the light on or off when Bobby got shot?

A On.

Q Okay.

A The light came on when the shot was fired. I don't know whether he left it on or turned it back off.

Q Say that again?
A I said the light was on when Bobby was shot, but I do not recall whether or not he turned it off after he shot Bobby or not.
Q He turned the light off after he shot Bobby?
A I don't recall if he did or not.
Q Okay. But it was clearly on -- the three seconds before Bobby was shot, that light was on?
A I don't know if it was three seconds.
Q A half a second, a second, two seconds. I'm not asking you to give me precisely, but some time?
A Yes, the light was on when Bobby was shot.
Q All right. And also in that report, if it was important for you to say about the, you know, "Where you at, you son of a bitch or whatever," "SOB," whatever, it was important for you to tell him the truth about what happened, is that correct?
A Yes.
Q So the other stuff about all these other words and all these other things, all that couldn't happen in those seconds, could it?
A All of what other things?
Q All these "Sheriff's Department," "Gun,"

"I don't give an 'f'," "What do y'all want?" -- I mean, we're talking seconds, aren't we?

A Not in between Bobby getting shot and him asking "Where you at, you son of a bitch?" It was maybe longer than seconds.

Q How many seconds?

A I'm going to say 30 to 45, maybe a minute.

Q It was a whole minute, then?

A I wasn't looking at my watch.

Q All right, one other thing. You said the officer crawled to you. That's the first time I saw that, "crawled to you." Did you tell Officer Stallo that he crawled to you?

A Crawled to me, walked to me. I don't really -- he got to me somehow. He was injured --

Q He ran, didn't he?

A -- and he got to me.

Q He ran, didn't he?

A I don't recall. I can't -- I mean, I can't swear to you that he ran, he crawled, he walked, he jogged. I can't swear to any of it. He got to me, though, I know that.

Q In your original statement, you said he ran, and the subsequent statement said he crawled. I just wondered if there's some reason for the

change in that part.

A Probably the dates in the statements was probably the reason.

Q Time had passed?

A Yes.

Q Thank you.

THE COURT: Anything else?

Thank you, sir. You can step down.

How many more witnesses do you plan to call?

MR. GARRETT: Melissa. She'll probably be the last witness, Judge.

THE COURT: All right, come on up, please.

MS. McALLISTER: Sara Melissa Hegler McAllister.

COURT REPORTER: Could you repeat that, please?

MS. McALLISTER: Sara Melissa Hegler McAllister.

COURT REPORTER: Sara McAllister.

MS. McALLISTER: I go by Melissa -- Melissa H. McAllister.

SARA MELISSA MCALLISTER, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GARRETT:

Q Officer McAllister, when did you join the McCormick County Sheriff's Department?

A In April of 2008.

Q Did you have an opportunity to bag evidence and assist in the crime scene evaluation in this case?

A Yes.

Q And what can you tell me you did in this circumstance?

A In this incident?

Q Yes, ma'am.

A Photographed.

Q And who --

A Collected evidence into the bags.

Q Okay. And tell me exactly how that went. Tell me how y'all investigated the scene -- who was all involved? Were in charge in the investigation?

A I was never in charge of it, no.

Q Nick Moore, did he put you -- when the sheriff got there, did he pull you aside to instruct you or ask you to go on and do the evidence bagging and photographing?

A No.

Q Who did that? Who asked you to do that?

A No one.
Q You just did it on your own?
A Yes.
Q So if Mr. Nick Moore said that he saw you doing that, you just did that on your own, is that correct?
A Yes.
Q You've had some difficulties in the past with truthfulness in investigations, is that correct?
A Yes.
Q In fact, you were terminated from the Department of Natural Resources for not telling the truth in a crime scene investigation, isn't that correct?
A I was terminated, yes.
Q For that reason, and that's the stated reason in the letter of termination that's been provided to us from the State. Do you want to see the letter?
A Sure.
THE COURT: What's your answer?
A Yes, I'd like to see the letter.
Q Let me get it for you. While I'm waiting on the letter, why don't you just tell me what your

version is as to why you were terminated? And I want to be specific about crime scene investigation. I'll let you look at that letter dated May 29, 2007, from the Department of Natural Resources.

A Uh-huh.

Q Do you recognize that letter?

A Yes, sir.

Q And would you tell us the basis for the termination? Did your supervisor --

A Failure to cooperate with an investigation.

Q What else?

A "Your failure to be truthful."

Q Truthful?

A Right.

Q Okay, go ahead. What else --

A Do you want me to read all of it?

Q Well, what were you untruthful about? What does it say?

A I wasn't untruthful.

Q Did you have some --

A I just did not comply.

Q There was a DNR death, is that correct?

A Uh-huh.

Q And I believe you were on one of the other

boats?

A Uh-huh.

Q Is that correct?

A Yes, sir.

Q Is that a "yes"?

A Yes, sir.

Q And as a result of the fatality, you were required as a DNR officer to secure the scene, is that correct?

A Yes.

Q All right. And did you secure the scene?

A No.

Q What did you not do to secure the scene?

A What did I not do?

Q Yes, ma'am. What did you fail to do?

A Well.

Q Tell me about the container of beer. What did you do with the container of beer?

A I didn't do anything with the container of beer.

Q What did somebody else do with the container of beer?

A They took it.

Q They took it?

A Uh-huh.

Q Where did they take it?
A I don't know where. I guess it was on the bank.
Q You're guessing what?
A I'm guessing it was on the bank.
Q Somehow it got out of your boat that you were in and got on the bank?
A Yes.
Q And did you know how that happened?
A No.
Q But you never reported that to the --
A No.
Q And they found out later on that happened, is that correct?
A Yes, sir.
Q And when you were questioned about it, you initially told them no, you didn't know anything about that?
A Yes.
Q And then you subsequently told them that you did, is that correct?
A No, there wasn't any time. I didn't tell them.
Q Do you dispute the testimony?
A Yes, I didn't tell them.

Q All right. And as a result, you got terminated?

A Yes, sir.

Q All right. Now, what steps did McCormick do in hiring you, or do you know?

A I'm not really sure of their process.

Q So did you work anywhere from May 29, 2007, until you were hired in '08?

A No, I did not.

Q And you were hired when?

A '08.

Q '08 -- in what month of '08?

A April.

MR. GARRETT: We have marked that. I move to introduce Six A into evidence, Your Honor.

THE COURT: Any objection to that?

MR. MAYE: No.

THE COURT: Mark it into evidence.

(Defendant's Exhibit Number Six A, Letter of termination from DNR, was marked for identification.)

Q Now, was this discussed when you got hired?

A Uh-huh.

Q Is that a "yes"?

A Yes.

Q We're from the South, and we're bad about saying "uh-huh" and "huh-uh."

A I'm sorry.

Q But try to say "yes" or "no" in order to help her, because she can't put an "uh-huh" or "huh-uh," and we won't understand it later on.

A Yes, sir.

Q Okay, all right. Now, it seems to me that you were kind of back behind Officer Moore, is that correct --

A Yes, sir.

Q -- when all this stuff went down?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q All right. And he sent you back to go get the car and to call in, is that correct?

A Yes.

Q And you got back there to the apex of the vehicle, as you said in your report, is that correct?

A Yes.

Q And waited until Officer Moore and Officer Rushton got back to the bushes there -- or did they

get to the bushes first, and then you went to the apex of the car, or how did that work?

A All I know is I was running.

Q Okay. When did you start running?

A When they began retreating.

Q Okay. So when Mr. Moore began retreating, you began retreating, all right. What's the closest you go to the corner?

A The closest I got to the corner?

Q The corner of the house there where the door is.

A The catwalk area, where the trash cans are over to the left, yes.

Q Eight to ten feet back?

A Uh-huh.

Q All right. And there's differing stories between your stories and the other officers' stories. Did you see Mr. Worley?

A No.

Q Did you ever see Mr. Worley?

A When he was arrested, yes.

Q When he was arrested, all right. And did you see Rushton hit?

A I don't believe I saw him get hit. I just heard "Oh, God."

Q You heard what?
A "Oh, God."
Q Who said "Oh, God"?
A One of them.
Q Bobby?
A I'm guessing Bobby did.
Q Did Bobby say, "I'm hit"? Do you hear him say, "I'm hit"?
A I did not.
Q Okay. And you say in your statement you lost vision of him?
A Huh?
Q You said you lost vision of him.
A Uh-huh.
Q Of Bobby?
A Uh-huh.
THE COURT: Try to say "yes" or "no."
A Yes, sir.
Q Did you see him running back with Nick Moore, or were you already headed out to go get the car?
A I saw him going with Nick, and I was running to the car.
Q Sprinted on out ahead. Where was your car parked?

A Right behind Deputy Moore's.
Q And where was Deputy Moore's patrol car?
A In the next driveway over.
Q And where was your car parked, there?
A Yes, right behind him.
Q So both of your cars were in the next-door neighbors' driveway?
A Yes.
Q Is that correct?
A Yes.
Q So there was only one patrol car at the Worley residence?
A Yes.
Q And where was it parked?
A In the yard.
Q Where at?
A I couldn't tell you exactly where in the yard.
Q At one point, you went out and got Nick Moore's phone, is that correct?
A Yes.
Q His phone was across in the Stevens' driveway?
A Yes.
Q All right. And you called in to 911?

A No, I took the phone to Nick.
Q Okay.
A And then I went back to my vehicle to get Bobby and Nick.
Q To get what?
A To get Bobby and Nick.
Q Okay. So you backed your car out of the Stevens' driveway, pulled down to the Worley driveway --
A Yes.
Q -- helped Nick load Bobby up?
A Yes.
Q And y'all went on up to the first responders?
A Yes, sir.
Q And they were right there -- is it Sandy Springs or Sandy Ridge?
A Yes, sir.
Q Right there?
A Yes, sir, they were already there.
Q Okay, all right. And what's your version?
A Huh?
Q What's your version of what happened?
A What's my version of what happened?
Q What happened that night?

A You want me to read the statement?
Q No, I want you to tell me what you remember. If you don't remember, that's fine.
A I do.
Q It's been some time.
A Yes, it's been a year and a half.
Q Okay. Do you feel comfortable enough to talk about it?
A Yes.
Q Okay, what happened?
A We arrived at the scene.
Q Okay.
A Knocked on the doors.
Q Who knocked on the doors?
A Nick.
Q Okay.
A Bobby talked to the next-door neighbors.
Q Okay.
A Nick knocked and announced again.
Q Okay.
A So a light had previously gone on and off.
Q While y'all were knocking or not knocking?
A I'm not really sure because he was the one who -- Nick was the one who told me the light came on.

Q He told you it came on and off?
A Yes, because I was watching Bobby as he was over at the Sheffields'.
Q Oh, okay. So you never saw the light come on or off?
A Not until the light came on when someone came out of the house.
Q All right, so the light came on, someone came out of the house. Then what happened?
A Then what happened?
Q Yes.
A Bobby was shot.
Q Okay. So the light came on, somebody came out of the house, and Bobby got shot?
A Yes. Nick stated, "Sheriff's Office," and I heard, "I don't give a fuck."
Q Okay.
A And that's when shots were fired.
Q Gunshots fired?
A Yes, sir, as Bobby was stepping out.
Q All right. So you never heard anybody say anything like "Who are y'all?" You didn't hear that, did you?
A No, I didn't.
Q And you didn't hear any statements about

"Put your gun down, put your gun down"?

A I did.

Q Oh, you did?

A Yes.

Q While ago in your statement, you didn't recall that?

A I don't have the statement right here in front of me.

Q All right. That wouldn't be important -- "Put your gun down, put your gun down"?

A Yes.

Q Who said it?

A Both.

Q How many times?

A I can't recall.

Q More than once?

A I guess it would have to be more than once. Nick said it, and Bobby said it.

Q Did they say it at the same time?

A I don't know.

Q When the word "gun" happened, how long was it between the word "gun" and the fired shots?

A It all seemed so fast.

THE COURT: All of it what, now?

A It all seemed so fast.

Q Between "gun" and the shot, was it about like bang -- "gun," bang? Was it like that, or was it longer?

A I can't recall. I don't know how fast it was.

Q Okay. You didn't know Bobby had been hit, is that right?

A Huh-uh.

Q Why? Is that a "no"?

A No, I did not. I did not realize he had been until Nick stated that he was shot. I saw him stumbling towards me, and so they ran. And it was when he laid down, he was on the ground, that I actually realized then.

Q That's when they were back behind the house?

A The bushes.

Q In the bushes, hiding and cover?

A Yes.

Q When you realized he had been hit?

A Yes.

Q I believe you said you saw where he had taken the shot where the bullet went in --

A Yes.

Q -- and maybe took off a finger?

A Yes, sir.
Q Okay. Do you know Worley?
A Huh?
Q Do you know Joe?
A No.
Q Do you have any reason to think he would be trying to kill you -- any motive to kill you?
A I have no idea, no.
Q All right. You never met him before?
A Not that I can recall.
Q Do you know Margaret, do you know Ms. Worley; his mom --
A No.
Q -- Ms. Mary?
A I met her that night.
Q Okay.
A But I wouldn't know her. I don't know her.
Q She was very cooperative, wasn't she?
A Yes.
Q She invited y'all into the house?
A I don't know. I didn't go in the house.
Q You didn't participate in that?
A I didn't go into the house until later.
Q Okay. You said you took the photographs?

A Uh-huh.
Q That's "yes"?
THE COURT: That's "yes"?
A Yes.
Q Whose camera did you use?
A The department's.
Q Did Bo Willis have a camera?
A Yes.
Q Is that his camera or a department camera?
A Two separate cameras.
Q So y'all use two separate cameras?
A Yes.
Q All right. And who took the photographs?
A I did.
Q All of it?
A No. I don't know what Bo took pictures of. I can't account for him.
Q You can't account for Bo Willis?
A No, I can't.
Q So you did part of the investigation, and he did the other part of the investigation?
A I have no idea. I did, yes. I'm guessing he did. I mean, I was there a little while with Bo, but I don't know what he did after I left.
Q What items of evidence did you pick up?

A What items of evidence did I pick up?

Q Yes, ma'am, and photographed -- that you bagged and photographed?

A The shells.

Q The shells?

A Yes, the shells and the ammo from Bobby's gun.

Q Okay. Where did you find the shells and the ammo from Bobby's gun?

A Throughout the yard.

Q Throughout the yard?

A Yes.

Q Have you looked at the drawing that's been prepared in this case by Bo Willis?

A No.

Q You haven't?

A No.

Q Have you read his report?

A No.

Q He draws a round -- basically, just a round area right there in front of the flower bed back to the porch, just around there, and it says "various items found in this area." Did you take any pictures of it as they lay on the ground? Did you take any pictures of that?

A Yes.

Q Okay. And what about the part that goes from the grass all the way up to the flower bed, did you take any pictures of that?

A I don't recall -- the flower bed, no, I didn't.

Q There was a piece of Bobby's gun that was found in that area. Did you find that piece?

A No.

Q Do you know who found that piece? Any idea?

A No.

Q You just found casings and shells?

A What I saw.

Q Did you find any distorted bullets or anything like that out there, do you recall?

A No, sir, I don't recall.

Q If you would have bagged that evidence, would you have put your initials on it?

A Yes.

Q You took a picture of it. Give me your procedure. What would you do?

A What would I do?

Q Uh-huh. How do you do it?

A How do I do it? I took the photograph and

took the paper and the ammo and put into the bag, sealed it, wrote my name, approximately where they were located.

Q Okay. Did you take a picture of it where it was located?

A Yes.

Q Okay. Did y'all use any GPS or anything like that?

A No.

Q And is there any reason why y'all didn't turn this thing over to SLED to have SLED investigate it for y'all?

A Can you say that again?

Q Any reason that your department, the Sheriff's Department -- was there any discussion as to why y'all didn't turn it over to SLED and let SLED investigate it?

A No.

MR. GARRETT: Nothing further.

THE COURT: Anything else?

MR. MYERS: No.

THE COURT: Thank you, ma'am. You may step down.

Any other witnesses?

MR. GARRETT: No, Your Honor.

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THE COURT: Is there anything further from you all?

MR. MYERS: No, sir.

THE COURT: You want to make your arguments tomorrow?

MR. GARRETT: Whatever you want to do is fine.

THE COURT: Do you all want to make your arguments tomorrow?

MR. MYERS: That would be good, Your Honor.

THE COURT: You all be here at noon tomorrow. Court is in recess until noon.

You all have Mr. Worley here tomorrow at noon, okay?

MR. GARRETT: Yes, sir.

THE COURT: All right.

-- End of Day --

Wednesday, June 1, 2011

THE COURT: I'm ready. What's your argument?

MR. HENDERSON: Your Honor, I'm Carson Henderson and Your Honor, I'd like to get this marked as a Court's exhibit. It's basically some applicable law.

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(Court's Exhibit 1A, applicable law prepared by the defense, was received in evidence.)

THE COURT: All right, go ahead.

MR. HENDERSON: Yes, sir, Your Honor, if it pleases the Court. The top documents in this packet, Your Honor, just bears proof that Deputy Rushton had quit the McCormick County Sheriff's Office and was rehired.

Your Honor, based on the testimony presented yesterday defense believes it made a prima facia showing that Deputy Rushton is not a qualified deputy of McCormick County, Your Honor.

And the documents attached, and I'll just flip through the documents, Your Honor, and this is based upon his sworn testimony yesterday. He said that to the best of his knowledge he'd never been approved by a circuit court judge since he's been rehired as a deputy. And Your Honor, that's code section 23-13-10 which is provided in this packet of materials.

Your Honor, this Deputy Rushton testified as well that he'd never given an oath of office as required by code section 23-13-20. But during his testimony the solicitor's office produced a bond,

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Your Honor. Actually, I've got it in my stack of materials.

But under 23-13-20 there are two oaths that are required for every deputy sheriff to be taken, Your Honor. The one that was provided to us was a constitutional oath which is required by section 26 of article 3 of the constitution. The one that he had not taken is the statutory oath and they are different oaths, Your Honor.

Under 23-13-20 -- and these oaths are required to be maintained by the Clerk of Court, Your Honor. And I've put the constitutional oath in here, Your Honor, and I've put a copy of the document introduced into evidence yesterday as the constitutional oath. But again, there is no statutory oath. And Your Honor, he never presented any evidence that he provided any bond, for whatever it's worth, Your Honor.

We believe that we have put forth a prima facia case that Deputy Rushton when all of this happened on November 15th 2009 was not a duly qualified deputy sheriff of McCormick County. And Your Honor, I would refer to code section 23-13-50 which talks about those exact words, "When duly qualified." It is our position that he wasn't duly

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qualified.

Your Honor, under these Castle Doctrine Motions, going back to this State vs. Duncan case that we provided to the Court yesterday, you must examine the Castle Doctrine Motion through the defendant's eyes. In this case this is a law that's designed to protect homeowners.

And the General Assembly has made it very clear that they are protecting the right of homeowners so I believe if you look through Mr. Worley's eyes about whether there's sufficient evidence in the record, more likely than not the Castle Doctrine was -- that he's entitled to the protection of the Castle Doctrine.

Your Honor, I've put this packet of material together, code section 16-11-420, "That homeowners have a right to expect to remain unmolested and safe within their homes and that no person should be required to surrender his personal safety to a criminal nor should a person be required to needlessly retreat in the face of intrusion or attack."

Your Honor, Mr. Worley was clear in his testimony. He thought he was being burglarized. He had heard of home invasions through media. His

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mother's property where he was at had been burglarized before and there had been an attempted burglary down there.

Mr. Worley testified heard this continuous door bell ringing in the middle of the night, early in the morning. He testified he heard no voices, and again this is in the house, heard no voices. He heard no door knock. And you heard the testimony his house was double insulated.

And you heard Mr. Worley testify that when he was looking out the upstairs sliding glass doors the only thing he saw was dark. He didn't see any light, didn't see any blue lights, didn't see anything flashing at all.

And Mr. Worley indicated he wasn't about to go downstairs and open up the ground floor door when it had no peep hole and no window. Plus there no windows downstairs at all, Your Honor. His only means to look out was this upstairs sliding door and he didn't see anything.

Your Honor, based upon Mr. Worley's testimony, at this point in the case, I believe under 16-11-440 he is entitled to the presumption that he believed somebody was in the process of unlawfully and forcefully entering his building or

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residence. And that there is evidence in the record to suggest that he knew or had reason to believe that an unlawful or forceful entry or act was occurring or was about to occur.

Your Honor, I think that at this point in the case I think he's entitled to this presumption. Now, you look at whether or not law enforcement is protection against Mr. Worley's presumption under the Castle Doctrine.

The first one is, Your Honor, under 16-11-440, and I've tried to break it down, that the first step the government has to prove is that Mr. Rushton was a law enforcement officer. And Your Honor, as we believe, we believe we put up a prima facia case indicating that he is not a qualified deputy sheriff of McCormick County.

But Your Honor, assuming and to play devil's advocate, which we're not conceding, but assume that he is a qualified deputy sheriff of McCormick County, the next issue is whether or not he attempted to enter a dwelling or residence. And Your Honor, by Deputy Rushton and Deputy Moore's own admission they were up under the roof of this porch or balcony ringing door bells and banging on the door.

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And under the Castle Doctrine the porch area and any area under the roof is included in your definition of residence and dwelling. So I believe we have that element that they were attempting to enter the residence, Deputy Rushton was attempting to enter the residence. And then the issue of in performance of his official duty again we maintain that there can be no official duty if you are not duly qualified to be a law enforcement office.

But without conceding that Deputy Rushton is not, assume that he is for a moment, that he's there in the performance of his official duty. The next issue is did he identify himself in accordance with applicable law.

Your Honor, again, going back to the evidence that's in the record Mr. Worley only heard the door bell prior to opening the door. He never heard any knocking, never heard any voices. Again, we're talking about prior to opening the door. Mr. Worley testified he didn't see anyone prior to opening the door, it was pitch black outside. And you heard evidence that this was the darkest night of November '09. Literally there was no moon that night, Your Honor.

Deputy Rushton has testified he was not

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wearing a departmental issued uniform. In fact, he bought these clothes someplace himself and was waiting on his uniform to come in. Your Honor, you heard testimony from Deputy Rushton that he wasn't wearing a hat, that law enforcement officers typically wear.

And of course, if he didn't wear a hat he didn't have badge on that hat he's not wearing and Your Honor, you've heard testimony that he wasn't wearing any clothing marked sheriff's department or law enforcement, police, anything along these lines. And you've heard testimony that Deputy Rushton was wearing no florescent clothing.

Your Honor, at the back of this material I've produced code section 23-23-10 and all the subsequent statutes that deal with law enforcement training. Your Honor, actually this is the legislation that created the South Carolina Criminal Justice Academy and made it a stand-alone entity from the Department of Public Safety.

And I've underlined various portions of this law, Your Honor, that says the purpose of this criminal justice academy is to train law enforcement officers. That we're setting standards for law enforcement service, that we shall provide

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facilities and training for officers. So the law is very clear that we've got an agency here in South Carolina, the Criminal Justice Academy that's sole duty is to train police officers in proper procedure and policies.

Your Honor, yesterday Dr. Kirkham, our expert witness, testified that in his professional opinion, that all this was a shots fired, a gun call, that the prudent way to do this, the acceptable way to do this would have been Deputy Rushton either have dispatched, called the Worley residence -- Your Honor, the Worley's phone number was in the county phone book at this time.

Or the proper thing would be for Deputy Rushton once he got the number to call the Worley residence. Wake them up, let them know law enforcement is outside and wants to talk to them. And then if that didn't work Dr. Kirkham said Deputy Rushton should have used his squad care PA loudspeaker system, some sort of bull horn to wake the people up if you truly wanted to talk to them.

And at that point in time, when you're making this contact, with the Worleys, turn on your blue lights. You could have blared your siren. You would have made these people wake up and come out of

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the house and come to you.

Now, Your Honor given -- there's been a lot of factual dispute about what was said after Mr. Worley came outside on November 15th 2009. And Your Honor, I submit to you, it really doesn't matter what was said.

Everybody's got a different remembrance about what was said or not said. But according to Dr. Kirkham that if anything was said the actions of Deputy Rushton and these other deputies did not match up with what Mr. Worley saw.

He's looking at the darkness. He doesn't see any blue lights. He doesn't hear sirens. All me sees is somebody in his yard with a small flashlight that he testified he believed was a burglar's flashlight. He saw Mr. Rushton not dressed in a uniform. And most importantly, he saw Deputy Rushton aiming a fire arm at him, going to kill him.

Deputy Rushton testified to that, that he intended on shooting him. I can only assume that he was going to shoot Mr. Worley, going to shoot him to kill him. That's what Mr. Worley saw that night, Your Honor. Regardless of what got said, anything he could see did not match up with what, you know,

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what words of anything he heard didn't match up with what he was seeing.

And you heard Dr. Kirkham testify that in his professional opinion that Deputy Rushton and other law enforcement officers did not announce themselves in accordance with applicable law, which includes no applicable policies and procedures taught by the South Carolina Criminal Justice Academy.

And Dr. Kirkham testified that to his professional opinion that a reasonable homeowner or a person inside a home, inside Mr. Worley's position that night, would not have known that Deputy Rushton was a law enforcement officer.

And Your Honor, the Castle Doctrine here under 16-11-450 -- again, I submit to the Court that the Court looks at this through Mr. Worley's eyes, through the homeowner's eyes. And more likely than not was he justified in doing what he did.

Your Honor, under 16-11-450 not only do we submit that Mr. Worley is entitled to protection under the Castle Doctrine statute but that code section also incorporates any other applicable provision of law that justifies a homeowner in using deadly force.

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Your Honor, we would submit this is flatly the case of self defense. We would submit this is a classic case of defense of habitation. But also that Mr. Worley had the right to resist an unlawful arrest assuming that Deputy Rushton is in fact a qualified deputy. Your Honor, I believe pointing and aiming a firearm at you is the most effective means of arrest that can be out there.

And also Code section 17-13-20 that Mr. Worley has the absolute right in the nighttime to arrest a person that he believes is felon. And Your Honor, we would submit that under all of these various statutory rights and or common law case law -- and in Your Honor's notebook we provided yesterday there is plenty of law on all of these issues.

We would submit that Mr. Worley has proven looking through his eyes more likely than not that he is entitled to protection of the Castle Doctrine. And we would ask, Your Honor, that the indictment be dismissed against Mr. Worley.

THE COURT: Solicitor?

MR. MYERS: Your Honor, the defense of habitation and/or the Castle Doctrine is all based on reasonableness. The word "reasonable" appears

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throughout the Doctrine itself. 16-11-420 section (d) says, "The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers."

Subsection (e) says, "The General Assembly finds that no person or victim of a crime should be required to surrender his personal safety to a criminal. Nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." That's in the first part.

In 16-11-440 (a) (1) talks about a person using deadly force in a home if the person against whom the deadly force is used is in the process of unlawfully and forcefully entering.

Subsection (a) (2) says that the person who uses deadly force knows or has reason to believe that an unlawful and forcible entry is occurring or has occurred.

Throughout this, Your Honor, it talks about attacks, intrusions, or attackers and intruders. And to come under the statute, the action of the people outside the property must be unlawful, and they must be forcibly entering. There's no evidence to support that. There's no

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evidence anywhere.

The officers were out there lawfully. They were responding to a complaint of a weapon being fired between three and four o'clock in the morning. They were out there to try to calm things down, to stop disturbing the peace, interfering with the neighbors' lives.

Now, there were three duly qualified, sworn, certified deputies out there. And it doesn't say he's not a deputy, Your Honor. That's an administrative thing. He has taken the oath of office, he has been to the academy, he trained officers in Iraq. He is a qualified deputy.

Coming down, Your Honor, to 16-11-440 subsection (d), the presumption provided in subsection (a) does not apply, Castle Doctrine does not apply, if the person against whom deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied building, in the performance of his duty, and he identifies himself in accordance with applicable law, or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

Here again, there's nothing unlawful. And

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we submit to you that this is an "or" in subsection (4). It's not an "and," it's "or," that he officer identifies himself in accordance with law. Or that the homeowner reasonably should have known the person entering or attempting to enter was a law enforcement officer.

They weren't out there unlawfully. They were out there performing their sworn duty. Again, Your Honor, in the same act, in 16-11-450, subsection (a), "A person who uses deadly force as permitted by the belief in this argument or another capital belief or argument is justified in using deadly force and is immune from criminal prosecution in a civil action for the use of deadly force unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his duties and he identifies himself first under the applicable law. Or, again, if the person using deadly force knows or reasonably should have known that the person was a law enforcement officer."

We submit to Your Honor, first of all, the main part of 440 does not apply because they have to show that whatever these officers did was unlawful and there was force used to enter or attempt to enter.

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In Duncan, it cites Fair versus the State of Georgia, 702-SE2nd-420, a 2010 case. That's what they did in this case. They cover that case, which our Supreme Court says it's a similar statute. The Court majority says they can plead that under this that the requirement that the entry or attack must in fact be unlawfully or for the use of threat before it can justify it with the defense of habitation.

Therefore, they have failed to begin with on the main part of the statute. They were obviously there lawfully. No force was used whatsoever.

The second thing, Your Honor, is these officers out there in their capacity identified themselves as law enforcement officers. That's a jury issue. The defendant says he didn't know. The officers said, "We were shouting, screaming, banging on the door, ringing the bell."

Even the next-door neighbors way over across the path over there heard this. I can't believe the man's living in a sound-proof house and he can't hear people talking. That defies common sense.

It's a jury question as to that, of them

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identifying themselves. It's also a jury question, Your Honor, as to whether the defendant reasonably should have known that the person entering or attempting to enter, neither of which occurred, is a law enforcement officer. And I think the clearest thing we have is he knew, because when they said "Sheriff's Department," he said, "I don't give a blank." He didn't. He didn't really care.

He said he's been asleep since 11 or 12. Well, that's disputed by the neighbors next door, when the shots occurred 15 or 20 minutes apart, three and four o'clock in the morning. The officers get out there about four. They were performing their duties.

We submit to you, Your Honor, the Castle Doctrine was not enacted to prevent officers from carrying out their duties. The officers were carrying out their duties.

They identified themselves, they were lawfully there, there was not even an attempt to enter the Worley residence. They were knocking on doors, ringing bells. And they can come in with the Monday morning quarterback and play hindsight all they want to. They facts are the facts.

The officers weren't out there to arrest

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anybody. They go out there, and they would say, "Let's stop all this foolishness. Let's stop this shooting in the middle of the night. Let's have peace in the neighborhood." They were peace officers trying to restore peace. We submit to you this is an issue for the jury, that the Castle Doctrine does not apply.

THE COURT: All right, is there any reply?

HENDERSON: Very briefly, Your Honor. I think it's the government that's looking at this in hindsight, Your Honor. Mr. Worley has testified about his perceptions that night.

And of course, now we know Mr. Worley knows that some of the perceptions he made that night were wrong, they were inaccurate. But, Judge, you look at this more likely than not through the defendant's eyes while this was happening.

I mean, this is something that we can't Monday morning - of course, we Monday morning quarterback about it now. But that night, there was no time. Mr. Worley has testified about what he reasonably believed, based upon what he was hearing and seeing at that point. Your Honor, I think that's got to be very clear.

And as for this Georgia case, Fair vs.

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State, Georgia has a somewhat different Castle Doctrine than we do, Your Honor. And plus, in that case, there was a no-knock warrant being served. And the Georgia Supreme Court says because there was a warrant being served that the deputies could not be trying to enter the house unlawfully.

That's why we made it very clear in this case, Your Honor, that Deputy Rushton had no warrant. They did not have any lawful right to enter that house to get anybody.

Your Honor, in looking through Mr. Worley's eyes here, there is ample evidence in the light most favorable to him, more likely than not, that he believed that somebody was unlawfully and forcefully trying to enter his house to do something to him.

And, Your Honor, in talking and going back to the issue about whether or not Deputy Rushton is a qualified law enforcement officer, under the statute I've given you it talks about oaths, and it talks about going in front of the circuit judge. These are "shall," these are not permissive statutes. These are mandates, and from his own testimony he has not been through what the law mandates before he can duly discharge any duties as

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a deputy sheriff.

THE COURT: Anything else, Solicitor?

MR. MYERS: No, sir.

THE COURT: I'll notify you of my decision in writing. Thank you.

MR. MYERS: Thank you.

MR. HENDERSON: Your Honor, may I be heard on one other matter?

THE COURT: Sure.

MR. HENDERSON: Your Honor, we would like to renew our motion for bond. Your Honor, we previously made several motions that the Court has denied based upon the government's allegation that Mr. Worley is a menace and a danger to the community.

Your Honor, I believe the testimony that came out yesterday told a totally different side of the story. Yesterday was Mr. Worley's chance to get up in court and put forth evidence about what he says happened through his eyes.

Your Honor, we believe that just totally paints a whole different picture. Your Honor, we've repeatedly asked for a speedy trial in this matter, and again the government opted to have this Castle Doctrine hearing at the same time that they wanted

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to have the trial.

I know this Duncan case has just come down. I think it has given us a lot of guidance under these Castle Doctrine cases. I have a feeling this case is going to give us some more guidance from the appeal courts level.

Your honor, but based upon what the Court heard yesterday, we would submit that Mr. Worley should be entitled to a reasonable bond. And, Your Honor, as we have suggested to the Court before, we have no problems if the Court put him under house arrest at his primary home in Aiken County and that he can't come to McCormick County unless he is here on court business or visiting one of his attorneys.

And, Your Honor, if you wanted him to report to the Aiken sheriff, Aiken probation, whoever, we will consent to any requirements that the Court put on him. But, Your Honor, Mr. Worley has now been incarcerated for 18 months, and we believe that yesterday hopefully shed a different light on what went on at his mother's residence on the night of November 15, 2009.

THE COURT: Does the State wish to be heard?

MR. MYERS: The State takes the same

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position they have previously as to the dangers of that, Your Honor.

THE COURT: I'll notify you of that decision in writing as well.

MR. HENDERSON: Thank you, Your Honor.

THE COURT: Thank you very much.

--End of Transcript of Record--

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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

232

OATH FOR COUNTY AND STATE OFFICERS

COPY

1. Immediately return this completed, notarized oath form to:

Secretary of State Jim Miles
Post Office Box 11350
Columbia, South Carolina 29211
Attention: Spencer Hewitt

2. Print your name, the office to which you have been appointed/elected, and your mailing address plainly. Make each letter plain and distinct.

NAME: Robert Edward Rushton

APPOINTED OFFICE: Deputy Sheriff - McCormick Co.

MAILING ADDRESS: P.O. Box 123 McCormick SC

TERM TO EXPIRE: Pleasure of Sheriff

State of South Carolina
County of McCormick

First, I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been elected (or appointed), 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.

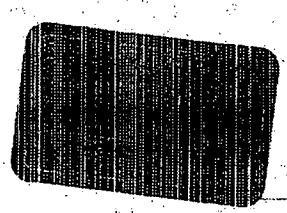
So help me God.

Sworn to and subscribed before me this
02 day of Nov., 2009

Robert E Rushton
Signature of Appointee

Katherine P Butler
Notary Public of South Carolina

My Commission Expires 07-22-19



VOLUNTARY STATEMENT

DATE 11-15-2009 TIME 0755 A.M. PLACE McCORMICK COUNTY SHERIFF'S OFFICE

I, DEPUTY NICHOLAS MOORE, am 31 years old and I live at 368 HWY 284 ABBEVILLE SC 29620

I am giving this statement to GEORGE REID I.D. _____, who has identified himself as SHERIFF GEORGE REID OF McCORMICK COUNTY and he has duly warned me that I have the following rights: that I have the right to remain silent and not make any statement at all; that any statement I make may be used against me at my trial; that any statement I make may be used as evidence against me in court; that I have the right to have a lawyer present to advise me prior to and during any questioning; that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and that I have the right to terminate the interview at any time.

Prior to and during the making of the statement, I have and do hereby knowingly, intelligently, and voluntarily waive the above explained rights and I do make the following voluntary statement to the aforementioned person of my own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomsoever:

SEE ATTACHED STATEMENT

NOM

NOM

NOM

NOM

I have read this statement consisting of _____ page(s), each page of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct.

N.O.M.
Signature of person making voluntary statement

The above warnings were given by and this voluntary statement was taken by

PFC Jesse Wideman MPD
Witness

GEORGE REID
(This must be one and the same person as named above)

NOM
LOCATED IN THE COUNTY OF MCCORMICK ON NOVEMBER 15, 2009 SHERIFF'S DEPUTIES WERE DISPATCHED TO PRESIDENTS DR. FOR A COMPLAINT OF A LOUD DISTURBANCE. THE CALLER ALAN SHEFFIELD WHO LIVES AT 130 PRESIDENTS DR. TOLD DISPATCH THAT HIS NEIGHBOR WAS OUTSIDE YELLING AND SHOOTING A GUN. DEPUTIES RUSHTON, MOORE AND MCALLISTER ALL RESPONDED TO THE CALL. UPON ARRIVAL DEPUTIES LOOKED FOR THE SUBJECT AT THE FRONT OF THE RESIDENCE. THE SUBJECT WAS BELIEVED TO NO LONGER BE OUTSIDE. DEPUTY RUSTON WENT OVER TO 130 PRESIDENTS DR. AND SPOKE WITH THE CALLER. I (DEPUTY MOORE) WENT TO THE DOOR AND RANG THE DOORBELL AND KNOCKED. AFTER SEVERAL SECONDS I RANG THE DOORBELL AND KNOCKED AGAIN. AFTER SEVERAL MORE SECONDS WITH NO RESPONSE I STARTED TO LEAVE THE RESIDENCE. I ADVISED THE OTHER DEPUTIES OF THAT ALSO. WHILE LEAVING WE NOTICED THAT THE PORCH LIGHT CAME ON. I THEN ANNOUNCED SHERIFF'S OFFICE AND THE LIGHT WENT OFF. I THEN KNOCKED ON THE DOOR AGAIN AND THE LIGHT CAME BACK ON AND I DID HEAR THE DOOR UPON FROM THE UPPER DECK OF THE RESIDENCE. I ONCE AGAIN ANNOUNCED SHERIFF'S OFFICE AND THEN HEARD THE SUBJECT SAY " WHAT DO YALL WANT". I THEN ANNOUNCED AGAIN SHERIFF'S OFFICE AND THE SUBJECT YELLED " I DON'T GIVE A FUCK"! DEPUTY RUSHTON THEN YELLED "GUN" I THEN DREW MY WEAPON AND NOTICED THAT RUSHTON HAD ALSO DRAWN HIS WEAPON. THEN I HEARD A GUNSHOT AND SAW RUSHTON GO DOWN. RUSH STATED THAT HE HAD BEEN HIT. RUSHTON THEN MADE IT TO ME AND WE BOTH FOUND COVER. DUE TO THE FACT THAT WE WERE IN AN UNKNOWN LOCATION I WANTED TO GET RUSHTON AND MYSELF AWAY FROM THE RESIDENCE. WE STARTED TO CREATE DISTANCE BETWEEN US AND THE SHOOTER. I ADVISED DEPUTY MCALLISTER TO GET HER VEHICLE AND COME AROUND TO GIVE US COVER. RUSHTON AND I FOUND CONCEALMENT BEHIND SOME BUSHES IN THE BACK YARD. I THEN ASKED RUSHTON IF HE WAS OK. HE STATED YES I NOTICED THAT HE HAD BEEN SHOT IN THE HAND. MYSELF AND RUSHTON STAYED BEHIND THE BUSHES FOR SEVERAL SECONDS. I WAS CONTINUING TO LOOK FOR THE SHOOTER WHILE ATTEMPTING TO AID RUSHTON. WE THEN HEARD THE SHOOTER SAY " WHERE YOU AT YOU SON OF A BITCH" RUSHTON AND I THEN STARTED TO MAKE MORE DISTANCE BETWEEN THE SHOOTER AND US. WE ARRIVED ABOUT 300 YARDS FROM THE RESIDENCE AND DEPUTY MCALLISTER MET US WITH HER PATROL CAR. DEPUTY MCALLISTER AND I GOT BOBBY INTO THE BACK SEAT OF THE PATROL CAR AND CARRIED HIM TO THE MAIN HIGHWAY TO MEET WITH EMS WORKERS. WHILE EMS WAS TREATING RUSHTON I CALLED THE SHERIFF AND CHIEF DEPUTY AND ADVISED THEM OF THE SITUATION. THEY BOTH ADVISED THAT THEY WERE HEADED OUR WAY. EMS LOADED RUSHTON INTO THE AMBULANCE AT LEFT. THE SHERIFF, MYSELF AND DEPUTY MCALLISTER THEN WENT BACK TO SECURE THE SCENE. UPON ARRIVAL BACK AT THE SCENE WE SAW TWO SUBJECTS IN THE YARD WALKING AROUND WITH A NOM

NOM

FLASHLIGHT. I TOOK COVER BEHIND A PATROL CAR AND THE SHERIFF. CALLED OUT TO THE SUBJECTS. THE SUBJECTS STARTED COMING TOWARDS US AND I TOLD THE SHERIFF TO WATCH THE FUCKERS. OFFICER WIDEMAN HAD THEN ARRIVED AT THE SCENE AND I TOLD HIM TO GET READY AND TO GET HIS SHOTGUN. THE SUBJECTS CAME UP AND DID NOT APPEAR TO BE ARMED. THE SHERIFF, MCALLISTER, WIDEMAN AND I APPROACHED THE SUBJECTS AND THE MALE SUBJECT STATED THAT THE GUN WAS IN THE PATROL CAR. THE SHERIFF ASKED WHO DID THE SHOOTING AND THE MALE SUBJECT STATED HE DID. I ALSO NOTICED THAT HE WAS THE GUY THAT I SAW ON THE PORCH WHEN RUSHTON WAS SHOT. I THEN PLACED THE SUBJECT UNDER ARREST. HE THEN STATED AGAIN THAT THE GUN WAS IN THE PATROL CAR. I ASKED WHICH GUN AND HE STATED THE DEPUTIES GUN. HE WAS THEN TRANSPORTED TO THE COUNTY JAIL BY OFFICER WIDEMAN. THE FEMALE THAT WAS WITH HIM WAS HIS MOTHER AND SHE WAS ASKED WHERE THE GUN WAS THAT HE HAD SHOT. SHE STATED SHE DIDN'T KNOW. SHE GAVE DEPUTIES PERMISSION TO GO IN AND LOOK FOR IT. UPON GOING INTO THE RESIDENCE DEPUTIES FOUND A LOADED 30-06 REMINGTON RIFLE WITH THREE ROUNDS IN THE MAGAZINE AND ONE IN THE CHAMBER. DEPUTIES SECURED THE WEAPON AND TOOK IT INTO EVIDENCE. DEPUTIES ALSO NOTICED EMPTY 30-06 SHELL CASINGS ON THE PORCH. THEY WERE ALSO TAKEN INTO EVIDENCE. DEPUTY MCALLISTER THEN PROCESSED THE SCENE AND COLLECTED ALL EVIDENCE. NOM

DEPUTY N. O. MOORE

N. O. Mo

Victim # 3 Case#2009-11-25

VOLUNTARY STATEMENT

PG 1

DATE 11/15/09 TIME 7:45 AM PLACE MCSO

I, Melissa McAllister, am 28 years old and I live at 2021 Whitetown Road, McCormick SC 29835

I am giving this statement to MCSO I.D. _____, who has identified himself as a _____

and he has duly warned me that I have the following rights: that I have the right to remain silent and not make any statement at all; that any statement I make may be used against me at my trial; that any statement I make may be used as evidence against me in court; that I have the right to have a lawyer present to advise me prior to and during any questioning; that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and that I have the right to terminate the interview at any time.

Jr's Statement attached

Prior to and during the making of the statement, I have and do hereby knowingly, intelligently, and voluntarily waive the above explained rights and I do make the following voluntary statement to the aforementioned person of my own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomsoever:

On 11/15/09 @ approx 4:00am officers responded to a call regarding a noise complaint (from a neighbor) stating the subject Joe Worely was yelling & firing shots @ his house. When officers arrived on scene we noticed that the back side of the house had no doors or exits so we proceeded down the rite side of the house to the door to attempt to make contact w/ the subj. Dep Moore was the lead contact officer & I stayed behind him. Dep moore against the right side of the building. Dep moore knocked on the bottom door & announced "Sheriffs Office!" No one came to the door. I'm unaware of where Dep. Rushton was at the time but when no one answered the door Dep. Rushton went to the neighbors to ask questions & Dep Moore & I went towards the back of the house to wait for Dep. Rushton. While Dep Rushton was walking back to us the porch lite outside came on. We then tried to make contact w/ the subj. again. Dep Rushton went to the front of the house under the deck, Dep moore to the rite side of house next to steps & door, & I behind

I have read this statement consisting of 3 page(s), each page of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct.

Melissa M. McAllister

Signature of person making voluntary statement

The above warnings were given by and this voluntary statement was taken by

PFC Stacie Wideman MPD

Witness

(This must be one and the same person as named above)

VOLUNTARY STATEMENT

Pg 2

DATE _____. TIME _____M. PLACE _____

I, _____, am _____ years old and I live at _____ 11/15/09

I am giving this statement to _____ I.D. _____, who has identified himself as a _____

and he has duly warned me that I have the following rights: that I have the right to remain silent and not make any statement at all; that any statement I make may be used against me at my trial; that any statement I make may be used as evidence against me in court; that I have the right to have a lawyer present to advise me prior to and during any questioning; that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and that I have the right to terminate the interview at any time.

Prior to and during the making of the statement, I have and do hereby knowingly, intelligently, and voluntarily waive the above explained rights and I do make the following voluntary statement to the aforementioned person of my own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomsoever:

Nick positioned to the rite side of the house. ~~He came back on~~ Dep Moore then knocked + announced again. We could hear Someone moving in the house + then the porchlite came back on + the Subj stepped out side. Dep Rushton stepped out into the yard + Im guessing was momentarily blinded by the flood lites + when he was able to focus he saw that the Subj had a gun. Dep Rushton told him to drop the gun + Dep Moore + Il drew our guns + Dep Moore told him drop the gun. Dep Moore was away from one side of the house w/ gun drawn to Subj + Il was away from rite side of house moving towards Dep Moore w/ gun drawn up @ Subj. Then Il heard one shot + Il saw Subj gun casings fall + Il thought Dep Moore had fired a shot @ the subj. Il saw Il lost visual of Dep Rushton + saw Dep Moore retreating back so Il then retreated to the back of the house to try + tell "Shots fired" My radio wasn't getting out (walkie) So Il ran to the car to to call dispatch.

3

I have read this statement consisting of _____ page(s), each page of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct.

_____
Signature of person making voluntary statement

The above warnings were given by and this voluntary statement was taken by

_____ _____

Witness (This must be one and the same person as named above)

Pg3

VOLUNTARY STATEMENT

DATE 11/15/09 TIME 8:30 am M. PLACE

I, Melissa M. McAllister, am 30 years old and I live at

I am giving this statement to _____ I.D. _____, who has identified himself as a _____

and he has duly warned me that I have the following rights: that I have the right to remain silent and not make any statement at all; that any statement I make may be used against me at my trial; that any statement I make may be used as evidence against me in court; that I have the right to have a lawyer present to advise me prior to and during any questioning; that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and that I have the right to terminate the interview at any time.

Prior to and during the making of the statement, I have and do hereby knowingly, intelligently, and voluntarily waive the above explained rights and I do make the following voluntary statement to the aforementioned person of my own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomsoever:

I positioned myself in the apex of the vehicle & called 911. ~~[illegible]~~ I then hear Dep Moore yelling Dep Rushton had been shot & I saw Dep Rushton laying on ground & dep. moore protecting him & looking out for the subj. They were behind the fire pole & scrubs. Dep. moore told me to call for ambulance. I called Shots fired, officer down, needems. Dep moore asked for his phone I got it out of his car & ran back to Dep Moore & Rushton. Dep Rushtons hand was injured & looked like he had two holes in his hand & a finger missing. I retreated back to my car & picked up Dep Moore & Rushton so that we could get dep Rushton to safety (ems) & we could wait for back up & get a plan together. We return after Rushton went w/ ems & subj surrendered. Evidence tagged & collected. Photos taken of scene.

For pg 2 when subj did step out onto top deck & Dep moore said Sheriffs office subj did state I don't give a fuck ~~[illegible]~~

I have read this statement consisting of 3 page(s), each page of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct.

Melissa M. McAllister

Signature of person making voluntary statement

The above warnings were given by and this voluntary statement was taken by

PFC Jesse Wideman #PD

Witness

(This must be one and the same person as named above)

On 11/15/09 at approx. 4:00am officers responded to a call regarding a noise complaint from a neighbor stating the subject Joe Worely was yelling & firing shots at his house. When officers arrived on the scene we noticed that the backside of the house had no doors or exits so we proceeded to the back & down the right side of the house to the front door to attempt to make contact with the subject. Deputy Moore was the lead contact officer & I stayed behind him (Dep Moore), as the cover officer, moving down against the right side of the building. Dep. Moore knocked on the bottom door & announced "Sheriffs Office". No one came to the door. I'm unaware of were Dep. Rushton was at the time but when no one answered the door Dep. Rushton went to the neighbors house to ask questions & Dep Moore & I went back towards the back of the house to wait for Dep Rushton. While Rushton was walking back to us the porch light cut on & off. We then tried to make contact with the subject again. Rushton went to the front of the house under the deck, Moore to the right side of house next to steps & door, & I was behind Moore approx 4-5ft back positioned to the right side of the house by the trashcans. Moore then knocked & announced again. We could hear someone moving in the house & then top porch light came back on & the subject stepped outside onto the top deck. When the subject stepped out on the upper deck & Dep Moore announced "Sheriffs Office" again & the subject stated, " I don't give a fuck". Dep Rushton stepped out into the yard & I'm guessing was momentarily blinded by the floodlights & when he was able to focus he saw that the subject had a gun. Rushton told him to drop the gun & Moore & I drew our guns. Moore told him to drop the gun. Moore was away from the right side of the house with gun drawn up to subject & I was away from the right side of the house moving towards subject Dep Moore w/ gun drawn up @ the area the subject was at although I did not have a visual sight of the subject. Then I heard one shot & I saw shell (gun) casings fall & I the heard another shot & thought that Moore had fired a shot. I did not have a visual of the subject at the time. I lost visual of Rushton & saw Moore retreating back so I then retreated to the back of the house to try to tell dispatch "shots fired'. My radio (walkie) wasn't getting out as I was running & trying to transmit. So I continued running to the car to call dispatch. I positioned myself in the apex of the vehicle & called back to dispatch. I then heard Dep Moore yelling Rushton had been shot; I didn't realize that Rushton had been shot until that point. I saw Rushton laying on ground behind bushes &

Moore w/ him protecting him & looking for the subject. They were behind the light pole & scrubs. Moore told me to call for ambulance. I called "Shots fired, officer down, need EMS." Moore asked for his phone. I got his phone out of his car & ran back to Moore & Rushton. Rushtons hand was injured & looked like he had two holes in his hand & a finger missing. I retreated back to my car & drove out to pick up Moore & Rushton so that we could get Rushton to safety (EMS) & we could wait for backup & get a plan together. We returned after Rushton went w/ EMS & subject surrendered to sheriff & Moore. Evidence was tagged & collected. Photos taken of scene.

Sworn statement of Sara Melissa Hegler McAllister.

A. Melissa H McAllister
11/15/09 9:44pm

Witness

VOLUNTARY STATEMENT
(NOT UNDER ARREST)

PAGE NO. ____ OF ____ PAGES

I, ALAN SHEFFIELD, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Deputy Brock M.H. MCSO. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

Ph. ____

I am 59 years of age, D.O.B. 8/28/50 and I live at 130 PRESIDENTS DRIVE

ON 11/15/09 AT APPROXIMATELY 3:15AM I HEARD WHAT SOUNDED LIKE A GUNSHOT. I LOOKED OUT MY WINDOW AND NOTICED THAT THE WORLEY'S DECK LIGHT WAS ON. THE GUNSHOT SOUNDED LIKE IT WAS COME FROM THAT DIRECTION. ABOUT 15 MINUTES LATER I HEARD ANOTHER GUNSHOT AND HEARD JOE TALKING LOUDLY. SHORTLY AFTER THE SECOND SHOT, THE LIGHTS WENT OFF AND THE TALKING STOPPED. ABOUT 15 MINUTES LATER THE LIGHTS CAME BACK ON AND THE TALKING STARTED AGAIN. AT THAT TIME I DECIDED TO CALL THE POLICE.

THE POLICE ARRIVED ABOUT 4:30AM. 3 CARS ARRIVED - 2 WENT DOWN WORLEY'S DRIVEWAY AND I WENT DOWN THE NEXT DRIVEWAY (STEVENS) ABOUT 5 MINUTES LATER AN OFFICER CAME TO OUR HOUSE AND ASKED WHAT THE ~~PROBLEM~~ PROBLEM WAS. I DESCRIBED THE EVENTS. DURING THAT CONVERSATION OTHER OFFICERS WERE KNOCKING ON WORLEY'S DOOR IDENTIFYING THEMSELVES AS SHERIFF'S OFFICERS. WHEN THE PORCH LIGHT WAS TURNED ON, THE OFFICER THAT I WAS TALKING TO EXCUSED HIMSELF AND WENT BACK TO THE WORLEY'S. I WENT BACK INSIDE MY HOUSE AND WAS WATCHING FROM THE KITCHEN. I SAW AN OFFICER AT THE BACK OF WORLEY'S HOUSE LOOKING UP TOWARDS THE DECK. I THEN HEARD A GUNSHOT AND SAW THE OFFICER FALL BACK. ~~AS~~ AS I THEN HEARD ANOTHER GUNSHOT AND SAW THE OFFICER RUN TOWARDS THE FRONT OF THE HOUSE

AS 11/15/09

11/15/09 AS

I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, ny, bear my initials, and I certify that the facts contained herein are true and correct.

Dated at 130 PRESIDENTS DRIVE this 15 day of NOVEMBER 2009

WITNESS Brock MH MCSO

Signature of person giving voluntary statement

WITNESS: ____

VOLUNTARY STATEMENT
(NOT UNDER ARREST)

PAGE NO. ____ OF ____ PAGES

I, Gayle Sheffield, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Deputy Brock-MA MCSO. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

Ph. 391-2431

I am 62 years of age, D.O.B. 1-11-1947 and I live at 130 Presidents Drive

On the morning of Nov. 15 at about 3:30 AM I was awaken by the sound of a gunshot. We also heard some loud talking. About 15 mins. later we heard another gunshot and more talking. My husband + I were concerned and called the police. This has happened before + sometime this September, the Thursday after Labor Day, we were awakened by 3 gunshots. These shots began around 2:00 AM + continued about every half hour.

We had been having a problem with our neighbor Joe Worley, for quite sometime. He would sit outside on his porch in the middle of the night + talk at the top of his voice. It would wake us up in the early morning hrs., sometime 2 or 4 AM. We never complained until last Sept. when we heard gunshots. Not wanting to cause a problem with the neighbors, we decided not to call the police, but instead talk to Joe's Mother, Margaret, about her son's behavior. She said he didn't do anything in terms of shooting a gun. Instead, she said the neighbors shot a deer. We confirmed with the neighbors, Bill Stevens, that no one was there + certainly didn't shoot deer in the middle of the night. I did report the shooting to the Sheriff on Friday.

Ever since then, at least once every weekend, we hear a shot, but still have not reported it — Last night we heard gunshots again + were concerned enough to call the police — They came out to take a look + we heard 2 shots — An officer had been shot. [illegible]

I have read each page of this statement consisting of ____ page(s), each page of which bears my signature, and corrections, I may bear my initials, and I certify that the facts contained herein are true and correct.

Dated at November 15, 2009, this ____ day of ____

WITNESS: Brock-MA MCSO

Gayle Sheffield
Signature of person giving voluntary statement

WITNESS: ____

Statement of Sheriff George H. Reid — November 16, 2009

RE: Arrest of Deputy Shooting Suspect

On Sunday morning, November 15, 2009, at approximately 4:50am, I was called and told that one of my officers, Bobby Rushton, was a victim in a shooting incident on Holiday Road here in McCormick County. Before I could get dressed, Deputy Nick Moore called me by cell phone and told me that Bobby had gotten shot and they needed help as soon as possible. At approx. 4:53 upon approaching the area, I saw the EMS unit parked on side of the road of 378 West.

I then got with Deputy Nick Moore and we went to the residence, as we got out the car and proceeded to walk down to the residence, it was dark and I noticed two subjects walking towards us with flashlights. Upon approaching suspects, I thought that the two were to ones who had made the complaint of the disturbance. I then told them not to shine flash light in my face, I then asked them; " who are you?" and the male asked me who I was and I identified myself as being Sheriff Reid. By this time we were face to face. He then told me that he put my deputy's gun in his patrol car. I asked him who was doing the shooting down here and he told me he was. I then asked him did he know that he shot the deputy and he stated; "The Deputy didn't have any business ringing my doorbell". We then placed him under arrest after he made that statement and he was transported to the County Detention Center by Officer Jessie Wideman of the McCormick Police Department. At this time, I spoke with his mother who lives at the residence, I asked the mother if she would give us consent to go into her home to locate the weapon and she did. At this time Deputy Nick Moore, Deputy Melissa Heigler McCallister and I entered the home and discovered the rifle was located under the couch on the floor in the den area. The rifle was seized for evidence.

George H. Reid

George H. Reid, Sheriff

Date: 11-16-09

Witness

Westlaw

Code 1976 § **23-13-20**

C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 23. Law Enforcement and Public Safety
Chapter 13. Deputy Sheriffs Generally
Article 1. General Provisions
→ **§ 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.

CREDIT(S)

HISTORY: 1962 Code § 53-77; 1952 Code § 53-77; 1942 Code §§ 3488, 3494; 1932 Code §§ 3488, 3494; Civ. C. '22 §§ 2033, 2039; Civ. C. '12 § 1147; Civ. C. '02 § 831; G. S. 654; R. S. 714; 1870 (14) 332; 1880 (17) 4; 1912 (27) 865; 1981 Act No. 105, § 1.

LIBRARY REFERENCES

Sheriffs and Constables ⚿ 19.
Westlaw Topic No. 353.
C.J.S. Sheriffs and Constables §§ 37 to 38.

LAW REVIEW AND JOURNAL COMMENTARIES

Coverage for Cops: Should Injuries Sustained by Off-Duty Sheriff's Deputies in Their Patrol Cars Be Compensable Under the Worker's Compensation Act? 55 SC Law Rev 695 (Spring 2004).

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DEFENDANT'S EXHIBIT 1-A 5/31/11

NOTES OF DECISIONS

In general 1

1. In general

Stated in Willis v. Aiken County (S.C. 1943) 203 S.C. 96, 26 S.E.2d 313.

Code 1976 § **23-13-20**, SC ST § **23-13-20**

Current through End of 2010 Reg. Sess.

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END OF DOCUMENT

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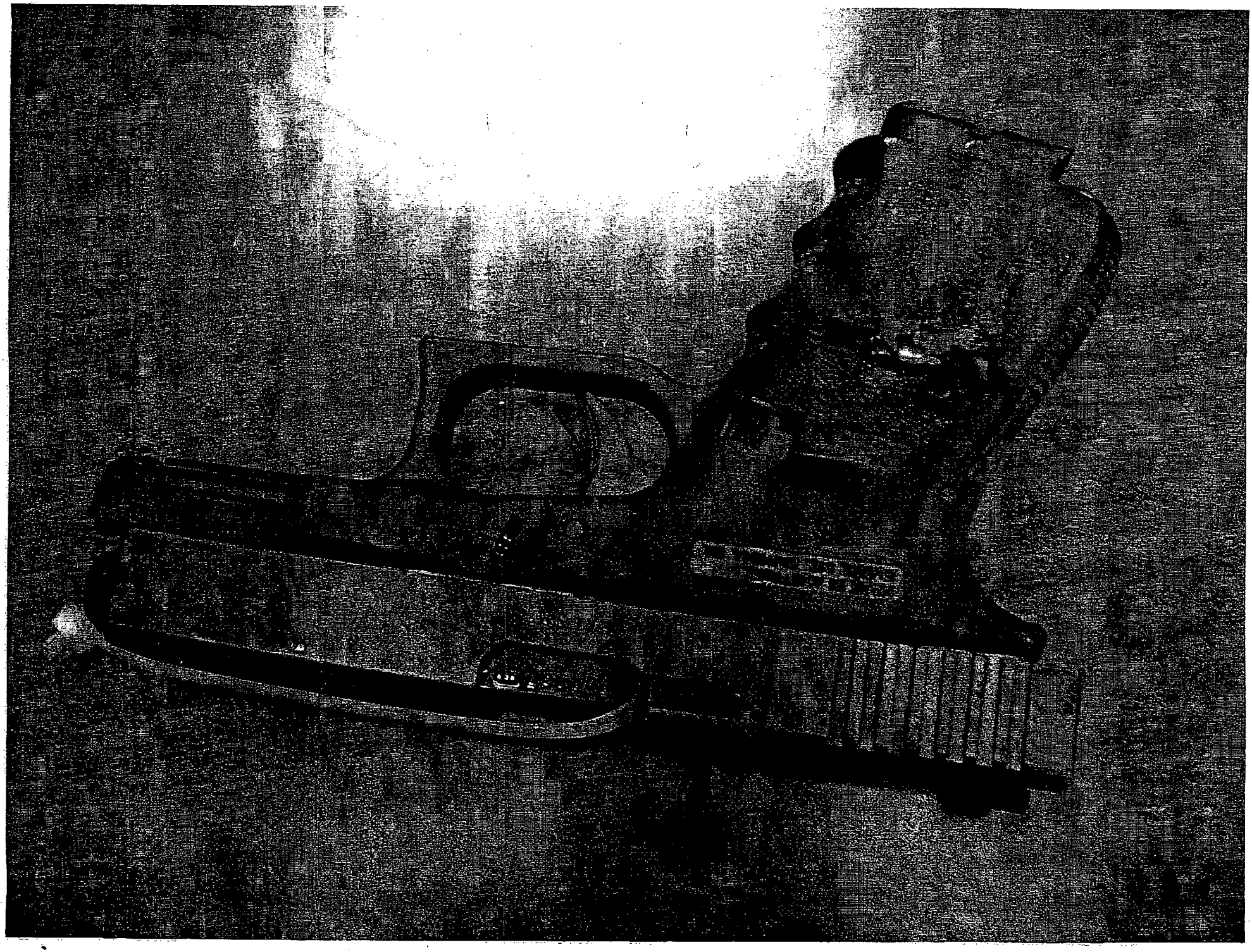

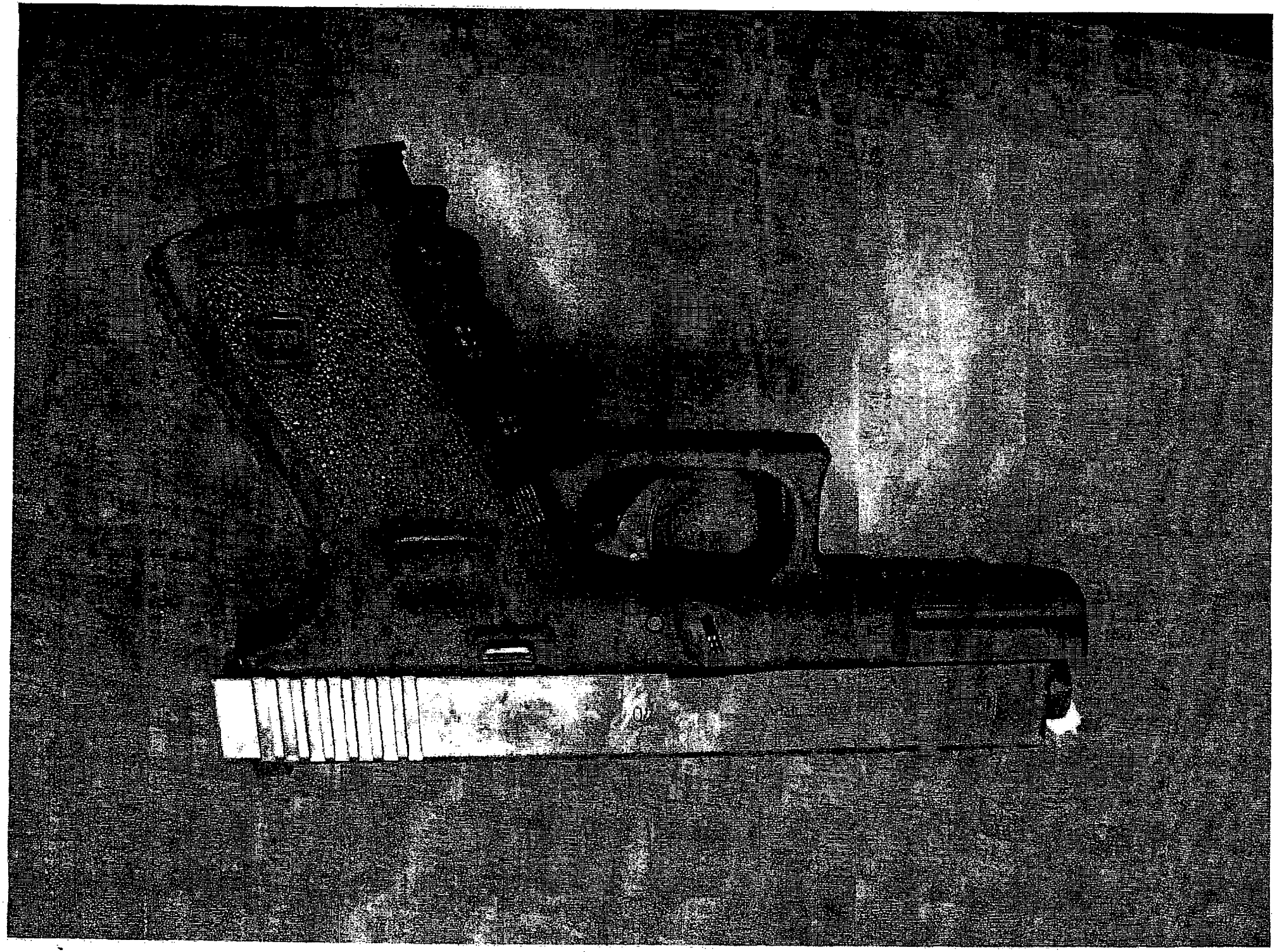

ORIGINAL

Statement of Robert E. Rushton

Due to gunshot injuries, my wife Jan Rushton is writing this statement. Jan Rushton

During the early morning hours of November 15, 2009 at approx 0410 am, county deputies received a disturbance call on Presidential Drive located in Little River Subdivision in McCormick County. As I was approaching Presidential Drive, I contacted dispatch via cell phone to confirm the address. I was told it was the Worley residence which I immediately saw to my right side. I informed the other two deputies I was turning into the residence. The other two deputies and myself arrived at the scene at the same time at approx 0425 am. We all parked our vehicles on the left backside of the residence. As we were approaching the residence from the right backside, I noticed lights come on and movement in the neighbor's house. I told Deputy McAllister I was going to speak with the neighbors to see if they were the complainants. While speaking with the neighbors, they informed me that they were the ones that called and made the complaints. They informed me that the suspect comes up on Thursdays or Fridays, and he is always coming outside in the early morning hours yelling and discharging what they believe to be a firearm. At this time I noticed that lights came on in front of the residence. I told the complainants to go back inside of their house while we went to talk to the suspect. As I was walking back, the light went off. I returned to the front right corner of the house with Deputies McAllister and Moore. Deputy Moore rang the doorbell and knocked and announced "Sheriff's Department." A few seconds later I heard what sounded like the sliding glass doors open from the upper deck of the home. As I was stepping back to see if someone was coming out of the doors, I saw a middle aged white male with salt and pepper hair and beard standing on the balcony holding what I thought was a shotgun. I could clearly see the wood stock and wooden forearm of the weapon. At this time it was not pointed at myself or other deputies but pointed upward. I immediately yelled "gun" letting the other deputies know. Deputy Moore and myself ordered the suspect to put the gun down and that we were sheriff's department. He then yelled "I don't give a fuck!" As we continued to yell to put the gun down and sheriff's department, I started to draw my duty weapon. The suspect moved and I was blinded by the floodlights on the upper deck. As that happened I heard the gunshot and I was hit in the right hand and was knocked to the ground. I yelled that I had been hit. Deputy Moore started yelling at me to come to him. As I was getting off the ground and started running toward Deputy Moore, the suspect then discharged another round. Deputy Moore led me to the back of the residence out of the line of fire. We then heard something that we thought was the suspect coming out of the residence. Deputy Moore then got me to the patrol car as Deputy McAllister covered us. Once Deputy Moore got me into the patrol car they took me to Highway 378 and Holiday Drive where First Responders meet us to render aid. While in route Deputy Moore contacted dispatch and notified them of the situation and possible barricaded suspect and they would need assistance. At this point I was in care of First Responders and EMS.

WITNESS: JOSEPH E. COLLIER, JR. 11-20-09

Joseph E. Collier

COPY

ORIGINAL

DEFENDANT'S EXHIBIT
3 A
5/31/11 dt

Title of Investigation:	Investigation Number:	Report Number:
Worley, Joe Ross	763055-10-0124	1

SUMMARY OF EVENT:

On Wednesday, June 9, 2010, Special Agent Shawn Stallo interviewed McCormick County Sheriff's Office Deputy Bobby Rushton at the McCormick County Courthouse in McCormick, SC. On November 15, 2009, Deputy Rushton, while on duty, was shot by Joe Ross WORLEY; WM, DOB: 03-05-1958, SSN: 255-94-5954.

NARRATIVE:

On Wednesday, June 9, 2010, Special Agent Shawn Stallo interviewed McCormick County Sheriff's Office (MCSO) Deputy Bobby Rushton at the McCormick County Courthouse in McCormick, SC. On November 15, 2010, Deputy Rushton, while on duty, was shot by Joe Ross WORLEY; WM, DOB: 03-05-1958, SSN: 255-94-5954. In response to the interview with SA Stallo, Deputy Rushton stated essentially the following:

On November 15, 2009, at approximately 4:00am, McCormick County 911 received and emergency call from Alan Sheffield who stated that his neighbor, Joe WORLEY, was yelling and discharging a firearm at WORLEY'S residence; [redacted] Presidents Drive McCormick, SC. MCSO Deputies Bobby Rushton, Nick Moore, and Melissa McAllister were dispatched to WORLEY'S residence. SA Stallo was provided with a McCormick County 911 incident detail report (see attached). It should be noted that the MCSO received a similar complaint in reference to WORLEY on September 9, 2009. SA Stallo obtained the MCSO incident report what will be attached to this report of investigation.

Deputies Rushton, Moore, and McAllister arrived at the incident location. Deputy Rushton approached the complaint, Sheffield, while Deputy Moore knocked on the front door of WORLEY'S residence.

Sheffield explained to Deputy Rushton that several times within the last hour he and his wife had heard WORLEY yelling and discharging a firearm. This is common behavior from WORLEY and the Sheffield's were scared to leave their residence. Deputy Rushton witnessed lights turn on from the front of WORLEY'S residence and left the Sheffield's home and walked to the back of WORLEY'S residence.

While approaching the rear of WORLEY'S residence, Deputy Rushton could hear someone walking on the second story deck above. Deputy Rushton witnessed WORLEY walking on the second story deck with a long gun in his hand. Deputy Rushton drew his firearm and yelled at WORLEY that he was from the Sheriff's Department.

Prepared by:	Title:	Signature:	Date:
Shawn M. Stallo	Special Agent, Greenville Field Office		7.20.10
Authorized by:	**Title:**	**Signature:**	**Date:**
Christopher J. Hyman	Resident Agent in Charge, Greenville Field Office		5/12/10
Second level reviewer (optional):	**Title:**	**Signature:**	**Date:**
Zebedee T. Graham	Special Agent in Charge, Charlotte Field Division		

WORLEY responded, "I do not g. a fuck!" Deputy Rushton became bli. .d by flood lights shining from the back of Worley's residence.

Deputy Rushton was trying to observe WORLEY and was suddenly shot in his hand, causing him to drop his duty weapon. Deputy Rushton fell to the ground and immediately heard a second shot, but was not struck. Deputy Rushton then heard WORLEY yell, "I'm going to get you, you son of a bitch!".

Deputy Rushton crawled to Deputy Moore and was able to take cover in the bushes with Deputy Moore. After a few minutes, the Deputies vacated the area with Deputy McAllister.

Deputy Rushton was taken to EMS workers located on Highway 378 and Holiday Drive. Deputy Moore requested backup and returned to the residence. Deputy Rushton was later informed that WORLEY admitted to Sheriff Reid that he shot Deputy Rushton and provided Sheriff Reid with Deputy Rushton's firearm that was shot out of his hand. A consensual search of WORLEY'S residence revealed a Remington, Model 742, 30-06 caliber rifle; SN: 7070652, 30-06 ammunition, and two 30-06 shell casings.

Deputy Rushton provided SA Stallo with a statement he prepared on November 20, 2009, a McCormick County Emergency Services EMS report, and a MCSO incident report in reference to his assault (see attached).

On June 10, 2010, SA Stallo queried NCIC for a criminal history in reference to WORLEY. The computer revealed a previous 1977 conviction for failure to stop for a blue light, a misdemeanor where WORLEY could have received three or more years in prison for the offense, thus making WORLEY prohibited from possessing a firearm.

Attachment(s):
McCormick County 911 Incident Detail Report
MCSO Incident Report dated 09/09/09
Statement of Deputy Bobby Rushton
McCormick County Emergency Services EMS Report
MCSO Incident Report dated 11/15/09

Statement of Robert E. Rushton

(Bond Hearing for Joe Ross Worley / Thursday, December 03, 2009)

If it pleases the court:

During the early morning hours of Sunday, November 15, 2009, my life, the lives of two of my coworkers, and, indeed, the lives of all citizens of McCormick County, changed forever. While responding to a call for assistance from local citizens concerning shots fired, I was seriously injured by a gunshot fired by Joe Ross Worley. This totally unprovoked act of violence against me and my fellow officers, by Mr. Worley, forever shattered the image of McCormick County as a quiet, peaceful community; a seemingly mythical "Mayberry" type setting where citizens could safely live with their families, secure in the knowledge that the violence often associated with "Big City" living was not a normal part of our home town. With this act of violence, and his display of total indifference toward, and disregard for, lawful authority, Mr. Worley changed that image, as well as my normal position in this court. I now stand here as a victim of violence, instead of a law enforcement officer actively participating in the judicial process.

From 1998 – 2005, I faithfully served the McCormick County Sheriff's Department. Prior to those dates I was employed by the S.C. Dept. of Corrections as a Corrections Officer. I left the Sheriff's Office in 2005 for a four year stint in Iraq where I served with a private contractor, under contract with the U.S. Department of State, as an International Police Advisor to the fledgling Iraqi Police Force. While in Iraq, though injured on several occasions, I managed to escape serious physical injury. I recently returned to my beloved home of McCormick and was once again fortunate enough to be employed as a Sheriff's Deputy with the McCormick County Sheriff's Department. My effective date of employment was November 01, 2009. I am sworn to preserve, protect, and defend the Constitution of our State and of the United States. I truly love my chosen vocation and I take my oath very seriously. It is for this reason that I appear before you today, not for my security and safety; obviously I would be much too late for that purpose. I stand here to insure the safety and security of my community; my friends, family, and neighbors; the very people I am sworn to serve and protect!

When Mr. Worley decided to fire upon law enforcement as we responded to a citizen's call for help, he crossed a line which even the most hardened, violent criminal will normally refuse to cross; that of attempting to take the life of a law enforcement officer. As we continuously yelled at him to drop the gun and that we were from the Sheriff's Department, his total disregard for our authority and safety, as well as his profanity laced responses, indicated that he had no intention of complying with our lawful demands in any way. He demonstrated his propensity for extreme violence when he, and only he, made the decision to pull the trigger on his gun; not just once but several times. In doing so, he jeopardized the safety and security of all responding officers, as well as the safety and security of any private citizen within range. Considering that he shot at us with a high-powered, 30.06 caliber rifle, his effective "kill zone" could have easily encompassed a mile or more in any direction. All of us were lucky that we survived this brutal attack. I suffered a severe injury to my right hand; ultimately loosing my middle finger. The Doctors have told me that, if lucky, I may regain 50 – 75% of the strength in my hand.

Like so many other victims of violent crime, I always believed that violence was something that happened to someone else, somewhere else. My standing here before you today proves that no one is immune. Violence can exist in any home, community, workplace or school. No one person or entity alone can stop violence. I can only hope and pray that, by appearing here today and taking a stand against Mr. Worley's release into the community, I will make a difference!

The impact of Mr. Worley's decision to fire upon us will affect me, my family, friends, coworkers, and community for years to come. The pain and disruption to my life did not stop with Mr. Worley's senseless act of violence. The trauma that results after experiencing such an act can last a lifetime. Studies have shown that trauma may impact one's mental, physical, emotional, financial and spiritual health in profound, and often devastating, ways. My mind continuously replays the events which unfolded early on that Sunday morning. Could we have done anything differently which would have affected the outcome? I have come to the same conclusion each time; we did what we needed to do, by the book, as safely as was humanly possible.

For me, the process of closure and healing is ongoing and may never end. With God's help, and the support and love of family and friends, I have no doubt that I will recover from this event. I can only pray that my coworkers and community will do the same!

I want to thank Your Honor and this court for giving me the opportunity to speak during this hearing. I have enjoyed the privilege of appearing in Your Honor's court, as a law enforcement officer, on numerous occasions. I stand before you today as a strong and determined victim; yet, still a dedicated law enforcement officer who maintains a strong desire to protect and serve. I strongly urge you to assist me in accomplishing my sworn task; that of keeping my Community, State, and Nation safe. By denying bond on this violent criminal, we can accomplish that goal; we can make a difference!

Thank you.

KENNEDY LAW FIRM, LLC
Attorneys and Counselors at Law

125 EAST CHURCH STREET
BATESBURG-LEESVILLE, SOUTH CAROLINA 29070

MAILING ADDRESS:
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RALPH S. KENNEDY, JR.
ROBERT M. COOK II
KATHRYN M. RAUTON

JULIUS H. BAGGETT
RETIRED JUDGE OF THE
SC CIRCUIT COURT
Of Counsel

March 1, 2010

The Honorable Kathryn P. Butler
Clerk of Court, McCormick County
County Courthouse
133 S. Mine Street, Room 102
McCormick SC 29835

RE: Robert E. Rushton and Janet M. Rushton
vs.
Joe Ross Worley and Mary C. Worley
Our File No: 09.12-15-361-4272

Dear Ms.Butler:

Enclosed for filing, please find the original Civil Action Coversheet, Summons and Complaint, along with two copies of each in the above matter for filing. We are also enclosing our check in the amount of $150.00 as well as a self-addressed stamped envelope for your return of the clocked copies to our office. Please call me if you have any questions about this.

Very Truly Yours,

Robert M. Cook II

ROBERT M. COOK II

RMC/lm

Enclosure: Original and Two Copies of Civil Cover Sheet, Summons, and Complaint
Filing Fee of $150.00
Return Envelope

STATE OF SOUTH CAROLI)
) IN THE COURT OF COMMON PLEAS
COUNTY OF McCORMICK)

ROBERT E. RUSHTON and JANET M. RUSHTON,) CIVIL ACTION COVERSHEET
Plaintiff(s))
) 2010-CP - 35- 30
vs.)
JOE ROSS WORLEY and MARY C. WORLEY,)
Defendant(s))

FILED
2010 MAR -2 AM 11:04
KATHRYN F. BUTLER
CLERK OF COURT
McCORMICK COUNTY, S.C.

(Please Print)
Submitted By: Robert M. Cook II
Address: PO Box 2559, Batesburg-Leesville, SC 29070

SC Bar #: 66296
Telephone #: 803-532-4100
Fax #: 803-532-0909
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION *(Check all that apply)*

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20___-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☒ Personal Injury (350)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Sexual Predator (510)

Submitting Party Signature: Robert M. Cook II **Date:** March 1, 2010

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF MCCORMICK) CIVIL ACTION NO.: 10-CP-35 30

FILED
2010 MAR -2 AM 11:01
KATHY M. P. BUTLER
CLERK OF COURT
McCORMICK COUNTY, S.C.

ROBERT E. RUSHTON AND
JANET M. RUSHTON,
Plaintiffs,

versus

JOE ROSS WORLEY AND
MARY C. WORLEY,
Defendants.

SUMMONS
(JURY TRIAL DEMANDED)

TO: THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office, 125 East Church Street, P. O. Box 2559, Batesburg-Leesville, South Carolina, 29070, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

KENNEDY LAW FIRM, LLC

BY: Robert M Cook II
RALPH S. KENNEDY, JR.
ROBERT M. COOK II

125 East Church Street
P.O. Box 2559
Batesburg-Leesville, South Carolina 29070
803-532-4100.

ATTORNEYS FOR THE PLAINTIFFS

March 1, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF MCCORMICK) CIVIL ACTION NO.: 10-CP-35 30

FILED
OCTOBER -2 PM 11:05
KATHERINE S. BUTLER
CLERK OF COURT
McCORMICK COUNTY, S.C.

ROBERT E. RUSHTON AND
JANET M. RUSHTON,
Plaintiffs,

versus

JOE ROSS WORLEY AND
MARY C. WORLEY,
Defendants.

COMPLAINT

(JURY TRIAL DEMANDED)

The above-named Plaintiffs would allege and show as to the Defendants as follows:

1. That the Plaintiffs are citizens and residents of the County of McCormick in the state of South Carolina and were at all times relevant to this action, and still are, lawfully married to each other as man and wife.
2. That the Defendants are, upon information and belief, citizens and residents of Aiken County, South Carolina, and are related to each other as mother and adult son.
3. That the shooting injury that is the subject matter of this Complaint occurred on or about November 15, 2010, at a lake house on Presidents Drive in McCormick County in the state of South Carolina and this shooting incident caused personal injuries and damages to the Plaintiffs as described within this Complaint.
4. That the Court has personal jurisdiction over the parties and subject matter jurisdiction over all issues raised within this Complaint.
5. That venue is proper in McCormick County as the wrongful acts and omissions of the Defendants occurred with that county.

RmcH

FOR A FIRST CAUSE OF ACTION BY PLAINTIFF ROBERT E. RUSHTON
(Negligence as to Defendant Joe Ross Worley)

6. The allegations set forth in Paragraphs 1 through 5 above are repeated as if set forth herein verbatim.

7. That during the early morning hours of November 15, 2009, a neighbor of the Defendants called the McCormick County Sheriff's Department to report that the Defendant Joe Ross Worley was outside his mother's residence at 142 Presidents Drive, McCormick, South Carolina, yelling and shooting his gun.

8. That on or about November 15, 2009, the Plaintiff Robert E. Rushton, while working as a deputy of the McCormick County Sheriff's Department, responded to that disturbance and arrived at the lake house owned by the Defendant Mary C. Worley with two other deputies at around 4:30 a.m.

9. That both Defendants were present in that residence when the Plaintiff Robert E. Rushton and the two other deputies arrived.

10. That at all times during his response and investigation into this reported disturbance the Plaintiff Robert E. Rushton acted appropriately as a law enforcement officer in the line of duty and complied with all relevant policies and procedures regarding such incidents.

11. That while the Plaintiff Robert E. Rushton was investigating this reported disturbance the Defendant Joe Ross Worley suddenly and without prior warning fired two shots at the Plaintiff Robert E. Rushton with a 30-06 rifle with one of the shots striking and badly injuring his right hand.

12. That this incident and the damages described herein were the direct, foreseeable and proximate result of the negligent and careless, and willful, wanton, reckless, and

RMC

grossly negligent acts and/or omission of the Defendant Joe Ross Worley in the following particulars:

a. In discharging his rifle in the direction of the Plaintiff;

b. In failing to ascertain the whereabouts of the Plaintiff prior to discharging his rifle;

c. In discharging his rifle when he knew or should have known that the Plaintiff was in the area into which the rifle was being discharged;

d. In discharging his rifle in an unsafe manner;

e. In discharging his rifle in an area that was unsafe for the same;

f. In failing to warn the Plaintiff that he was about to discharge his rifle;

g. In failing to fire a warning shot;

h. In failing to properly respond to the announcement of the presence of law enforcement officers;

i. In failing to act a reasonable person would under the circumstances then and there prevailing;

j. In violating the statutes and ordinances, including regulations of the Army Corps of Engineers, as may be applicable to the discharge of firearms under the circumstances then and there prevailing;

k. Such other and further particulars as the evidence at the trial may show.

All of which acts and omissions, or both, were the actual, direct, and proximate cause of the damages and injuries claimed herein.

13. That as a direct and proximate result of the acts and omissions, or both, of the Defendant Joe Ross Worley as described above, the Plaintiff Robert E. Rushton was violently injured by way of a gunshot wound to his right hand in which many bones within his hand were broken and fragmented and which gunshot also blew off one of his fingers; that this serious physical injury has caused the Plaintiff Robert E. Rushton great excruciating pain and other damages.

RMCII

14. That Plaintiff Robert E. Rushton has and will continue to incur substantial medical expenses related to his injuries, he has had to undergo various medical procedures including surgery and additional surgeries in the future are anticipated by his physicians, he suffered permanent physical disability as well a permanent physical disfigurement to his hand and the loss of a finger, he sustained a diminishment in his earning capacity, and he further experienced pain and suffering, inconvenience, emotional distress and trauma, mental anguish, and loss of enjoyment of life.

15. That the Plaintiff Robert E. Rushton is entitled to judgment against the Defendant for his actual damages and such punitive damages as may be determined by a jury.

16. **THAT THE PLAINTIFF DEMANDS A JURY TRIAL ON THIS CAUSE OF ACTION AS CONTEMPLATED BY RULE 38(b), SCRCP.**

FOR A SECOND CAUSE OF ACTION
(Negligence as to the Defendant Mary C. Worley)

17. That the Plaintiff Robert E. Rushton repeats and re-alleges the above paragraphs as if set forth herein verbatim.

18. That Defendant Mary C. Worley had actual and imputed prior knowledge of the proclivity of the Defendant Joe Ross Worley to unsafely and recklessly discharge firearms while he was an invited guest at her residence in McCormick County and that such knowledge by that Defendant was gained over a period of months and years.

19. That the Defendant Mary C. Worley knew or should have known that it was unsafe and dangerous to permit the Defendant Joe Ross Worley to bring and/or keep firearms as an invited guest at her residence in McCormick County.

20. That during the period of time during the evening of November 14th and early morning hours of November 15th leading up to the shooting of the Plaintiff Robert E.

Rushton the Defendant Mary C. Worley knew or reasonably should have known that the Defendant Joe Ross Worley was acting in a dangerous and unpredictable manner and that he had previously and discharged his firearm in an unsafe and dangerous manner from her residence during that time period.

21. That prior to this shooting the Defendant Mary C. Worley did not take any reasonable steps to eliminate or at limit the danger to others likely to be caused by the Defendant Joe Ross Worley as a result of his known proclivity for unsafely and repeatedly shooting guns at her residence.

22. That the Defendant Mary C. Worley was at the time and place alleged above negligent, negligent per se, careless, reckless, grossly negligent, willful and wanton in the following particulars:

a. In inviting and continuing to invite the Defendant Joe Ross Worley as a guest to her residence despite her knowledge that he had a proclivity towards discharging his firearm in an unsafe manner from her residence;

b. In allowing and continuing to allow the Defendant Joe Ross Worley to keep and/or bring firearms to her residence in light of her prior knowledge that he had a proclivity towards discharging his firearm in an unsafe manner from her residence;

c. In failing to require the Defendant Joe Ross Worley leave her residence despite his dangerous behavior immediately leading up to the shooting described herein;

d. In failing to require that the Defendant Joe Ross Worley lock up or otherwise secure his firearms despite his dangerous behavior immediately leading up to the shooting described herein;

e. In allowing the unsafe discharge of firearms from her residence;

f. In failing to prevent the unsafe discharge of firearms from her residence;

g. In allowing firearms to be brought to and/or kept at her residence despite her knowledge that it was unsafe and dangerous for the Defendant Joe Ross Worley to have access to such firearms;

h. In allowing her residence to became a safe haven and refuge for the Defendant Joe Ross Worley when she that she knew or should have known that he was likely to be danger to other people, including the Plaintiff Robert E. Rushton;

i. In allowing firearms to be discharged from her residence in violation of such statutes and ordinances, including regulations of the Army Corps of Engineers, as may be applicable;

j. In such other particulars as will be shown at trial.

23. That as a direct and proximate result of the negligence, negligence per se, carelessness, recklessness, gross negligence, willful and wanton acts of the Defendant Mary C. Worley as described above, the Plaintiff Robert E. Rushton sustained the personal injuries and damages alleged in the first cause of action above.

24. That the Plaintiff Robert E. Rushton is entitled to an award of actual damages and such punitive damages as a jury may award against the Defendant Mary C. Worley.

25. **THAT THE PLAINTIFF DEMANDS A JURY TRIAL ON THIS CAUSE OF ACTION AS CONTEMPLATED BY RULE 38, SCRCP(b).**

FOR A THIRD CAUSE OF ACTION
(Loss of Consortium by the Plaintiff Janet M. Rushton Against Both Defendants)

26. That each and every one of the above allegations consistent with this cause of action is realleged as if fully repeated herein.

27. That at all times relevant to this action the Plaintiff Janet M. Rushton was the lawful wife of the Plaintiff Robert E. Rushton.

28. That as a direct and proximate result of the negligence, negligence per se, carelessness, recklessness, gross negligence, and willful and wanton conduct of both Defendants as described above, the Plaintiff Janet M. Rushton lost the companionship, aid, society, and services of her husband, the Plaintiff Robert E. Rushton, as contemplated by South Carolina Code Section 15-75-20 or otherwise.

29. That due to the nature of the injury to her husband the Plaintiff Janet M. Rushton can reasonably be expected to permanently experience the loss of the companionship, aid, society and services of her husband.

30. That the Plaintiff Janet M. Rushton is entitled to an award of actual damages against both Defendants.

31. **THAT THE PLAINTIFF DEMANDS A JURY TRIAL ON THIS CAUSE OF ACTION AS CONTEMPLATED BY RULE 38(b), SCRCP.**

WHEREFORE, the Plaintiffs request that the Court enter judgment against the Defendants for actual and punitive damages, in an amount to be determined by the jury, and as appropriate to the causes of action alleged, for the reasonable costs for this action, and for such other and further relief as this Court may deem just and proper.

KENNEDY LAW FIRM, LLC

125 East Church Street
P.O. Box 2559
Batesburg-Leesville, South Carolina 29070
803-532-4100 (phone)
803-532-0909 (fax)
robcook1965@yahoo.com

BY: _____
RALPH S. KENNEDY, JR.
ROBERT M. COOK II

ATTORNEYS FOR THE PLAINTIFFS

March 1, 2010

266

COPY

FILED
IN THE COURT OF COMMON PLEAS
2011 MAY 11 PM 3:47
ELEVENTH JUDICIAL CIRCUIT
KATHRYN A. BUTLER
CLERK OF COURT
McCORMICK COUNTY, S.C.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF MCCORMICK)	ELEVENTH JUDICIAL CIRCUIT
)	
ROBERT E. RUSHTON and JANET M. RUSHTON,)	
)	
Plaintiffs,)	**DEFENDANT JOE ROSS WORLEY'S ANSWER AND COUNTERCLAIM**
)	
v.)	
)	C/A No. 2010-CP-35-30
JOE ROSS WORLEY and MARY C. WORLEY,)	
)	(Jury Trial Demanded)
Defendants.)	

The Defendant Joe Ross Worley, while reserving any motions filed or to be filed, and while answering and counterclaiming to the Plaintiffs' Complaint, would respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

(General Denial)

1. The Defendant Joe Ross Worley denies all allegations in the Plaintiffs' Complaint except those allegations which are specifically admitted, explained, modified, and/or qualified.

FOR A SECOND DEFENSE

(Specific Denial)

2. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraph 1 into this his Second Defense as if fully set forth herein verbatim.

3. Admits Paragraph 1.

4. Admits the portion of Paragraph 2 which alleges that the Defendants "are related to

each other as mother and adult son." Denies the remainder of this paragraph and demands strict proof thereof.

5. Denies the portion of Paragraph 3 which alleges that a "shooting injury" occurred and that "this shooting incident caused personal injuries and damages to the Plaintiffs as described within this Complaint," and demands strict proof thereof. Admits the remainder of this paragraph.

6. Admits Paragraph 4.

7. Denies the portion of Paragraph 5 which alleges that "the wrongful acts and omissions of the Defendant occurred with[in] that county," and demands strict proof thereof. Admits the remainder of this paragraph.

8. Paragraph 6 doesn't require a response from the Defendant Joe Ross Worley.

9. Denies Paragraph 7 and demands strict proof thereof.

10. Denies the portion of Paragraph 8 which alleges that a "disturbance" occurred, and demands strict proof thereof. Admits the remainder of this paragraph.

11. Admits Paragraph 9.

12. Denies Paragraph 10 and demands strict proof thereof. Upon information and belief, the Plaintiff Robert E. Rushton's failure, along with the other two (2) deputies' failure, to follow proper law enforcement policies and procedures led to the Plaintiff Robert E. Rushton being shot by the Defendant Joe Ross Worley, who was acting in self defense, defense of others, and/or defense of his home.

13. Denies the portion of Paragraph 11 which alleges that "the Defendant Joe Ross Worley suddenly and without prior warning fired two shots" while the Plaintiff Robert E. Rushton "was investigating this reported disturbance," and demands strict proof thereof. Upon information

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and belief, the Defendant Joe Ross Worley did not fire a shot until the Plaintiff Robert E. Rushton pulled and aimed his handgun at the Defendant Joe Ross Worley. The second shot fired by the Defendant Joe Ross Worley was into the air up into the trees. Admits the remainder of Paragraph 11.

14. Denies Paragraph 12 and all subparts and demands strict proof thereof.

15. Denies Paragraph 13 and demands strict proof thereof.

16. Denies Paragraph 14 and demands strict proof thereof.

17. Denies Paragraph 15 and demands strict proof thereof.

18. Admits Paragraph 16.

19. Paragraph 17 doesn't require a response from the Defendant Joe Ross Worley.

20. Paragraph 18 doesn't require a response from the Defendant Joe Ross Worley. To the extent it does, the allegations contained in this paragraph are denied by the Defendant Joe Ross Worley and strict proof is demanded.

21. Paragraph 19 doesn't require a response from the Defendant Joe Ross Worley. To the extent it does, the allegations contained in this paragraph are denied by the Defendant Joe Ross Worley and strict proof is demanded.

22. Paragraph 20 doesn't require a response from the Defendant Joe Ross Worley. To the extent it does, the allegations contained in this paragraph are denied by the Defendant Joe Ross Worley and strict proof is demanded.

23. Paragraph 21 doesn't require a response from the Defendant Joe Ross Worley. To the extent it does, the allegations contained in this paragraph are denied by the Defendant Joe Ross Worley and strict proof is demanded.

#3

24. Paragraph 22 doesn't require a response from the Defendant Joe Ross Worley. To the extent it does, the allegations contained in this paragraph and all subparts are denied by the Defendant Joe Ross Worley and strict proof is demanded.

25. Paragraph 23 doesn't require a response from the Defendant Joe Ross Worley. To the extent it does, the allegations contained in this paragraph are denied by the Defendant Joe Ross Worley and strict proof is demanded.

26. Paragraph 24 doesn't require a response from the Defendant Joe Ross Worley. To the extent it does, the allegations contained in this paragraph are denied by the Defendant Joe Ross Worley and strict proof is demanded.

27. Paragraph 25 doesn't require a response from the Defendant Joe Ross Worley.

28. Paragraph 26 doesn't require a response from the Defendant Joe Ross Worley.

29. Admits Paragraph 27.

30. Denies Paragraph 28 and demands strict proof thereof.

31. Denies Paragraph 29 and demands strict proof thereof.

32. Denies Paragraph 30 and demands strict proof thereof.

33. Admits Paragraph 31.

34. Denies the relief sought in the Prayer and demands strict proof thereof.

FOR A THIRD DEFENSE

(Failure to State Facts Sufficient to Constitute a Cause of Action)

35. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 34 into this his Third Defense as if set out herein verbatim.

36. The Plaintiffs' Complaint should be dismissed pursuant to SCRCivP 12(b)(6) because

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it fails to state facts sufficient to constitute a cause of action.

FOR A FOURTH DEFENSE

(Plaintiff's Sole Negligence)

37. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 36 into this his Fourth Defense as if set out herein verbatim.

38. Any injuries and damages sustained by the Plaintiff Robert E. Rushton as set forth in the Complaint, upon information and belief, were due to and caused by the sole negligence, recklessness, wilfulness, and wantonness of the Plaintiff Robert E. Rushton in one or more of the following particulars:

(A) in failing to maintain a proper lookout;

(B) in failing to exercise that degree of care and caution which a reasonable and prudent law enforcement officer would have exercised under the same or similar circumstances;

[C] in failing to pay attention to the Defendant Joe Ross Worley's location;

(D) in failing to follow appropriate law enforcement policies and procedures to ensure his own safety;

(E) in failing to follow appropriate law enforcement policies and procedures to notify the Defendant Joe Ross Worley of law enforcement presence on the property;

(F) in pulling a handgun on the Defendant Joe Ross Worley when the Defendant Joe Ross Worley was lawfully on the balcony of the house;

(G) in failing to employ reasonable care for his own safety; and

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(H) in additional particulars that may be revealed during discovery and/or in the evidence at trial.

All of which acts and/or omissions were in violation of statutes, laws, regulations, policies, and procedures of the State of South Carolina, and by reason thereof the Plaintiff Robert E. Rushton is not entitled to recover from the Defendant Joe Ross Worley.

FOR A FIFTH DEFENSE

(Plaintiff More Than Fifty (50) Percent at Fault)

39. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 38 into this his Fifth Defense as if set out herein verbatim.

40. Any injuries and damages allegedly sustained by the Plaintiff Robert E. Rushton at the time and place alleged in the Complaint, if any, upon information and belief, were due to and proximately caused by the negligence, recklessness, wilfulness, and wantonness of the Plaintiff Robert E. Rushton, which contributed more than fifty (50) percent to cause the accident and the Plaintiff Robert E. Rushton's resulting injuries and damages, if any.

FOR A SIXTH DEFENSE

(Comparative Negligence)

41. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 40 into this his Sixth Defense as if set out herein verbatim.

42. Even assuming the Defendant Joe Ross Worley was careless, negligent, grossly negligent, wilful, wanton, or reckless in any respect, which is expressly denied, and even if such conduct on the Defendant Joe Ross Worley's part operated as a greater than fifty (50) percent cause of the accident and the Plaintiff Robert E. Rushton's resulting injuries and damages, if any, which

is also expressly denied, the Defendant Joe Ross Worley is entitled to a determination as to the percentage which the Plaintiff Robert E. Rushton's negligent, grossly negligent, reckless, or wilful conduct contributed to this accident and to a reduction of any amount awarded to the Plaintiff Robert E. Ruhston by an amount equal to the percentage of the Plaintiff Robert E. Rushton's own negligent, grossly negligent, reckless, wilful, and wanton conduct.

FOR A SEVENTH DEFENSE

(Unconstitutionality of Punitive Damages)

43. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 42 into this his Seventh Defense as if set out herein verbatim.

44. Any claim on behalf of the Plaintiff Robert E. Rushton for punitive damages is barred by the provisions of the United States and South Carolina Constitutions.

45. The Plaintiff Robert E. Rushton's claim for punitive damages violates both the 14th Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees.

46. The Plaintiff Robert E. Rushton's claim for punitive damages violates both the 5th, 6th, and 14th Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution, for even if it could be argued that a standard governing the imposition of punitive damages exists, this standard is void for vagueness.

47. The Plaintiff Robert E. Rushton's claim for punitive damages violates both the equal protection clause of the 14th Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution, in that the amount of punitive damages is based upon the wealth

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of the Defendant Joe Ross Worley.

48. The Plaintiff Robert E. Rushton's claim for punitive damages violates the federal doctrine of separation of powers and Article 1, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR AN EIGHTH DEFENSE

(Code Section 16-11-410 Et. Seq.)

49. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 48 into this his Eighth Defense as if set out herein verbatim.

50. The Defendant Joe Ross Worley pleads Code Section 16-11-410 et. seq. ("Protection of Persons and Property Act") as an affirmative defense.

FOR A NINTH DEFENSE

(Code Section 50-11-2570(B))

51. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 50 into this his Ninth Defense as if set out herein verbatim.

52. The Defendant Joe Ross Worley pleads Code Section 50-11-2570(B) as an affirmative defense.

FOR A TENTH DEFENSE

(Assumption of the Risk)

53. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 52 into this his Tenth Defense as if set out herein verbatim.

54. The Defendant Joe Ross Worley pleads assumption of the risk as an affirmative

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defense.

FOR AN ELEVENTH DEFENSE

(Contributory Negligence)

55. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 54 into this his Eleventh Defense as if set out herein verbatim.

56. The Defendant Joe Ross Worley pleads contributory negligence as an affirmative defense.

FOR A TWELFTH DEFENSE

(Failure to Meet Employer Work Standards)

57. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 56 into this his Twelfth Defense as if set out herein verbatim.

58. The Defendant Joe Ross Worley pleads failure to meet employer work standards as an affirmative defense.

FOR A THIRTEENTH DEFENSE

(Common Law Self Defense, Defense of Others, and Defense of Home)

59. The Defendant Joe Ross Worley hereby incorporates the relevant portions of Paragraphs 1 through 58 into this his Thirteenth Defense as if set out herein verbatim.

60. The Defendant Joe Ross Worley pleads common law self defense, common law defense of others, and common law defense of home as affirmative defenses.

FOR A FIRST COUNTERCLAIM AS TO PLAINTIFF ROBERT E. RUSHTON

(Attorney Fees, Court Costs, Loss of Income, and Expenses)

61. The Defendant Joe Ross Worley hereby incorporates the relevant portions of

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Paragraphs 1 through 60 into this his First Counterclaim as if set out herein verbatim.

62. The Defendant is informed and believes that he is entitled to reasonable attorney fees, courts costs, compensation for loss of income, and all expenses incurred in defense of this case from the Plaintiff Robert E. Rushton pursuant to Code Section 16-11-450[c].

PRAYER

WHEREFORE, the Defendant Joe Ross Worley prays:

1. That this Court dismiss the Plaintiffs' claims with prejudice.

2. That the Defendant Joe Ross Worley be awarded reasonable attorney fees, court costs, compensation for loss of income, and all expenses incurred in defense of this case as permitted by case law and statutes such as he can prove at trial.

3. For a trial by jury.

4. For such other and further relief as this Court deems just, proper, and equitable.

THE GARRETT LAW FIRM, P.C.
Attorney for the Defendant Joe Ross Worley

By: _____
Billy J. Garrett, Jr.
109 Oak Avenue
Greenwood, S.C. 29646
Phone: (864) 229-8000
Facsimile: (864) 229-8001

10

THE HENDERSON LAW FIRM, P.C.
Attorney for the Defendant Joe Ross Werley

By: Carson M. Henderson
Carson M. Henderson
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Phone: (864) 229-8000
Facsimile: (864) 229-8001

Greenwood, South Carolina

May 10, 2010

COPY

Morrison Law Firm, LLC
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Phone: (803) 661-6285
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david@dmorrison-law.com
kassi@dmorrison-law.com

David L. Morrison*
Kassi B. Sandifer

*Licensed in SC & NC
*Certified Mediator

June 10, 2010

The Honorable Kathryn P. Butler
Clerk of Court, McCormick County
133 S. Mine Street, Room 102
McCormick, South Carolina 29835

RE: Robert E. Rushton & Janet M. Rushton v. Joe Ross Worley & Mary C. Worley
C/A #: 10-CP-35-30
Date of Incident: 11/15/09
Claim #: EV2009004301
Our File: 310.0242

Dear Clerk Butler:

Please find enclosed the original and one copy of the Answer to Joe Ross Worley's Counterclaim in this matter. Please file the original and return a clocked-in copy to me in the self-addressed stamped envelope enclosed for your convenience. By copy of this letter, I am serving all counsel of record with a copy of same.

Very truly yours,

MORRISON LAW FIRM, LLC

David L. Morrison

DLM/cmm

Enclosure

WHEREFORE, having fully answered the Counterclaim of the Joseph Ross Worley, the Plaintiff prays that the Counterclaim be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

MORRISON LAW FIRM, LLC

By: _____

David L. Morrison, Esquire
Kassi B. Sandifer, Esquire
7453 Irmo Drive, Suite B
Columbia, South Carolina 29212
Phone: (803) 661-6285
Fax: (803) 661-6289
E-mail: david@dmorrison-law.com
E-mail: kassi@dmorrison-law.com

AND ON BEHALF OF:

Robert M. Cook, II, Esquire
125 East Church Street
Post Office Box 2559
Batesburg-Leesville, South Carolina 29070
E-mail: robcook1965@yahoo.com

ATTORNEYS FOR THE PLAINTIFF ROBERT RUSHTON

Columbia, South Carolina

June 10, 2010

COPY

STATE OF SOUTH CAROLINA **COUNTY OF McCORMICK**	**IN THE COURT OF COMMON PLEAS**
Robert E. Rushton and Janet M. Rushton, Plaintiffs, v. Joe Ross Worley and Mary C. Worley, Defendants.	C/A #: 10-CP-35-30 **ANSWER TO JOE ROSS WORLEY'S COUNTERCLAIM BY ROBERT RUSHTON**

The Plaintiff, Robert E. Rushton, answers the Counterclaim of Joe Ross Worley as follows:

FOR A FIRST DEFENSE

1. The Counterclaim fails to state facts sufficient to state a cause of action.

FOR A SECOND DEFENSE

2. This Plaintiff denies each and every allegation of the Defendant's Counterclaim not hereinafter specifically admitted.

3. In response to paragraph 61 of the answer and counterclaim, this Plaintiff specifically denies the relevant factual assertions contained in Paragraphs 1 through 60 of the Answer and Counterclaim.

4. This Plaintiff denies the allegations of paragraph 62 of the answer and counterclaim.

5. This Plaintiff denies that the Joe Ross Worley is entitled to any relief whatsoever on his Counterclaim.

FOR A THIRD DEFENSE

6. This Plaintiff is entitled to sovereign immunity as a bar to the Counterclaim.

FOR A FOURTH DEFENSE

7. This Plaintiff is entitled to immunity pursuant to the South Carolina Tort Claims Act as a bar to the Counterclaim.

FOR A FIFTH DEFENSE

8. This Plaintiff is entitled to immunity as a law enforcement official acting in the performance of his official duties whose identity was known or should have been known to Worley.

FOR A SIXTH DEFENSE

9. This Plaintiff is immune from suit under the South Carolina Tort Claims Act, including but not limited to, S.C. Code Ann. Sections 15-78-30 and 15-78-50.

FOR A SEVENTH DEFENSE

10. This Plaintiff is immune from suit under the South Carolina Tort Claims Act, including but not limited to, S.C. Code Ann. Sections 15-78-60 (1), (2), (3), (4), (5), (6).

FOR AN EIGHTH DEFENSE

11. This Plaintiff is immune from suit under the South Carolina Tort Claims Act, including but not limited to, S.C. Code Ann. Section 15-78-70.

FOR A NINTH DEFENSE

12. This Plaintiff is entitled to the protections and limitations upon liability contained in the South Carolina Tort Claims Act.

cc: Billy J. Garrett, Jr., Esquire
Karl S. Brehmer, Esquire
Robert M. Cook, II, Esquire

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF McCORMICK	)	
Robert E. Rushton and Janet M. Rushton,	)	C/A #: 10-CP-35-30
Plaintiffs,	)	**CERTIFICATE OF SERVICE**
v.	)	
Joe Ross Worley and Mary C. Worley,	)	
Defendants.	)	

The undersigned employee of Morrison Law Firm, LLC, attorney for the Defendant, does hereby certify that service of the **ANSWER TO JOE ROSS WORLEY'S COUNTERCLAIM** in the above-captioned action was made upon all counsel of record by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 10th day of June, 2010, addressed as follows:

Billy J. Garrett, Jr., Esquire
109 Oka Avenue
Greenwood, South Carolina 29646

Karl S. Brehmer, Esquire
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202

Ralph S. Kennedy, Jr., Esquire
Robert M. Cook, II, Esquire
125 East Church Street
Post Office Box 2559
Batesburg-Leesville, South Carolina 29070

Columbia, South Carolina

Callie M. Morrison
Callie M. Morrison

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Title of Investigation: Worley, Joe Ross	Investigation Number: 763055-10-0124	Report Number: 4

SUMMARY OF EVENT:

On Wednesday, July 21, 2010, Special Agent Shawn Stallo interviewed Alan and Gayle Sheffield at their residence; 130 Presidents Drive McCormick, SC. On November 15, 2009, the Sheffield's notified the McCormick County Sheriff's Office (MCSO) that Joe Ross WORLEY, their next door neighbor, was discharging a firearm at his residence; [redacted] Presidents Drive McCormick, SC.

NARRATIVE:

On Wednesday, July 21, 2010, Special Agent Shawn Stallo interviewed Alan and Gayle Sheffield at their residence; 130 Presidents Drive McCormick, SC. On November 15, 2009, the Sheffield's notified the McCormick County Sheriff's Office (MCSO) that Joe Ross WORLEY, their next door neighbor, was discharging a firearm at his residence; [redacted] Presidents Drive McCormick, SC. In response to the interview with SA Stallo, Alan and Gayle Sheffield stated essentially the following:

The Sheffield's moved into their residence in July 2006. The Sheffield's reside at their home throughout the year, where as their neighbor, Joe Ross WORLEY and his mother Margret Worley, live at the their home only on the weekends.

In September 2009, WORLEY began staying up very late at night talking to himself on the back deck of his residence. The Sheffield's home is very close to the WORLEY'S; therefore the Sheffield's could hear WORLEY most nights.

During the Labor Day weekend holiday in 2009, at approximately 2:00am, the Sheffield's were awaked by a gunshot. Alan Sheffield walked outside and observed the lights on at the WORLEY'S back deck. Approximately 20 minutes later, the Sheffield's heard another gunshot. The Sheffield's were certain that WORLEY was responsible for the gunfire, yet did not contact the police until later in the week.

The next weekend, Alan Sheffield spoke with WORLEY'S mother Margret. Alan explained to Margret that he heard gunfire in the early morning hours and felt that WORLEY was responsible. Margret admitted that WORLEY has access to firearms at their home, yet stated that the gunfire was the other neighbors shooting at

Prepared by: Shawn M. Stallo	Title: Special Agent, Greenville Field Office	Signature:	Date: 7.27.10
Authorized by: Christopher J. Hyman	Title: Resident Agent in Charge, Greenville Field Office	Signature:	Date: 07/27/10
Second level reviewer (optional): Zebedee T. Graham	Title: Special Agent in Charge, Charlotte Field Division	Signature:	Date:

deer. Alan later spoke with the other neighbors who denied shooting deer in the early morning hours.

Following Alan's conversation with Margret, every weekend the Sheffield's would hear gunfire from the WORLEY'S residence and hear WORLEY on the deck talking to himself late at night. However, the Sheffield's never saw him with a firearm due to the view from their residence.

On November 15, 2009, at approximately 2:30am, the Sheffield's hear a gunshot at the WORLEY'S residence. Approximately 30 minutes later, they heard another and observe the lights on at the WORLEY'S residence. Approximately 30 minutes later, Alan observes the lights come on again at the WORLEY'S residence and calls the McCormick County Sheriff's Office (MCSO).

At approximately 4:00 am, MCSO Deputy Bobby Rushton meets the Sheffield's in their driveway. The Sheffield's can hear the other Deputies knocking on the door at the WORLEY'S residence announcing that they are with the MCSO.

The Sheffield's witness the lights come on at the rear two story deck of the WORLEY'S residence and Deputy Rushton walk towards the area. As Deputy Rushton was approaching the rear of the WORLEY'S residence he was shot. A few minutes later they hear another gunshot. The Sheffield's witnessed Deputy Rushton get shot, but could not see WORLEY.

Approximately 20 minutes later, the Sheffield's witness Margret walking the property. The Sheffield's explain that WORLEY had shot a Deputy. Margret appeared to be surprised and walked back to her residence.

SA Stallo obtained statement provided by Alan and Gayle Sheffield on November 15, 2009 from the MCSO. These statements will be attached to this report if investigation.

Attachment(s):
Statement of Alan Sheffield
Statement of Gayle Sheffield

WITNESS

VOLUNTARY STATEMENT
(NOT UNDER ARREST)

PAGE NO. ____ OF ____ PAGES

I, ALAN SHEFFIELD, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Deputy Brock-M.H. MCSO. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

Ph. ____

I am 59 years of age, D.O.B. 8/28/50 and I live at 130 PRESIDENTS DRIVE

ON 11/15/09 AT APPROXIMATELY 3:15AM I HEARD WHAT SOUNDED LIKE A GUNSHOT. I LOOKED OUT MY WINDOW AND NOTICED THAT THE WORLEY'S DECK LIGHT WAS ON. THE GUNSHOT SOUNDED LIKE IT HAD COME FROM THAT DIRECTION. ABOUT 15 MINUTES LATER I HEARD ANOTHER GUNSHOT AND HEARD JOE TALKING LOUDLY. SHORTLY AFTER THE SECOND SHOT, THE LIGHTS WENT OFF AND THE TALKING STOPPED. ABOUT 15 MINUTES LATER THE LIGHTS CAME BACK ON AND THE TALKING STARTED AGAIN. AT THAT TIME I DECIDED TO CALL THE POLICE.

THE POLICE ARRIVED ABOUT 4:30AM. 3 CARS ARRIVED - 2 WENT DOWN WORLEY'S DRIVEWAY AND I WENT DOWN THE NEXT DRIVEWAY (STEVENS) ABOUT 5 MINUTES LATER AN OFFICER CAME TO OUR HOUSE AND ASKED WHAT THE ~~PROBLEM~~ PROBLEM WAS. I DESCRIBED THE EVENTS. DURING THAT CONVERSATION OTHER OFFICERS WERE KNOCKING ON WORLEY'S DOOR IDENTIFYING THEMSELVES AS SHERIFF'S OFFICERS. WHEN THE PORCH LIGHT WAS TURNED ON, THE OFFICER THAT I WAS TALKING TO EXCUSED HIMSELF AND WENT BACK TO THE WORLEY'S. I WENT BACK INSIDE MY HOUSE AND WAS WATCHING FROM THE KITCHEN. I SAW AN OFFICER AT THE BACK OF WORLEY'S HOUSE LOOKING UP TOWARDS THE DECK. I THEN HEARD A GUNSHOT AND SAW THE OFFICER FALL BACK. ~~AS~~ AS I THEN HEARD ANOTHER GUNSHOT AND SAW THE OFFICER RUN TOWARDS THE FRONT OF THE HOUSE

AS 11/15/09

11/15/09 AS

I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

Dated at 130 PRESIDENTS DRIVE this 15 day of NOVEMBER, 2009

WITNESS Brock MH MCSO

Signature of person giving voluntary statement

WITNESS: ____

VOLUNTARY STATEMENT
(NOT UNDER ARREST)

PAGE NO.____OF____PAGES

I Gayle Sheffield, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Deputy Brock-MA MCSO. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

Ph. 391-2431

I am 62 years of age, D.O.B. 1-11-1947 and I live at 130 Presidents Drive

On the morning of Nov. 15 at about 3:30 AM I was awaken by the sound of a gunshot. We also heard some loud talking. About 15 mins. later we heard another gunshot and more talking. My husband + I were concerned and called the police. This has happened before + sometime this September, the Thursday after Labor Day, we were awakened by 3 gunshots. These shots began around 2:00 AM + continued about every half hour.

We had been having a problem with our neighbor, Joe Worley, for quite sometime. He would sit outside on his porch in the middle of the night + talk at the top of his voice. It would wake us up in the early morning, sometime 2 or 4 AM. We never complained until last Sept. when we heard gunshots. Not wanting to cause a problem with the neighbors, we decided not to call the police, but instead talk to Joe's Mother, Margaret, about her son's behavior. She said he didn't do anything in terms of shooting a gun. Instead, she said the neighbors shot a deer. We confirmed with the neighbors, Bill Stevens, that no one was there + certainly didn't shoot deer in the middle of the night. We did report the shooting to the Sheriff on Friday.

Ever since then, at least once every weekend, we hear a shot, but still have not reported it — last night we heard gunshots again + were concerned enough to call the police — by the time they got to take a look + we heard 2 shots — An officer had been shot at 2:45

I have read each page of this statement consisting of _____ page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

Dated at November 15, 2009, this _____ day of _____

WITNESS: Brock-MA MCSO

Gayle Sheffield
Signature of person giving voluntary statement

WITNESS: _____

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Report of Investigation

Title of Investigation:	Investigation Number:	Report Number:
Worley, Joe Ross	763055-10-0124	3

SUMMARY OF EVENT:

On Wednesday, July 21, 2010, Special Agent Shawn Stallo interviewed McCormick County Sheriff's Office (MCSO) Deputy Nick Moore at the McCormick County Sheriff's Office in McCormick, SC. Deputy Moore was present on November 15, 2009 when Deputy Bobby Rushton was shot by suspect Joe Ross WORLEY.

NARRATIVE:

On Wednesday, July 21, 2010, Special Agent Shawn Stallo interviewed McCormick County Sheriff's Office (MCSO) Deputy Nick Moore at the McCormick County Sheriff's Office in McCormick, SC. Deputy Moore was present on November 15, 2009 when Deputy Bobby Rushton was shot by suspect Joe Ross WORLEY. In response to the interview with SA Stallo, Deputy Moore stated essentially the following:

On November 15, 2009, at approximately 4:00am, McCormick County 911 received and emergency call from Alan Sheffield who stated that his neighbor, Joe WORLEY, was yelling and discharging a firearm at WORLEY'S residence; [redacted] Presidents Drive McCormick, SC. MCSO Deputies Bobby Rushton, Nick Moore, and Melissa McAllister were dispatched to WORLEY'S residence.

Deputies Rushton, Moore, and McAllister arrived at the incident location. Deputy Rushton approached the complaint, Sheffield, while Deputy Moore knocked on the door of WORLEY'S residence.

Deputy Moore knocked on the door for several minutes and was leaving when the top deck flood lights turned on. Deputy Moore returned to the door and heard someone walking on the top deck above his head. Deputy Moore witnessed Deputy Rushton walk towards the top deck and heard Deputy Rushton yell at the person on the top deck, "Sheriff's Office" and then yell, "gun!". Deputy Moore next heard gunfire and saw Deputy Rushton fall to the ground.

Deputy Moore took cover and yelled for Deputy Rushton to come to his location. Deputy Moore then heard another gunshot. He could hear WORLEY state, "I am going to get you, you son of a bitch!" Deputy Rushton managed to crawl to Deputy Moore's location and the two vacated the area with Deputy McAllister. The three Deputies drove a few miles from the incident location to meet with EMS.

Approximately 30 minutes later, Deputy Moore met with MCSO Sheriff George Reid and returned to

Prepared by:	Title:	Signature:	Date:
Shawn M. Stallo	Special Agent, Greenville Field Office		7-22-10
Authorized by:	Title:	Signature:	Date:
Christopher J. Hyman	Resident Agent in Charge, Greenville Field Office		07/22/10
Second level reviewer (optional):	Title:	Signature:	Date:
Zebedee T. Graham	Special Agent in Charge, Charlotte Field Division		

WORLEY'S residence. At WORLEY'S residence, Sheriff Reid and Deputy Moore encountered two individuals walking around the property shining a flashlight; later identified as WORLEY and his mother, Margret Worley.

Sheriff Reid called out to the individuals and asked who they were (?). WORLEY replied, "Who are you?" Sheriff Reid stated he was from the MCSO and asked who shot his Deputy. WORLEY replied, "I did, he should not have been ringing my doorbell". WORLEY was arrested and transported to the MCSO. WORLEY also told Sheriff Reid that he placed Deputy Rushton's firearm in his patrol car.

Following WORLEY'S arrest, Sheriff Reid asked Margret Worley if he could search her residence for the firearm believed to be used to shoot the Deputy. Mrs. Worley provided Sheriff Reid with verbal consent to search her residence.

Deputy Moore added that the ammunition seized from WORLEY'S residence appeared to have been manipulated into more lethal rounds.

SA Stallo will attach a statement prepared by Deputy Moore and a statement prepared by Deputy McAllister on November 15, 2009.

Attachment(s):

MCSO Statement by Deputy Nick Moore
MCSO Statement by Deputy Melissa McAllister

VOLUNTARY STATEMENT

DATE 11-15-2009 TIME 0755 A.M. PLACE McCORMICK COUNTY SHERIFF'S OFFICE

I, DEPUTY NICHOLAS MOORE, am 31 years old and I live at 368 Hwy 284 ABBEVILLE SC 29620

I am giving this statement to GEORGE REID I.D. _____, who has identified himself as SHERIFF GEORGE REID OF McCORMICK COUNTY and he has duly warned me that I have the following rights: that I have the right to remain silent and not make any statement at all; that any statement I make may be used against me at my trial; that any statement I make may be used as evidence against me in court; that I have the right to have a lawyer present to advise me prior to and during any questioning; that if I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and that I have the right to terminate the interview at any time.

Prior to and during the making of the statement, I have and do hereby knowingly, intelligently, and voluntarily waive the above explained rights and I do make the following voluntary statement to the aforementioned person of my own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomsoever:

SEE ATTACHED STATEMENT

NOM

NOM

NOM

NOM

I have read this statement consisting of _____ page(s), each page of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct.

N.O.M.

Signature of person making voluntary statement

The above warnings were given by and this voluntary statement was taken by

P Fc Jesse Wideman MPD

Witness

GEORGE REID

(This must be one and the same person as named above)

NOM
LOCATED IN THE COUNTY OF MCCORMICK ON NOVEMBER 15, 2009 SHERIFF'S DEPUTIES WERE DISPATCHED TO PRESIDENTS DR. FOR A COMPLAINT OF A LOUD DISTURBANCE. THE CALLER ALAN SHEFFIELD WHO LIVES AT 130 PRESIDENTS DR. TOLD DISPATCH THAT HIS NEIGHBOR WAS OUTSIDE YELLING AND SHOOTING A GUN. DEPUTIES RUSHTON, MOORE AND MCALLISTER ALL RESPONDED TO THE CALL. UPON ARRIVAL DEPUTIES LOOKED FOR THE SUBJECT AT THE FRONT OF THE RESIDENCE. THE SUBJECT WAS BELIEVED TO NO LONGER BE OUTSIDE. DEPUTY RUSTON WENT OVER TO 130 PRESIDENTS DR. AND SPOKE WITH THE CALLER. I (DEPUTY MOORE) WENT TO THE DOOR AND RANG THE DOORBELL AND KNOCKED. AFTER SEVERAL SECONDS I RANG THE DOORBELL AND KNOCKED AGAIN. AFTER SEVERAL MORE SECONDS WITH NO RESPONSE I STARTED TO LEAVE THE RESIDENCE. I ADVISED THE OTHER DEPUTIES OF THAT ALSO. WHILE LEAVING WE NOTICED THAT THE PORCH LIGHT CAME ON. I THEN ANNOUNCED SHERIFF'S OFFICE AND THE LIGHT WENT OFF. I THEN KNOCKED ON THE DOOR AGAIN AND THE LIGHT CAME BACK ON AND I DID HEAR THE DOOR UPON FROM THE UPPER DECK OF THE RESIDENCE. I ONCE AGAIN ANNOUNCED SHERIFF'S OFFICE AND THEN HEARD THE SUBJECT SAY " WHAT DO YALL WANT". I THEN ANNOUNCED AGAIN SHERIFF'S OFFICE AND THE SUBJECT YELLED " I DON'T GIVE A FUCK"! DEPUTY RUSHTON THEN YELLED "GUN" I THEN DREW MY WEAPON AND NOTICED THAT RUSHTON HAD ALSO DRAWN HIS WEAPON. THEN I HEARD A GUNSHOT AND SAW RUSHTON GO DOWN. RUSH STATED THAT HE HAD BEEN HIT. RUSHTON THEN MADE IT TO ME AND WE BOTH FOUND COVER. DUE TO THE FACT THAT WE WERE IN AN UNKNOWN LOCATION I WANTED TO GET RUSHTON AND MYSELF AWAY FROM THE RESIDENCE. WE STARTED TO CREATE DISTANCE BETWEEN US AND THE SHOOTER. I ADVISED DEPUTY MCALLISTER TO GET HER VEHICLE AND COME AROUND TO GIVE US COVER. RUSHTON AND I FOUND CONCEALMENT BEHIND SOME BUSHES IN THE BACK YARD. I THEN ASKED RUSHTON IF HE WAS OK. HE STATED YES I NOTICED THAT HE HAD BEEN SHOT IN THE HAND. MYSELF AND RUSHTON STAYED BEHIND THE BUSHES FOR SEVERAL SECONDS. I WAS CONTINUING TO LOOK FOR THE SHOOTER WHILE ATTEMPTING TO AID RUSHTON. WE THEN HEARD THE SHOOTER SAY " WHERE YOU AT YOU SON OF A BITCH" RUSHTON AND I THEN STARTED TO MAKE MORE DISTANCE BETWEEN THE SHOOTER AND US. WE ARRIVED ABOUT 300 YARDS FROM THE RESIDENCE AND DEPUTY MCALLISTER MET US WITH HER PATROL CAR. DEPUTY MCALLISTER AND I GOT BOBBY INTO THE BACK SEAT OF THE PATROL CAR AND CARRIED HIM TO THE MAIN HIGHWAY TO MEET WITH EMS WORKERS. WHILE EMS WAS TREATING RUSHTON I CALLED THE SHERIFF AND CHIEF DEPUTY AND ADVISED THEM OF THE SITUATION. THEY BOTH ADVISED THAT THEY WERE HEADED OUR WAY. EMS LOADED RUSHTON INTO THE AMBULANCE AT LEFT. THE SHERIFF, MYSELF AND DEPUTY MCALLISTER THEN WENT BACK TO SECURE THE SCENE. UPON ARRIVAL BACK AT THE SCENE WE SAW TWO SUBJECTS IN THE YARD WALKING AROUND WITH A NOM

NOM

FLASHLIGHT. I TOOK COVER BEHIND A PATROL CAR AND THE SHERIFF CALLED OUT TO THE SUBJECTS. THE SUBJECTS STARTED COMING TOWARDS US AND I TOLD THE SHERIFF TO WATCH THE FUCKERS. OFFICER WIDEMAN HAD THEN ARRIVED AT THE SCENE AND I TOLD HIM TO GET READY AND TO GET HIS SHOTGUN. THE SUBJECTS CAME UP AND DID NOT APPEAR TO BE ARMED. THE SHERIFF, MCALLISTER, WIDEMAN AND I APPROACHED THE SUBJECTS AND THE MALE SUBJECT STATED THAT THE GUN WAS IN THE PATROL CAR. THE SHERIFF ASKED WHO DID THE SHOOTING AND THE MALE SUBJECT STATED HE DID. I ALSO NOTICED THAT HE WAS THE GUY THAT I SAW ON THE PORCH WHEN RUSHTON WAS SHOT. I THEN PLACED THE SUBJECT UNDER ARREST. HE THEN STATED AGAIN THAT THE GUN WAS IN THE PATROL CAR. I ASKED WHICH GUN AND HE STATED THE DEPUTIES GUN. HE WAS THEN TRANSPORTED TO THE COUNTY JAIL BY OFFICER WIDEMAN. THE FEMALE THAT WAS WITH HIM WAS HIS MOTHER AND SHE WAS ASKED WHERE THE GUN WAS THAT HE HAD SHOT. SHE STATED SHE DIDN'T KNOW. SHE GAVE DEPUTIES PERMISSION TO GO IN AND LOOK FOR IT. UPON GOING INTO THE RESIDENCE DEPUTIES FOUND A LOADED 30-06 REMINGTON RIFLE WITH THREE ROUNDS IN THE MAGAZINE AND ONE IN THE CHAMBER. DEPUTIES SECURED THE WEAPON AND TOOK IT INTO EVIDENCE. DEPUTIES ALSO NOTICED EMPTY 30-06 SHELL CASINGS ON THE PORCH. THEY WERE ALSO TAKEN INTO EVIDENCE. DEPUTY MCALLISTER THEN PROCESSED THE SCENE AND COLLECTED ALL EVIDENCE. NOM

DEPUTY N.O. MOORE

N.O. M

Legal

South Carolina Department of
Natural Resources
P.O. Box 167, 1000 Assembly Street
Columbia, South Carolina 29202

DNR

JAN 18 2011

Mr. Carson M. Henderson
The Henderson Law Firm
109-B Oak Avenue
Greenwood, SC 29646

29646262624 C012

South Carolina Department of

Natural Resources

DNR

John E. Frampton
Director

Office of Chief Counsel
Buford S. Mabry, Jr.
Paul S. League
Robert Stephenson

January 14, 2011

Mr. Carson M. Henderson
The Henderson Law Firm
109-B Oak Avenue
Greenwood, SC 29646

Re: FOIA request regarding Sara M. McCallister

Dear Mr. Henderson:

This letter is a final response to your request for information received in my office on December 29, 2010. Enclosed please find all information regarding Ms. Hegler's (McCallister's) termination from the SC Department of Natural Resources.

Should you have any questions, please feel free to contact me.

Sincerely,

Caroline M. Pinckney
Freedom of Information Officer

/cmp
Enclosure

South Carolina Department of
Natural Resources

John E. Frampton
Director

May 29, 2007

VIA HAND DELIVERY
PERSONAL AND CONFIDENTIAL

Officer Sara Melissa Hegler
2034 Whitetown Road
McCormick, S.C. 29835

Dear Officer Hegler:

You are hereby notified that your employment with the South Carolina Department of Natural Resources (DNR) is terminated effective May 27, 2007. I am terminating your employment according and pursuant to the statutory authority provided me by S.C. Code Section 50-3-310 as a result of issues related to a fatal boating accident that occurred on the Little Pee Dee River on May 26, 2007 in which you were a passenger in one of the boats involved. Details of the conditions resulting in this decision are set forth below.

On May 26 and 27, 2007, you failed to cooperate with the DNR investigation by withholding information important to the Department's investigator regarding the accident. Your failure to be truthful with the supervising Captain and with the Department's investigator are actions unbecoming a DNR Law Enforcement Officer and requires that I take this action. Your actions are in violation of DNR's Standards of Disciplinary Actions (policy 701.03).

On three (3) separate occasions while being questioned, first by Captain William Poole, and on two other occasions by DNR accident investigator, Sergeant Donnie Pritcher, you were not forthcoming concerning the removal of a cooler of alcohol from the boat in which you were a passenger. This evidence was important to the investigation and there are witnesses stating you were aware that the cooler was removed from the boat and hidden and that you helped clean the empty alcohol cans from the boat and placed them in the cooler prior to it being hidden. Furthermore, you left the scene of the accident allegedly to search for the missing person from the accident. While you were downstream, allegedly searching, the cooler of alcohol was removed from the boat and placed in bushes on the side of the river. As a DNR Law Enforcement Officer, your sworn duty is to ensure the preservation of a boating accident site and to assist in an investigation. The fact that you withheld important information from DNR investigators during a fatal boating accident is absolutely unacceptable.

Because I have the authority to remove law enforcement officers at my discretion (S.C. Code Section 50-3-310), you are not entitled to grievance rights for this decision.

Any questions you have regarding administrative matters relating to your termination, such as delivery of your final paycheck and the status of insurance benefits going forward should be directed to DNR's Human Resources Office.

Sincerely,

John E. Frampton
Director

CC: Colonel Alvin Taylor
Human Resources Office
Legal Office

SSN:
Name: McAllister, Sara M.
D.O.B.
DL No.:

Gender:
Race:
Education
Active Status: A - Active

Cert Type: Class 1
Cert Date: 04/13/2007
Recert Date: 04/13/2010
Orig Cert Date: 04/13/2007

Agency: McCormick Co. Sheriff's Office
ORI#: 330000
Hire Date: 04/01/2008
Position: 400 - Other

Note:

Cert Type	Status	Cert Date	Recert Date	Cert#
C1 - Class 1		04/13/2007	04/13/2010	
DT - DataMaster Transition		05/06/2009	05/06/2011	DT004322
RA - Radar		11/20/2008	12/31/2011	

Hire Date	Date Left	Agency	Cert Type	Reason
02/02/2007	05/26/2007	SC Dept. of Natural Resources	Class 1	Unfavor

Course Date	Crs#	Course title	Cert Type	Hours
02/12/2007	1172	A - Physical Abilities Test - #500	None	1
04/13/2007	1135	B - Basic Law Enforcement - #500	Class 1 Basic	338
04/27/2007	2884	Wildlife Basic - CJA	In-Service	40
04/30/2008	5128	Gang Legislation & Awareness	In-Service	7
09/03/2008	9899	Safe and Legal Traffic Stops (SALTS)	In-Service	4
10/27/2008	2563	CDV Evidence Collection	In-Service	3
10/27/2008	4367	Criminal Domestic Violence and Culturally Diverse Victims	In-Service	3
11/20/2008	2721	Police Traffic Speed Enforcement Radar Operator	Radar Cert	16
05/06/2009	2789	DMT Certification (Spring)	DMT Cert	8
08/14/2009	2598	Detective Level I	In-Service	40

THIS IS TO CERTIFY THAT THIS IS A TRUE COPY AS CONTAINED IN THE FILES OF THE S.C. CRIMINAL JUSTICE ACADEMY.

Jeffrey B. Finch
CUSTODIAN OF RECORDS

DATE 12/14/2009

COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	
COUNTY OF MCCORMICK)	ELEVENTH JUDICIAL CIRCUIT
)	
STATE OF SOUTH CAROLINA)	**TABLE OF CONTENTS FOR DEFENDANT'S CASTLE DOCTRINE MOTION NOTEBOOK**
)	
v.)	
)	
JOE ROSS WORLEY,)	
)	Warrant Nos. J-036561/62/63/64/65/66
Defendant.)	
)	

1. PROTECTION OF PERSONS AND PROPERTY ACT, CODE SECTION 16-11-410 ET. SEQ.
2. STATE V. DUNCAN, 2011 WL 1744209 (S.C. 2011)
3. KELVIN V. STATE, 610 SO.2D 1359 (FLA. CT. APP. 1992)
4. CRIDER V. STATE, 632 SO.2D 1058 (FLA. CT. APP. 1994)
5. STATE V. DICKEY, 669 S.E.2D 917 (S.C. CT. APP. 2008)
6. STATE V. BRYANT, 705 S.E.2D 465 (S.C. CT. APP. 2010)
7. STATE V. MCGOWAN, 557 S.E.2D 657 (S.C. 2001)
8. CODE SECTIONS 17-13-20 AND 17-13-10
9. MOON CALENDAR FOR NOVEMBER 2009
10. PHOTOGRAPHS OF MARY WORLEY'S HOME
11. PHOTOGRAPHS OF DEPUTY RUSHTON'S HANDGUN AND EVIDENCE FOUND AT WORLEY RESIDENCE ON NOVEMBER 15, 2009
12. CODE SECTIONS AND REGULATIONS DEALING WITH LAW ENFORCEMENT UNIFORMS AND TRAINING

#1

13. INFORMATION FROM MCCORMICK COUNTY SHERIFF'S OFFICE CONCERNING POLICIES AND DEPUTY RUSHTON'S CLOTHING ON THE NIGHT OF THE SHOOTING

14. S.C. CRIMINAL JUSTICE ACADEMY LESSON PLANS

15. TREATISES RELIED ON BY DR. GEORGE KIRKHAM

16. DR. GEORGE KIRKHAM'S C/V

17. RICHARD "DICK" FLIPPO, SR.'S C/V

18. DON GIRNDT'S C/V

#2

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C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 11. Offenses Against Property
Article 6. Protection of Persons and Property
→ § 16-11-410. Citation of article.

This article may be cited as the "Protection of Persons and Property Act".

CREDIT(S)

HISTORY: 2006 Act No. 379, § 1, eff June 9, 2006.

Code 1976 § 16-11-410, SC ST § 16-11-410

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Code 1976 § 16-11-420

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 11. Offenses Against Property
Article 6. Protection of Persons and Property
§ 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.

CREDIT(S)

HISTORY: 2006 Act No. 379, § 1, eff June 9, 2006.

Code 1976 § 16-11-420, SC ST § 16-11-420

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Code 1976 § 16-11-430

C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 11. Offenses Against Property
Article 6. Protection of Persons and Property
§ 16-11-430. Definitions.

As used in this article, the term:

(1) "Dwelling" means a building or conveyance of any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.

(2) "Great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

(3) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

(4) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

CREDIT(S)

HISTORY: 2006 Act No. 379, § 1, eff June 9, 2006.

Code 1976 § 16-11-430, SC ST § 16-11-430

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Code 1976 § 16-11-440

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 11. Offenses Against Property
Article 6. Protection of Persons and Property

§ 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, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

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

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; or

(2) sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship, of the person against whom the deadly force is used; or

(3) who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(4) against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his official duties, and he identifies himself in accordance with applicable law or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a

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right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

(D) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime as defined in Section 16-1-60.

(E) A person who by force enters or attempts to enter a dwelling, residence, or occupied vehicle in violation of an order of protection, restraining order, or condition of bond is presumed to be doing so with the intent to commit an unlawful act regardless of whether the person is a resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder.

CREDIT(S)

HISTORY: 2006 Act No. 379, § 1, eff June 9, 2006.

NOTES OF DECISIONS

Construction and application 1

1. Construction and application

The Protection of Persons and Property Act could not be applied retroactively, and therefore, defendant, whose charged criminal acts including voluntary manslaughter occurred four months prior to the Act's effective date, was not entitled to jury instruction on presumptions set forth in the Act, specifically, for purposes of self-defense, that one is presumed to have reasonable fear of imminent peril when using deadly force against another unlawfully entering his or her residence, occupied vehicle, or place of business; statutory language indicated that the Act was to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must be treated as remaining in full force and effect. State v. Bolin (S.C.App. 2009) 381 S.C. 557, 673 S.E.2d 885. Homicide ⚿ 751

Code 1976 § 16-11-440, SC ST § 16-11-440

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Code 1976 § 16-11-450

C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 11. Offenses Against Property
Article 6. Protection of Persons and Property
→ § 16-11-450. Immunity from criminal prosecution and civil actions; law enforcement officer exception; costs.

(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.

(B) A law enforcement agency may use standard procedures for investigating the use of deadly force as described in subsection (A), but the agency may not arrest the person for using deadly force unless probable cause exists that the deadly force used was unlawful.

(C) The court shall award reasonable attorneys' fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of a civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (A).

CREDIT(S)

HISTORY: 2006 Act No. 379, § 1, eff June 9, 2006.

Code 1976 § 16-11-450, SC ST § 16-11-450

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--- S.E.2d ----, 2011 WL 1744209 (S.C.)
(Cite as: 2011 WL 1744209 (S.C.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of South Carolina.
The STATE, Appellant,
v.
Gregory Kirk DUNCAN, Respondent.

No. 26974.
Heard Jan. 18, 2011.
Decided May 9, 2011.

Background: After defendant was indicted for murder, the Circuit Court, Greenville County, Edward W. Miller, J., granted defendant's motion to dismiss on the ground that he was entitled to immunity under the Protection of Persons and Property Act. State appealed.

Holdings: The Supreme Court, Pleicones, J., held that:
(1) on issue of first impression, immunity under Protection of Persons and Property Act was to be determined pre-trial;
(2) on issue of first impression, defendant was required to prove entitlement to immunity by preponderance of the evidence; and
(3) defendant was entitled to immunity.

Affirmed.

West Headnotes

[1] Homicide 203 ⚿788

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k785 Danger
203k788 k. Circumstances and Events Constituting Danger: Most Cited Cases

Immunity from criminal prosecution pursuant to the Protection of Persons and Property Act was properly determined pre-trial, rather than being treated as an affirmative defense to be raised at trial; while the Act did not explicitly provide a procedure for determining immunity, by using the words "immune from criminal prosecution," the legislature intended to create a true immunity, and not simply an affirmative defense, thus, immunity was a complete bar to prosecution. Code 1976, § 16–11–450.

[2] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.

[3] Statutes 361 ⚿188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning.

[4] Statutes 361 ⚿189

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language

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361k189 k. Literal and Grammatical Interpretation. Most Cited Cases

Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.

[5] Homicide 203 ⚿788

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k785 Danger
203k788 k. Circumstances and Events Constituting Danger. Most Cited Cases

Defendant was entitled to immunity from prosecution for murder pursuant to Protection of Persons and Property Act, where victim was attempting to force his way into defendant's residence at the time defendant shot and killed the victim. Code 1976, § 16–11–450.

[6] Homicide 203 ⚿1194

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1192 Self-Defense
203k1194 k. Degree of Proof in General. Most Cited Cases

When a party raises the question of statutory immunity pursuant to the Protection of Persons and Property Act prior to trial, the proper standard for the circuit court to use in determining immunity is a preponderance of the evidence. Code 1976, § 16–11–450.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General S. Creighton Waters, of Columbia, and Solicitor Robert Mills Ariail, of Greenville, for Appellant.

Chief Appellate Defender Robert M. Dudek and Senior Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

Justice PLEICONES.

*1 The State appeals the circuit court's grant of respondent's pre-trial motion to dismiss on the ground that respondent was entitled to immunity under the Protection of Persons and Property Act [FN1] (the Act). We affirm.

FACTS

Respondent was indicted for murder after he shot and killed Christopher Spicer (the victim) at respondent's home. Prior to trial, respondent moved to dismiss the indictment, arguing he was entitled to immunity under the Act. At a hearing on respondent's motion, the State introduced numerous pieces of evidence, including witness statements and testimony, photographs and video of the crime scene, 911 tapes, and the victim's autopsy report.

According to the statement and testimony of respondent's girlfriend, Jean Templeton, she, the victim, and the victim's girlfriend, Amanda Grubbs, were guests in respondent's house on the night of the shooting. At some point, Grubbs handed the victim a picture of respondent's daughter in a cheerleading outfit and the victim began making inappropriate comments about the picture. Respondent asked the victim and Grubbs to leave.

According to Templeton, the victim left but returned a few minutes later. The victim was opening the screened porch door when respondent exited the front door of the house onto the porch with the gun. At one point, the victim began advancing across the porch and Templeton was "between [the victim]

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and [respondent]" and was "trying to get [the victim] off the steps and leave." The victim continued to force his way onto the porch. Templeton claimed respondent pointed the gun at the victim and fired. The victim died as a result of the gunshot wound to the face.

After considering the evidence, the circuit court dismissed the indictment finding respondent was immune, under the Act, from prosecution.

ISSUES

I. Did the circuit court err in making a pre-trial determination of immunity?

II. Did the circuit court err in finding respondent was entitled to immunity under the Act?

ANALYSIS

I. *Pre-trial determination of immunity*

[1] The State argues the circuit court erred in making a pre-trial determination of immunity.[FN2] We disagree.

The Act provides, "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** " S.C.Code Ann. § 16–11–420(A) (Supp. **2010**). The Act also states, "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." S.C.Code Ann. § 16–11–420(B) (Supp. **2010**).

The Act further provides:

> (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:
>
> ***2** (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle ...; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> ....
>
> (D) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime as defined in Section 16–1–60.

S.C.Code Ann. § 16–11–440 (Supp. **2010**).

The immunity provision at issue provides:

> (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....

S.C.Code Ann. § 16–11–450 (Supp. **2010**) (emphasis supplied).

[2][3][4] The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid–State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Id.* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

Black's Law Dictionary defines "immune" as

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"having immunity" or being "exempt from a duty or liability." Black's Law Dictionary (9th ed.2009). "Prosecution" is defined as "a criminal proceeding in which an accused person is tried." *Id.*

The trial court found the plain meaning of the immunity provision was to shield a person from a "full blown criminal trial." Accordingly, the trial court found the only way this statutorily granted right could be meaningfully enforced was for the defendant to be able to raise immunity in a pre-trial motion.

Whether immunity under the Act should be determined prior to trial is an issue of first impression in this state. Further, the Act does not explicitly provide a procedure for determining immunity. In deciding this matter, we find guidance from several other states that have addressed similar statutory immunity provisions.

In *Fair v. State,* the Supreme Court of Georgia held the trial court erred in refusing to rule on the defendants' immunity [FN3] prior to trial. *Fair v. State,* 284 Ga. 165, 166, 664 S.E.2d 227, 230 (Ga.2008). Particularly, the *Fair* court found that by the plain meaning of "immune from prosecution," the statute must be construed to bar criminal proceedings against persons who used force under the circumstances set forth in the statute, and that this determination must be made before the trial commences. *Id.*

*3 In the recent decision of *Dennis v. State,* 51 So.3d 456 (Fla.2010), the Supreme Court of Florida approved the reasoning of *Peterson v. Florida,* 983 So.2d 27 (Fla.1st D.C.A.2008), where the First District Court of Appeal found that by enacting a statute [FN4] similar to the Act at issue here, the legislature intended to establish a true immunity and not merely an affirmative defense. The *Dennis* court therefore found the plain language of the statute grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial. *Dennis,* 51 So.3d at 462. The *Dennis* court concluded that, where a defendant files a motion to dismiss on the basis of Florida's "Stand Your Ground" statute, the trial court should conduct a pre-trial evidentiary hearing to decide the factual question of the applicability of the statutory immunity. *Id.*

Likewise, we find that, by using the words "immune from criminal prosecution," the legislature intended to create a true immunity, and not simply an affirmative defense. We also look to the language of the statute that provides, "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." We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial. Accordingly, we find the trial court properly made a pre-trial determination of respondent's immunity.

II. *Respondent's immunity under the Act*

The State argues the circuit court erred in finding respondent was entitled to immunity under the Act. We disagree.

The circuit court found that, applying any standard of proof, respondent would be entitled to immunity under the Act.

The proper standard of proof in determining immunity under the Act is also a novel issue in this state. Other states have addressed this matter. In *Dennis,* the Florida Supreme Court rejected the State's argument that the pre-trial hearing on immunity should test merely whether the State has probable cause to believe the defendant's use of force was not legally justified. *Dennis,* 51 So.3d at 463. Specifically, the *Dennis* court found the grant of immunity from "criminal prosecution" under the statute "must be interpreted in a manner that provides the defendant with more protection from prosecution for a justified use of force than the

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probable cause determination previously provided to the defendant by rule." *Id.* Accordingly, the court found the procedure set out in *Peterson, supra,* best effectuated the intent of the legislature. The *Peterson* court held that when a defendant raises the question of statutory immunity pre-trial, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. *Peterson,* 983 So.2d at 29.

*4 [5][6] Likewise, we hold that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence. Turning to the facts of this case, we find there is evidence to support the circuit court's finding that respondent was entitled to immunity. Templeton's testimony and statements showed that, at the time the victim was shot, she was between the victim and respondent, trying to remove the victim from the dwelling. The victim, however, continued to force his way onto the porch. We find respondent showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering respondent's home in accordance with § 16–11–440. Accordingly, the circuit court properly found respondent was entitled to immunity under the Act.

We further find the circuit court's order of dismissal was proper because it found respondent was entitled to immunity under the Act under any standard of proof. In other words, had the circuit court held respondent to a stricter standard of proof, such as clear and convincing evidence or even proof beyond a reasonable doubt, the circuit court would have nonetheless found respondent was entitled to immunity.

CONCLUSION

We conclude a pre-trial determination of immunity under the Act using a preponderance of the evidence standard is proper and that respondent was entitled to immunity under the Act. Accordingly, the findings of the circuit court are

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

FN1. S.C.Code Ann. §§ 16–11–410 to 450 (Supp. 2010).

FN2. We find an order granting or denying a motion to dismiss under the Act is immediately appealable, as it is in the nature of an injunction. *See* S.C.Code Ann. § 14–3–330(4) (Supp. 2010) ("The Supreme Court ... shall review upon appeal ... an interlocutory order or decree ... granting, continuing, modifying, or refusing an injunction....").

FN3. The defendants argued they were immune from prosecution under OCGA § 16–3–24.2, which provides in relevant part that "[a] person who uses threat or force in accordance with Code Section ... 16–3–23 or ... 16–3–24 shall be immune from criminal prosecution...."

FN4. *See* F.S.A. § 776.032 (Supp.2010).

S.C.,2011.
State v. Duncan
--- S.E.2d ----, 2011 WL 1744209 (S.C.)

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Westlaw.

610 So.2d 1359, 18 Fla. L. Weekly D190
(Cite as: 610 So.2d 1359)

C

District Court of Appeal of Florida,
First District.

Keith Anthony KELVIN, Appellant,
v.
STATE of Florida, Appellee.

No. 91-2627.
Dec. 30, 1992.

Defendant was convicted in the Circuit Court, Duval County, Donald R. Moran, Jr., J., of murder and attempted murder of undercover police officers, and he appealed. The District Court of Appeal, Ervin, J., held that: (1) evidence of belligerent statements made by the defendant during a prior arrest was relevant and admissible to show premeditated intent to use deadly force during an incident in which the defendant shot at police officers; (2) proposed cross-examination of an officer about whether he used profanity when he approached suspected drug sellers was relevant to support defendant's theory that he believed that the undercover officers were robbers; (3) a flight instruction amounted to an impermissible comment on the evidence; (4) the defendant waived errors in the prosecutor's opening statement; and (5) the evidence was sufficient to withstand a motion for judgment of acquittal under the "castle" doctrine.

Affirmed in part, reversed in part, and remanded for new trial.

West Headnotes

[1] Criminal Law 110 ⚿371(4)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k371 Acts Showing Intent or Malice or Motive
110k371(4) k. In Prosecutions for Homicide. Most Cited Cases

Evidence of belligerent statements made by defendant during prior arrest was relevant and admissible to show defendant's premeditated intent to use deadly force during incident in which he shot at police officers, even if it did reveal other crimes to jury.

[2] Criminal Law 110 ⚿412.1(1)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(1) k. In General. Most Cited Cases

Criminal Law 110 ⚿412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases

Suppression of statements allegedly obtained in contravention of *Miranda* is required only if statements were product of interrogation, not if statements were volunteered by suspect.

[3] Criminal Law 110 ⚿655(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(1) k. In General. Most Cited Cases

Trial court's comments when defense counsel

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attempted to cross-examine police officer about whether he used profanity as he approached suspected drug sellers were impermissible comments that reflected skepticism about defense theory that defendant believed officer was robber when defendant fired shots that gave rise to prosecution for murder and attempted murder.

[4] Criminal Law 110 ⚖759(5)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k754 Instructions Invading Province of Jury
110k759 Inferences from Evidence
110k759(5) k. Flight. Most Cited Cases

Flight instruction amounted to impermissible comment on evidence in prosecution for murder and attempted murder of undercover police officers.

[5] Courts 106 ⚖100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases

State Supreme Court's *Fenelon* decision prohibiting flight instructions as impermissible comments on evidence applied retrospectively to prosecution that was pending on appeal at time of decision.

[6] Criminal Law 110 ⚖478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases

Evidence technician was not qualified to give expert testimony about trajectory of bullets depicted by dowels that had been stuck into bullet holes in sofa located in apartment in which shootings of undercover police officers had occurred; technician was not reconstructionist and had no training in ballistics.

[7] Criminal Law 110 ⚖369.2(4)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(3) Particular Offenses, Prosecutions for
110k369.2(4) k. Assault, Homicide, Abortion and Kidnapping. Most Cited Cases

Probative value of evidence about defendant's prior felony conviction, about his pending deportation order, and about his being on bond posted for prior arrest was too speculative to outweigh danger of unfair prejudice from admitting evidence of prior wrongs or acts in prosecution for murder and attempted murder of undercover officers; prosecution presented only speculation that defendant, at time of shooting, did not want to be arrested for possession of firearm by convicted felon or that he feared his bond would be revoked.

[8] Homicide 203 ⚖975

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k974 Nature of Act and Attendant Circumstances in General
203k975 k. In General. Most Cited Cases
(Formerly 203k171(1))

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Homicide 203 ⚖1003

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1000 Motive
203k1003 k. Avoiding Arrest or Prosecution; Escape. Most Cited Cases
(Formerly 203k166(1))
Evidence that defendant was in drug business with suspect whom undercover police officers were pursuing at time of shooting was relevant and admissible to show relationship between men who fled from officers, context in which murder and attempted murder of officers occurred, and defendant's possible motives for fleeing and shooting at his pursuers.

[9] Criminal Law 110 ⚖2186

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2184 Objections, Motions, and Waiver
110k2186 k. Necessity. Most Cited Cases
(Formerly 110k728(2))
Defendant waived any errors in prosecutor's opening statement and closing arguments by not objecting to improper comments about defendant's role in drug operation and about defendant's criminal history that may have affected his actions that gave rise to prosecution for murder and attempted murder of undercover police officers.

[10] Criminal Law 110 ⚖2188

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2184 Objections, Motions, and Waiver
110k2188 k. Sufficiency. Most Cited Cases
(Formerly 110k728(4))
Defendant waived error in prosecutor's opening statement, even though defendant objected at time of statement that referred to police officers' attempt to battle drug problem in county, where defendant did not move for mistrial.

[11] Criminal Law 110 ⚖1186.1

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1186.1 k. Grounds in General. Most Cited Cases
Prosecutor's comments during opening statement about why defendant ran from police officers required reversal and remand when considered in conjunction with multiple errors, including improper admission of speculative evidence that defendant ran from undercover officers because he was on bond for previous arrest.

[12] Homicide 203 ⚖1342

203 Homicide
203XI Questions of Law or Fact
203k1342 k. Defense of Dwelling or Habitation. Most Cited Cases
(Formerly 203k278)
Evidence was sufficient to withstand motion for judgment of acquittal and to raise jury question on whether defendant was acting to protect his "castle" at time he fired shots that gave rise to prosecution for murder and attempted murder of undercover police officers who had been in pursuit of suspected drug sellers.

[13] Criminal Law 110 ⚖655(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General

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110k654 Remarks and Conduct of Judge
110k655 In General
110k655(5) k. Remarks and Conduct as to Argument and Conduct of Counsel. Most Cited Cases

Trial court's admonishment to defense counsel for being two minutes late in returning to courtroom following break, although not sufficiently egregious to warrant reversal, was inappropriate in presence of jury.

[14] Jury 230 ⇐97(2)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k97 Bias and Prejudice
230k97(2) k. Personal Relations in General. Most Cited Cases

Jury 230 ⇐99.7

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k98 Formation and Expression of Opinion as to Cause
230k99.7 k. Source of Information. Most Cited Cases
(Formerly 230k99(8))

Veniremember who was married to sergeant in sheriff's department should have been excused for cause after indicating that she believed her husband had discussed murder and attempted murder charges with her shortly after incident in which undercover police officers had been shot.

*1361 Nancy A. Daniels, Public Defender, David P. Gauldin, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for appellee.

ERVIN, Judge.

Appellant, Keith Anthony Kelvin, appeals his convictions for first-degree murder and attempted first-degree murder, raising 11 issues on appeal: Whether the trial court erred in (1) admitting a statement Kelvin made to a law enforcement officer following a prior arrest; (2) denying appellant's renewed motion for change of venue; (3) rebuking defense counsel in front of the venire; (4) refusing to excuse the wife of a deputy sheriff for cause from the venire; (5) allowing one of the officers who was wounded in the gun battle involved in this case to testify that he was disabled as a result of this incident; (6) commenting on certain aspects of the evidence during trial; (7) instructing the jury on flight; (8) admitting expert testimony about a photograph of a sofa with dowels sticking into it; (9) admitting evidence of other crimes, wrongs, or acts; (10) permitting the prosecutor to make improper statements during opening statement and closing argument; and (11) failing to grant appellant's motion for judgment of acquittal on the charges of first-degree murder and attempted first-degree murder. We affirm issues 1 and 11; reverse issues 6, 7, 8, 9, and 10, and remand the case for new trial. Due to our disposition of the above issues, we consider it unnecessary to consider issues 2, 3, 4, and 5.

At approximately 9:00 p.m. on July 26, 1990, Jacksonville Sheriff's Office Patrolmen Kirk Clark and Warren Sanders went to Yellow Pine Court in an unmarked white truck on special assignment, wearing undercover clothing and bulletproof vests. The officers observed Lasean Dunnell and Tony Hamilton standing among a group of men at the nearby Cyprus Court Apartments and concluded that they were selling drugs. Believing they had been recognized by the men, the officers then decided to arrest Dunnell and Hamilton. Clark testified that he blocked the suspects' car with his truck, got out with his gun drawn, and yelled, "Mother-f-----, don't move, it's the police." Dunnell began walking slowly toward apartment number two until Clark told him to stop, whereupon Dunnell ran toward the apartment yelling "99," a street term for "police." Dunnell ran into the apartment, closing the door behind him.

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In hot pursuit, Clark kicked the door open without checking whether it was locked and without identifying himself as a police officer. Clark testified that once inside, a barrage of shots was fired in his direction, and that he saw a man, later identified as appellant Keith Kelvin, squatting in a corner shooting at him. Clark returned the fire and had his legs shot out from under him. He fell and was shot two more times. He then raised himself up and, intending to shoot at the suspect, instead shot Officer Sanders, who had followed him into the apartment. Sanders said, "God damn it, Clark," and fell backward onto the floor. Clark crawled to the door where he remained until Officer J.C. Tranquille came in.

Officer Sanders died of multiple gunshot wounds with perforations of vital organs and hemorrhaging. Three of his 15 wounds were fatal or potentially fatal; four of the six bullets recovered from his body were from Officer Clark's gun, and the other two were traced to the weapon that Dunnell testified was owned by Kelvin. Clark was shot six times.

Lasean Dunnell testified on behalf of the state that he had known Kelvin for about two months before the incident. Over defense*1362 objection, Dunnell said he was selling crack cocaine that evening in order to pay Kelvin $400 he owed him for some other cocaine which he had obtained from Kelvin and that Kelvin knew Dunnell was selling drugs that night to pay the debt. The court gave a *Williams* [FN1] rule instruction advising the jury that such evidence was offered for the limited purpose of proving motive, opportunity, etc. Dunnell continued that he saw the white truck parked across the street, and that Kelvin was sitting in front of apartment number two at the time, the apartment of Elaine Brown, with a gun in his pocket. Dunnell said that when someone jumped out of the driver's side of the truck yelling "police," Dunnell ran toward apartment number two, shouting "9," also a street term for police. Dunnell testified that he, Kelvin, and Gerald Brown ran into the apartment where Elaine had friends in the front room, and that the door was immediately kicked in by Officer Clark, whom he recognized. He said that Kelvin immediately shot Clark in the leg, that Clark fell over, and that Kelvin shot Clark a couple of more times while Clark was on the floor. He said Officer Sanders then came in the door pointing his gun at Dunnell, that Sanders did not shoot at Dunnell, and that several persons began shooting at that time, [FN2] including Kelvin who was firing at Sanders. Dunnell then ran out the back door.

FN1. *Williams v. State,* 110 So.2d 654 (Fla.), *cert. denied,* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

FN2. Dunnell denied firing any shots, stating he did not have a firearm.

On cross-examination, Dunnell testified that when the men jumped out of the unmarked truck, he did not know that they were police, even if he had yelled "9." He said he thought they might be "jackmen" or robbers because he heard someone shout "jackmen" as the officers left the truck. In fact, he denied knowing at any time while he was running toward the apartment that the two men were police officers and not robbers, and testified that he was afraid for his life as he ran, because he knew that "jackmen" shoot. Dunnell testified he heard Clark say, "Mother-f-----, don't run," but that Clark did not say "police." He said that after he was inside the apartment, he still did not know whether the two men were police officers or robbers, and that he was even more frightened when he saw the person who had been chasing them kick the door open with a gun in hand. Dunnell said that he had been robbed twice in the same apartment complex two weeks before, first by three armed men and the second time by eight armed men. He said that Kelvin knew about the first robbery and was in a position to have observed the second. In addition, contrary to his testimony on direct, Dunnell denied having any actual knowledge whether Kelvin had in his possession a firearm while he was sitting in the chair outside the apartment.

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Officer Tranquille testified that when he arrived on the scene he went to apartment number two and found both officers lying in a pool of blood. He testified that no one told him that the persons who had been shot inside the apartment were police officers, and that the only indications to that effect were the handcuffs which Sanders had on his belt and the bulletproof vests both men were wearing beneath their shirts.

Over objection, the following evidence was introduced on the issue of defendant's motive behind the shooting. Detective Varner testified that on June 30, 1990, while he was working undercover, he sold Kelvin some marijuana, and then arrested him and informed him of his constitutional rights. He described Kelvin as acting belligerently, saying to him that the "next time he wouldn't go as peacefully." Prior to trial, the court denied Kelvin's motion to suppress this testimony.

The state also theorized that Kelvin shot the two police officers to avoid being apprehended because he was on bond for the marijuana charge at the time of the shooting, he had a previous New York felony conviction, and/or he had immigration problems. Evidence was accordingly introduced showing that Kelvin had posted bond *1363 on July 1, 1990 for the earlier marijuana charge, and that bond was not released therefor until August 21, 1990; that Kelvin had been convicted of a felony in New York; and that Kelvin, who is from Guyana, had been issued an order of deportation dated March 22, 1988. The significance of all the above, according to the state, was that Kelvin would have been taken into custody and his bond cancelled if he had been arrested; therefore, Kelvin obviously had a motive to resist arrest, even with deadly force.

Elaine Brown testified on behalf of appellant, stating that on July 26, 1990, she lived at apartment number two, Cyprus Court Apartments, with her daughter and Keith Kelvin, and on that night Kelvin was sitting outside the apartment in front of the open door, while she was entertaining two guests inside the apartment. She heard a noise which sounded like children playing and went into the living room where she heard shooting; then she and her guests left by the back door. Brown and each of the guests testified that they did not hear anyone shout "police" or "9," and they did not know that the man who broke open the door was a police officer. Brown stated that she and Kelvin had witnessed an apparent robbery a couple of weeks before by people who yelled "vice," and that some men had jumped out of a car and shot at the apartment located opposite hers a couple of nights earlier.

Gerald Brown testified that he was standing by a tree the night of the incident, and he believed that robbers were inside the pickup truck. He had been robbed previously. He said that Officer Clark had stopped him a number of times; that he never had any reason to run from him; that he never saw Clark out of uniform or in an unmarked car before; and that he did not recognize Clark as the man who got out of the truck, who never identified himself as a police officer but merely instructed Brown and his acquaintances not to run. Brown and Kelvin went into apartment two, and when the door was kicked in, Brown ran out the back door. He never saw a gun on Kelvin before or during the shooting.

Derrick Martin, another member of the group outside the apartment, testified that he was with Dunnell, Brown, and others that night, and that when the two men jumped out of the truck, he believed they were robbers. He also denied hearing the two men identify themselves as police officers, but did hear someone yell "jackmen." He had been robbed two weeks before.

On rebuttal, Detective Herb Scott testified that when he interviewed Elaine Brown on the night of the incident, she never mentioned that Kelvin lived with her and her daughter. He admitted on cross-examination that he treated Brown as a hostile witness that night.

Kelvin was found guilty of first-degree murder and attempted first-degree murder with use of a

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firearm. He was sentenced to life in prison with a 25-year minimum mandatory for the first-degree murder offense, and life in prison with a three-year minimum mandatory sentence to run consecutive to his sentence for attempted first-degree murder with a firearm.

[1][2] As to issue 1, we conclude that Detective Varner's testimony regarding appellant's prior belligerent statement upon arrest was relevant to show appellant's premeditated intent to use deadly force during this incident, and we affirm as to this point. *See Ruffin v. State,* 397 So.2d 277, 280 (Fla.) ("Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted."), *cert. denied,* 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). We reject as well Kelvin's constitutional argument asserting that his self-incriminating statement should have been suppressed because it was made in contravention of *Miranda.*[FN3] Suppression is required only when statements are obtained through interrogation; it does "not apply to volunteered statements initiated by the suspect." *Traylor v. State,* 596 So.2d 957, 966 (Fla.1992). The record shows that Kelvin's defiant statement was voluntary and was not a ***1364** response to interrogation; therefore, we are not confronted with whether Kelvin knowingly waived his privilege against self-incrimination. *See, e.g., State v. Foster,* 562 So.2d 808 (Fla. 5th DCA 1990); *Rivera v. State,* 547 So.2d 140 (Fla. 4th DCA 1989), *cert. denied,* 558 So.2d 19 (Fla.1990).

FN3. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] As to issue 6, we conclude that the trial court improperly commented on the evidence and erroneously precluded appellant from pursuing a relevant line of questioning. During the cross-examination of Officer Clark, while defense counsel was attempting to question Clark about his use of profanity when he first approached the men whom he suspected of selling drugs, the trial judge interrupted, saying, "I don't know why the state isn't objecting, but I'm going to start objecting. This is going to be a long trial, let's go on to something more relevant; Okay?" It appears from the record that defense counsel was trying to develop the argument that Clark's use of profanity while chasing Dunnell was not proper police procedure, thereby lending credence to his defense that Kelvin believed that Clark and Sanders were apparently robbers rather than police officers. The judge's comment had the appearance of indicating skepticism as to this version of events, which was improper.

[4] We also reverse on issue 7, relating to the trial court's erroneous instruction to the jury on flight. The evidence discloses that following the gun battle, Kelvin climbed out an upstairs window, jumped to the ground, ran to a ditch where the gun was later recovered, and proceeded to an apartment complex four or five blocks away and there called a friend who picked him up and checked him into a motel. Kelvin thereafter went to Miami where he contacted an attorney and turned himself in. Over an objection by defense counsel, the court instructed the jury on flight.

[5] Regardless of the applicability of the instruction on the merits, the supreme court in *Fenelon v. State,* 594 So.2d 292 (Fla.1992), held that a flight instruction constitutes an improper comment on the evidence and directed "that henceforth the jury instruction on flight shall not be given." *Id.* at 295. Although *Fenelon* had not been decided when the trial of the case at bar took place in May 1991, its holding must be applied retrospectively because *Fenelon* was decided during the time that Kelvin's conviction was pending on appeal. *See Smith v. State,* 598 So.2d 1063 (Fla.1992). *Accord Keys v. State,* 606 So.2d 669 (Fla. 1st DCA 1992); *Brown v. State,* 609 So.2d 656 (Fla. 3d DCA 1992).[FN4]

FN4. Although in *Fenelon* the court decided that giving the instruction was harmless error, the state in the case at bar failed to present any argument on this point. We therefore decline to conclude that the jury

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was not influenced by the error. *Ciccarelli v. State,* 531 So.2d 129 (Fla.1988); *Lee v. State,* 508 So.2d 1300 (Fla. 1st DCA 1987), *approved,* 531 So.2d 133 (Fla.1988).

[6] We reverse as well as to issue 8, pertaining to the court's erroneous admission of expert testimony. The court admitted into evidence a photograph of a sofa located in the apartment where the shooting occurred, showing long dowels stuck through purported bullet holes in the sofa, resting up against bullet holes in the wall. Over objection, the court permitted Dwight Morrow, an evidence technician, to testify that the dowels showed the flight path of some of the bullets that had been fired in the apartment. Morrow admitted he was not a reconstructionist and had no training in ballistics. We therefore conclude that he was unqualified to testify as to the trajectory of the bullets as depicted by the dowels in the photograph. *Cf. Floyd v. State,* 569 So.2d 1225, 1232 (Fla.1990) (police officers were not qualified to testify that stab wound on victim's hand was a defensive wound), *cert. denied,* 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075, 115 L.Ed.2d 1075 (1991); *Gilliam v. State,* 514 So.2d 1098, 1100 (Fla.1987) (medical examiner was not expert in shoe-pattern evidence; thus, she was not qualified to testify about marks on decedent).

[7] We next turn to issue 9, regarding whether the trial court erroneously admitted evidence of prior wrongs or acts, which the state maintained was relevant to show Kelvin's motive to flee from the police and ***1365** engage in the ensuing gun battle. [FN5] First, the court admitted testimony which revealed that Kelvin had a felony conviction in New York, based on the state's theory that Kelvin had shot the officers because he did not want to be apprehended while carrying a firearm, which is a criminal offense for a convicted felon.[FN6] Second, evidence was admitted showing that Kelvin was a citizen of Guyana and was appealing a deportation order requiring him to return to that country. The state theorized that Kelvin shot the officers to avoid the deportation which might have occurred had he been apprehended in possession of a firearm. Finally, the court permitted testimony that Kelvin had posted a $1,500 bond for his June 30, 1990 arrest, and that he remained out on bond as of the date of the incident. The state contended that Kelvin's bond would have been revoked had he been "caught doing something," so he shot the officers to avoid this possibility. If there was any probative value in admitting such speculative evidence-and we find it to be weak at best-we consider its value far outweighed by its prejudicial effect. *See, e.g., Drake v. State,* 400 So.2d 1217 (Fla.1981) (reversible error for court to permit evidence in homicide case of previous sexual battery and attempted sexual battery for the purpose of showing that defendant murdered victim in order to avoid revocation of parole).

FN5. The parties characterized this as *Williams* rule evidence, yet there is nothing similar about Kelvin's felony conviction, deportation order, marijuana charge, and the facts in this case. The question of whether such evidence was correctly admitted is resolved simply by determining its relevancy. *See Bryan v. State,* 533 So.2d 744, 746 (Fla.1988), *cert. denied,* 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).

FN6. The court took judicial notice of and read to the jury Section 790.23, Florida Statutes, which provides that it is unlawful for a person convicted of a felony in any state to possess a firearm.

[8] Turning to the trial court's admission of evidence disclosing that Kelvin was in the drug business with Dunnell, we agree that such evidence was admissible to show the relationship between the men who fled from Officers Clark and Sanders, the entire context out of which the homicide arose, and Kelvin's possible motive for fleeing and firing upon his pursuers. *Jackson v. State,* 522 So.2d 802 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988); *Craig v. State,* 510 So.2d

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857 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988).

[9] Finally, Kelvin urges in issue 10 that the prosecutor engaged in an improper opening statement and closing argument. In his opening statement, the prosecutor commented that Sanders gave up his life and Clark almost gave up his "while serving the citizens of Duval County"; that as police officers they were attempting "to do their part in battling or dealing with the drug problem"; that Dunnell had a "business relationship" with Kelvin; that Kelvin ran from the police because of his arrest "on June 30th by an undercover officer"; that Kelvin was a convicted felon; and that the evidence would show why Kelvin fled that night. In closing argument, the prosecutor argued that "defendant's spot" was in front of Brown's apartment; that it was his "drug kingdom" and the young kids out there were his pawns; that he was the "king maker"; that he was a convicted felon; that he was out on bond for the prior arrest when he committed the crimes in this case; that Kelvin couldn't legally possess a gun; and that he had been ordered deported "in case there's any issue about whether he knew they were police officers and whether he ran from them."

[10][11] While we agree that many of these statements were improper, Kelvin did not object to most of the prosecutor's statements during his opening, and objected to none during closing argument; therefore these potential errors were waived. *State v. Cumbie,* 380 So.2d 1031 (Fla.1980). He did, however, object to the prosecutor's statement during opening stating that the officers were attempting to battle the drug problem that night, but he failed to move for mistrial. An objection without a motion for mistrial is considered a waiver. *Id.* at 1033. Kelvin later moved for a mistrial when the prosecutor stated that Kelvin ran ***1366** from the police because of his previous arrest on June 30th. We previously concluded under issue 9 that evidence of the latter was improperly admitted as evidence of motive; consequently, the combination of this error with the other errors recounted in this opinion warrants reversal and remand for new trial.

[12] In issue 11, Kelvin contends the evidence was insufficient to convict him of first-degree murder, and that his motion for judgment of acquittal should have been granted. He argues that the evidence does not establish that Kelvin knew that Sanders and Clark were police officers, thus he was entitled to be acquitted on both charges under the "castle doctrine," recognizing that a man's home is his castle, and that he may therefore use deadly force to protect it from attack. On the contrary, sufficient evidence was submitted to raise a jury question on this issue and to defeat Kelvin's motion for judgment of acquittal. Application of the "castle doctrine" was a factual question to be determined by the jury. *Strange v. State,* 579 So.2d 859 (Fla. 1st DCA) (evaluation of evidence of self-defense is a function of the trier of fact), *review denied,* 591 So.2d 184 (Fla.1991).

[13] Because we conclude that a number of the above issues requires reversal of appellant's conviction and a remand of the case for new trial, we consider a number of other issues raised by appellant to be mooted by our disposition. Nevertheless, in that this case must be retried, we regard comment on some of the points raised to be helpful. In his third issue, appellant contends that the trial judge committed reversible error by rebuking appellant's counsel in front of the jury. During jury selection, defense counsel was two minutes late following a break due to co-counsel's difficulty in going through a metal detector inside the courthouse caused by a metal plate in his head. When the attorney returned to the courtroom, the judge said, in front of the jury panel, "You do it one more time, you're going to leave the courtroom. You'll be right back there in the [jail] chute where I'll know where you are; you understand that? ... There's no excuse for it." Although we do not consider this statement sufficiently egregious to constitute reversible error, we do note that it is inappropriate to admonish counsel in such manner in the presence of the jury. Additionally, we take issue with the trial court's re-

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peated refusal to permit defense counsel to approach the bench in order to make objections outside the hearing of the jury.

[14] In issue 4, appellant argues that the trial court should have excused veniremember Spaulding for cause. Mrs. Spaulding was married to a sergeant in the Jacksonville Sheriff's Office and indicated that she believed her husband had discussed the instant case with her shortly after the incident occurred. Because we are remanding for new trial, this issue is moot. Nevertheless, we note that the failure to excuse this potential juror for cause constituted an abuse of discretion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED for new trial.

ZEHMER and BARFIELD, JJ., concur.

Fla.App. 1 Dist.,1992.
Kelvin v. State
610 So.2d 1359, 18 Fla. L. Weekly D190

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Westlaw.

632 So.2d 1058, 19 Fla. L. Weekly D250
(Cite as: 632 So.2d 1058)

C

District Court of Appeal of Florida,
Fifth District.

Albert CRIDER, Appellant,
v.
STATE of Florida, Appellee.

No. 93-872.
Feb. 4, 1994.
Rehearing Denied March 10, 1994.

Defendant was convicted of aggravated assault, in the Circuit Court, Orange County, John Adams, J. Defendant appealed. The District Court of Appeal, Harris, C.J., held that trial court should have given "castle" instruction on self-defense involving invasion of home.

Reversed and remanded.

West Headnotes

Assault and Battery 37 ⇐96(4)

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k96 Instructions
37k96(4) k. Defense of Property. Most Cited Cases

Trial court improperly refused to give "castle" instruction, that defendant had right to defend his home, even with firearm, if he believed that armed burglars were invading; even though jury had found defendant not guilty of aggravated assault on law enforcement officer, thus apparently accepting defendant's testimony that he did not realize that persons who had burst into his home were police officers, jury had convicted defendants of aggravated assault, and might not have if requested instruction had been given.

*1059 James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Kristen L. Davenport, Asst. Atty. Gen., Daytona Beach, for appellee.

HARRIS, Chief Justice.

The issue on appeal is whether the trial court erred in denying Albert Crider's request that the jury be instructed on his right to self defense-specifically the castle doctrine.

Officers of the Ocoee Police Department requested and obtained a "no knock" warrant to enter and search Crider's home. About midnight, the Orange County Sheriff's Department's special weapons and tactics team (SWAT team) executed the warrant by first knocking on the door and, when there was no response, using a bullhorn to announce "Police with a search warrant. Open the door now." When there was no response, the police broke down the door with a battering ram and entered the residence, announcing that they were police officers and ordering the occupants to put up their hands. The police entered through the kitchen, turned right, and observed Crider and his wife on a mattress on the floor of the living room. Their eight-year-old son was sleeping on the couch beside them. The only lighting in the living room came from the television and two extremely powerful hand held flashlights carried by the two lead officers. Crider apparently rose to his knees and was fumbling with a .22 semiautomatic handgun which he accidentally dropped. He momentarily looked up at the officers at that point, then looked back down again and retrieved the handgun. At this point, the lead officer was aiming his handgun at Crider and telling him to put his hands up and drop the weapon. Crider began to bring the handgun up in the direction of the officers, at which time the lead officer fired one round which struck Crider in the

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shoulder. This all happened in about ten seconds.

Crider was charged with aggravated assault on a law enforcement officer. At his trial, he testified that he never realized that the individuals breaking into his home were law enforcement officers. Rather, he believed that they were burglars because only two weeks before the SWAT team raid, two men broke into Crider's house at about 1:15 A.M. They had hoods on their faces and wore dark clothes. Just as the SWAT team did, the earlier intruders entered by breaking down the same door. Crider and his family were asleep in the same room as they were when the SWAT team entered. Crider fought them off and they ran away. He called the police and Orange County deputies came to Crider's house, took a statement from him, and looked around the house and the area for the intruders. The original intruders were never apprehended.

In response to this incident, Crider testified that he replaced the old wood frame door, which the intruders had broken down, with a steel door. He also changed the direction of the door to prevent it being kicked in again. Finally, he purchased a .22 caliber semiautomatic pistol and slept with it under his pillow.

Crider testified that in the days preceding the SWAT team raid, he had worked long hours in the evening at his job as a security guard and then had stayed awake during the day in order to spend time with his son as it was the weekend. As a result, he had been up for between thirty to forty-eight hours before going to bed the evening of the raid. He also testified that he had taken Adavan, a nerve medication, and Darvocet, a painkiller, for back pain.

Crider testified that on the night of the raid, the family went to bed around 8:30 P.M. or 9:00 P.M. The TV was on with the volume low; the window air conditioner unit was on and the windows were closed. The unit was only about four or five feet from Crider's head. The first thing he remembered was hearing the door being kicked in. Crider testified that this rattled him, and he jumped up on his knees and reached for his gun, which he located and pulled out with his left hand. Because he is right-handed, he fumbled with and dropped the gun while attempting to remove the safety. He picked the gun back up and was still trying to remove the safety when he looked up and ***1060** was "hit" in the eyes with a flashlight. He discerned a "bunch" of guys and immediately thought it was the same two intruders who had broken in two weeks earlier, only this time they brought more people with them. Crider then resumed attempting to remove the safety from his gun and also reached for his glasses on the ottoman next to the mattress upon which he had been sleeping. He testified that he was then shot.

The court instructed the jury on the primary charge of aggravated assault on a law enforcement officer and the lesser included offenses of aggravated assault, assault on a law enforcement officer, and assault. Defense counsel prepared and submitted two special jury instructions regarding self defense and defense of home (the castle doctrine), but the trial court refused to give them, finding that the standard jury instructions adequately covered both subjects. Defense counsel then requested that the court give the standard jury instruction on self defense, 3.04(d) Justifiable Use of Deadly Force. The following colloquy between the court and counsel then took place:

> [DEFENSE COUNSEL]: I think the defense of habitat, which is under number four, certainly applies. In fact that's the entire basis of my defense. And I've got numerous case law to support my arguments, Florida Supreme Court cases.
>
> Specifically the Presley case, seven five thirty two cites United States Supreme Court case of Starr versus United States, one fifty three U.S. six fourteen.
>
> There's also an addendum to that, Your Honor. Because of the references made to the possession of cannabis on the premises I believe it's very important for the jury to understand that under the

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Presley decision and Starr decision this is very clear that Mr. Crider does not forfeit-his right to self defense is not diminished because he's committing a crime were [sic] when an assault is made on his dwelling.

It's a nuance that is very very important for the jury's consideration. I would urge the court to review this Starr decision which was eighteen ninety Supreme Court decision where U.S. Marshal was killed by a Cherokee Indian and the judge instructed the jury that the defendant-he was sentence[d] to death, went to the Supreme Court. The trial judge instructed the jury his right to self defense was diminished because he was a fugitive from justice and Supreme Court reversed and said the right to self defense is not diminished because someone is committing a crime or is in the wrong when he is assaulted.

And then the Florida Supreme Court in Presley cited the Starr decision in a case where a Negro killed a sheriff up in the panhandle back in around the turn of the century. And it's a distinction that's not covered in the standard jury instructions.

Because most of these cases were homicide cases where police officers were killed either entering houses to make an arrest and because this particular statute this aggravated assault on a law enforcement officer is a new statute and because this is [-] was not a homicide this particular nuance that Mr. Crider's right to self defense is not diminished because they found two pounds of cannabis in his house is very very important.

THE COURT: I'm going to deny your request to give three point zero four D. If you read the second full paragraph there the instruction itself says the use of force likely to cause death or great bodily harm is justifiable only if the defendant reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself while resisting another[']s attempt to murder him. And there's no testimony to support that an attempt to commit a felony upon him [-] and there's no evidence of an attempt to commit a felony upon him [or] an attempt to commit a felony in a dwelling house. There's no evidence to support that or any attempt to commit a felony upon him in a dwelling house occupied by him.

It simply is inapplicable to the circumstances because this-the evidence here is of the officers serving a warrant lawfully or not. And if they were not lawfully serving a warrant they haven't met the elements of the offense and he would be found not guilty.

***1061** So it's a question-the question-only fact question here is a question that is dealt with by the elements of the offense itself. It's not an affirmative defense in the sense that you can admit the elements of the offense. And there are other facts that operate as an affirmative defense notwithstanding the fact that the elements themselves are met.

And so conceptually it doesn't meet the factual test required to support a jury finding of that. I'm going to deny your request.

[DEFENSE COUNSEL]: Your Honor, in fact, the testimony is by Mr. Crider and by his confession, his believe [sic] was, an armed burglary was being committed upon him.

THE COURT: Yes, sir. And that would, if believed by the jury, would support their finding of not guilty.

[DEFENSE COUNSEL]: Only if the jury understands that he has that right to resist if that is his reasonable believe [sic]. And I would ask the court to read one particular-this is the Weaver case which is a Florida case and it was a murder of a police officer and-

THE COURT: Mr. Dick, I understand your arguments. I'll deny your motion to give the self defense.

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We agree that there was error and reverse.

The trial court's reason for not giving the requested instruction as to the main charge (aggravated assault on a law enforcement officer), while correct, is itself the reason why the instruction must be given for the lesser included offense of aggravated assault. If the jury believed Crider's testimony that he was not aware that the invaders were police, then, as the trial judge stated, that "would support their finding of not guilty." But not guilty of what? All charges or merely the main charge?

The trial court apparently expected that, if the jury believed Crider on the issue of lack of knowledge of the identity of the police, the jury would completely exonerate him. At least defense counsel seems to have interpreted the court's statement in that way because he cautioned the court that the jury would only exonerate his client if they were instructed that he had the right to defend his home, even with a firearm, if he believed that armed burglars were invading. Because the court failed to consider the appropriateness of this instruction (which was the entire theory of the defense) to the lesser included offenses, it refused to give the instruction.

The court was right in that the jury, apparently believing Crider, found him not guilty of aggravated assault on a law enforcement officer. Defense counsel was also right because, not being aware of the castle doctrine, the jury found Crider guilty of aggravated assault.

We find the requested instruction should have been given and reverse and remand to the trial court for further action consistent with this opinion.

REVERSED and REMANDED.

DIAMANTIS and THOMPSON, JJ., concur.

Fla.App. 5 Dist.,1994.
Crider v. State
632 So.2d 1058, 19 Fla. L. Weekly D250

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SELF DEFFENSE

Westlaw.

669 S.E.2d 917
380 S.C. 384, 669 S.E.2d 917
(Cite as: 380 S.C. 384, 669 S.E.2d 917)

Court of Appeals of South Carolina.
The STATE, Respondent,
v.
Jason Michael DICKEY, Appellant.

No. 4451.
Heard Oct. 7, 2008.
Decided Oct. 29, 2008.
Rehearing Denied Dec. 19, 2008.
Certiorari Granted Nov. 10, 2009.
Certiorari Granted Oct. 20, 2010.

Background: Defendant was convicted in the Circuit Court, Richland County, James W. Johnson, Jr., J., of voluntary manslaughter. Defendant ap- pealed.

Holdings: The Court of Appeals, Williams, J., held that:
(1) evidence was insufficient to establish self-defense;
(2) evidence was sufficient to establish that defendant could have acted in heat of passion at time he shot victim as required to support voluntary manslaughter charge; and
(3) trial court's illustration during instructions to jury on voluntary manslaughter was not improper comment on facts of case.

Affirmed.

West Headnotes

[1] **Homicide 203 ⇐780**

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k773 Aggression or Provocation by Accused
203k780 k. Weapons. Most Cited Cases

Homicide 203 ⇐801

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k798 Duty to Retreat or Avoid Danger
203k801 k. Place or situation of confrontation. Most Cited Cases

Evidence was insufficient to establish self-defense in prosecution for voluntary manslaughter; defendant was not without fault in bringing on difficulty as his decision to exit building and brandish his loaded gun after confrontation between him and victim inside apartment had all but ended was act that was reasonably calculated to provoke new altercation with victim, and defendant had other probable means of avoiding danger than to act as he did as he was not inside apartment building at time he shot victim, nor was he within curtilage of building, but rather, he was standing on public sidewalk outside apartment building.

[2] **Homicide 203 ⇐766**

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k766 k. In general. Most Cited Cases

A person is justified in using deadly force in self-defense is comprised of four elements when: (1) he was without fault in bringing on difficulty, (2) he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury, or he actually was in imminent danger of losing his life or of sustaining serious bodily injury, (3) if his defense is based on his actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief, or if his defense is based on his being in actual and imminent danger, that the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life, (4) he had no

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other probable means of avoiding danger of losing his own life or sustaining serious bodily injury than to act as he did in particular instance.

[3] Homicide 203 ⚿774

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k773 Aggression or Provocation by Accused
203k774 k. In general. Most Cited
Any act of an accused that is reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense.

[4] Homicide 203 ⚿784

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k784 k. Mutual or voluntary conduct. Most Cited Cases
The plea of self-defense is not available to one who kills another in mutual combat.

[5] Homicide 203 ⚿802

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k798 Duty to Retreat or Avoid Danger
203k802 k. Confrontation on accused's own premises. Most Cited Cases
Under the "**Castle Doctrine**," one attacked, without fault on his own part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.

[6] Criminal Law 110 ⚿814(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(1) k. In general. Most Cited Cases
A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence.

[7] Criminal Law 110 ⚿1173.1

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.1 k. In general. Most Cited Cases
To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.

[8] Criminal Law 110 ⚿829(1)

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(1) k. In general. Most Cited Cases
If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial.

[9] Homicide 203 ⚿1485

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications
203k1471 Self-Defense
203k1485 k. Duty to retreat or avoid danger. Most Cited Cases
Charge on curtilage as part of self-defense claim was not warranted; defendant was on

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doormat outside front door to apartments at time he shot victim, and doormat was placed away from threshold of entrance to building on public sidewalk.

[10] Homicide 203 ⚖802

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k798 Duty to Retreat or Avoid Danger
203k802 k. Confrontation on accused's own premises. Most Cited Cases

A defendant has no duty to retreat when attacked in his home or at his place of business; this rule of immunity extends to the curtilage of the building as well.

[11] Homicide 203 ⚖802

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k798 Duty to Retreat or Avoid Danger
203k802 k. Confrontation on accused's own premises. Most Cited Cases

The common denominator amongst places that are considered "curtilage," for purposes of self-defense claim, is they are places where the property owner alone has the right to be, to the exclusion of the general public.

[12] Homicide 203 ⚖1484

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications
203k1471 Self-Defense
203k1484 k. Apprehension of danger. Most Cited Cases

Trial court sufficiently instructed jury on right to act on appearances as part of defendant's self-defense claim; trial court instructed jury that in deciding whether defendant was or believed that he was in imminent danger of death or serious bodily injury, jury should consider all facts and circumstances surrounding offense including physical condition and characteristics of defendant and victim, that it did not have to appear that defendant believed that he was actually in danger, that it was enough that defendant believed that he was in imminent danger and reasonably prudent person of ordinary firmness and courage would have had same belief, and that defendant had right to act on appearances even though defendant's belief may have been mistaken.

[13] Criminal Law 110 ⚖822(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k822 Construction and Effect of Charge as a Whole
110k822(1) k. In general. Most Cited Cases

A jury charge is correct if, when the charge is read as a whole, it is substantially correct and adequately covers the law.

[14] Homicide 203 ⚖801

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k798 Duty to Retreat or Avoid Danger
203k801 k. Place or situation of confrontation. Most Cited Cases

Regardless of whether a defendant is on personal premises or business premises, a defendant has no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase.

[15] Homicide 203 ⚖801

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k798 Duty to Retreat or Avoid Danger
203k801 k. Place or situation of con-

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frontation. Most Cited Cases

If both parties are where they have a right to be there is a duty to retreat, unless retreating, in doing so the danger of being killed or suffering serious bodily injury would increase.

[16] Criminal Law 110 ⚿1043(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(2) k. Necessity of specific objection. Most Cited Cases

Defendant preserved for appellate review claim that charge of voluntary manslaughter was improper; at conclusion of instructions to jury, defense counsel stated his objection to charge on voluntary manslaughter, and while defense counsel could have made more specific objection, objection made it sufficiently clear to trial court that defense counsel did not believe evidence supported charge of voluntary manslaughter.

[17] Homicide 203 ⚿1458

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1458 k. Degree or classification of manslaughter. Most Cited Cases

Evidence was sufficient to establish that defendant could have acted in heat of passion at time he shot victim so as to support voluntary manslaughter charge; defendant and victim engaged in heated argument before shooting and victim verbally threatened defendant.

[18] Criminal Law 110 ⚿814(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(1) k. In general. Most Cited Cases

The law to be charged must be determined from the evidence presented at trial.

[19] Homicide 203 ⚿1457

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1457 k. Manslaughter. Most Cited Cases

For a court to refuse to charge a jury on manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter.

[20] Homicide 203 ⚿658

203 Homicide
203IV Manslaughter
203k658 k. What constitutes voluntary manslaughter, in general. Most Cited Cases

"Voluntary manslaughter" is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.

[21] Homicide 203 ⚿668

203 Homicide
203IV Manslaughter
203k666 Sudden Passion or Heat of Passion
203k668 k. Passion as element or as factor affecting degree or grade of offense. Most Cited Cases

Homicide 203 ⚿673

203 Homicide
203IV Manslaughter
203k670 Provocation
203k673 k. Sufficiency as cause of pas-

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sion. Most Cited Cases

Evidence of acting in the heat of passion alone will not suffice to reduce murder to voluntary manslaughter; rather, both heat of passion and sufficient legal provocation must be present at the time of the killing.

[22] Homicide 203 ⚿668

203 Homicide
203IV Manslaughter
203k666 Sudden Passion or Heat of Passion
203k668 k. Passion as element or as factor affecting degree or grade of offense. Most Cited Cases

To mitigate a felonious killing to manslaughter, the sudden heat of passion must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

[23] Homicide 203 ⚿1458

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1458 k. Degree or classification of manslaughter. Most Cited Cases

Homicide 203 ⚿1473

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications
203k1471 Self-Defense
203k1473 k. Necessity of instruction in general. Most Cited Cases

Self-defense and voluntary manslaughter are not mutually exclusive, and both issues should be submitted to the jury if supported by the evidence; the rationale for this rule is that the jury may fail to find all the elements for self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

[24] Homicide 203 ⚿668

203 Homicide
203IV Manslaughter
203k666 Sudden Passion or Heat of Passion
203k668 k. Passion as element or as factor affecting degree or grade of offense. Most Cited Cases

Fear can constitute a basis for heat of passion to support voluntary manslaughter.

[25] Homicide 203 ⚿1457

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1457 k. Manslaughter. Most Cited Cases

Evidence of arguments and physical threats prior to a homicide can support a charge of manslaughter.

[26] Criminal Law 110 ⚿761(11)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k754 Instructions Invading Province of Jury
110k761 Assumptions as to Facts
110k761(11) k. Commission of offense. Most Cited Cases

Trial court's illustration during instructions to jury on voluntary manslaughter was not improper comment on facts of case; jury was reminded numerous times of its role as arbiter of facts, trial court prefaced its illustration by making clear it was just an illustration, and trial court's illustration took on form: "If X, Y and Z occur, that constitutes manslaughter," it did not say, "X, Y and Z occurred."

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[27] Criminal Law 110 ⚿656(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k656 Comments on Evidence or Witnesses
110k656(5) k. Expressions affecting credibility of witnesses. Most Cited Cases

Criminal Law 110 ⚿656(8)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k656 Comments on Evidence or Witnesses
110k656(8) k. Expression of opinion as to facts in issue. Most Cited Cases

Criminal Law 110 ⚿656(9)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k656 Comments on Evidence or Witnesses
110k656(9) k. Expressions as to weight and sufficiency of evidence and guilt of accused. Most Cited Cases

A trial judge should refrain from any comment that tends to indicate to the jury his opinion on the credibility of witnesses, the weight of the evidence, or the guilt of the accused.

[28] Criminal Law 110 ⚿822(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k822 Construction and Effect of Charge as a Whole
110k822(1) k. In general. Most Cited Cases

Jury instructions must be considered in their entirety and, if in their entirety are free from error, any potentially misleading portions do not constitute reversible error.

[29] Criminal Law 110 ⚿761(2)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k754 Instructions Invading Province of Jury
110k761 Assumptions as to Facts
110k761(2) k. Instructions assuming facts in general. Most Cited Cases

A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge on the facts, nor a mandate to the jury to assume the truth of the facts as stated.

[30] Criminal Law 110 ⚿1030(3)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(3) k. Criminal liability. Most Cited Cases

Criminal Law 110 ⚿1045

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1045 k. Necessity of ruling on ob-

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jection or motion. Most Cited Cases

Defendant preserved for appellate review claim that trial court should have applied recently enacted Protection of Persons and Property Act to his case; defense counsel argued before trial court, on record, that trial court should apply Act to case, thereafter, trial court heard opposing argument from State on same issue, and after hearing from both parties on issue, trial court ruled on issue.

[31] Homicide 203 ⚷751

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(A) In General
203k751 k. Constitutional and statutory provisions. Most Cited Cases

Trial court did not err in refusing to retroactively apply "stand your ground" law, which codified and extended common-law " **castle doctrine**," which provides that there is no duty to retreat when attacked on one's own premises, where there was no clear indication from legislature that retroactivity was intended.

[32] Statutes 361 ⚷278.5

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 k. In general. Most Cited Cases
(Formerly 361k278.1)

Statutes 361 ⚷278.6

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.6 k. Presumptions. Most Cited Cases

The retrospective operation of a statute is not favored by the courts, and statutes are presumed to be prospective in effect.

****920** Laura C. Tesh, of Columbia and Lourie A. Salley, of Lexington, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Office of the Attorney General and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

WILLIAMS, J.

***390** Jason Michael Dickey was convicted of voluntary manslaughter after he shot and killed Josh Boot on the sidewalk outside the apartment building where Dickey lived and worked as a security guard. Dickey makes several arguments on appeal. We affirm.

FACTS

In April 2004, Dickey was working as the night watchman at the Cornell Arms apartments in Columbia, where he also resided. Although not required by his employer for his duties, Dickey carried a loaded pistol, for which he held a valid permit.

On April 29, 2004, Boot and Alex Stroud (Stroud) were tailgating outside a Jimmy Buffett concert at the Colonial Center, a few blocks from the Cornell Arms apartments. According to Stroud, Boot consumed approximately twenty beers and several shots of liquor that evening. Stroud and Boot met two ladies outside the concert, Amanda McGariggle (McGariggle) and Tara West (West), both of whom resided at the Cornell Arms apartments. After a few hours of drinking together outside the Colonial Center, Boot and Stroud accompanied the two ladies back to their apartment. While West and Stroud adjourned to West's bedroom, Boot and McGariggle remained on the sofa in the living room of the apartment. As they sat on the sofa, apparently close to an open window, a neighbor from the sixth floor threw a water balloon [FN1] down ***391** into the ladies' apartment, splash-

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ing Boot. Boot became angry and stormed out of the apartment. He then went upstairs to the floors above and **921 began randomly knocking on the doors of other tenants.

> FN1. The record indicates that the ladies and their neighbors were in the practice of tossing water balloons at each other's apartments as part of an ongoing "joke."

At this point, McGariggle went to the lobby and asked Dickey, who was the security guard on duty that night, to evict Boot from her apartment. Dickey came to the apartment where he found Boot upset and intoxicated. Dickey told Boot to leave or else he would call the police. Boot was indignant, hurling obscenities and insults at Dickey and making physical threats to him as he slammed the door to the apartment. According to West and McGariggle, Dickey looked angry during the encounter but remained calm and did not try to threaten or grab Boot. As he stood outside the door, Dickey proceeded to call the police to report the disturbance.

Meanwhile, back in the apartment, Stroud calmed Boot down and convinced Boot they should leave. As the two exited the apartment, they passed Dickey in the hallway. According to Stroud, Dickey and Boot "stared each other down," but no words were exchanged. Boot and Stroud took the elevator down to the lobby while Dickey took the stairs down to meet them. As Boot and Stroud walked to the front door to exit, Dickey followed behind them. Again, no words were exchanged. Boot and Stroud exited the building. Dickey followed the two out the building, stood on the Cornell Arms front doormat, and watched them walk away. Boot then turned around and walked back in the direction of Dickey.

At this point, the testimony of the witnesses varies substantially. Stroud testified he was "right beside" Boot as Boot advanced towards Dickey and asked Dickey, "[W]hy the f--- was he following [them]?" Stroud then stated when Boot turned around to say something towards Dickey, Dickey shot Boot three times. Dickey, on the other hand, testified the two turned towards him and made threats they were going to "kick his a---," and called him a "fat f---" among other things. Dickey testified he told them, again, he just wanted them to leave. Dickey stated he was afraid and felt "[he] was outnumbered and [he] realized they were covering ground too fast for [him] to get back in the building." Dickey went on to say he reached into his pocket and exposed his pistol, causing *392 both men to stop advancing temporarily. Dickey then claimed Boot said, "f--- it, let's do it," and reached under his shirt and stepped toward Dickey. Believing Boot to have a concealed weapon under his shirt, Dickey fired three shots, killing Boot.

Immediately, Dickey called 911. When the police arrived, Dickey told the officer about his pistol and that he had a concealed weapon permit. Dickey told the officer he shot Boot after Boot had come at him with a bottle he had hidden under his shirt. Crime scene investigators found a broken liquor bottle near the scene of the shooting with a smear of Boot's blood on it.

Dickey was indicted for murder and tried before a jury in September 2006. At the close of the State's evidence, defense counsel moved for a directed verdict of acquittal on the ground of self-defense. The motion was denied. Defense counsel renewed the motion for directed verdict at the close of all evidence. Thereafter, the trial court instructed the jury on murder, voluntary manslaughter, and self-defense. After the trial court charged the jury, defense counsel argued the trial court did not adequately charge the jury on either the right to act on appearances or the duty to retreat and objected to the refusal to charge the requested instructions on curtilage. During the instruction on voluntary manslaughter, the trial judge stated to the jury:

> By way of illustration, and I would point out this is by illustration alone, that if an unjustifiable assault is made with violence with the circumstances of indignity upon a man's person and the

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party so assaulted kills the aggressor the crime will be reduced to manslaughter.

The jury returned a verdict of voluntary manslaughter. Dickey was sentenced to sixteen years imprisonment.

ISSUES

A. Whether the trial court erred in refusing to grant a directed verdict that Dickey acted in self defense as a matter of law?

**922 B. Whether the trial court, in its instructions on self-defense, properly charged the jury on curtilage, the duty to retreat, and the right to act on appearances?

*393 C. Whether the trial court erred in charging the jury on voluntary manslaughter in light of the evidence presented at trial?

D. Whether the trial court's "illustration" to the jury of voluntary manslaughter was an improper comment on the facts?

E. Whether the trial court erred in refusing to retroactively apply the "Stand Your Ground" law to this case?

STANDARD OF REVIEW

In criminal cases, this Court reviews errors of law only. *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct.App.2007). Thus, we are bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

A. Directed Verdict of Self-Defense as a Matter of Law

[1] Dickey argues under *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978), the trial court should have directed a verdict of acquittal because the State failed to provide evidence to negate his claim of self-defense as a matter of law. We disagree.

[2] The basic definition of when a person is justified in using deadly force in self-defense is comprised of four elements:

> (1) That he was without fault in bringing on the difficulty, (2) That he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury [ ], or he actually was in imminent danger of losing his life or of sustaining serious bodily injury, (3) If his defense is based on his actual belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief [ ], or if his defense is based on his being in actual and imminent danger, that the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life, (4) That *394 he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

Id. at 657-58, 244 S.E.2d at 505-06 (internal citations omitted).

At one time, self-defense was an affirmative defense in this State, and a defendant bore the burden of establishing it by a preponderance of the evidence. *State v. McDowell*, 272 S.C. 203, 207, 249 S.E.2d 916, 918 (1978). However, current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt. *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998).

When this Court reviews the denial of a motion for a directed verdict, it views the evidence in the light most favorable to the non-moving party. *State v. Long*, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). When ruling on a motion for directed verdict, the trial judge is concerned with the existence of evidence, not its weight. *Id.* If there is any direct or substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, it

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is the trial court's duty to submit the case to the jury. *Id.* In other words, if the State provided evidence sufficient to negate Dickey's claim of self-defense, Dickey's motion for directed verdict was properly denied.

[3][4] The State provided such evidence. First, the State provided evidence which, if believed, tended to show Dickey was not without fault in bringing on the difficulty. Any act of an accused that is reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense. *State v. Slater,* 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). Additionally, the plea of self-defense is not available to one who kills another in mutual combat. **923*State v. Graham,* 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). In this case, a jury could have found that Dickey's decision to exit the building and brandish his loaded gun, after the confrontation between him and Boot inside the apartment had all but ended, was an act that was reasonably calculated to provoke a new altercation with Boot, and that Dickey intended to engage in mutual combat.

***395** [5] Second, the State provided evidence that, if believed, tended to show Dickey had other probable means of avoiding the danger than to act as he did (i.e., that Dickey had a duty to retreat). Under the **Castle Doctrine,** " one attacked, without fault on his own part, on his own premises, has the right in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." *State v. Hewitt,* 205 S.C. 207, 212, 31 S.E.2d 257, 258 (1944). In this case, Dickey was not immune from the duty to retreat under the Castle Doctrine. It is undisputed that Dickey was not inside the apartment building at the time he shot Boot, nor was he within the curtilage of the building. [FN2] Rather, he was standing on a **public** sidewalk outside the apartment building. He was, therefore, not immune as a matter of law under the **Castle Doctrine.**

FN2. A discussion of curtilage follows.

B. Sufficiency of Jury Instructions on Self-Defense

[6][7][8] A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence. *State v. Peer,* 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct.App.1996). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *State v. Hughey,* 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. *Id.* at 452, 529 S.E.2d at 728.

i. Curtilage

[9] Dickey argues the trial court erred in refusing to charge the jury on curtilage. We disagree.

[10][11] A defendant has no duty to retreat when attacked in his home or at his place of business. *Wiggins,* 330 S.C. at 548 n. 15, 500 S.E.2d at 494 n. 15. This rule of immunity extends to the curtilage of the building as well. Id. Curtilage includes outbuildings, the yard around the dwelling, a garden of a dwelling, or the parking lot of a business. Id. The common denominator between these places that are considered**396** curtilage is they are places where the property owner alone has the right to be, to the exclusion of the general public. *See State v. McGee,* 185 S.C. 184, 191, 193 S.E. 303, 306 (1937) (holding duty to retreat applies on a public highway, "where all men have equal rights"); *State v. Rochester,* 72 S.C. 194, 197, 51 S.E. 685, 686 (1905) ("A man on his own premises has a greater right there than anybody else."). They are not considered curtilage simply because they are close to the building or maintained by the owner. *State v. Boyd,* 126 S.C. 300, 302, 119 S.E. 839, 840 (1923) (holding one charged with assault and battery with intent to kill cannot defend on the ground that the Castle Doctrine extends to the middle of the street in front of the defendant's house).

In this case, it is undisputed Dickey was on the

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doormat outside the front door to the Cornell Arms apartments at the time he shot Boot. The doormat was placed away from the threshold of the entrance to the building, on the public sidewalk.[FN3] Although Dickey makes a colorable argument this portion of the sidewalk should be treated as curtilage of the apartment building,[FN4] the current law in **924 this state does not include adjacent public sidewalks or public streets as curtilage such that the duty to retreat would be excused. *See McGee,* 185 S.C. at 184, 193 S.E. at 306 (rejecting defendant's argument he had no duty to retreat in his car on a public street). Other jurisdictions have similarly refused to hold there is no duty to retreat from a sidewalk in front of a business or residence. *See, e.g., State v. Menser,* 222 Neb. 36, 382 N.W.2d 18, 20 (1986) (holding a sidewalk outside defendant's apartment house was not part of defendant's "dwelling" within the meaning of law of self-defense); *State v. Provoid,* 110 N.J.Super. 547, 554, 266 A.2d 307, 311 (1970) (noting the curtilage of *397 one's residence does not extend to a public thoroughfare running along the boundary of one's property). Unlike an outbuilding, yard or parking lot next to a building, the sidewalk is public land from which Dickey would not have had "the right to eject his adversary." *Rochester,* 72 S.C. at 203, 51 S.E. at 688. Because the sidewalk was not within the curtilage of the apartment building, Dickey was not immune from the duty to retreat. Therefore, the trial court's refusal to instruct the jury on the law of curtilage was not error.

FN3. At oral argument, counsel for Dickey argued the front mat was located in an "indentation," away from the sidewalk, such that the front edge of the doormat was flush with the front of the building and therefore not on the sidewalk. However, photos taken at the crime scene do not corroborate this.

FN4. Dickey argues the shooting occurred on the curtilage of the apartment building because the sidewalk was covered by the building's awning; Dickey was on the front door mat when the shooting occurred; Cornell Arms owned both the doormat and the awning; and Cornell Arms maintained the flower beds and benches on the sidewalk.

ii. Defendant's Right to Act on Appearances

[12] Dickey next argues the trial court's instruction to the jury on the right to act on appearances was inadequate. We disagree.

[13] A jury charge is correct if, when the charge is read as a whole, it is substantially correct and adequately covers the law. *State v. Foust,* 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). Regarding the right to act on appearances, the Supreme Court has held:

> The test is not whether there was testimony of an intended attack but whether or not the appellant believed he was in imminent danger of death or serious bodily harm, and he is not required to show that such danger actually existed because he had a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief.

State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 684 (1955).

In this case, the trial court instructed the jury on the second and third elements of self-defense as follows:

> In deciding whether the defendant was or believed that he was in imminent danger of death or serious bodily injury you should consider all of the facts and circumstances surrounding the offense including the physical condition and the characteristics of the defendant and the victim ... [I]t does not have to appear that the defendant believed that he was actually in danger. It is enough that the defendant believed that he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the

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same belief. A defendant has the right to act *398 on appearances even though the defendant's belief may have been mistaken.

Given the similarity between these two statements of the law, the trial court sufficiently instructed the jury on the right to act on appearances.

iii. Duty to Retreat

Although the trial court did instruct the jury on the duty to retreat, Dickey argues the charge was inadequate. We disagree.

Despite the fact that Dickey was not within the curtilage at the time of the shooting, one may still satisfy the fourth prong of self-defense if he had no other probable means of avoiding the danger than to act as he did in the situation. *Hendrix,* 270 S.C. at 658, 244 S.E.2d at 506. Here, Dickey presented evidence that, if believed, could have supported a finding that retreat would have increased the danger to him. Had he retreated back into the apartment's first set of heavy front doors, he would have encountered the locked interior doors to the lobby. If his assailants had then followed him in, he could have been trapped in an enclosed space, thereby increasing his risk of peril from what it would **925 have been had he stood his ground outside. Because this evidence, if believed, could have supported a finding of no duty to retreat, Dickey was entitled to a charge on the duty to retreat.

[14][15] The trial court instructed the jury on the duty to retreat as follows:

> Regardless of whether a defendant is on personal premises or business premises, ... a defendant has no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase ... [I]f both parties are where they have a right to be there is a duty to retreat unless retreating, in doing so the danger of being killed or suffering serious bodily injury would increase.

Because this charge, when read as a whole, was substantially correct and adequately covers the law, it was a proper instruction on the duty to retreat. *Foust,* 325 S.C. at 16, 479 S.E.2d at 52.

***399 C. Voluntary Manslaughter Charge**

i. Preservation of Error

[16] The State argues the charge of voluntary manslaughter was not properly objected to by defense counsel and, therefore, the issue is not available for appellate review. We disagree.

If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. *State v. Pauling,* 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996). A proper objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial court. *State v. Wigington,* 375 S.C. 25, 35-36, 649 S.E.2d 185, 190 (Ct.App.2007).

At the conclusion of the instructions to the jury, defense counsel stated his objection to the charge on voluntary manslaughter as, "We do not think [the instruction on voluntary manslaughter] was appropriate with the facts and circumstances in the case." The State argues this objection was not sufficiently specific to preserve the issue for appellate review. While defense counsel could have made a more specific objection, the objection made it sufficiently clear to the trial court that defense counsel did not believe the evidence supported a charge of voluntary manslaughter. Because the objection brought to the trial court's attention the precise nature of the alleged error, the issue is properly preserved for our review.

ii. Propriety of the Charge

[17] Dickey argues the trial court erred in instructing the jury on voluntary manslaughter because no evidence was presented from which the jury could have reasonably concluded he acted "in the heat of passion." We disagree.

[18][19] The law to be charged must be determined from the evidence presented at trial. *State*

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v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). In determining whether the evidence requires a charge on voluntary manslaughter, this Court must view the facts in the light most favorable to the defendant. *State v. Byrd,* 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). For a court to refuse to charge a jury on manslaughter, there must be no evidence in the record tending***400** to reduce the crime from murder to manslaughter. *State v. Lowry,* 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993).

[20][21][22] Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Kornahrens,* 290 S.C. 281, 285-86, 350 S.E.2d 180, 184 (1986). Evidence of acting in the heat of passion alone will not suffice to reduce murder to voluntary manslaughter. *State v. Walker,* 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Rather, both heat of passion and sufficient legal provocation must be present at the time of the killing. *State v. Tyson,* 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984). To mitigate a felonious killing to manslaughter, the sudden heat of passion "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *State v. Byrd,* 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (internal quotations omitted).

****926** Even assuming [FN5] adequate legal provocation by Boot, Dickey argues there was no evidence presented at trial from which the jury could have found he acted in the heat of passion at the time he shot Boot that would support the voluntary manslaughter charge. Dickey points to witness testimony indicating he "remained calm," "did not ever touch Boot," "did not mouth off in return," and "had no prior bad feelings or ill will [towards Boot]." In contrast, the heat of passion is an uncontrollable impulse to do violence, which renders the mind incapable of cool reflection. *Byrd,* 323 S.C. at 322, 474 S.E.2d at 432. Thus, Dickey argues he did in fact remain calm and in control, which necessarily means he was not acting in the heat of passion at the time of the shooting.

FN5. In his brief, Appellant has phrased his argument as: "[M]anslaughter is not a valid verdict where Dickey was not acting in the heat of passion." He does not dispute the finding of adequate legal provocation. His argument on appeal is therefore limited to whether Dickey was in the heat of passion. An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal. Rule 208(b)(1)(D), SCACR; *Jinks v. Richland County,* 355 S.C. 341, 344 n. 3, 585 S.E.2d 281, 283 n. 3 (2003).

In essence, Dickey's position is that, in view of the evidence presented, the only emotion he was experiencing at the time ***401** he shot Boot was **fear.** Dickey correctly points out that fear for one's safety is a necessary prong of self-defense. *Hendrix,* 270 S.C. at 657-58, 244 S.E.2d at 505-506. Therefore, Dickey argues, if simply being afraid amounts to being in the heat of passion for purposes of voluntary manslaughter, the line separating it from self-defense would be blurred under such an interpretation. To reconcile this, Dickey argues there must exist some legal difference between the type of reasonable fear that would support a self-defense claim on the one hand, and the type of fear that would support a verdict of voluntary manslaughter on the other. Dickey argues the latter type is "fear that causes a person to lose control of himself temporarily," and because the evidence did not support a finding of this latter type of fear, he was not acting in the heat of passion. Thus, the charge was improper.

[23][24] However, it is well settled that self-defense and voluntary manslaughter are not mutually exclusive, and both issues should be submitted to the jury if supported by the evidence. *Wiggins,* 330 S.C. at 549 n. 18, 500 S.E.2d at 495 n. 18;

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State v. Nichols, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997); *State v. Gilliam,* 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988). The rationale for this rule is that the jury may fail to find all the elements for self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter. *Gilliam,* 296 S.C. at 396-97, 373 S.E.2d at 597. Furthermore, contrary to Dickey's argument, fear can constitute a basis for heat of passion to support voluntary manslaughter. *See Wiggins,* 330 S.C. at 549, 500 S.E.2d at 495 (holding when evidence showed appellant was in a heated argument with the victim and was afraid for his life because victim physically threatened him, such evidence, if believed, would tend to show appellant acted in sudden heat of passion).

[25] In this case, ample evidence was introduced that would support a finding of heat of passion. Dickey and Boot engaged in a heated argument before the shooting and Boot verbally threatened Dickey. Evidence of arguments and physical threats prior to a homicide can support a charge of manslaughter. *See Lowry,* 315 S.C. at 399, 434 S.E.2d at 274 (holding it was an error for trial court to refuse to charge on ***402** manslaughter when there was testimony which, if believed, tended to show that the decedent and the defendant were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred). Dickey also testified Boot came at him in a threatening manner, reaching under his shirt for what could have been a weapon, and said to Dickey, "F---- it, let's do it." Taken together, these could support a finding that Dickey was in the heat of passion. *See Gilliam,* 296 S.C. at 397, 373 S.E.2d at 597 ("Appellant's testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion.").

****927 D. Trial Judge's "Illustration" of Voluntary Manslaughter**

[26] Dickey argues the trial court's illustration during his instructions to the jury on voluntary manslaughter was an improper comment on the facts of the case. We disagree.

[27][28] Article V, § 21 of the South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." South Carolina law dictates a trial judge should refrain from any comment that tends to indicate to the jury his opinion on the credibility of witnesses, the weight of the evidence, or the guilt of the accused. *State v. Jackson,* 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). However, jury instructions must be considered in their entirety and, if in their entirety are free from error, any potentially misleading portions do not constitute reversible error. *Id.*

[29] "Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations." *State v. Quick,* 141 S.C. 442, 447, 140 S.E. 97, 99 (1927). A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge on the facts, nor a mandate to the jury to assume the truth of the facts as stated. *Williams v. Se. Life Ins. Co.* 197 S.C. 171, 177, 14 S.E.2d 895, 897 (1941). The test is how a reasonable juror would have understood the charge. *Sheppard v. State,* 357 S.C. 646, 664, 594 S.E.2d 462, 472 (2004).

Here, it is unlikely that a reasonable juror would have singled out the illustration portion of the charge and interpreted***403** it as the court's opinion on the facts of this case or as an instruction on the weight to be given to the evidence. First, the jury was reminded numerous times of its role as arbiter of the facts. Second, the trial court prefaced its illustration by making clear it was just an illustration. Third, the trial court's illustration took on the form: "If X, Y and Z occur, that constitutes manslaughter." He did not say, "X, Y and Z occurred." *See, e.g., State v. Smith,* 288 S.C. 329, 330-31, 342 S.E.2d 600, 601 (1986) (holding judge's instruction, "If the State proves [elements one through four],

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then the results of the test can be admitted into evidence and the jury to consider. **You have heard such evidence** " was error because a reasonable juror could have construed that the trial judge felt the State had met its burden of proof on the required elements) (emphasis added). In this case, the trial court's illustration was an explanation, not commentary. Taken as a whole, the instructions were not erroneous.

E. Retroactive Application of "Stand Your Ground" Law

Dickey argues that the trial court should have applied the recently enacted Protection of Persons and Property Act (the Act) to his case. The Act has an effective date of June 9, 2006, and Dickey was charged with murder on April 29, 2004, and convicted of manslaughter on September 15, 2006.

i. Preservation of Error

[30] The State argues Dickey did not properly assert this argument to the trial court, and so it is not preserved for appellate review. We disagree.

An issue not presented to the trial court is not preserved for appellate review. *State v. Johnson,* 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996). *See also State v. Tucker,* 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995) (holding when defendant failed to object to a jury charge, issue is not preserved for consideration on appeal); *State v. Stone,* 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (holding defendant's failure to object to charge as given, or to request an additional charge when the opportunity to do so has been afforded, waived the right to complain on appeal); ***404***State v. Rogers,* 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct.App.2004) (holding that to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court, raised by the appellant, raised in a timely manner, and raised to the trial court with sufficient specificity).

Defense counsel in this case argued before the trial court, on the record, that the trial court should apply the Act to this case. ****928** Thereafter, the trial court heard opposing argument from the State on this same issue. After hearing from both parties on the issue, the trial court ruled on the issue, stating: "I think it was clearly the intent of the legislature, that ... this [A]ct does not apply to pending criminal prosecution. For that reason that is the court's ruling." The issue was timely raised on the record and ruled upon by the trial court and is, therefore, preserved for review.

ii. Retroactive Application

[31] Dickey argues the trial court erred in refusing to apply the Act to this case. We disagree.

[32] The retrospective operation of a statute is not favored by the courts, and statutes are presumed to be prospective in effect. *State v. Davis,* 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992), *overruled on other grounds by Brightman v. State,* 336 S.C. 348, 352 n. 2, 520 S.E.2d 614, 616 n. 2 (1999). The Supreme Court has recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." *Am. Nat. Fire Ins. Co. v. Smith Grading & Paving,* 317 S.C. 445, 449, 454 S.E.2d 897, 899 (1995). The exception to this rule of prospective operation is where the statute is remedial or procedural in nature. *Hercules, Inc. v. S.C. Tax Comm'n,* 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980).

Dickey argues the Act should be applied retroactively because it is procedural in nature. We disagree.

The Act, by codifying the common law **Castle Doctrine**, creates substantive rights for citizens. The Act "extends the [**Castle**] **doctrine** to include an occupied vehicle and the person's place of business." [FN6] The Act also gives citizens the right ***405** "to protect themselves, their families and others from intruders and attackers without fear of prosecution or civil action." [FN7] Therefore, because the rights are substantive, the Act will only operate retroactively if there is a clear indication from the legislature that this was intended. *Am. Nat. Fire,* 317 S.C. at 449, 454 S.E.2d at 899. There is no

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such indication in the Act. The Act specifically states it was not effective until approved by the Governor, which occurred on June 9, 2006. 2006 S.C. Act No. 379 § 6. This effective date was over two years after the shooting at the Cornell Arms Apartments. Additionally, section 4 of the Act provides the following savings clause:

FN6. S.C.Code Ann. § 16-11-420(A) (2006).

FN7. S.C.Code Ann. § 16-11-420(B) (2006).

> The repeal or amendment by this act of any law, whether temporary or permanent, civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties and forfeitures, and liabilities as they stood under the repealed or amended laws.

Here, the Legislature clearly manifested its intent that the Act be applied prospectively. As such, the fact that Dickey's prosecution was pending before the effective date of the Act precludes the application of the Act to this case.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

ANDERSON and KONDUROS, JJ., concur.

S.C.App.,2008.
State v. Dickey

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705 S.E.2d 465
391 S.C. 225, 705 S.E.2d 465
(Cite as: 391 S.C. 225, 705 S.E.2d 465)

H

Court of Appeals of South Carolina.
The STATE, Respondent,
v.
Thomas T. **BRYANT**, Jr., Appellant.

No. 4766.
Heard Nov. 3, 2010.
Decided Dec. 15, 2010.
Rehearing Denied Feb. 28, 2011.

Background: Defendant was convicted in the Circuit Court, Richland County, Mark H. Westbrook, J., of murder and unlawful possession of a weapon by a convicted felon. He appealed. The Court of Appeals, 356 S.C. 485, 589 S.E.2d 775, affirmed. Defendant petitioned for a writ of certiorari, and the Supreme Court, 369 S.C. 511, 633 S.E.2d 152, reversed. Defendant was retried in a jury trial in the Circuit Court, Richland County, Perry M. Buckner, J., and found guilty of murder. Defendant appealed.

Holding: The Court of Appeals, Huff, J., held that defendant was entitled to a jury instruction on defense of habitation.

Reversed and remanded.

West Headnotes

[1] Criminal Law 110 ⇐814(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(2) k. Evidence justifying instructions in general. Most Cited Cases
The law to be charged to the jury is determined by the evidence presented at trial.

[2] Criminal Law 110 ⇐814(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(2) k. Evidence justifying instructions in general. Most Cited Cases
If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter.

[3] Criminal Law 110 ⇐1173.1

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.1 k. In general. Most Cited Cases
To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.

[4] Criminal Law 110 ⇐814(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(1) k. In general. Most Cited Cases
The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law.

[5] Homicide 203 ⇐760

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(A) In General
203k759 Defense of Dwelling or Habita-

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tion

203k760 k. In general. Most Cited

The defense of "habitation" provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection.

[6] **Homicide 203 ⚿1491**

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications
203k1491 k. Defense of dwelling or habitation. Most Cited Cases

One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation.

[7] **Homicide 203 ⚿760**

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(A) In General
203k759 Defense of Dwelling or Habitation
203k760 k. In general. Most Cited

For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances.

[8] **Homicide 203 ⚿760**

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(A) In General
203k759 Defense of Dwelling or Habitation
203k760 k. In general. Most Cited

Homicide 203 ⚿766

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k766 k. In general. Most Cited Cases

Unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage; rather, the defense of habitation provides where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser.

[9] **Homicide 203 ⚿760**

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(A) In General
203k759 Defense of Dwelling or Habitation
203k760 k. In general. Most Cited

When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion.

[10] **Homicide 203 ⚿1491**

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications
203k1491 k. Defense of dwelling or habitation. Most Cited Cases

Defendant was entitled to jury instruction on defense of habitation in murder trial; evidence indicated that defendant, who was in a wheelchair, was forced into his hotel room by victim and that defendant was attempting to eject victim from his room when he fired fatal shot.

[11] **Homicide 203 ⚿760**

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(A) In General
203k759 Defense of Dwelling or Habita-

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tion

203k760 k. In general. Most Cited

The defense of habitation does not exist at the place of a homicide that is away from the habitation and away from the curtilage.

[12] Homicide 203 ⚿1491

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications
203k1491 k. Defense of dwelling or habitation. Most Cited Cases

Although self-defense and defense of habitation are analogous, it is insufficient to charge only self-defense when a charge on defense of habitation is warranted.

**466 Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon, Jr., Solicitor Warren B. Giese, all of Columbia, for Respondent.

HUFF, J.

*227 Thomas T. Bryant, Jr. was convicted of murder in the death of Daniel Austin. Bryant appeals, asserting the trial judge erred in (1) refusing to admit into evidence a dispatch log of a 911 call and (2) refusing to instruct the jury on the defense of habitation. We reverse and remand for a new trial.[FN1]

FN1. **Bryant** was initially tried and convicted of Austin's murder in 2001. That conviction was reversed by the supreme court in 2006 based on the improper admission of **Bryant's** prior firearms convictions, and **Bryant** was re-tried in 2008. *State v. Bryant,* 369 S.C. 511, 633 S.E.2d 152 (2006). It is from his second conviction for murder that **Bryant** appeals.

FACTUAL/PROCEDURAL BACKGROUND

The record shows **Bryant** is a paraplegic who is confined to a wheelchair. At the time of this incident, **Bryant** had been living at a Days Inn Hotel, located approximately 150 yards from the "Bottoms Up" nightclub. On the night of July 22, 1999, **Bryant** met Austin at the nearby nightclub. Austin, who was at the club with some other men from North Carolina, became friendly with **Bryant**. As the night wore on, both **Bryant** and Austin became intoxicated.

467 There is conflicting evidence on the relationship of the two men that evening and what occurred between them. An employee of the club characterized the two as being "very chummy," and observed no arguments, fighting, or violence *228 between **Bryant and Austin. According to **Bryant**, Austin and the two other men with Austin pressed **Bryant** to obtain some marijuana. **Bryant** told them "he did not do that" and informed them he did not know where to obtain any. At approximately 3:30 a.m. on July 23, 1999, **Bryant** and Austin left the nightclub. The nightclub employee testified that just before they left, **Bryant** had fallen from his wheelchair and the employee and Austin assisted **Bryant** back into the chair and helped him out the door. Austin then continued to help **Bryant** down the road toward the Days Inn, "pushing him along, still talking, still carrying on, having a good time." **Bryant**, however, testified he was attempting to leave the club by himself when Austin followed him in the parking lot and was on the back of his wheelchair, telling **Bryant** to let him help him.

Nellie Connell, the night auditor and desk clerk at the Days Inn, was working the night shift when in the early morning hours she observed a gentleman pushing **Bryant** in his wheelchair. According to Connell, the two men were laughing and talked "like two buddies." As she watched them, she saw **Bryant** fall out of his wheelchair when they hit a speed bump in the parking lot. The other gentleman then put **Bryant** back into his wheelchair.

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Bryant testified he repeatedly told Austin he did not need his help. When Austin continued, **Bryant** stopped his chair and told Austin he did not want his help and Austin should leave him alone and let him go. Austin then pushed **Bryant**, causing him to almost fall from his chair. Austin and **Bryant** began swinging at each other and **Bryant** was knocked from his chair. Austin then picked **Bryant** up and placed him back in his wheelchair. As **Bryant** attempted to roll away, Austin grabbed the back of his chair and they argued again. As they rolled down the street, **Bryant** stopped again and told Austin to leave him alone, but Austin began cussing at **Bryant**, harassing him again for some drugs. **Bryant** stated another altercation ensued in which **Bryant** was again knocked from his chair, but this time Austin kicked **Bryant** in the face twice. Because he could not get away from Austin, **Bryant** finally "went along with it," and the two ended up outside **Bryant's** room at the Days Inn.

*229 **Bryant** claimed he was scared to open the door to the room with Austin standing there because Austin had been pressing him for marijuana and they had been fighting. He attempted to stall in opening his door and Austin tried to snatch a pouch from him, which contained his room key, causing the contents of the pouch to fall to the ground. The two men cussed at each other, and Austin left, presumably to go to the front desk to obtain a room key. During this time, a gentleman named Mr. Hawkins walked through, and Bryant asked Hawkins to help him by "get[ting] somebody to call" because "they done beat me up and I feel like they're going to rob me." Bryant testified he referred to "they" because he was concerned one or two of the other men with Austin that night might be "hanging back waiting." Hawkins agreed to go to the desk and get the night clerk to call the police. Thereafter, Bryant found his key and opened the door to his room. Once he entered, but before he could shut his door, Austin came in the room behind him and shut the door. Bryant testified he did not invite Austin into his room and did not want him in there. Bryant maintained he was scared, as Austin then stated, "I'm going to kill you," and Austin had shut the door to the room. Bryant then opened a drawer to a nightstand and pulled out a pistol. When he turned around, Austin, who was "a good six feet in the door" was coming toward him, and he shot Austin "once[,] ... twice, maybe a few more times." According to Bryant, Austin fell, got right back up, opened the door and ran from the room. Bryant dropped his pistol on his bed, retrieved a shotgun from his dresser, rolled out of the door and saw Austin standing in the breezeway. Bryant then started shooting Austin until his shotgun was empty.

Bryant further testified, at the time he saw Austin in the breezeway, "I had done had— **468 I'm seeing red. I'm very angry, mad. I've been done like this—I was done like this for no reason. And when I seen him, I started shooting him, and I just—I just shot. I shot my shotgun 'til it was—I believe it was empty." Bryant explained he did not know if Austin had a weapon or not, but he was concerned Austin could get his weapon, and stated, "I was scared to death." Bryant stated, after having been treated the way he was, he was not thinking and recognized, "I was just seeing red because I'd done had enough. I'd done been beat, kicked and everything over *230 something that I didn't even do." He claimed he did not plan on killing Austin, but he did so because he was scared for his life and did not feel he had any other options at that time, as he felt Austin was going to hurt him badly or kill him. Bryant further acknowledged that he was angry and he grabbed his shotgun, and when Austin fell and then jumped up and ran, he did not know if he had hit Austin, but he was scared because he believed another person was out there besides Austin.

When the authorities arrived, Austin was lying in the breezeway bleeding from gunshot wounds, and shots were being fired from Bryant's room. After a standoff lasting approximately twenty minutes, officers heard one final, muffled pistol shot. The officers entered Bryant's room and found Bryant on the floor with a self-inflicted gunshot

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wound to his stomach. Bryant was transported to the hospital for treatment, but Austin died at the scene.

An autopsy showed Austin suffered from birdshot and buckshot wounds, as well as three standard bullet gunshot wounds. Two of the standard bullets, consistent with a .32 caliber projectile, were recovered from the upper portion of the right side and just above the hip on the right side of Austin's body. The pathologist testified the most deadly or dangerous shot, and the cause of Austin's death, was the gunshot delivered to the upper portion of Austin's right side, which fractured a rib, passed through the right lung, ruptured the aorta, and passed through the left lung. He opined that after receiving this gunshot, about half of Austin's blood volume would have been immediately pouring out into his chest, his blood pressure would have dropped, he would start to lose consciousness, and within seconds he would have been on the ground. While a wound to Austin's left side, where shotgun pellets entered his left lung, would have been a dangerous wound, it was not fatal in an immediate manner as was the standard bullet wound to the right upper side of Austin's body. Had this fatal gunshot wound from the .32 caliber projectile occurred first, Austin would have been able to walk a short period of time, and it was not outside the realm of possibility that he could have run twenty feet.

Following presentation of all the evidence, the trial judge discussed the matters he intended to charge. Bryant noted he *231 requested a charge on the defense of habitation.[FN2] The trial judge recognized Bryant had requested the charge but declined to include it in his instructions to the jury, noting he was charging, as part of the self-defense instruction, that a defendant had no duty to retreat while on his own premises before acting in self-defense and, in addition was charging "words accompanied by hostile acts, prior difficulties, age, prior violence by the victim, threats by the victim, no other way to avoid the danger, and then no duty to retreat if on your own premises, [and] degree of force continuing until the threat of harm is ended," finding defense of habitation was going to be covered by his charge. The trial judge thereafter charged the jury as he indicated and did not include the defense of habitation **469 charge sought by Bryant.[FN3] Bryant was convicted of murdering Austin and was sentenced to life imprisonment without parole. This appeal followed.

FN2. Trial counsel, citing *State v. Rye,* 375 S.C. 119, 651 S.E.2d 321 (2007), and *State v. Bradley,* 126 S.C. 528, 120 S.E. 240 (1923), requested the following defense of habitation charge: "A person may use deadly force to protect his home. Thus, he may use deadly force to eject a trespasser who is in his house or in the area immediately surrounding his house. For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances. Stated differently, unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger [of] sustaining serious injury or damage. Instead, the defense of habitation provides that where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser."

FN3. While trial counsel did not thereafter except to the charge as given, the matter is still preserved for our review. *See State v. Johnson,* 333 S.C. 62, 64 n. 1, 508 S.E.2d 29, 30 n. 1 (1998) (wherein our supreme court set forth the following preservation rule: "[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of

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the court's instructions.").

ISSUES

I. Did the trial judge err by refusing to instruct the jury on the defense of habitation because a self-defense instruction was not sufficient to cover this separate distinct defense when Bryant testified he was threatened in and around his hotel *232 room and Bryant was entitled to this instruction under the facts of this case?

II. Did the trial judge err by refusing to admit evidence of a Richland County Sheriff's Department computer-aided dispatch record that showed the Days Inn night clerk told the dispatch operator that a man was being "pushed around and pushed out of wheelchair" because this document was admissible as a business record, and the trial judge erred by excluding this critical evidence of self-defense?

LAW/ANALYSIS

I. Defense of Habitation Charge

On appeal, Bryant asserts the defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection, that an instruction that the same elements required by law to establish self-defense apply to the defense of habitation with the exception of duty to retreat is an improper charge as it incorrectly implies the defense of habitation requires a defendant to establish his person or property was in danger of injury or harm, for the defense of habitation to apply a defendant need only establish a trespass has occurred and the chosen means of ejectment were reasonable, and the defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was defending himself from imminent attack on his own premises. Bryant argues evidence that Austin entered his hotel room without consent after Austin had beaten him, that Bryant asked another person to summon help, and that Austin was not a guest in his room and had threatened to kill him is evidence Bryant was acting in self-defense, as well as evidence he was attempting to eject a trespasser, therefore entitling him to a charge on the defense of habitation.

The State acknowledges the law provides as to the defense of habitation that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection, and one is permitted to use deadly force against a trespasser, with no duty to retreat before taking the life of the trespasser. However, the State asserts Bryant was not entitled to a defense of habitation *233 charge because there was no evidence indicating that he was attempting to eject a trespasser. Specifically, the State contends there was no evidence indicating Bryant was attempting to eject Austin when he shot him in the hotel room. Rather, it maintains Bryant's testimony clearly indicates that ejecting Austin was not his concern during his assault on Austin, citing Bryant's testimony that he followed Austin out to the breezeway and that he saw red, he was very angry and mad because he had been "done like this for no reason," when he saw Austin he started shooting him, and he shot until his shotgun was empty. The State further contends, even if the trial judge erred in declining to give the requested defense of habitation charge, the error was harmless as Bryant's guilt was conclusively proven by competent evidence at trial and no other rational conclusion could have been reached.

[1][2][3][4] The law to be charged to the jury is determined by the evidence presented at trial. *State v. Gaines,* 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). If there is any evidence**470 to support a jury charge, the trial judge should give a requested charge on the matter. *State v. Burriss,* 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Gaines,* 380 S.C. at 31, 667 S.E.2d at 732. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d

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144,,167 (2007).

[5][6][7][8] The defense of habitation provides that defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection. *State v. Rye,* 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) . "One defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation." *State v. Lee,* 293 S.C. 536, 537, 362 S.E.2d 24, 25 (1987). "For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." *Rye,* 375 S.C. at 124, 651 S.E.2d at 323. Unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he or his ***234** property was in imminent danger of sustaining serious injury or damage. *Id.* Rather, the defense of habitation provides "where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." *Id.* "The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was 'defending himself from imminent attack on his own premises.' " *State v. Sullivan,* 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001) (quoting *Lee,* 293 S.C. at 537, 362 S.E.2d at 25). Although self-defense and habitation are analogous, the defenses are not identical. *Rye,* 375 S.C. at 124, 651 S.E.2d at 323.

[9] When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion. *State v. Sparks,* 179 S.C. 135, 137, 183 S.E. 719, 720 (1936).

> A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion.

State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923).

[10] In the case at hand, although there is conflicting evidence as to the relationship between Austin and Bryant on the night in question, Bryant presented evidence that he was in a vulnerable position, being confined to a wheelchair, that he argued with and was assaulted by Austin and attempted to get away from Austin prior to entering his room at the hotel, that he attempted to prevent Austin from entering his room with delay tactics, that Austin was not invited in the room but managed to enter it after **Bryant** entered but before **Bryant** was able to close the door, that Austin advanced toward **Bryant** and threatened to kill **Bryant**, and that **Bryant** then shot Austin with his pistol while in the hotel room. Thus, there is evidence from which the jury could conclude Austin became a trespasser by forcing himself into **Bryant's** dwelling and that **Bryant** was defending himself from imminent attack ***235** on his own premises. Further, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion. Accordingly, contrary to the State's assertion, there is evidence Bryant was attempting to eject a trespasser from his dwelling such that he was entitled to a defense of habitation charge.

[11] In arguing there was no evidence Bryant was attempting to eject a trespasser from his premises, the State points to Bryant's testimony that he was mad and angry when he followed Austin out of his room and into the breezeway where Bryant then shot at Austin until his shotgun was ****471** empty. We recognize the law provides that the right of the occupant to expel a trespasser and to use such force as might be necessary, even to killing him, is limited to the place of his habitation and perhaps his curtilage, and the defense of habitation does not exist at the place of a homicide that is away from the habitation and away from the curtil-

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age. *Bradley,* 126 S.C. at 537, 120 S.E. at 243. *See also State v. Boyd,* 126 S.C. 300, 302, 119 S.E. 839, 840 (1923) (holding that one on his land, adjoining a public road, if assaulted by another who is on such road, is bound to retreat before taking the life of his adversary, if there is probability of his being able to escape without losing his life or suffering grievous bodily harm, the reason of this distinction being that, under the circumstances, he would not have the right to eject his adversary from the place where the adversary had a right to be); *State v. Rochester,* 72 S.C. 194, 203, 51 S.E. 685, 688 (1905) (holding, if the defendant was attacked while on his own premises by the deceased, who was at that time on the public highway, or where he had a right to be, then the defendant was bound to retreat before taking the life of his adversary, if there was a probability of his being able to escape without losing his life or suffering grievous bodily harm, the reason being that under such circumstances he would not have had the right to eject his adversary from the place where he had a right to be). Had the evidence shown Bryant peaceably ejected Austin from his room and then followed Austin out to the breezeway, a place Austin was entitled to be and no longer a trespasser in Bryant's dwelling, it is unlikely that Bryant would have been entitled to a defense of habitation charge had he thereafter ***236** inflicted a fatal blow. We need not decide that point, however, as there is evidence that when Bryant fired the fatal shot, he was attempting to eject Austin as a trespasser from his dwelling. Bryant testified that he shot Austin with his pistol while Austin was present in his room, and then followed Austin out into the breezeway, leaving his pistol behind and shooting him there with his shotgun. The testimony of the pathologist who performed the autopsy on Austin indicates that the injury that caused Austin's death was inflicted by the pistol and not the shotgun. Accordingly, the fatal shot, based on this testimony, occurred while Austin was in Bryant's room and Bryant was attempting to eject him as a trespasser. Though Bryant's testimony that he thereafter followed Austin outside his room and continued to shoot Austin, at least in part out of anger, may be evidence that Bryant's goal was not, in fact, to eject Austin as a trespasser, we find such determination is for the jury, as there was evidence adduced at trial from which the jury could find Bryant was attempting to eject a trespassing Austin from his dwelling when Bryant inflicted the fatal blow.

[12] Further, although self-defense and defense of habitation are analogous, it is insufficient to charge only self-defense when a charge on defense of habitation is warranted. In *Rye,* the trial judge actually charged the jury in part on the defense of habitation, instructing that the law recognized the right of every person to defend his or her premises, "but differentiated habitation from self-defense with the sole caveat that '[a] person defending his or her home or premises ... has no duty to retreat.' " *Rye,* 375 S.C. at 123, 651 S.E.2d at 323. The court found, by instructing the jury that " '[t]he same elements required by law to establish self-defense apply to the defense of habitation, with the exception of the duty to retreat,' the charges [in that case] incorrectly implied that [defense of] habitation requires a defendant to establish that his person or property was in some danger of injury or harm." *Id.* at 123–24, 651 S.E.2d at 323. Thus, the court in *Rye* determined the jury was not properly charged on the defense of habitation. Likewise, the trial judge's charge on self-defense in the case at hand was clearly insufficient to cover the law on the defense of habitation.

237** Finally, we believe there is no merit to the State's assertion that any error in the failure to charge the jury on the defense of habitation is harmless because of overwhelming evidence of Bryant's guilt. In making this argument, the State points to evidence that is either incorrect, in dispute, and/or irrelevant to the defense of habitation. Essentially, the arguments raised by the State in this regard are matters for the jury. At any rate, inasmuch*472** as the trial judge effectively deprived Bryant of an entire defense, the error here cannot be harmless.

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II. Exclusion of 911 Log

Because we reverse Bryant's conviction and remand for a new trial based on the failure of the trial judge to charge defense of habitation, it is unnecessary to address the second issue. *See Rye,* 375 S.C. at 122–23, 651 S.E.2d at 323 (noting, although appellant presented a total of eight issues for appellate review, the court, exercising its prerogative to address only those issues necessary to resolution of a case, addressed only the refusal of the trial court to charge Rye's proposed charge on the defense of habitation). *See also State v. Mekler,* 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008) (affirming this court's decision reversing defendant's conviction and granting a new trial based on failure to charge involuntary manslaughter, but finding it unnecessary to address an issue concerning the admission of evidence decided by this court, noting whether this issue will arise on retrial and its resolution will depend upon the evidence and testimony presented, and it will be for the trial judge's consideration).

CONCLUSION

For the foregoing reasons, we hold Bryant was entitled to a defense of habitation charge as evidence was presented to show Bryant was attempting to eject a trespasser from his premises when he inflicted the fatal blow. Accordingly, we reverse Bryant's conviction and remand for a new trial.

REVERSED AND REMANDED.

KONDUROS and LOCKEMY, JJ., concur.

S.C.App.,2010.
State v. Bryant
391 S.C. 225, 705 S.E.2d 465

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RESISTING UNLAWFUL ARREST

Westlaw.

557 S.E.2d 657
347 S.C. 618, 557 S.E.2d 657
(Cite as: 347 S.C. 618, 557 S.E.2d 657)

H

Supreme Court of South Carolina.
The STATE, Respondent,
v.
Robert G. McGOWAN, Jr., Petitioner.

No. 25389.
Heard Sept. 27, 2001.
Decided Dec. 17, 2001.

Defendant was convicted in the Circuit Court, Horry County, David H. Maring Sr., J., of assault and battery with intent to kill and resisting arrest with a deadly weapon. Defendant appealed. The Court of Appeals affirmed. Defendant petitioned for a writ of certiorari. The Supreme Court, Waller, J., held that: (1) in regard to assault and battery charge, whether defendant's use of deadly force was proportional to the threatened arrest was a matter for the jury, and (2) on the resisting arrest charge, a jury question was presented as to whether underlying arrest for disorderly conduct was lawful.

Affirmed in result.

West Headnotes

[1] Criminal Law 110 ⇐1134.70

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)7 Nature of Decision Appealed from as Affecting Scope of Review
110k1134.70 k. In General. Most Cited Cases
(Formerly 110k1134(8))

Criminal Law 110 ⇐1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases
In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the state.

[2] Criminal Law 110 ⇐1159.2(5)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(5) k. Substantial Evidence. Most Cited Cases

Criminal Law 110 ⇐1159.6

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.6 k. Circumstantial Evidence. Most Cited Cases
If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury.

[3] Criminal Law 110 ⇐753.2(3.1)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evid-

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7

ence

110k753.2(3.1) k. In General. Most Cited Cases

Although the trial court should not refuse to grant a motion for directed verdict when the evidence merely raises a suspicion of the accused's guilt, the case must be submitted to the jury if substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt can be fairly and logically deduced, exists.

[4] Obstructing Justice 282 ⚿8

282 Obstructing Justice
282k8 k. Defenses. Most Cited Cases

A defendant has the right to resist an arrest to the point of deadly force only if necessary, and may not use force disproportionate to the injury threatened.

[5] Assault and Battery 37 ⚿95

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k93 Trial
37k95 k. Questions for Jury. Most Cited Cases

In prosecution for assault and battery with intent to kill, whether or not defendant's use of deadly force was proportional to the threatened **arrest** was a matter for the jury, even assuming the **arrest** was **unlawful**.

[6] Obstructing Justice 282 ⚿9

282 Obstructing Justice
282k9 k. Persons Liable. Most Cited Cases

A person may not be convicted of **resisting arrest** with a deadly weapon where the underlying **arrest** is **unlawful**. Code 1976, § 16-3-625.

[7] Obstructing Justice 282 ⚿7

282 Obstructing Justice
282k7 k. Obstructing or Interfering with Performance of Duties of Ministerial Officers. Most Cited Cases

Even if the underlying **arrest** is **unlawful**, a defendant may be convicted of assault and battery with intent to kill or murder if the degree of force used to **resist** the **arrest** is disproportionate to the threat.

[8] Obstructing Justice 282 ⚿17.2

282 Obstructing Justice
282k17 Trial
282k17.2 k. Questions for Jury. Most Cited Cases

In prosecution for **resisting arrest** with a deadly weapon, a jury question was presented as to whether underlying **arrest** for disorderly conduct was lawful on ground defendant was conducting himself in a grossly intoxicated and disorderly manner in a public place, in light of evidence that defendant was acting in a loud and boisterous manner and cursing at police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul-de-sac across the street. Code 1976, §§ 16-3-625, 16-17-530.

****658 *620** Deputy Chief Attorney Joseph L. Savitz, III, South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Harold M. Coombs, Jr. all of Columbia, and Solicitor John Gregory Hembree, of Conway, for respondent.

Justice WALLER.

We granted a writ of certiorari to review the Court of Appeals' unpublished opinion in *State v. McGowan*, Op. No. 99-UP-626 (S.C. Ct.App. filed Dec. 9, 1999). We affirm in result.

FACTS

McGowan was convicted of assault and battery with intent to kill (ABIK) and resisting arrest with a

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deadly weapon. The charges stem from police attempts to arrest McGowan for "disorderly conduct." According to the State's version of the evidence,[FN1] at approximately**659 1:00 a.m. on the morning of September 7, 1996, McGowan, who was intoxicated, called police *621 to his home in the Socastee area of Myrtle Beach in order to file a false complaint. [FN2] Officer James Mills arrived to find McGowan waiting in his driveway. McGowan became loud and boisterous, and began using profanity toward Officer Mills and other officers on the scene. At one point, McGowan retrieved a pistol from his home, which police took from him. When McGowan began "ranting and raving" for the third or fourth time, Mills decided to arrest him for disorderly conduct. Mills advised McGowan to place his hands on the police car, but when Mills went to cuff him, McGowan ran toward his house. Mills chased him, catching him by the ponytail at the front door, and both fell into the living room. McGowan kicked Mills in the groin, then ran to a bedroom where he retrieved a shotgun. Mills' attempt to subdue McGowan with mace was unsuccessful. McGowan pointed the shotgun at Mills, and Mills fired a warning shot with his pistol. McGowan shot at Mills, hitting him in the hand; Mills fired another shot, grazing McGowan, at which point he surrendered. McGowan was thereafter tried and convicted of ABIK and resisting arrest with a deadly weapon. The Court of Appeals affirmed.

FN1. We view the evidence, as we must, in the light most favorable to the State. *State v. Burdette,* 335 S.C. 34, 515 S.E.2d 525 (1999) (in reviewing denial of a motion for directed verdict, the evidence must be viewed in light most favorable to the State).

FN2. A short time earlier, McGowan had gotten into a fight at a bar with a man named Howard Peel. Upon leaving the bar, McGowan pushed Peel's pickup truck into a ditch with his white Ford Bronco. Police were called to the bar, where they took an incident report concerning the altercation. McGowan called police to his home to falsely report that Peel had come to his home and assaulted him there.

ISSUES

1. Was McGowan entitled to a directed verdict on the charges of ABIK?

2. Was McGowan entitled to a directed verdict on the charge of **resisting arrest** with deadly force on the ground that the underlying **arrest** for disorderly conduct was **unlawful**?

1. DIRECTED VERDICT/ABIK

McGowan claims his underlying **arrest** for disorderly conduct was **unlawful**. Therefore, he contends, he was entitled to use deadly force to **resist** an **unlawful arrest**, entitling him to a directed verdict on the charge of ABIK. We disagree; even *622 assuming *arguendo* the threatened **arrest** was **unlawful**, [FN3] we find the ABIK charge was properly submitted to the jury.

FN3. As discussed in Issue 2 below, whether the **arrest** was lawful was properly submitted to the jury.

[1][2][3] In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. *State v. Kelsey,* 331 S.C. 50, 502 S.E.2d 63 (1998). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. *State v. Rowell,* 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997). Although the trial court should not refuse to grant the motion where the evidence merely raises a suspicion of the accused's guilt, the case must be submitted to the jury if substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt can be fairly and logically deduced, exists. *Id.*

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This Court has previously recognized that a person has a right to resist an unlawful arrest even to the extent of taking the life of the aggressor if it be necessary in order to regain his liberty. *State v. Poinsett,* 250 S.C. 293, 157 S.E.2d 570 (1967); *State v. Bethune,* 112 S.C. 100, 99 S.E. 753 (1919); *State v. Robertson,* 191 S.C. 509, 5 S.E.2d 285 (1939). However, the cases do not stand for the blanket proposition that one may, in every instance, resist an unlawful arrest to the point of deadly force without fear of repercussion. To the contrary, the cases clearly reveal that only such force as is reasonably necessary under the circumstances may be invoked.

In *State v. Bethune, supra,* we upheld the following charge concerning the **right** to **resist** an **unlawful arrest**:

> I charge you that a man has the **right** to defend himself from an **unlawful arrest**, and for the purpose of so protecting himself** he has the **right** to use whatever force is necessary, even to the taking of life, the life of him who is seeking to make the **unlawful arrest**, if that be apparently necessary, and if it would have been apparently necessary to a man of ordinary courage in the circumstances. I charge you that, **where one is defending his person from an unlawful arrest, he had the right to use just so much force as is apparently necessary to accomplish his deliverance * and no more. He has not the right to use excessive force unless excessive force not only be apparently necessary to him, but would have been to a man of ordinary courage so situated.**

112 S.C. at 101, 99 S.E. at 753. (Emphasis supplied). Thereafter, in *State v. Francis,* 152 S.C. 17, 34-39, 149 S.E. 348, 355-356 (1929), this Court stated:

> An **unlawful arrest**, or an attempt to make an **unlawful arrest**, stands upon the same footing as any other nonfelonious assault, or as a common assault and battery. The person who is so **unlawfully arrested**, or against whom such an **unlawful** attempt is directed, is not bound to yield, and **may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault,** or he in turn becomes a wrongdoer....
>
> A mere trespass on one's person or liberty is no reason for the taking of life, and if one commits a homicide while resisting an arrest, even though it is unlawful, he cannot justify on the ground of self-defense unless he can show that the killing was apparently necessary to protect himself from death or great bodily harm....
>
> **But such person should use no more force than is necessary to resist the unlawful arrest, and is justified in using or offering to use a deadly weapon only where he has reason to apprehend an injury greater than the mere unlawful arrest,** as danger of death or great bodily harm....
>
> **It not infrequently has been reasoned that an unlawful attempt to restrain a person's liberty is such an aggression as to furnish a complete excuse for slaying the aggressor. The contention, however, has met with little or no favor in the eyes of the courts. On the contrary, it is generally held that the slayer is not excused unless he can show that the homicidal act was done in his necessary defense. While there can be no doubt of the right of the citizen to resist an attempt illegally to restrain his freedom, yet his resistance must not be in enormous disproportion to the injury threatened. He has no right, according to the better view, to take human life to prevent a mere trespass upon his person or liberty, when unaccompanied by any imminent danger of great bodily harm or felony.**

*624 (Emphasis supplied; internal citations omitted). The *Francis* court held the issue was for the jury. *Id.*

[4] Clearly, *Bethune* and *Francis* stand for the proposition that a defendant has the right to resist

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an arrest to the point of deadly force only if necessary, and may not use force disproportionate to the injury threatened.

[5] Here, although there was conflicting evidence as to who first responded with deadly force, Officer Mills testified that McGowan first kicked him in the groin, then ran to his room and pulled a shotgun. Only then did Mills spray him with mace and pull his own gun. Mills also testified that he warned McGowan not to point the shotgun at him or he would shoot him; only when McGowan pointed the shotgun at him did Mills fire his weapon. Given this testimony, and viewing the evidence in the light most favorable to the state, whether or not McGowan's response was proportional to the threatened arrest was a matter for the jury. Accordingly, the issue of ABIK was properly submitted to the jury.[FN4]

FN4. The trial judge stated on two occasions that he would charge the jury that a defendant has the right to resist an unlawful arrest, even to the point of using deadly force. Although the jury charge is not contained in the record, we assume the jury was so charged. *State v. Hutto,* 279 S.C. 131, 303 S.E.2d 90 (1983) (appellant has burden of presenting adequate record which is sufficiently complete to permit this Court's review).

**661 2. DIRECTED VERDICT/ RESISTING ARREST

McGowan also contends his **arrest** for disorderly conduct was **unlawful**, thereby entitling him to a directed verdict on the charge of **resisting arrest** with deadly force. We disagree.

[6][7] Pursuant to S.C.Code Ann. § 16-3-625 (Supp.2000), a person who **resists** the **lawful** efforts of a law enforcement officer to **arrest** him with the use or threat of use of a deadly weapon is guilty of a felony. Accordingly, a person may not be convicted of **resisting arrest** with a deadly weapon where the underlying **arrest** is **unlawful**.[FN5]

FN5. As noted in Issue 1, however, a person may nonetheless be convicted of other offenses, such as ABIK, ABHAN or murder, if the underlying **arrest** is **unlawful** and the degree of force used to **resist** is disproportionate to the threat.

S.C.Code Ann. 16-17-530 (2000) provides, in part:

*625 Any person who shall (a) be found on any highway or **at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner,** [or] (b) **use obscene or profane language on any highway or at any public place** or gathering or in hearing distance of any schoolhouse or church ..., shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days. (Emphasis supplied).

In *State v. Williams,* 280 S.C. 305, 306-7, 312 S.E.2d 555, 556 (1984), we adopted the following definition of "public place":

A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. *People v. Whitman,* 178 A.D. 193, 165 N.Y.S. 148, 149. *Roach v. Eugene,* 23 Or. 376, 31 P. 825. **Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look.** Steph.Cr.L. 115. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and for. *Lewis v. Commonwealth,* 197 Ky. 449, 247 S.W. 749, 750.[FN6]

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FN6. In *Town of Springdale v. Butler*, 299 S.C. 276, 384 S.E.2d 697 (1989), we held the fact that the defendant was on his private property did not preclude his conviction for disorderly conduct under a town ordinance which did not require the incident occur in a public area. Although *Butler* could be viewed as an indication that a person's yard or driveway is not a public place, the definition of a public place was not an issue in *Butler*, and there was no need for this Court to determine whether or not Butler's driveway could, under any circumstances, be considered a public place. Accordingly, *Butler* is not dispositive.

Emphasis supplied.

[8] Here, there is testimony that McGowan was intoxicated, was acting in a loud and boisterous manner and cursing at ***626** police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul-de-sac across the street. Under our definition of "public place" as stated in *Williams*, we find this is sufficient evidence from which the jury could find, for purposes of the disorderly conduct statute, that McGowan was conducting himself in a grossly intoxicated and disorderly manner in a public place. *Accord State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) (statutory aggravating circumstance of "great risk of danger" to more than one person in public place properly submitted to jury where incident occurred on public street and in defendant's yard and several children were playing in public street when incident occurred). *See also City of Bismarck v. Nassif*, 449 N.W.2d 789 (N.D.1989)(jury could reasonably have concluded that defendant's front yard was public place where evidence revealed that bystanders nearby could have heard his profanity and threats directed toward police); *Loera v. Texas*, 14 S.W.3d 464 (Tex.App.2000)(walkway to private residence ****662** could be considered a public place under certain circumstances; matter should be resolved on a case-by-case basis).

Accordingly, as the jury could have determined McGowan's conduct was prohibited by the disorderly conduct statute, his arrest was lawful such that he was not entitled to a directed verdict on the charge of resisting arrest with deadly force.[FN7] Accordingly, the Court of Appeals opinion is

FN7. McGowan also contends his disorderly conduct arrest was unlawful under *State v. Perkins*, 306 S.C. 353, 412 S.E.2d 385 (1991) (holding that raising voices to police officers, standing alone, is insufficient to convict of disorderly conduct). The Court of Appeals recently distinguished *Perkins*, holding such an arrest is justified where a defendant is both grossly intoxicated and uses obscene language toward arresting officers. *State v. Pittman*, 342 S.C. 545, 537 S.E.2d 563 (Ct.App.2000). Accordingly, this argument is without merit.

AFFIRMED IN RESULT.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

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John Kassel, Esq., Suggs & Kelly

IV. Defenses

References

§ 29. Resisting unlawful arrest

While it is the duty of an individual to submit peacefully to an officer with a valid arrest warrant, an individual has a right to resist an unlawful arrest, even to the extent of taking the life of the aggressor in order to regain his liberty.[1]

[FN1] State v. Poinsett, 250 S. C. 293, 157 S. E. 2d 570 (1967); State v. DeBerry, 250 S. C. 314, 157 S. E. 2d 637 (1967), cert. denied, 391 U. S. 953 (1968).

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SCJUR ASSAULTBAT § 29

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Code 1976 § 17-13-20

C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 17. Criminal Procedures
Chapter 13. Arrest, Process, Searches and Seizures
→ **§ 17-13-20. Additional circumstances where citizens may arrest; means to be used.**

A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person:

(a) has committed a felony;

(b) has entered a dwelling house without express or implied permission;

(c) has broken or is breaking into an outhouse with a view to plunder;

(d) has in his possession stolen property; or

(e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.

CREDIT(S)

HISTORY: 1962 Code § 17-252; 1952 Code § 17-252; 1942 Code § 908; 1932 Code § 908; Cr. P. '22 § 2; Cr. C. '12 § 2; Cr. C. '02 § 2; G. S. 2617; R. S. 2; 1866 (13) 406; 1995 Act No. 53, § 1.

CROSS REFERENCES

Military personnel not being subject to certain arrests, see § 25-3-120.

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S.C. Jur. Arrest § 17, Relationship of Misdemeanor Rule to the Common Law.

S.C. Jur. False Imprisonment § 3, False Arrest.

S.C. Jur. Private Detectives & Security Businesses § 29, Violation of Statutes.

Treatises and Practice Aids

Drinking/Driving Litigation: Criminal and Civil 2d § 5:9, Citizen's Arrest.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: criminal law: arrest, search and seizure. 28 SC L Rev 290.

NOTES OF DECISIONS

In general 1
Use of deadly force 2

1. In general

There is no common law right to make warrantless citizen's arrests of any kind, and such rights as exist are created by statute. State v. McAteer (S.C. 2000) 340 S.C. 644, 532 S.E.2d 865. Arrest ⚿ 64

Failure to instruct that before citizen is justified in attempting to arrest one suspected of possessing stolen property suspicion must be reasonably grounded held prejudicial error as to accused charged with murder. State v. Irby (S.C. 1932) 166 S.C. 430, 164 S.E. 912. Homicide ⚿ 1486

This section [Code 1962 § 17-252] applies only to arrests in the nighttime, and under the circumstances named. State v. Davis (S.C. 1897) 50 S.C. 405, 27 S.E. 905, 62 Am.St.Rep. 837.

2. Use of deadly force

The holding of Tennessee v Garner, 471 U.S. 1, 105 S.Ct. 1694 (1986) regarding the use of deadly force by police officers does not apply to seizures by private persons not acting as agents of the State, and does not change the State's criminal law with respect to citizens using force in apprehending a fleeing felon. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied. Arrest ⚿ 64

In order to invoke the defense of justifiable killing in apprehending a fleeing felon, the assailant at a minimum must show that he had certain information that a felony had been committed, and that he used reasonable means to effect the arrest. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied.

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In determining the reasonableness of killing a fleeing felon in an attempt to apprehend him, the determination of reasonableness depends upon the facts of the case and is a question for the jury unless there is no evidence to support a finding of reasonableness; consequently, the trial judge erred in finding that killing an unarmed fleeing suspect was per se unreasonable, and in failing to charge the jury on the common law of citizen's arrest and the use of reasonable force. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied.

In the prosecution of a defendant who shot and killed the victim while allegedly trying to make a citizen's arrest, the trial court did not err in excluding evidence tending to show that the victim committed a burglary; such evidence was irrelevant since actual guilt of the suspect is not required to justify a citizen's arrest. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied.

This section [Code 1962 § 17-252] does not justify a killing, where deceased failed to answer upon being hailed in the nighttime upon premises of the defendant. State v. Jones (S.C. 1916) 104 S.C. 141, 88 S.E. 444.

Code 1976 § 17-13-20, SC ST § 17-13-20

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Westlaw.

Code 1976 § 17-13-10

C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 17. Criminal Procedures
Chapter 13. Arrest, Process, Searches and Seizures
→ **§ 17-13-10. Circumstances where any person may arrest a felon or thief.**

Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.

CREDIT(S)

HISTORY: 1962 Code § 17-251; 1952 Code § 17-251; 1942 Code § 907; 1932 Code § 907; Cr. P. '22 § 1; Cr. C. '12 § 1; Cr. C. '02 § 1; G. S. 2616; R. S. 1; 1866 (13) 406; 1898 (22) 809.

CROSS REFERENCES

Unlawful searches and seizures, see SC Const, Art 1, § 10.
Arrests by magistrates, see §§ 22-5-110 et seq.
Military personnel not being subject to certain arrests, see § 25-3-120.
Arrests by inspectors of law enforcement department of public service commission, see § 58-3-370.

LIBRARY REFERENCES

Arrest ⇨ 63.2, 64.
WESTLAW Topic No. 35.
C.J.S. Arrest §§ 12 to 15, 17.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Arrest § 11, Felony Arrest Upon "Certain Information".

S.C. Jur. Arrest § 17, Relationship of Misdemeanor Rule to the Common Law.

S.C. Jur. False Imprisonment § 3, False Arrest.

S.C. Jur. Private Detectives & Security Businesses § 29, Violation of Statutes.

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Treatises and Practice Aids

Drinking/Driving Litigation: Criminal and Civil 2d § 5:9, Citizen's Arrest.

LAW REVIEW AND JOURNAL COMMENTARIES

Search and Seizure. 25 SC L Rev 348.

ATTORNEY GENERAL'S OPINIONS

A minor may sign an affidavit for an arrest warrant provided he is capable of understanding the oath and is competent to testify, the determination of which factors is within the individual magistrate's discretion. 1978 Op Atty Gen, No 78-15, p 28.

Members of General Assembly are not entitled to privilege or constitutional immunity from arrest or from prosecution and conviction for speeding or any other traffic or criminal offense. 1993 Op Atty Gen No 93-7.

NOTES OF DECISIONS

In general 1
Purpose 2
Requirement that arrestee be taken before judge or magistrate 3
Use of deadly force 4

1. In general

The word "certain" is used in the sense of trustworthy, capable of being depended upon, credible, positive, or reliable, and has reference to the evidence or information upon which the person making the arrest is allowed to act, and not to the actual fact that a felony has been committed. When the information is certain, in the sense hereinbefore mentioned, any person has as much right to make the arrest as if acting by virtue of a warrant issued by a regularly authorized officer of the law, and it is the corresponding duty of the person supposed to have committed the felony to submit to the arrest. Burton v McNeill (1941) 196 SC 250, 13 SE2d 10, 133 ALR 603. State v Swilling (1967) 249 SC 541, 155 SE2d 607, cert den 389 US 1055, 19 L Ed 2d 853, 88 S Ct 806.

While there appears to be no substantial difference between the right of an officer to arrest for a felony under this section [Code 1962 § 17-251] and under the common law, such right of an officer existed at common law, and was unaffected by the statute. Bushardt v United Inv. Co. (1922) 121 SC 324, 113 SE 637, 35 ALR 637. State v Swilling (1967) 249 SC 541, 155 SE2d 607, cert den 389 US 1055, 19 L Ed 2d 853, 88 S Ct 806.

Proposed instruction, that a citizen's arrest upon viewing commission of a felony or larceny must be made with use of reasonable force, was not warranted in capital murder prosecution arising from defendant's gun battle with guard during robbery of armored car; defendant's acts as initiator of crime put guard directly in danger, and there was no evidence guard was attempting an arrest rather than simply trying to protect himself. State v. Shuler (S.C. 2001) 344 S.C. 604, 545 S.E.2d 805, rehearing denied, certiorari denied 122 S.Ct. 404, 534 U.S.

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977, 151 L.Ed.2d 306, habeas corpus dismissed 2006 WL 490126, affirmed 209 Fed.Appx. 224, 2006 WL 3611810, certiorari denied 127 S.Ct. 2429, 550 U.S. 958, 167 L.Ed.2d 1132. Criminal Law ⚿ 814(8)

Where municipal police officer was outside municipality's city limits when he first observed defendant, whom officer suspected of driving under influence, officer had no police authority to detain defendant, but was authorized to arrest defendant if private citizen could have done so. State v. McAteer (S.C. 2000) 340 S.C. 644, 532 S.E.2d 865. Automobiles ⚿ 349(12)

The statute permitting warrantless misdemeanor arrests for any "view of a larceny committed" is the only circumstance when a citizen can make a daytime misdemeanor arrest. State v. McAteer (S.C. 2000) 340 S.C. 644, 532 S.E.2d 865. Arrest ⚿ 64

There is no common law right to make warrantless citizen's arrests of any kind, and such rights as exist are created by statute. State v. McAteer (S.C. 2000) 340 S.C. 644, 532 S.E.2d 865. Arrest ⚿ 64

The Fourth Amendment proscription against warrantless searches and seizures does not apply to searches by private individuals not acting as agents of the state. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied. Searches And Seizures ⚿ 33

The defendants were entitled to a directed verdict on a charge of assault and battery of a high and aggravated nature against one who was attempting to make a citizen's arrest where (1) the assault victim's belief that the defendants had slashed the top of his daughter's convertible was based on her statement, not on his personal knowledge, (2) such crime was a misdemeanor, not a felony, and (3) the assault victim grabbed one defendant without prior warning or notice that he was making a citizen's arrest; thus, the attempted citizen's arrest by the assault victim was not lawful. State v. Nall (S.C.App. 1991) 304 S.C. 332, 404 S.E.2d 202.

Where an officer, in good faith, believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise, he has such probable cause for his belief as will justify him in arresting without a warrant. State v. Swilling (S.C. 1967) 249 S.C. 541, 155 S.E.2d 607, certiorari denied 88 S.Ct. 806, 389 U.S. 1055, 19 L.Ed.2d 853. Arrest ⚿ 63.4(2)

Where a dangerous wound is inflicted, a peace officer need not wait to ascertain whether the injured person dies, and may arrest the offender without a warrant, if he in good faith believes that the wound is such that a felony will likely result from it through the injured person's death, and his belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise. State v. Swilling (S.C. 1967) 249 S.C. 541, 155 S.E.2d 607, certiorari denied 88 S.Ct. 806, 389 U.S. 1055, 19 L.Ed.2d 853. Arrest ⚿ 63.4(5)

When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the

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crime. The right to search and seize incident to a lawful arrest and without a warrant extends to things under the accused's immediate control and, to an extent depending on the circumstance of the case, to the place where he is arrested. State v. Swilling (S.C. 1967) 249 S.C. 541, 155 S.E.2d 607, certiorari denied 88 S.Ct. 806, 389 U.S. 1055, 19 L.Ed.2d 853.

The "certain information" referred to in this section [Code 1962 § 17-251] means the existence of reasonable grounds to suspect the party arrested may be guilty of a felony. State v. Swilling (S.C. 1967) 249 S.C. 541, 155 S.E.2d 607, certiorari denied 88 S.Ct. 806, 389 U.S. 1055, 19 L.Ed.2d 853. Arrest ⚿ 63.4(1)

Assuming, without deciding, that the statute embodies the requirement that a lay person who effects an arrest must, after turning the arrested person over to the police, procure a warrant as soon as possible, it could not be determined from the pleadings whether the duty, if any, to seek such warrant was on the arrestor or on the police authorities. Thomas v. Colonial Stores, Inc. (S.C. 1960) 236 S.C. 95, 113 S.E.2d 337.

Statute was applied to situation at bar. State v. Miller (S.C. 1947) 211 S.C. 306, 45 S.E.2d 23.

Where owner arrested respondent who was found in owner's house, the owner being sued for false arrest, it was held that the owner had the right to arrest respondent if he was acting "upon certain information that a felony had been committed," it being unnecessary as an actual fact that a felony had been committed in order to permit him, as a private citizen, to arrest respondent and take him before the proper officer of the law. Burton v. McNeill (S.C. 1941) 196 S.C. 250, 13 S.E.2d 10, 133 A.L.R. 603. False Imprisonment ⚿ 7(3)

Where owner whose house had been broken into several times arrested persons found in his house on information from a twelve-year-old boy who told him he had heard an awful noise in his house, it was held that owner acted on information within the meaning of this section [Code 1962 § 17-251]. Burton v. McNeill (S.C. 1941) 196 S.C. 250, 13 S.E.2d 10, 133 A.L.R. 603.

It cannot be held to be in derogation of the common-law right of a peace officer to arrest in felony cases. Bushardt v. United Inv. Co. (S.C. 1922) 121 S.C. 324, 113 S.E. 637, 35 A.L.R. 637.

The statute has no application to one who kills in assisting another. State v. Cook (S.C. 1906) 78 S.C. 253, 59 S.E. 862, 125 Am.St.Rep. 788, 13 Am.Ann.Cas. 1051.

Under this section [Code 1962 § 17-251], a private person may arrest one because of a supposed felony committed, on such information as to convince a reasonable man that the felony has been committed, even though the information be false. State v. Griffin (S.C. 1906) 74 S.C. 412, 54 S.E. 603. Arrest ⚿ 64

A private person may arrest without a warrant, under this section [Code 1962 § 17-251], a fugitive from justice from a sister state on showing that prima facie a felony or some crime, punishable either capitally or by imprisonment for one year or upwards in a State prison, was in fact committed and the prisoner was the perpetrator.

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State v. Whittle (S.C. 1901) 59 S.C. 297, 37 S.E. 923.

A private person has no right under section to arrest without warrant for simple petit larceny. State v. Davis (S.C. 1897) 50 S.C. 405, 27 S.E. 905, 62 Am.St.Rep. 837.

It is error to charge jury as to right of arrest without distinguishing larceny that is misdemeanor from larceny that is felony. State v. Davis (S.C. 1897) 50 S.C. 405, 27 S.E. 905, 62 Am.St.Rep. 837.

2. Purpose

It is reasonable to suppose that this section [Code 1962 § 17-251] was intended to change existing law. This section [Code 1962 § 17-251] would not have this effect unless it is construed as enabling the party making the arrest to act upon information, although it might not be true, provided it was of such nature as to convince a reasonable man that the act had been committed from which the law presumed the felony by the person arrested. Burton v. McNeill (S.C. 1941) 196 S.C. 250, 13 S.E.2d 10, 133 A.L.R. 603.

3. Requirement that arrestee be taken before judge or magistrate

Under this section [Code 1962 § 17-251], upon arresting the defendant without a warrant, officers are required to take him before a judge or magistrate within a reasonable length of time thereafter. However, the failure of the officers to do so does not warrant reversal of defendant's conviction unless such failure has deprived the defendant of a fair trial. State v. Swilling (S.C. 1967) 249 S.C. 541, 155 S.E.2d 607, certiorari denied 88 S.Ct. 806, 389 U.S. 1055, 19 L.Ed.2d 853. Criminal Law ⚿ 1166(7)

If there was a lawful arrest made in good faith, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay. Thomas v. Colonial Stores, Inc. (S.C. 1960) 236 S.C. 95, 113 S.E.2d 337. Arrest ⚿ 70(2); False Imprisonment ⚿ 8

There is a sufficient compliance with this section [Code 1962 § 17-251] is the person arrested is taken to police headquarters to be dealt with according to law. Thomas v. Colonial Stores, Inc. (S.C. 1960) 236 S.C. 95, 113 S.E.2d 337.

A private person can only arrest for the purpose of taking the arrested party to the proper official to be dealt with according to law, and this must be done within a reasonable time. Thomas v. Colonial Stores, Inc. (S.C. 1960) 236 S.C. 95, 113 S.E.2d 337.

Where owner of house took person caught in his house to police headquarters and delivered him to chief of detectives of city police department, it would be quibbling to hold for all practical purposes and the intent of this section [Code 1962 § 17-251] that owner did not comply with this section, permitting him to make an arrest, by not taking respondent before a judge or magistrate to be dealt with according to law. Burton v. McNeill (S.C.

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1941) 196 S.C. 250, 13 S.E.2d 10, 133 A.L.R. 603.

In action for false imprisonment this section [Code 1962 § 17-251] was not available to defendant who had forced an eleven-year-old boy into a room and, without taking him to a judge or magistrate, questioned him for one and one-half hours concerning theft of defendant's money. He must, without unreasonable delay, either take him before a magistrate or a judge to be dealt with according to law. Westbrook v. Hutchison (S.C. 1940) 195 S.C. 101, 10 S.E.2d 145.

4. Use of deadly force

A law enforcement officer may use whatever force is necessary to effect the arrest of a felon, including deadly force. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Arrest ⚭ 68(2)

Section **17-13-10**, allowing a citizen's arrest of a felon or thief, does not authorize the use of deadly force. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied.

The holding of Tennessee v Garner, 471 U.S. 1, 105 S.Ct. 1694 (1986) regarding the use of deadly force by police officers does not apply to seizures by private persons not acting as agents of the State, and does not change the State's criminal law with respect to citizens using force in apprehending a fleeing felon. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied. Arrest ⚭ 64

In order to invoke the defense of justifiable killing in apprehending a fleeing felon, the assailant at a minimum must show that he had certain information that a felony had been committed, and that he used reasonable means to effect the arrest. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied.

In determining the reasonableness of killing a fleeing felon in an attempt to apprehend him, the determination of reasonableness depends upon the facts of the case and is a question for the jury unless there is no evidence to support a finding of reasonableness; consequently, the trial judge erred in finding that killing an unarmed fleeing suspect was per se unreasonable, and in failing to charge the jury on the common law of citizen's arrest and the use of reasonable force. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied.

In the prosecution of a defendant who shot and killed the victim while allegedly trying to make a citizen's arrest, the trial court did not err in excluding evidence tending to show that the victim committed a burglary; such evidence was irrelevant since actual guilt of the suspect is not required to justify a citizen's arrest. State v. Cooney (S.C. 1995) 320 S.C. 107, 463 S.E.2d 597, rehearing denied.

Code 1976 § 17-13-10, SC ST § 17-13-10

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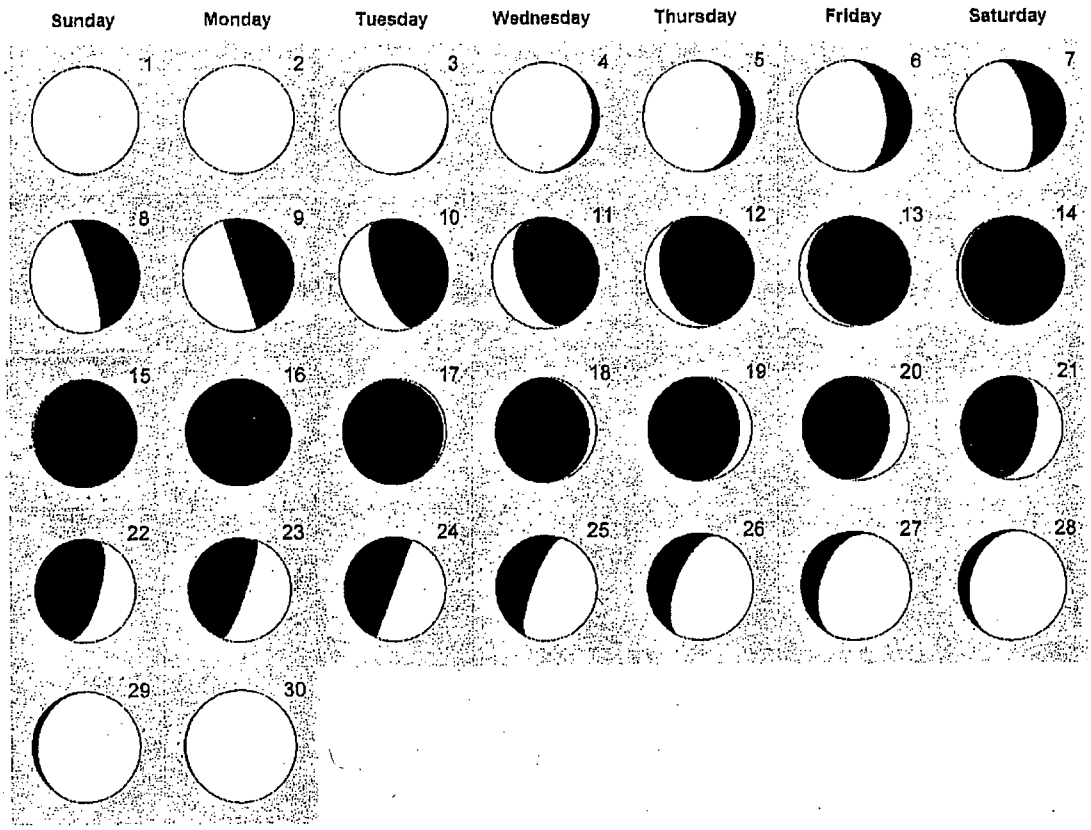

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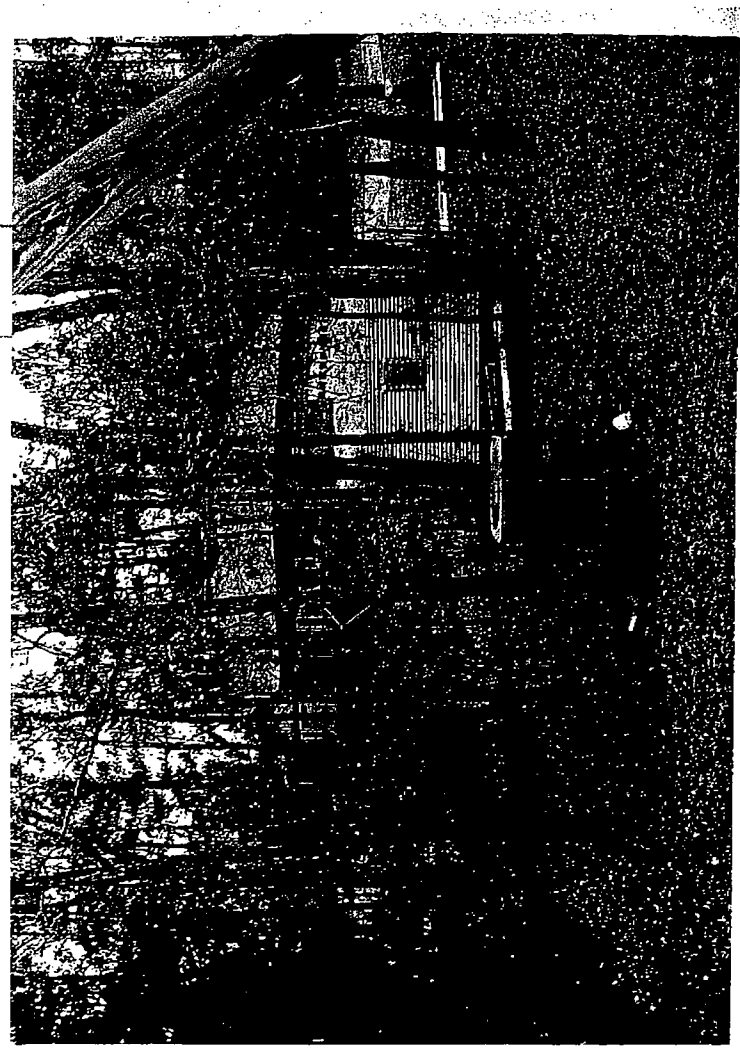

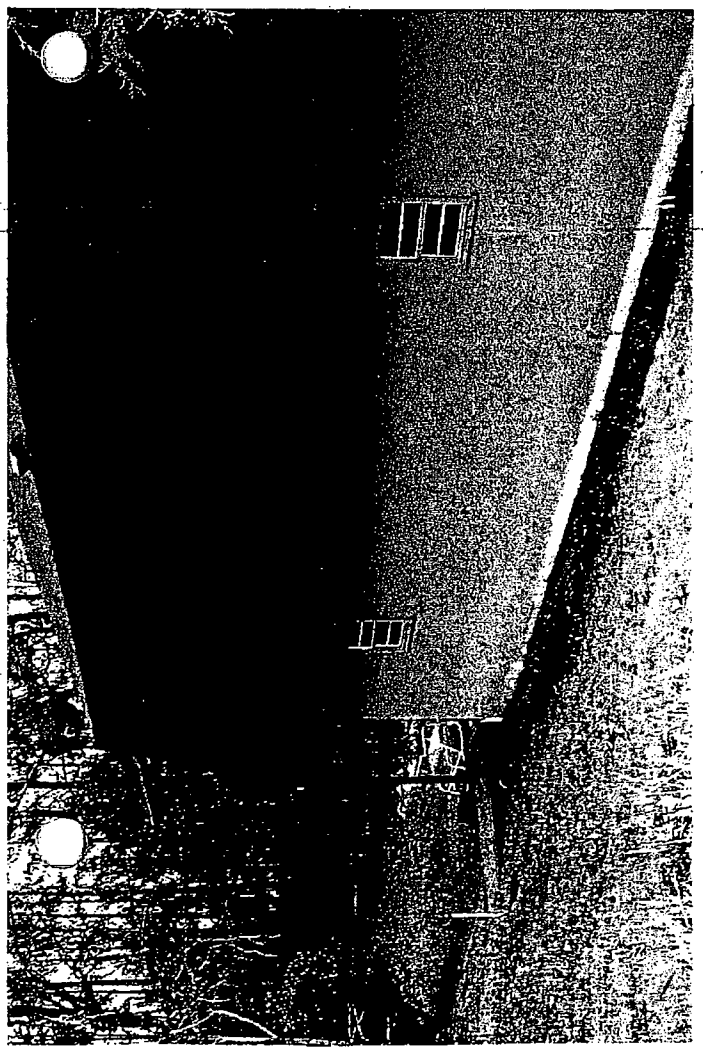

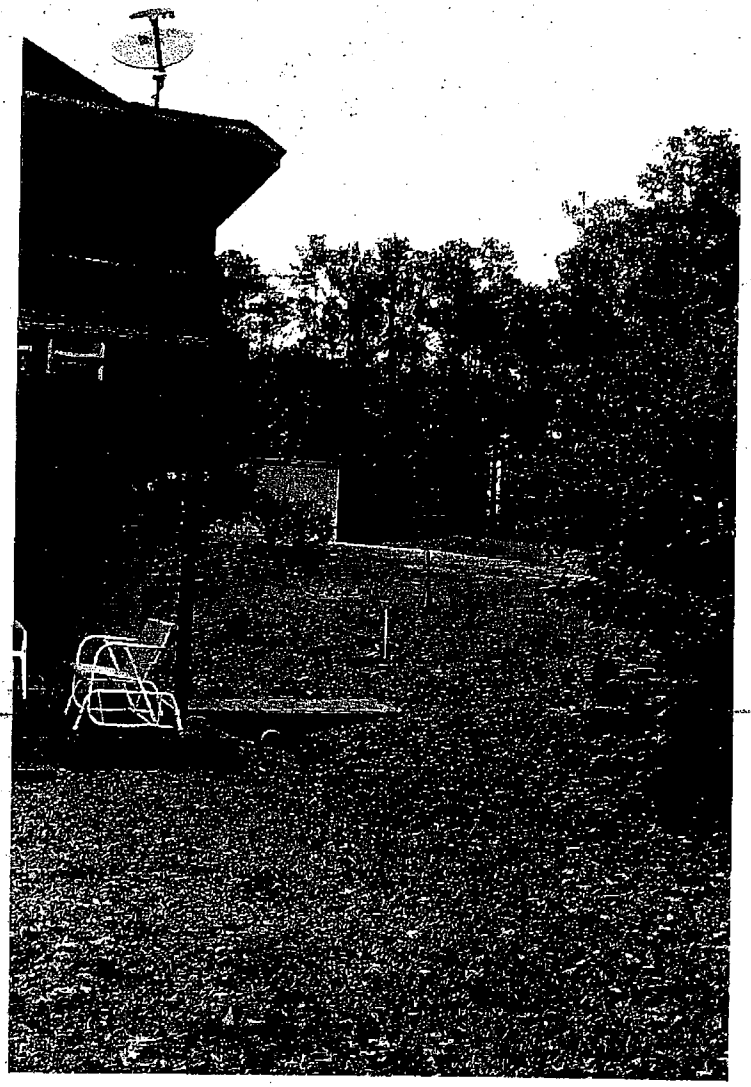

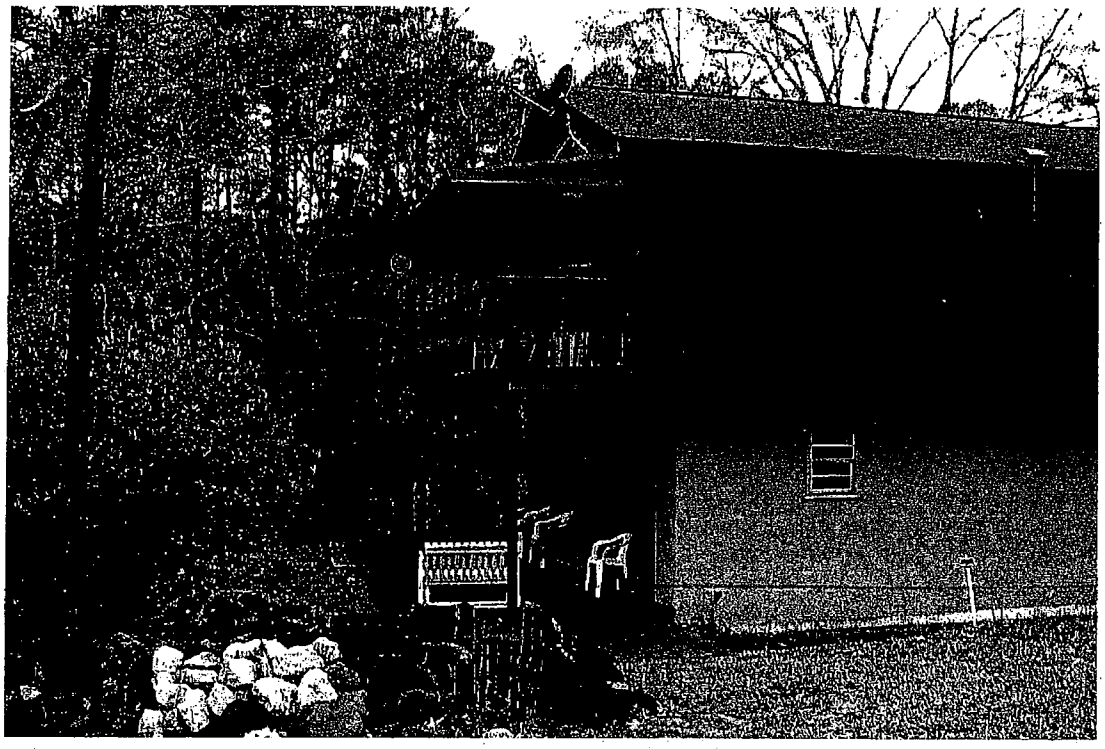

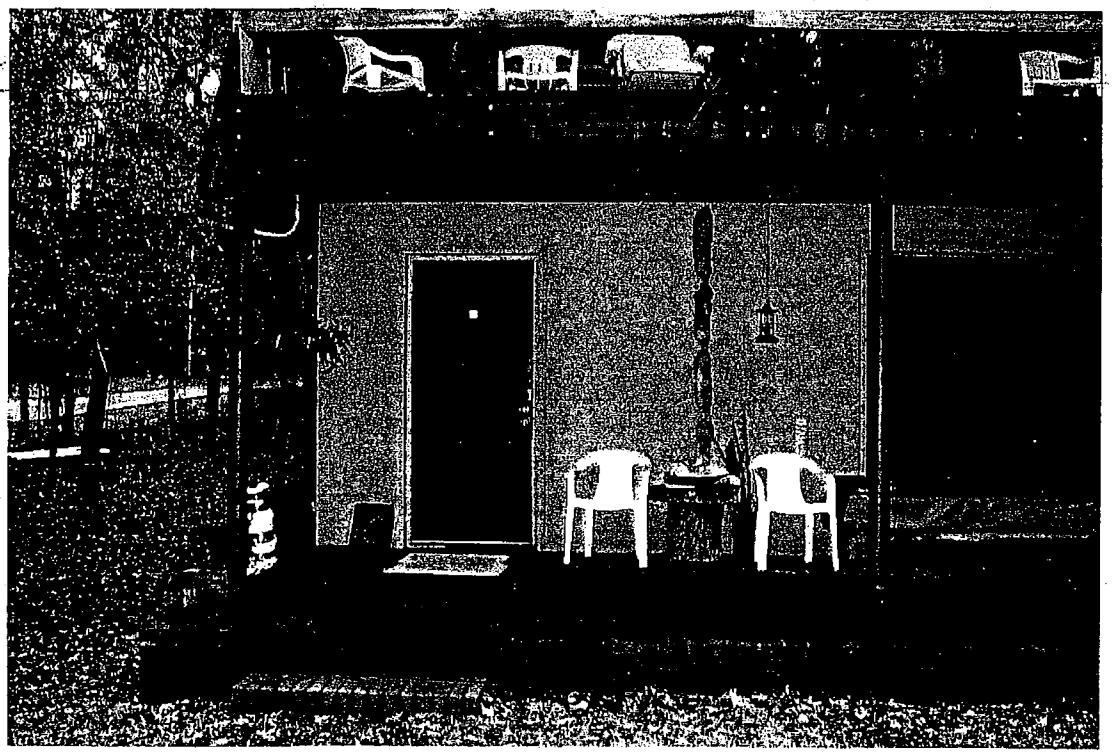

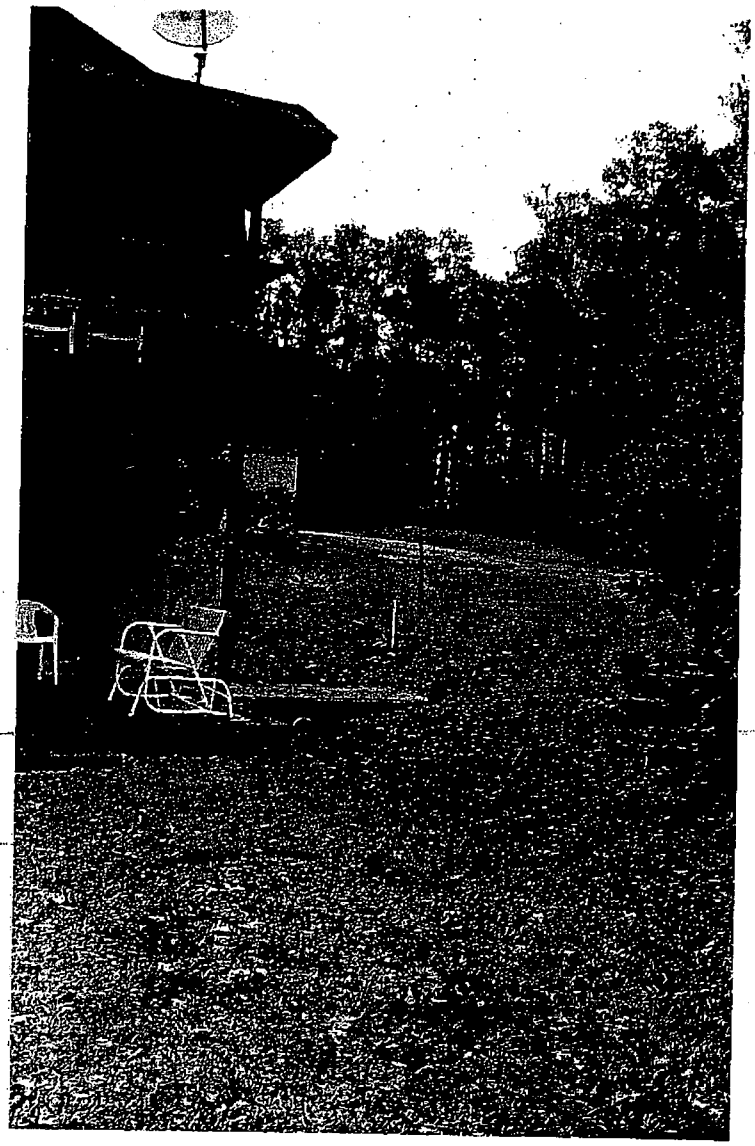

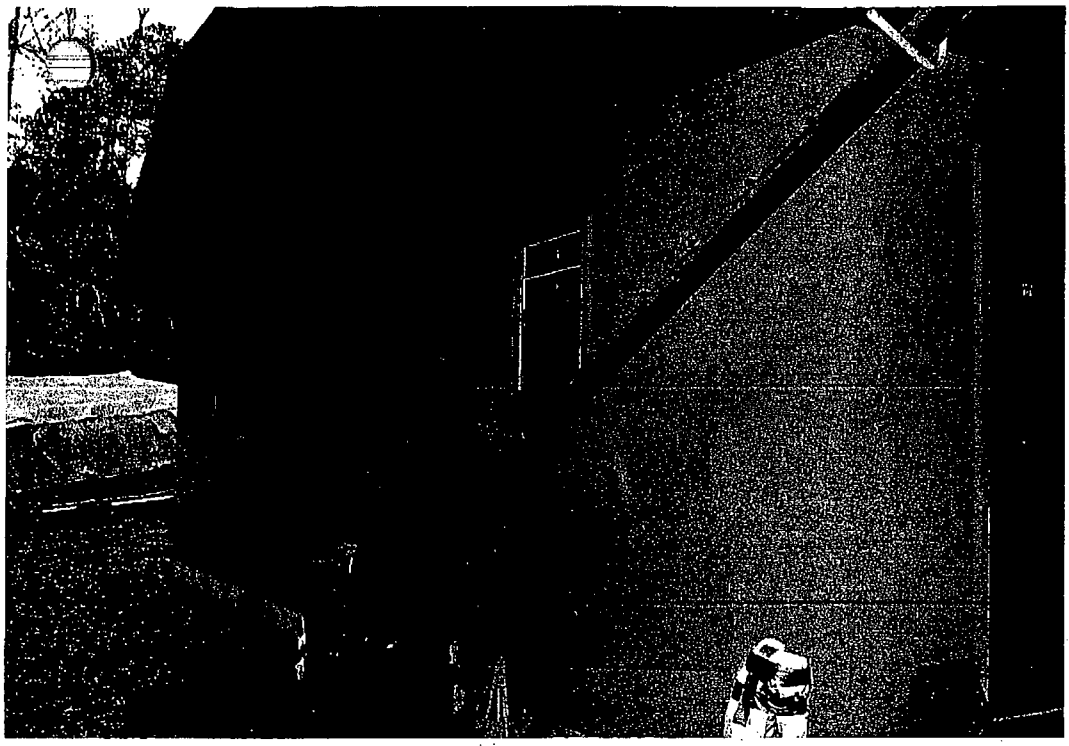

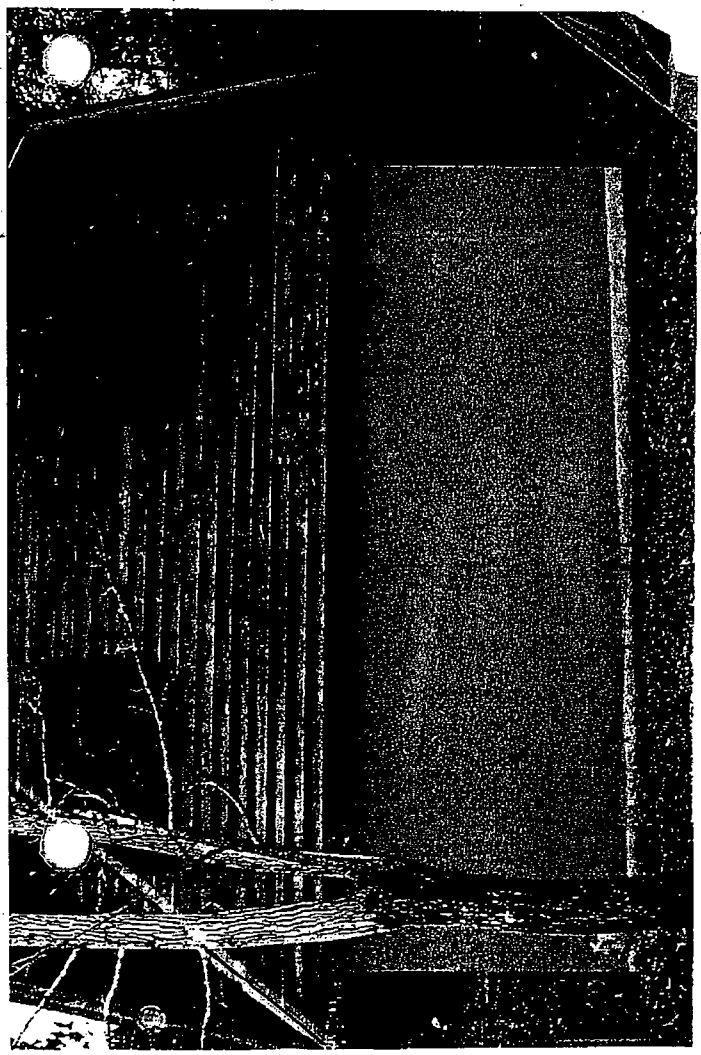

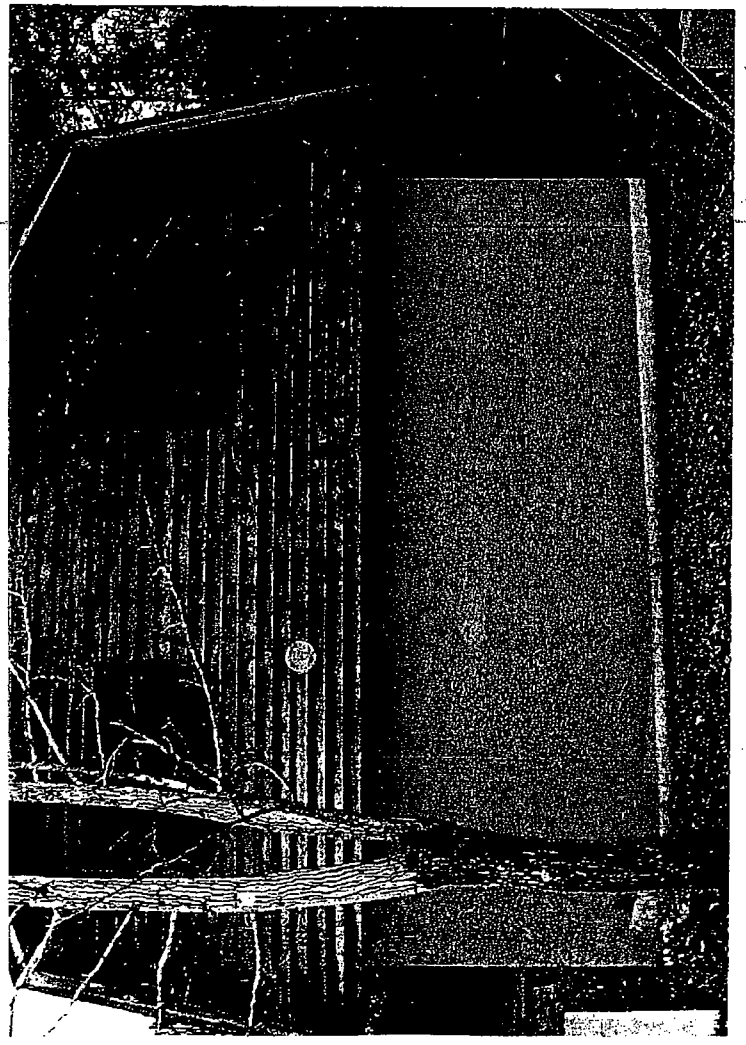

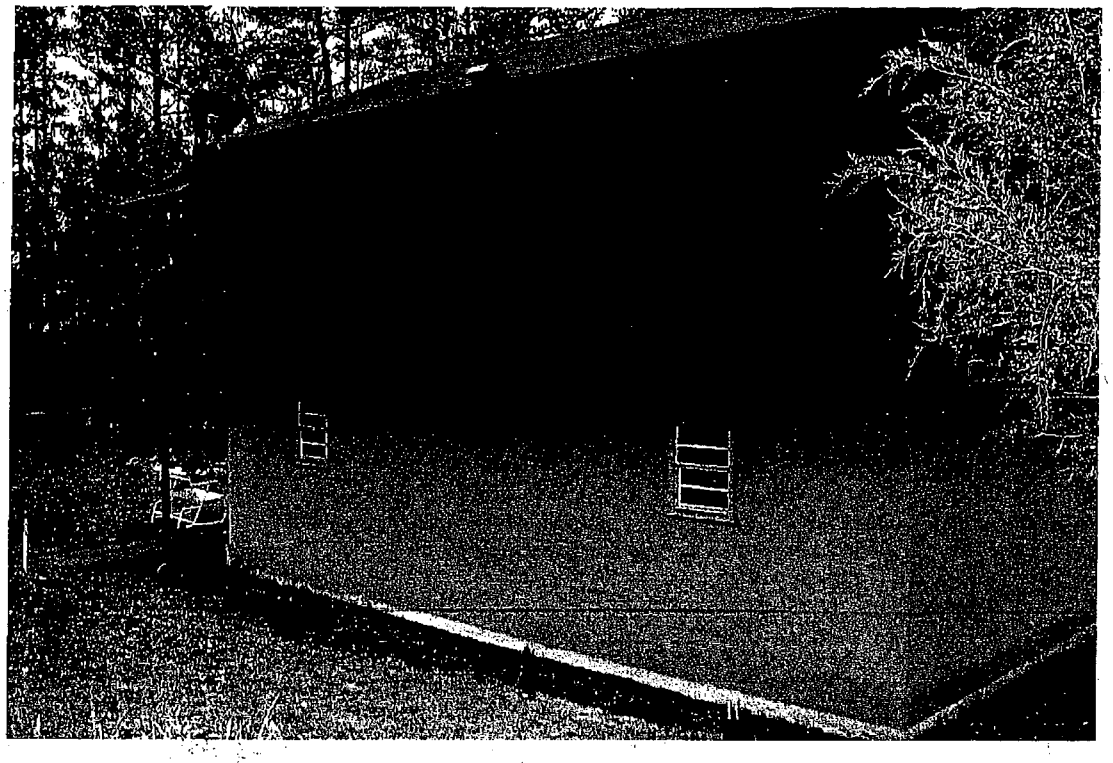

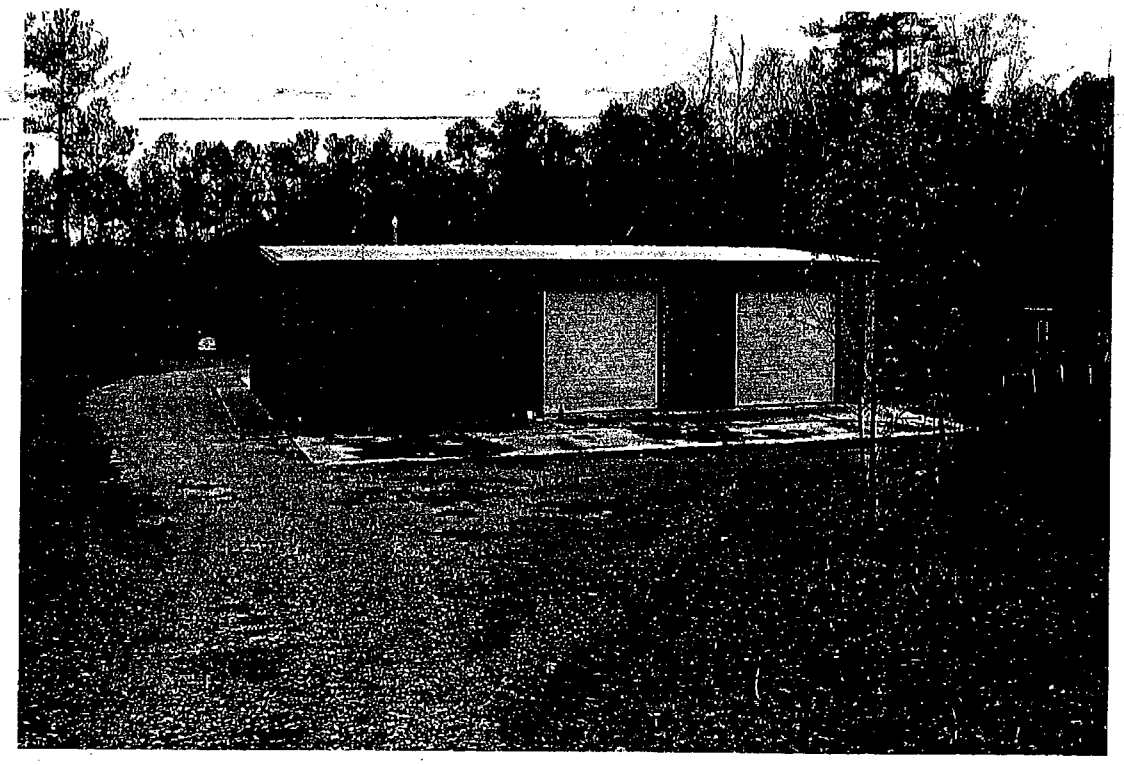

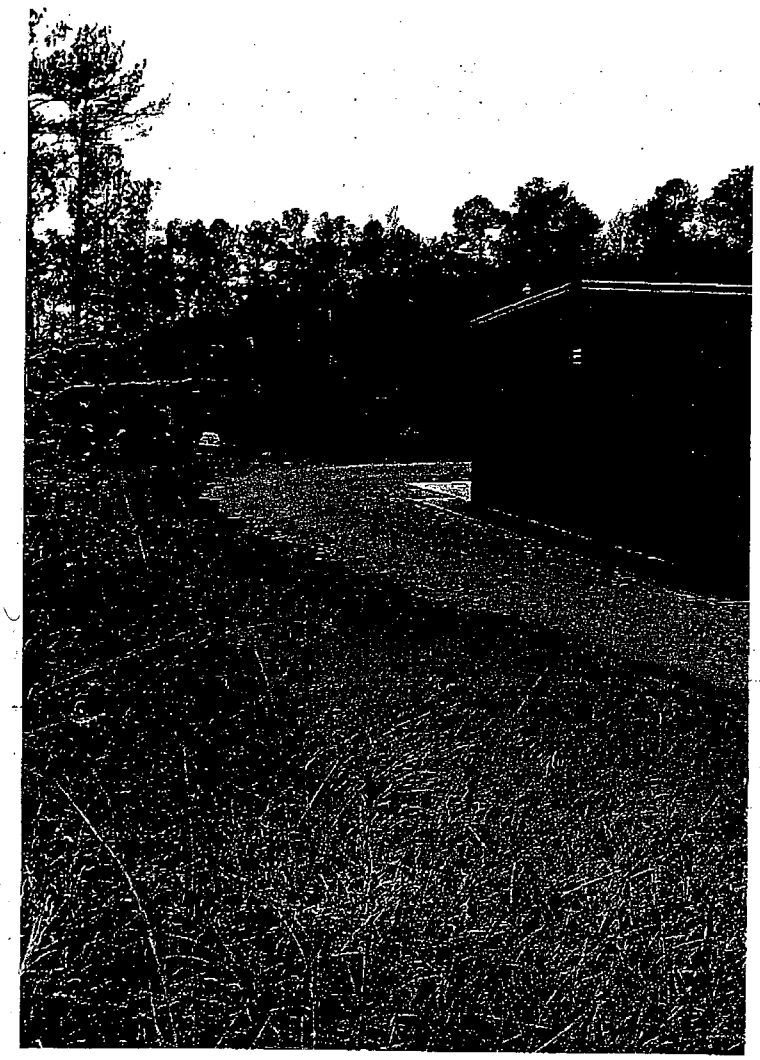

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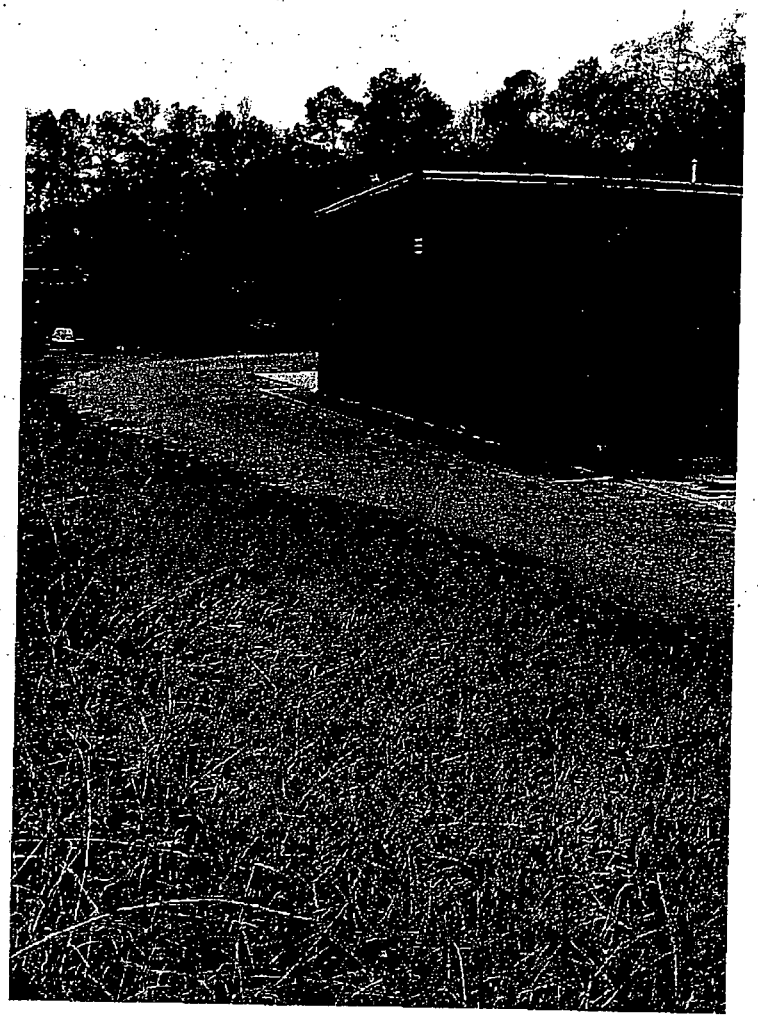

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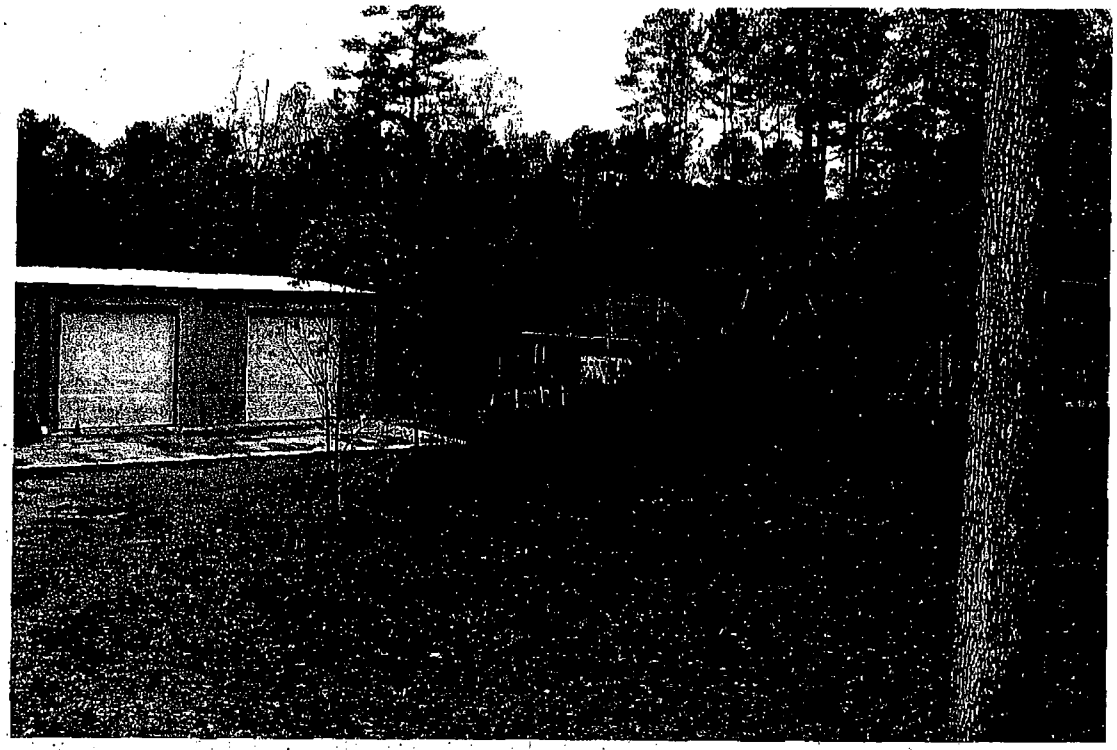
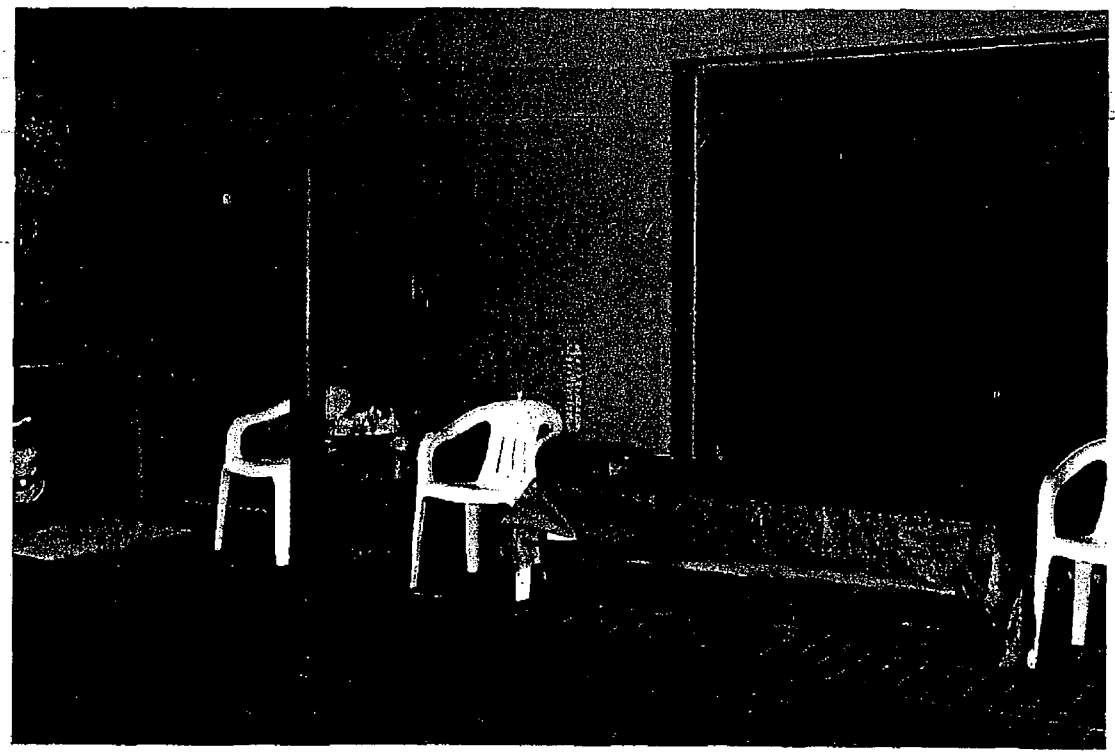
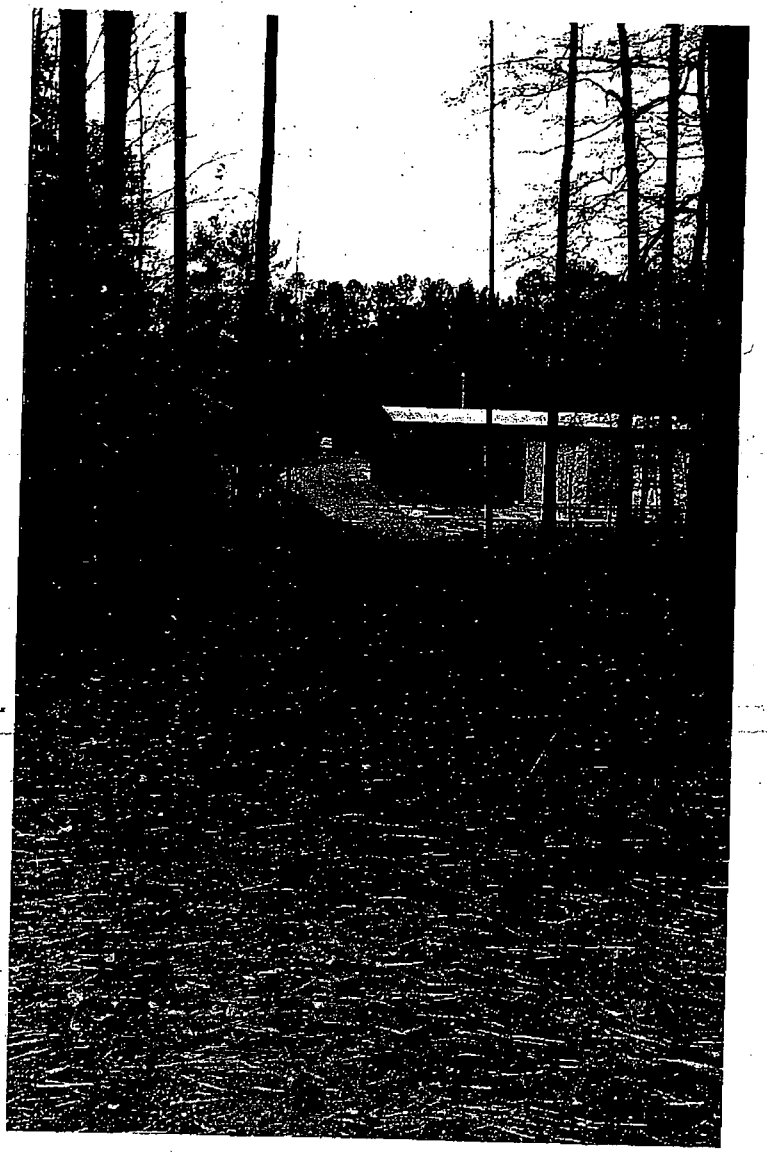
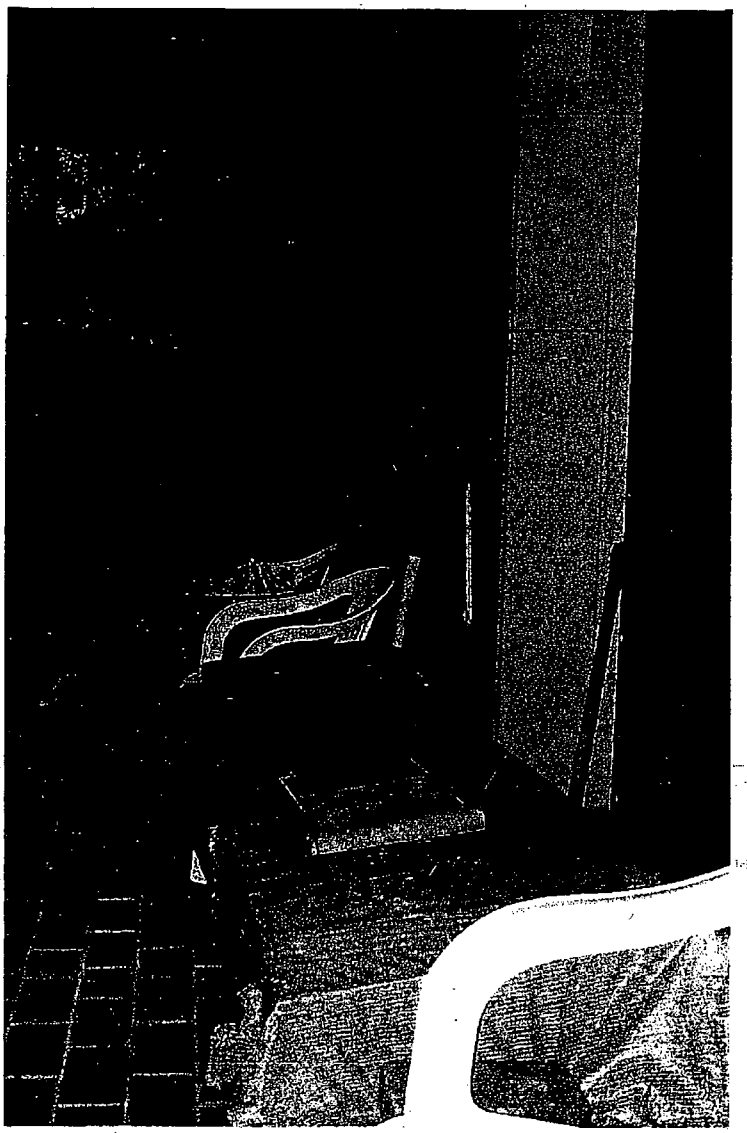
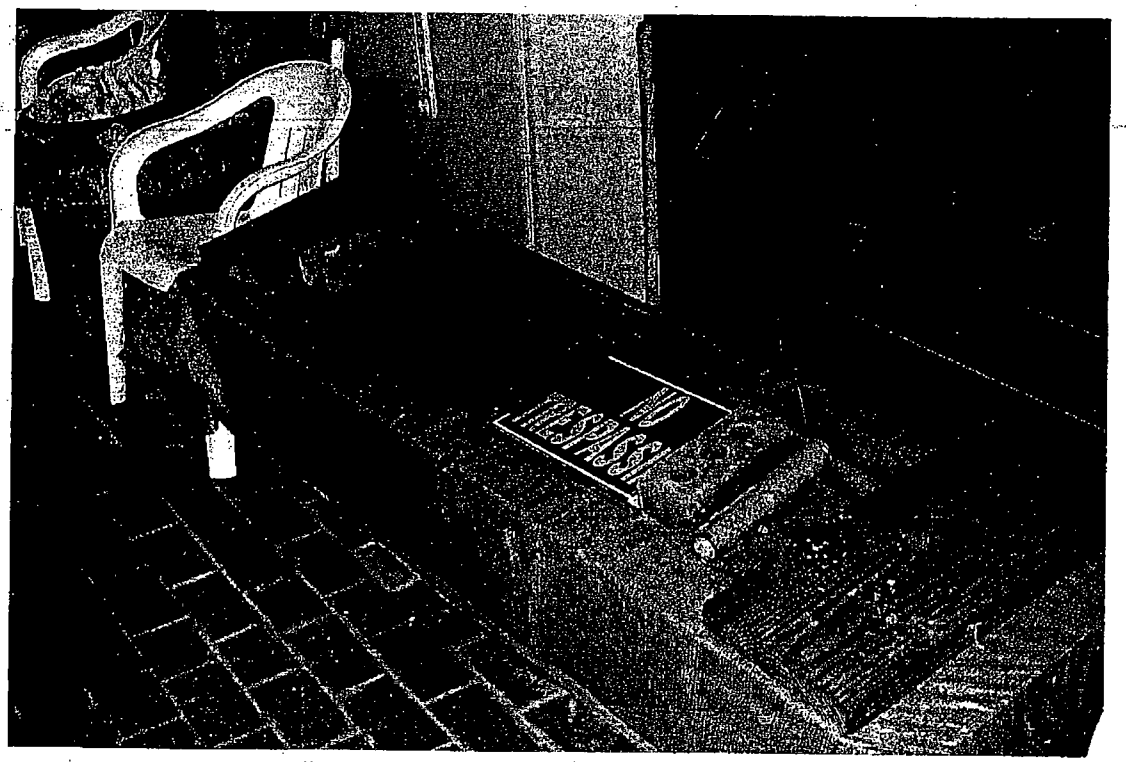


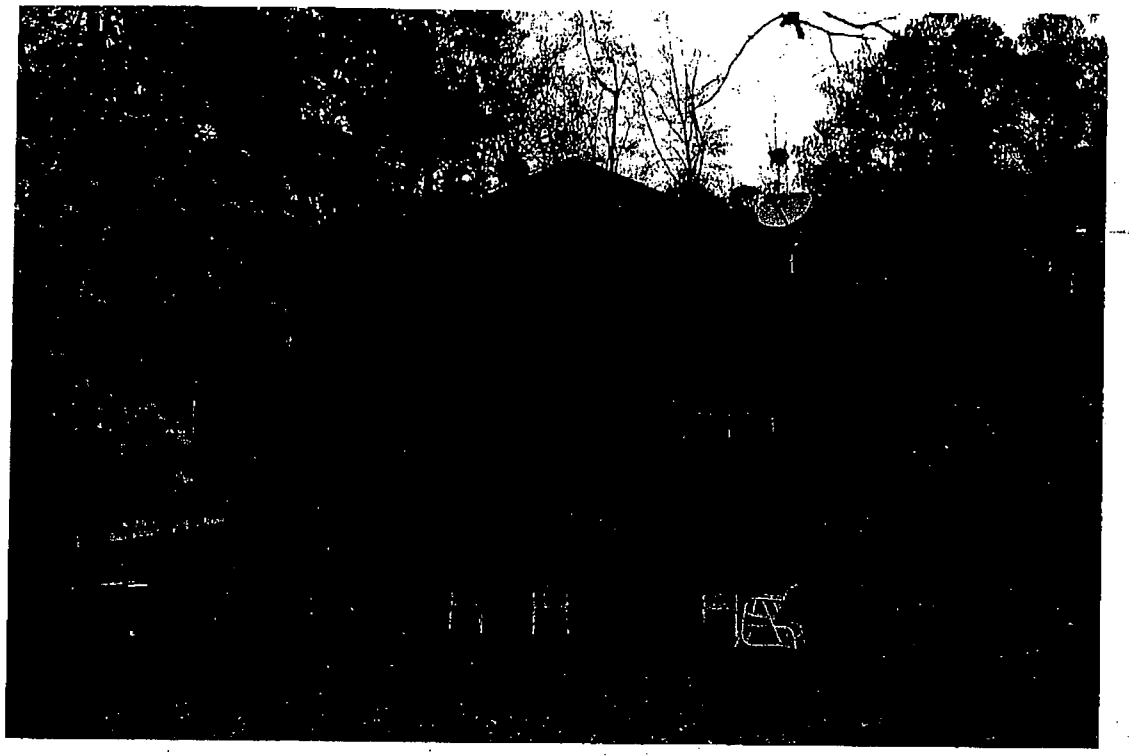


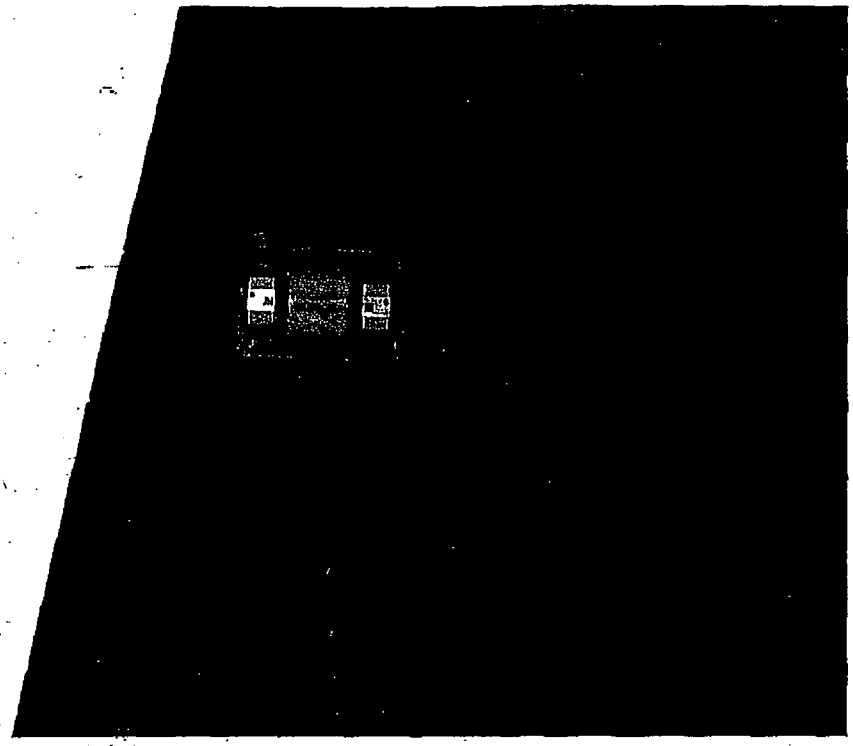


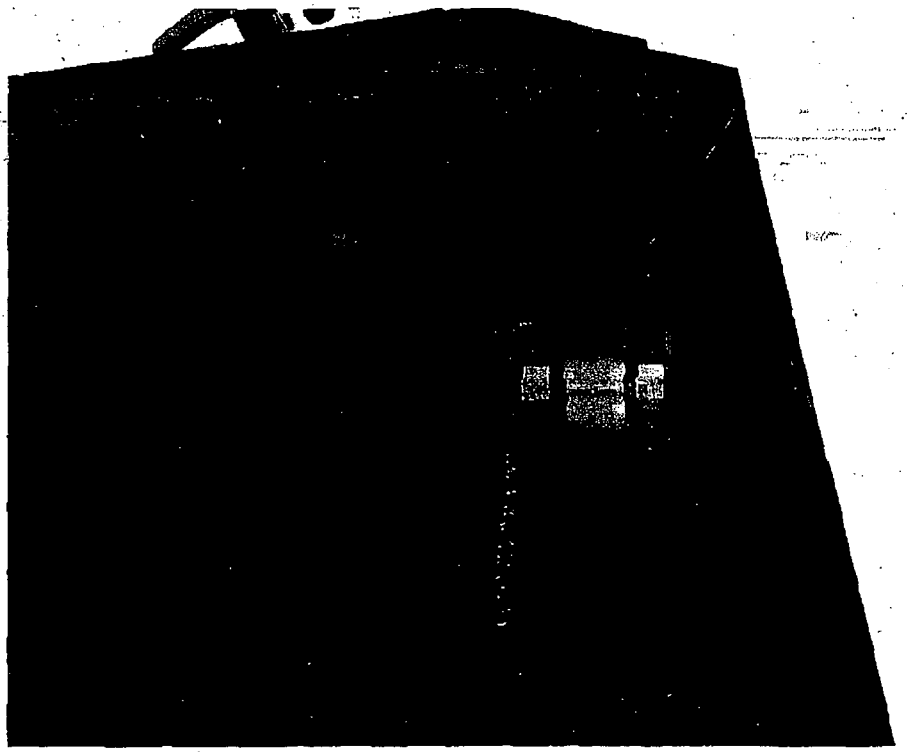


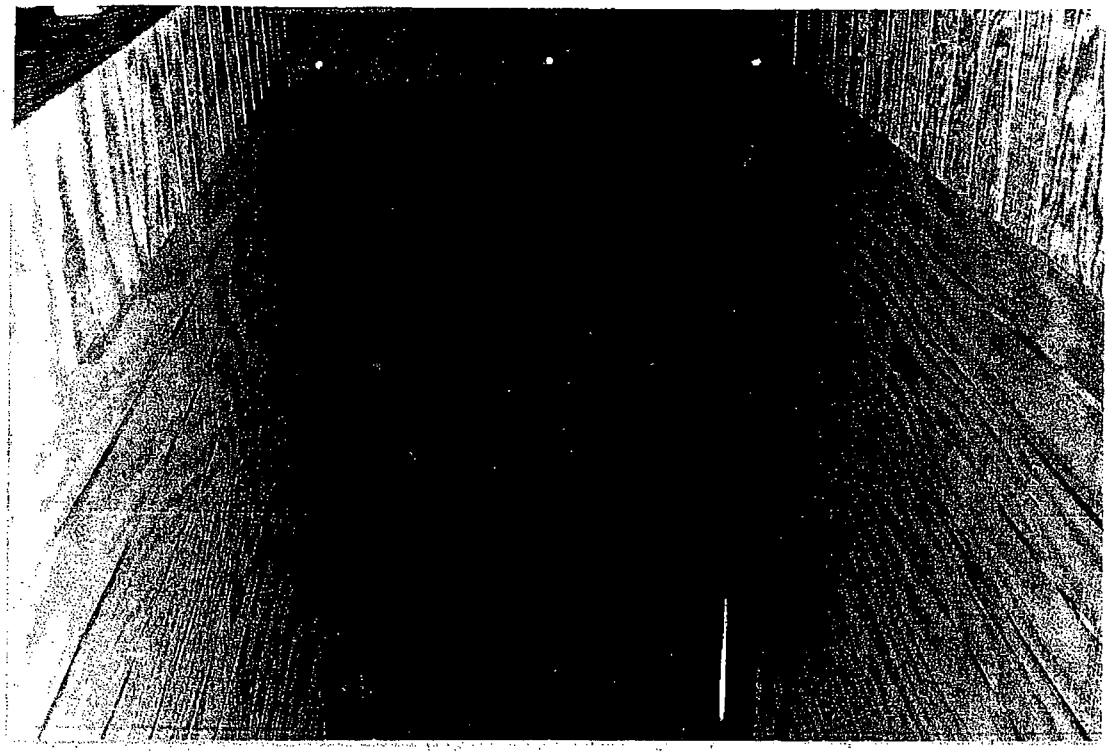
NO
TRESPASSING

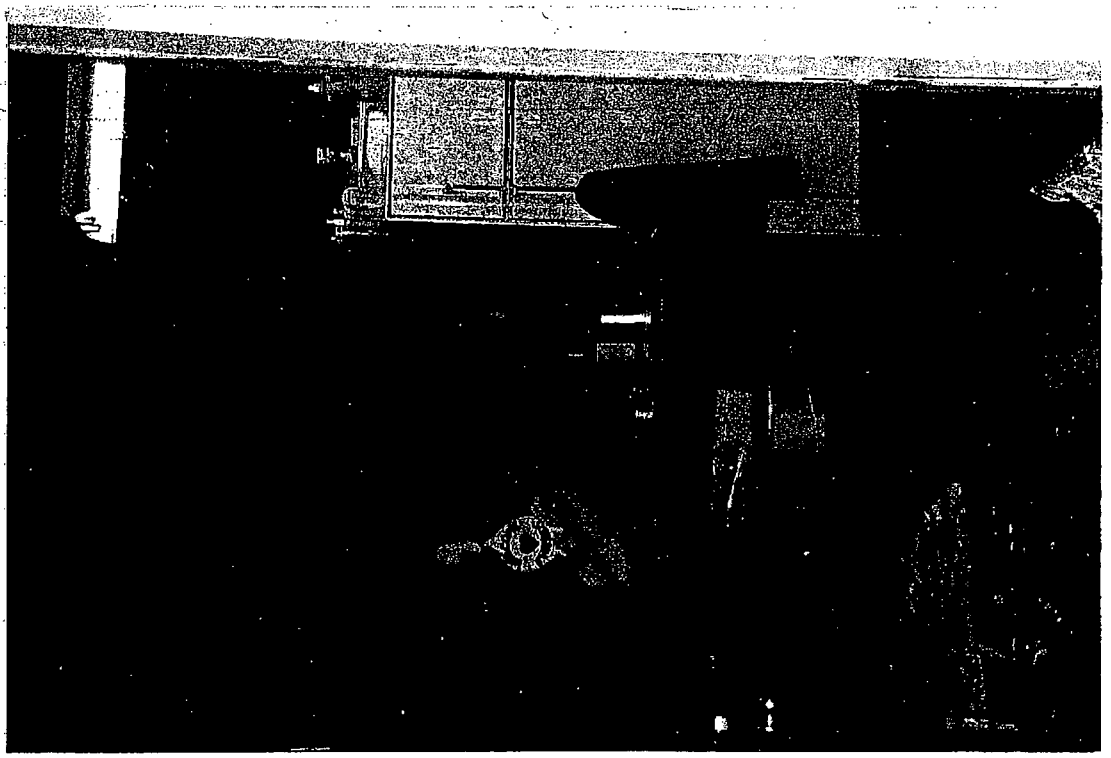

NO
TRESPASSING

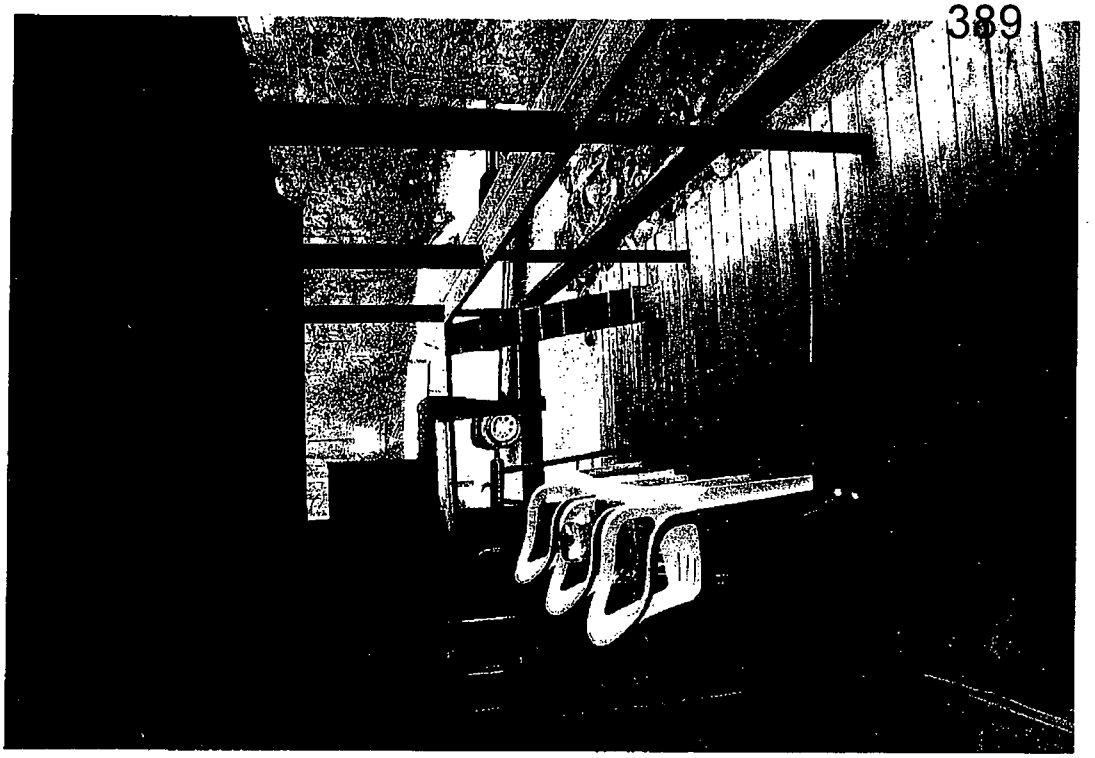


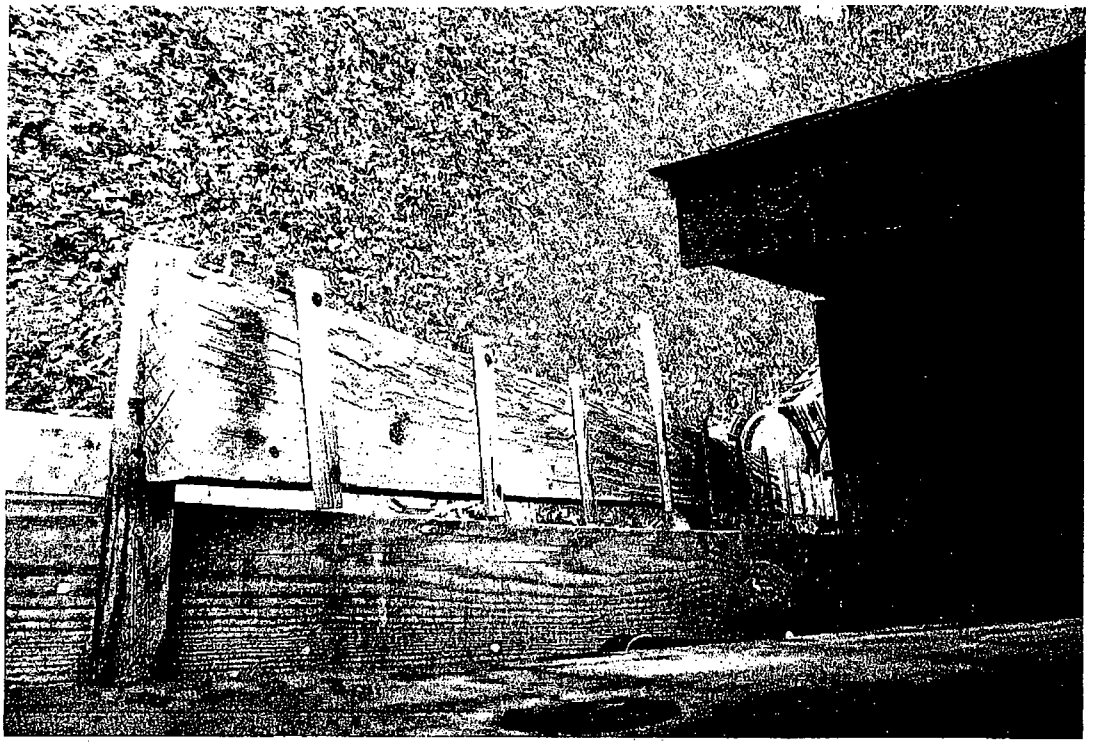


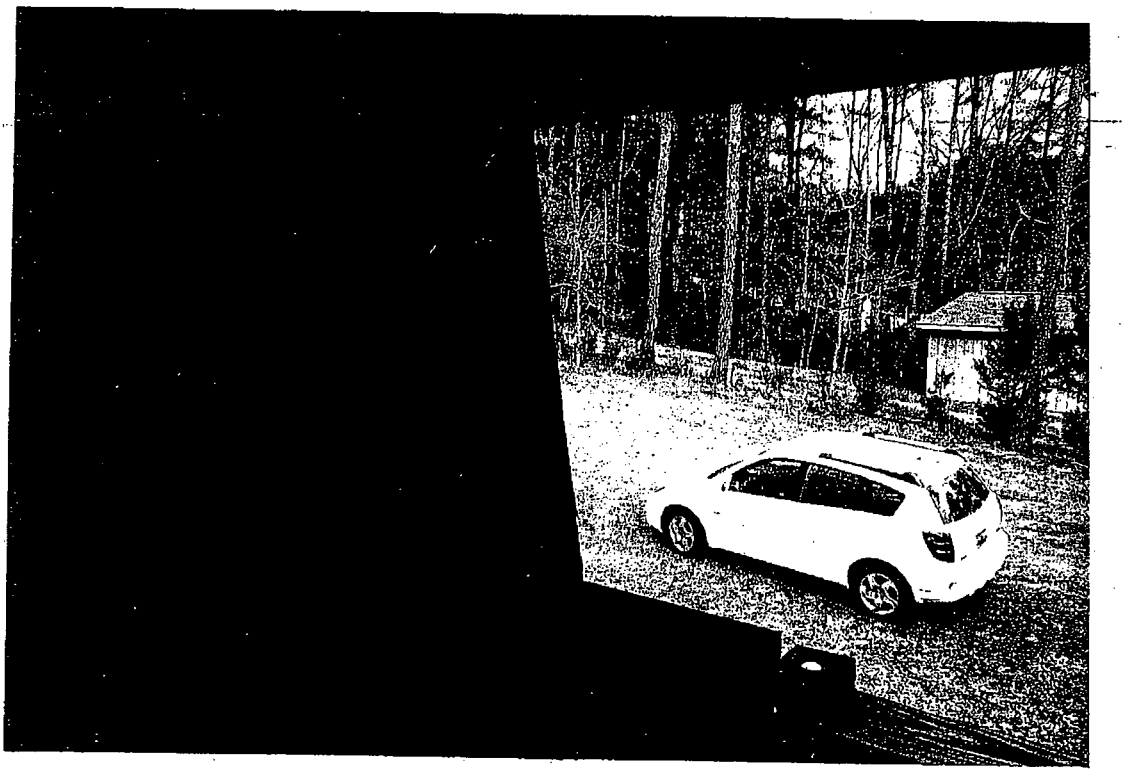


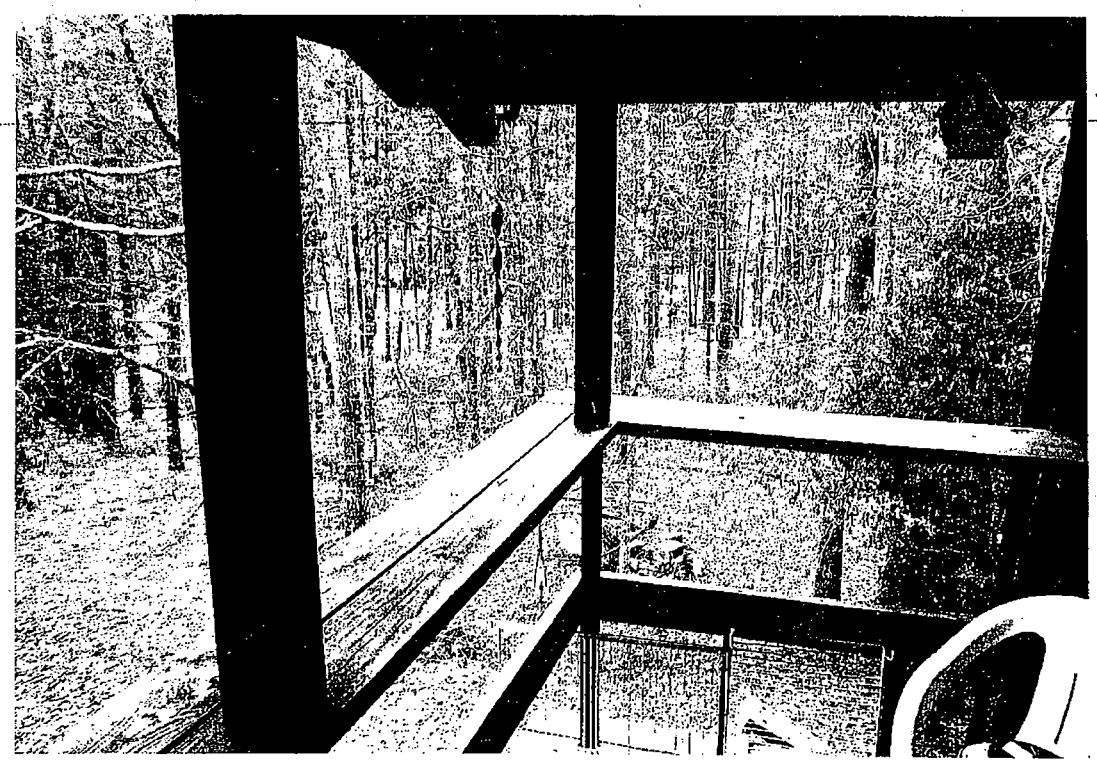


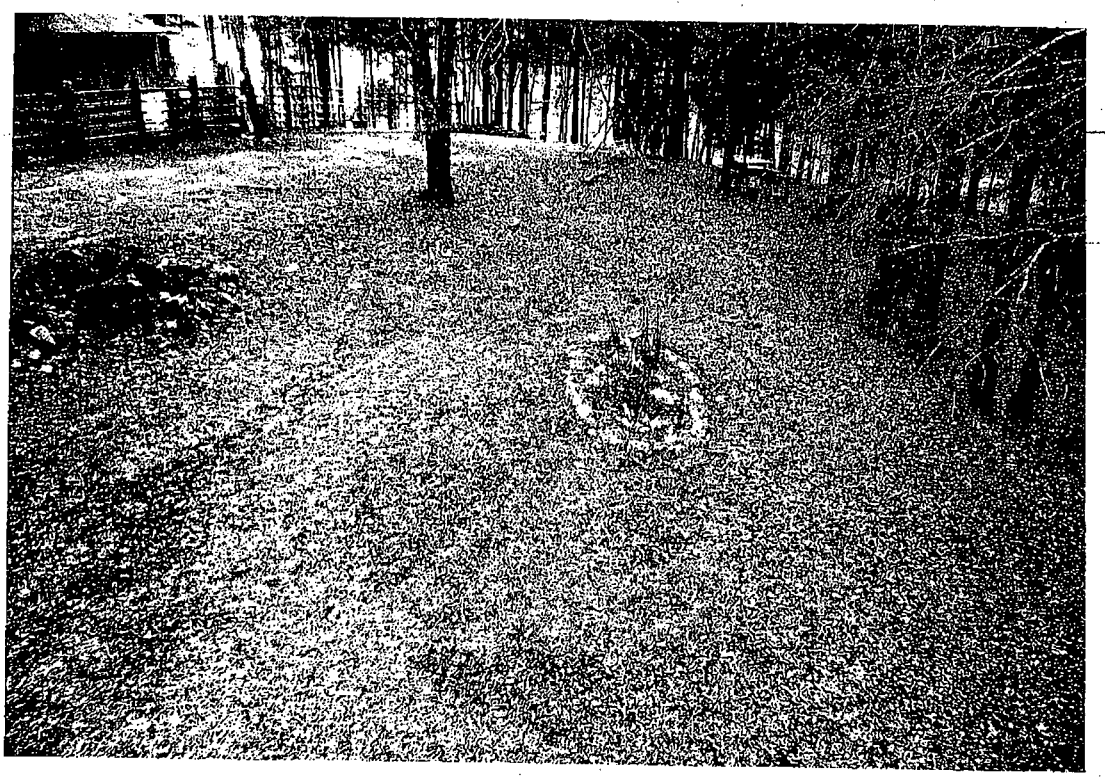












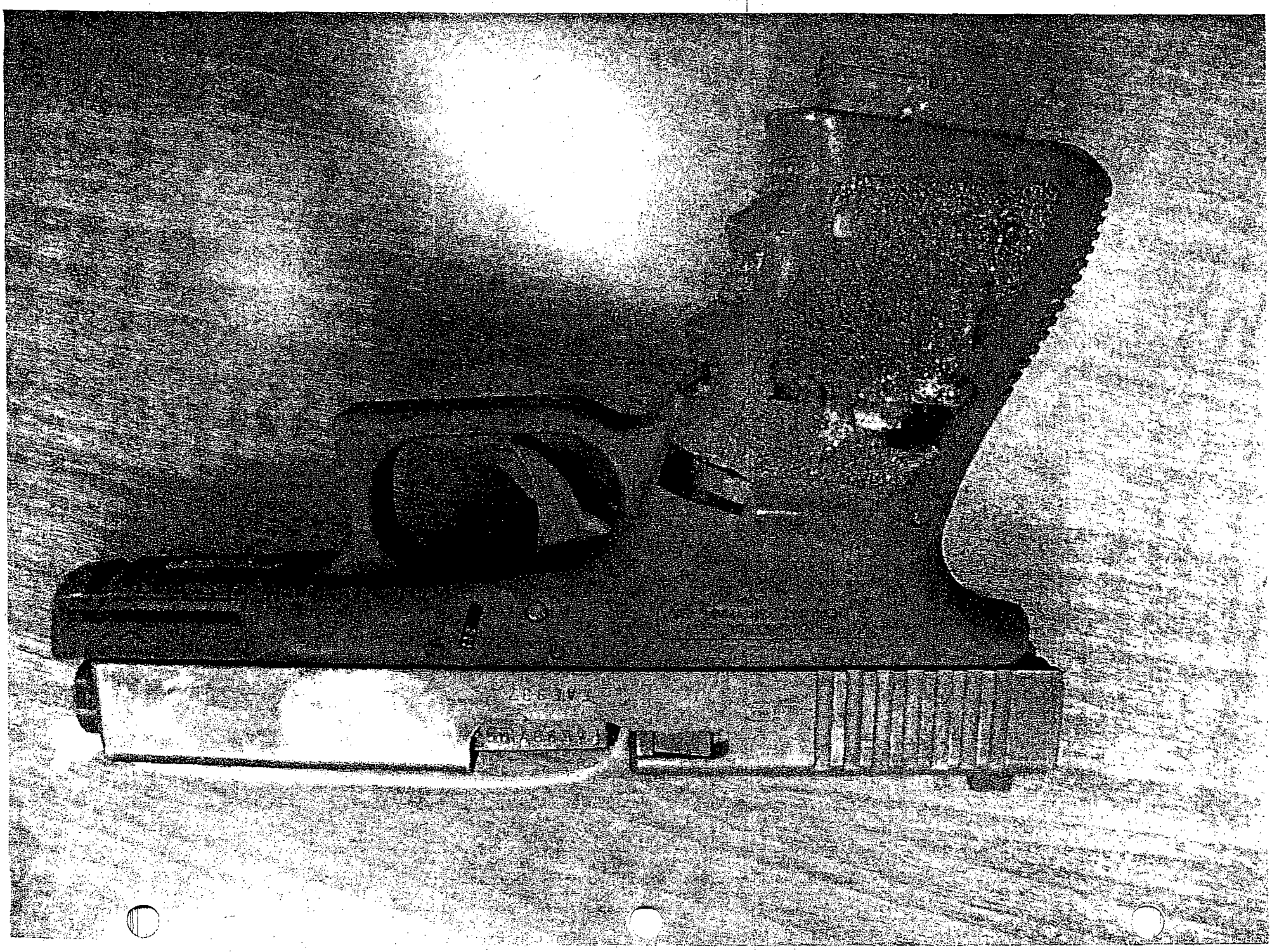
Photos

From: **McCormick County Sheriffs Department** (mcsonarctraining@yahoo.com)
Sent: Thu 5/19/11 3:10 PM
To: carsonhenderson2@hotmail.com

4 attachments
RushtonGLOCKMay192011 007.jpg (3.1 MB) , RushtonGLOCKMay192011 008.jpg (3.0 MB) ,
RushtonGLOCKMay192011 009.jpg (3.0 MB) , RushtonGLOCKMay192011 010.jpg (3.1 MB)

Carson:
Photos for your use.
Also, I graduated from the Academy in '94; I'm not sure but I think that I told you '93.

Take care,
Joe



AUSTRIA

Photos (8, one more to follow due to size of jpg images)

From: **McCormick County Sheriffs Department** (mcsonarctraining@yahoo.com)
Sent: Fri 5/27/11 12:09 PM
To: carsonhenderson2@hotmail.com
Cc: Ervin Maye (ervinmaye@yahoo.com)

8 attachments
Photos for Carson Henderson May272011 001.jpg (2.8 MB), Photos for Carson Henderson May272011 002.jpg (2.9 MB), Photos for Carson Henderson May272011 003.jpg (2.9 MB), Photos for Carson Henderson May272011 004.jpg (2.8 MB), Photos for Carson Henderson May272011 005.jpg (2.9 MB), Photos for Carson Henderson May272011 006.jpg (2.9 MB), Photos for Carson Henderson May272011 007.jpg (2.9 MB), Photos for Carson Henderson May272011 008.jpg (2.8 MB)

Please disregard the earlier email. I guess I hit send, or something, prematurely / before I could even attach the photos. Sorry!

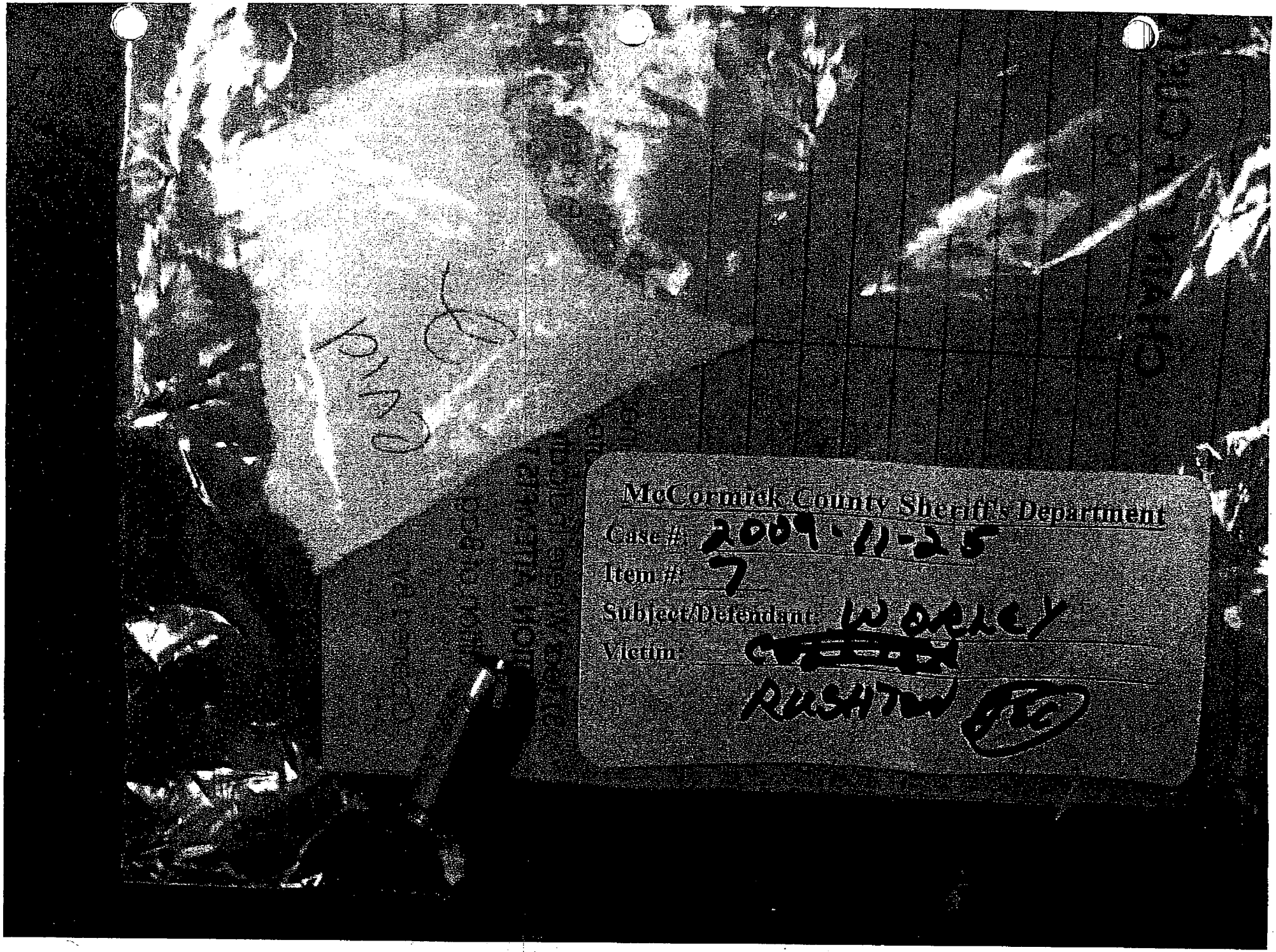
Carson:
Here are the nine photos that you requested that I take for you (eight, one more to follow in a separate email). I believe that they should correlate to the photos originally taken by Melissa McAllister (on Nov. 15, 2009, which show white scraps of paper with "EVID" and an associated handwritten number) as follows:

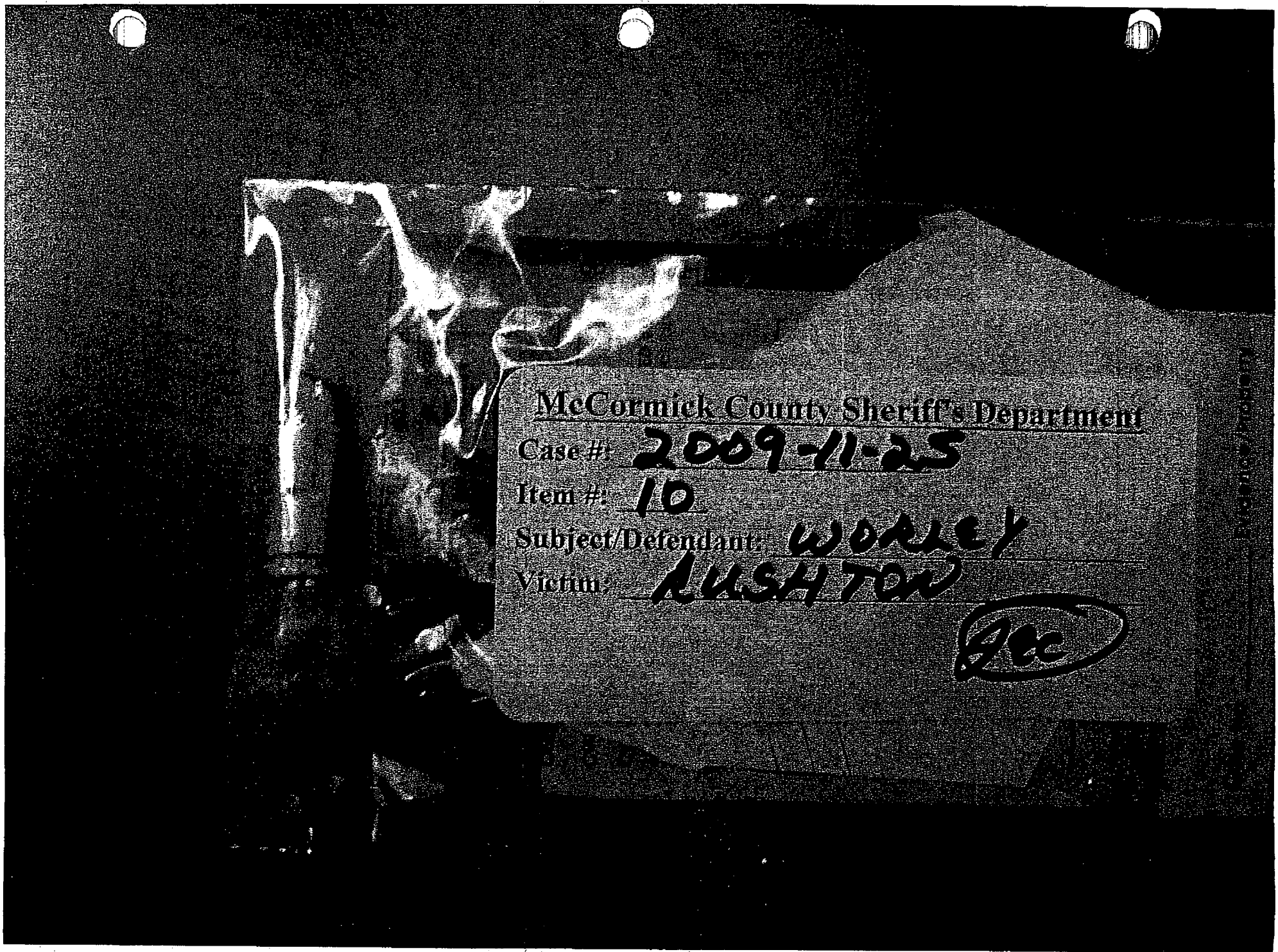
MCSO Item #	Labeled in photo by McAllister
6	EVID 1
7	EVID 2
8 - Submitted to SLED (Fired 30.06 cartridge) **NO PHOTO/SEALED**	
9 - Submitted to SLED (Fired 30.06 cartridge) **NO PHOTO/SEALED**	
10	EVID 5
11	EVID 6
12	EVID 7
13	EVID 8
14	EVID 9
15	EVID 10
16 - Submitted to SLED (Fragments from Rushton's hand). **NO PHOTO/SEALED**	
17 - Various .40 cal fragments recovered by Chief Deputy Gable.	

Have a safe and happy Memorial Day weekend.

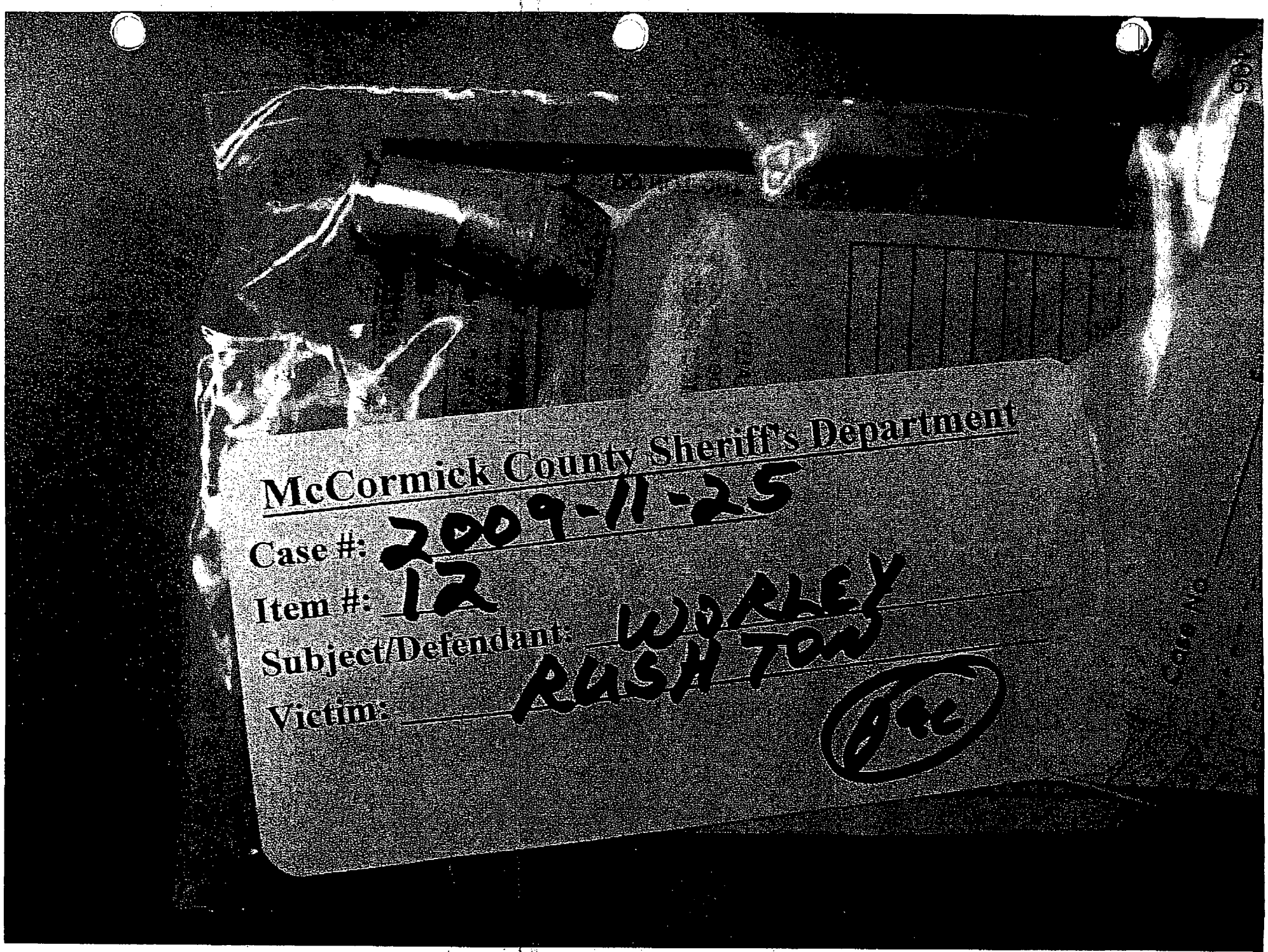
Take care,
Joe

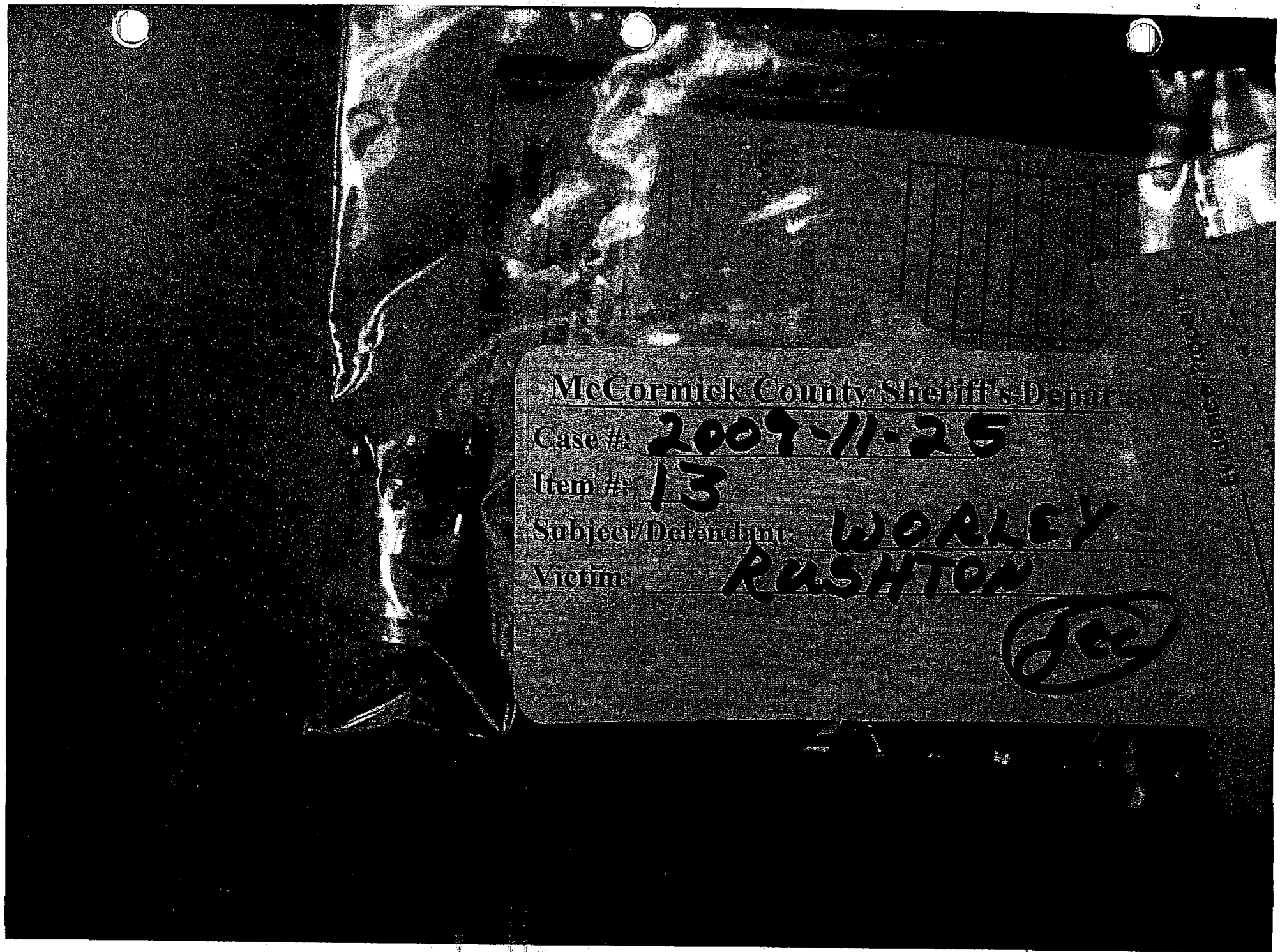
Property
Evidence
MCG Criminal Courts Sheriff's Department
Case #
Item #
Suspect/Defendant
Victim

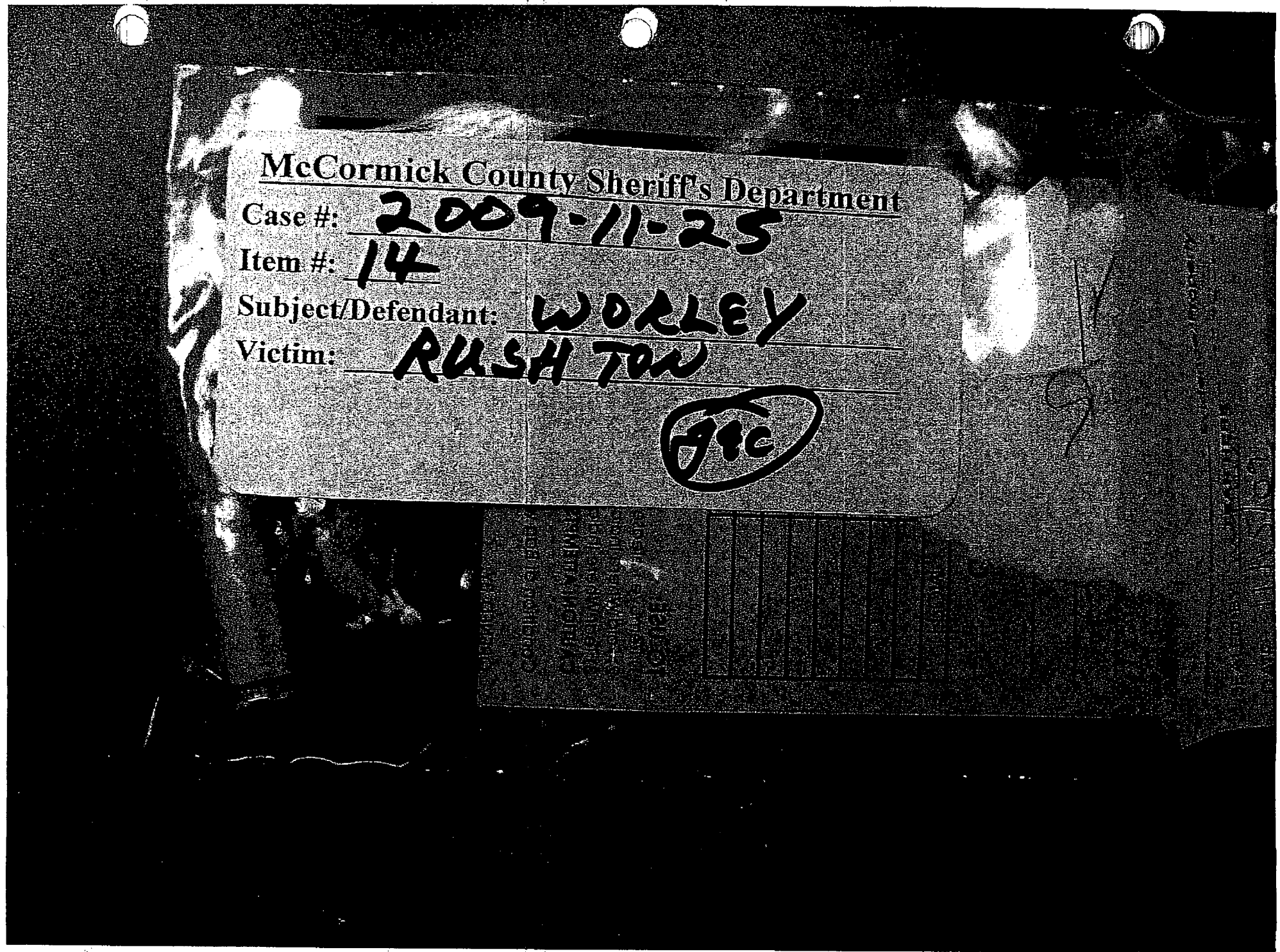

McCormick County Sheriff's Department
Case #: 2009-11-25
Item #: 7
Subject/Defendant:
Victim:


McCormick County Sheriff's Department
Case #: 2009-11-25
Item #: 10
Subject/Defendant: Wright
Victim: Lusk Ford
Exc

McCormick County Sheriff's Department
Case #: 25-11-2687
Item #: 11
Subject/Detainee:
Victim:
Property


McCormick County Sheriff's Department
Case #: 2009-11-25
Item #: 12
Subject/Defendant: WILEY RUSH JOE
Victim:


McCormick County Sheriff's Depar
Case #: 2007-11-25
Item #: 13
Subject/Defendant: WORLEY
Victim: RUSHTON


McCormick County Sheriff's Department
Case #: 2009-11-25
Item #: 14
Subject/Defendant: WORLEY
Victim: RUSH TOW
GC

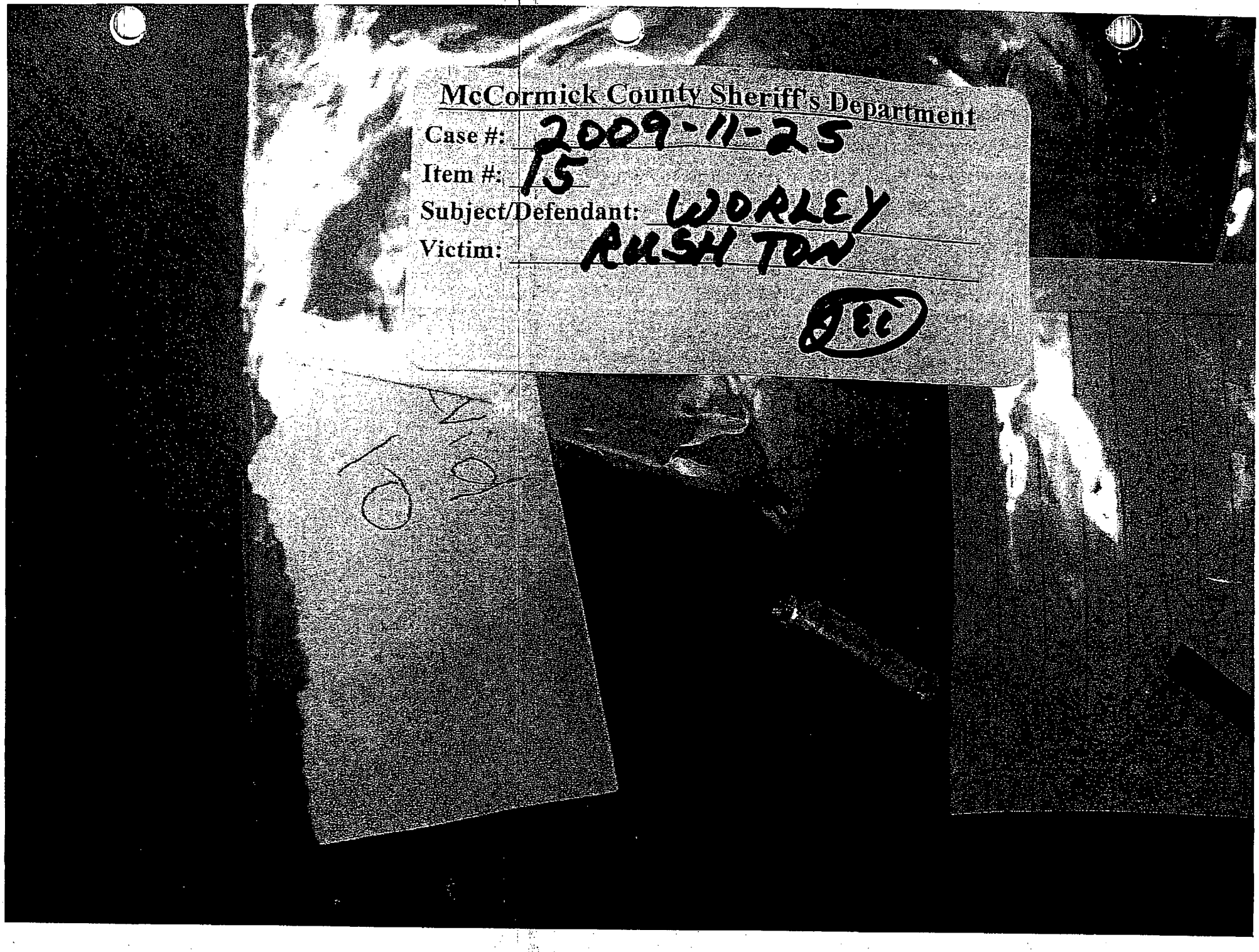
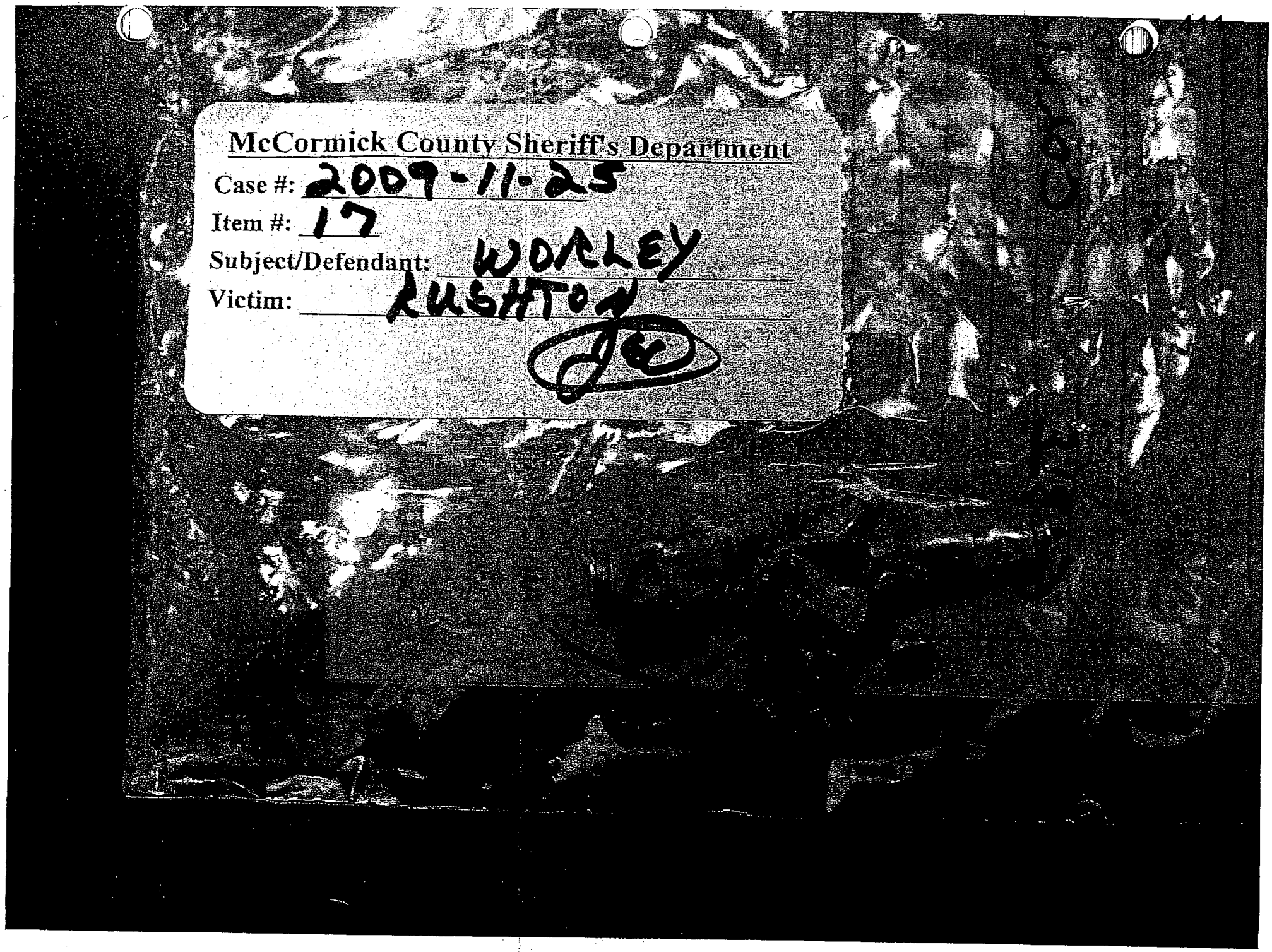

McCormick County Sheriff's Department
Case #: 2009-11-25
Item #: 15
Subject/Defendant: WORLEY
Victim: RUSH TOW
EC

Photo #9

From: **McCormick County Sheriffs Department** (mcsonarctraining@yahoo.com)
Sent: Fri 5/27/11 12:12 PM
To: carsonhenderson2@hotmail.com
Cc: Ervin Maye (ervinmaye@yahoo.com)
1 attachment
Photos for Carson Henderson May272011 009.jpg (2.9 MB)

Remaining photo for your use.

Joe


McCormick County Sheriff's Department
Case #: 2009-11-25
Item #: 17
Subject/Defendant: WORLEY
Victim: RUSHTON

Westlaw

Code 1976 § 23-6-100

Code of Laws of South Carolina 1976 Annotated Currentness
Title 23. Law Enforcement and Public Safety
Chapter 6. Department of Public Safety
Article 3. Highway Patrol Division

§ 23-6-100. Highway Patrol Division, State Police Division created; distinctive uniforms, emblems, etc.

(A) There is created a South Carolina Highway Patrol Division and a South Carolina State Police Division within the Department of Public Safety. The South Carolina Highway Patrol Division shall have such troopers, officers, agents and employees as the department may deem necessary and proper for the enforcement of the traffic and other related laws, and the South Carolina State Police Division shall have such troopers, officers, agents and employees as the department may deem necessary and proper for the enforcement of the commercial motor carrier related laws, the enforcement of which is devolved upon the department. Such officers and troopers shall be commissioned by the Governor upon the recommendation of the Director of the Department of Public Safety. Such commissions may be terminated at the pleasure of the director.

(B) The department must provide the officers of the Highway Patrol and of the State Police with distinctive uniforms and suitable arms and equipment for use in the performance of their duties. Such officers and troopers shall at all times, when in the performance of their duties, wear complete uniforms with badges conspicuously displayed on the outside of their uniforms.

(C) The commanding officers of the South Carolina Highway Patrol and the South Carolina State Police respectively, with the approval of the director of the department, shall prescribe a unique and distinctive official uniform, with appropriate insignia to be worn by all officers when on duty and at such other times as the director shall order, and a distinctive color or colors and appropriate emblems for all motor vehicles used by the Highway Patrol and the State Police except those designated by the director. No other law enforcement agency, private security agency, or any person shall wear a similar uniform and insignia which may be confused with the uniform and insignia of the Highway Patrol or State Police. An emblem must not be used on a nondepartment motor vehicle, nor may such vehicle be painted in a color or in any manner which would cause the vehicle to be similar to a Highway Patrol or State Police vehicle or readily confused with it.

(D) The director shall file with the Legislative Council for publication in the State Register a description and illustration of the official highway patrol uniform with insignia and the emblems of the official highway patrol and motor vehicles including a description of the color of such uniforms and vehicles and a description and illustration of the official state police uniform with insignia and the emblems of the official state police and motor vehicles including a description of the color of such uniforms and vehicles.

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(E) The South Carolina Highway Patrol Division shall transfer the service sidearm of an active duty trooper killed in the line of duty to the trooper's surviving spouse upon request at no charge once the sidearm has been rendered permanently inoperable.

CREDIT(S)

HISTORY: 1993 Act No. 181, § 343(A); 1994 Act No. 335, § 1; 1997 Act No. 51, § 1.

CROSS REFERENCES

Violation of this section may be enjoined, see § 23-6-130.

LIBRARY REFERENCES

States 45.
Westlaw Topic No. 360.
C.J.S. States §§ 145 to 146, 157 to 161, 249.

Code 1976 § **23-6-100**, SC ST § **23-6-100**

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Code 1976 § 23-6-220

Code of Laws of South Carolina 1976 Annotated Currentness
Title 23. Law Enforcement and Public Safety
Chapter 6. Department of Public Safety
Article 5. Department of Public Safety Special Constable
§ 23-6-220. Compensation; uniforms and equipment; workers' compensation and death bene- fits.

(A) Constables may not receive compensation including, but not limited to, salary for services rendered absent specific statutory authorization.

(B) Any uniforms and equipment issued by the department shall remain the property of the department, but may, in the discretion of the director, be entrusted to the care and control of the constables. A constable assisting a full-time department law enforcement officer shall wear uniforms or other insignia which identify the constable as a special law enforcement officer assisting the department.

(C) Workers' compensation benefits may be provided on an as needed basis for special constables by the director in the same manner as benefits are provided for full-time officers. For purposes of compensation or benefits arising from duty-related injury or death, special constables shall be considered as employees of the department.

CREDIT(S)

HISTORY: 2000 Act No. 252, § 1.

LIBRARY REFERENCES

Sheriffs and Constables 28 to 76.
Westlaw Topic No. 353.
C.J.S. Sheriffs and Constables §§ 469 to 513.

Code 1976 § 23-6-220, SC ST § 23-6-220

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Westlaw

Code 1976 § 23-13-30

C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 23. Law Enforcement and Public Safety
Chapter 13. Deputy Sheriffs Generally
Article 1. General Provisions
→ **§ 23-13-30. Monthly oath as prerequisite to salary warrant; uniforms and other equipment.**

Before issuing any warrant to any deputy for his salary, the supervisor shall require such deputy to take and subscribe an oath that he has fully and faithfully performed during the preceding month the duties required of him herein. The governing body of the county shall furnish to each such deputy two uniforms per year, to be prescribed and approved by such body. Such deputies shall provide themselves with deputies' billies and such firearms as may be prescribed by the governing body of the county. They shall bear all expenses incident to their service.

CREDIT(S)

HISTORY: 1962 Code § 53-80; 1952 Code § 53-80; 1942 Code § 3491; 1932 Code § 3491; Civ. C. '22 § 2036; 1912 (27) 569, 865; 1961 (52) 497.

LIBRARY REFERENCES

Sheriffs and Constables ⚿ 19.
Westlaw Topic No. 353.
C.J.S. Sheriffs and Constables §§ 37 to 38.

Code 1976 § 23-13-30, SC ST § 23-13-30

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Code 1976 § 23-15-140

Code of Laws of South Carolina 1976 Annotated Currentness
Title 23. Law Enforcement and Public Safety
Chapter 15. General Powers and Duties of Sheriffs and Deputy Sheriffs
→ **§ 23-15-140. Badges for sheriffs and deputy sheriffs.**

(A) The purpose of this section is to provide for uniformity among sheriffs and deputy sheriffs, and to aid the public in identifying a sheriff and deputy sheriff.

(B) A badge that consists of or incorporates the shape of a five-pointed or six-pointed star with a replica of the Great Seal of South Carolina inscribed in its center is the official badge to be worn by all sheriffs and deputy sheriffs throughout the State.

(C) It is unlawful for a person who is not a sheriff or deputy sheriff to present himself as such by wearing or presenting the official badge described in subsection (A).

(D) A person who violates the provisions of this section, upon conviction, must be fined not more than one hundred dollars, or imprisoned not more than thirty days.

CREDIT(S)

HISTORY: 2001 Act No. 109, § 2.

Code 1976 § **23-15-140**, SC ST § **23-15-140**

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Westlaw

Code 1976 § 23-28-100

Code of Laws of South Carolina 1976 Annotated Currentness
Title 23. Law Enforcement and Public Safety
Chapter 28. Reserve Police Officers
→ **§ 23-28-100. Uniforms and equipment.**

The uniforms and equipment issued by the political entity shall remain the property of the entity but, in the discretion of the chief, may be entrusted to the care and control of the reserves. Reserves shall wear uniforms which shall identify them as law enforcement officers. However, in the discretion of the chief, a reserve may wear plain clothes or another uniform that is consistent with his duties as a law enforcement officer. Handguns, if issued, shall be of a caliber approved by the chief.

CREDIT(S)

HISTORY: 1978 Act No. 481, § 10; 2007 Act No. 44, § 1, eff June 4, 2007; 2008 Act No. 321, § 7, eff 6 months after approval (approved June 16, 2008).

EFFECT OF AMENDMENT

The **2007** amendment deleted "political" preceding "entity" in the first sentence and made nonsubstantive language changes throughout.

The **2008** amendment added the third sentence relating to wearing plain clothes.

Code 1976 § **23-28-100**, SC ST § **23-28-100**

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S.C. Code of Regulations R. 38-021

C

Code of Laws of South Carolina 1976 Annotated Currentness
Regulations
Chapter 38. Department of Public Safety (Refs & Annos)
Article 1. Criminal Justice Academy
Subarticle 1. Law Enforcement Training
→ **38-021. Law Enforcement Emergency Vehicle Training Requirement.**

A. Every agency which employs one or more law enforcement officers who use emergency vehicles shall make provision for the training set out in R.38-022 as appropriate for each such officer's law enforcement duty requirements prior to any such officer's certification as qualified by the Department.

B. Officers holding valid certification on the effective date of these regulations must successfully complete the training set out in R.38-022, as is appropriate for such officer's law enforcement duty requirements within 180 days of such date.

HISTORY: Added by State Register Volume 21, Issue No. 6, Part 2, eff June 27, 1997. Amended by State Register Volume 27, Issue No. 5, eff May 23, 2003.

S.C. CODE REGS. 38-021, SC ADC 38-021

Current through State Register Volume 35, Issue No. 4, eff April 22, 2011

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Code of Laws of South Carolina 1976 Annotated Currentness
Regulations
Chapter 38. Department of Public Safety (Refs & Annos)
Article 1. Criminal Justice Academy
Subarticle 1. Law Enforcement Training
→ **38-022. Law Enforcement Emergency Vehicle Training Programs.**

A. Non-Emergency Response Training

1. Every law enforcement officer who drives or operates an emergency vehicle shall successfully complete a course of instruction as prescribed by the Department relating to non-emergency operation of the law enforcement emergency vehicle.

2. Every agency required to make provision for the training prescribed in R.38-022(A)(1) shall promulgate written policy and procedure concerning non-emergency vehicle response, consistent with the provisions of the course of instruction prescribed by the Department, which shall be included as part of the training program provided to its officers.

B. Emergency Response Training

1. Every Class 1 law enforcement officer and any other law enforcement officer who drives or operates a law enforcement emergency vehicle in response to an emergency, as defined in these regulations, shall successfully complete a course of instruction as prescribed by the Department relating to emergency response operation of the law enforcement emergency vehicle.

2. Every agency required to make provision for the training prescribed in R.38-022(B)(1) shall promulgate written policy and procedure concerning emergency response with the law enforcement emergency vehicle, consistent with the provisions of the course of instruction prescribed by the Department, which shall be included as part of the training program provided to its officers.

C. Pursuit Training

1. Every Class 1 law enforcement officer and any other law enforcement officer who drives or operates a law enforcement emergency vehicle in pursuit of an actual or suspected violator of the law, as defined in these regulations, shall successfully complete a course of instruction as prescribed by the Department relating to pursuit operation of the law enforcement emergency vehicle.

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2. Every agency required to make provision for the training prescribed in R.38-022(C)(1) shall promulgate written policy and procedure concerning pursuit operation of the law enforcement emergency vehicle, consistent with the provisions of the course of instruction prescribed by the Department which shall be included as a part of the training program provided to its officers.

HISTORY: Added by State Register Volume 21, Issue No. 6, Part 2, eff June 27, 1997. Amended by State Register Volume 27, Issue No. 5, eff May 23, 2003.

S.C. CODE REGS. 38-022, SC ADC 38-022

Current through State Register Volume 35, Issue No. 4, eff April 22, 2011

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Code of Laws of South Carolina 1976 Annotated Currentness
Regulations
Chapter 38. Department of Public Safety (Refs & Annos)
Article 1. Criminal Justice Academy
Subarticle 1. Law Enforcement Training
→ **38-023. Notification of Training Compliance.**

A. Every agency required to conduct training pursuant to R.38-022 shall provide proof of completion of the required training programs, including appropriate instruction in the written policies and procedures of the agency concerning operation of the law enforcement emergency vehicle as required by R.38-022.

B. A law enforcement officer who transfers from one agency to another shall be required to successfully complete the training program appropriate for the agency to which transfer has occurred, in accordance with R.38-022. Provided, however, that an officer who has successfully completed a training program pursuant to R.38-022 within a period of one year of the date of transfer to another agency, where the successfully completed program is appropriate for the officer's law enforcement duty with the agency to which transferred, shall not be required to complete another training program upon such a transfer, but rather the employing agency to which transferred shall provide appropriate instruction to the transferred officer in the written policies and procedures of the agency concerning operation of the law enforcement emergency vehicle as required by R.38-022. This training shall be reported to the Department as required in R.38-023(A).

HISTORY: Added by State Register Volume 21, Issue No. 6, Part 2, eff June 27, 1997. Amended by State Register Volume 27, Issue No. 5, eff May 23, 2003.

S.C. CODE REGS. 38-023, SC ADC 38-023

Current through State Register Volume 35, Issue No. 4, eff April 22, 2011

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S.C. Code of Regulations R. 38-024

C

Code of Laws of South Carolina 1976 Annotated Currentness
Regulations
Chapter 38. Department of Public Safety (Refs & Annos)
Article 1. Criminal Justice Academy
Subarticle 1. Law Enforcement Training
38-024. Continuing Training Requirement.

A. The training required by R.38-022 shall be conducted on a continuing basis no less frequently than annually. Every agency shall report, on the form prescribed by the Department, the provision of appropriate training on or before the expiration of the current certification. Nothing in these regulations shall be construed to prohibit such training on a basis more frequently than annually.

B. Officers successfully completing appropriate required emergency vehicle training shall be provided CLEE hours in accordance with R.38-013 appropriate for the number of hours of instruction received.

HISTORY: Added by State Register Volume 21, Issue No. 6, Part 2, eff June 27, 1997. Amended by State Register Volume 27, Issue No. 5, eff May 23, 2003.

S.C. CODE REGS. 38-024, SC ADC 38-024

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Code of Laws of South Carolina 1976 Annotated Currentness
Regulations
Chapter 38. Department of Public Safety (Refs & Annos)
Article 1. Criminal Justice Academy
Subarticle 1. Law Enforcement Training
38-025. Approval of Training Programs.

A. All agencies required to conduct training programs pursuant to R.38-022 shall, prior to initiation of the required training, submit training materials as required by the Department to the Academy for review and approv- al.

B. CLEE hours shall be awarded only for materials properly submitted and approved by the Department.

HISTORY: Added by State Register Volume 21, Issue No. 6, Part 2, eff June 27, 1997. Amended by State Register Volume 27, Issue No. 5, eff May 23, 2003.

S.C. CODE REGS. 38-025, SC ADC 38-025

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S.C. Code of Regulations R. 38-026

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Code of Laws of South Carolina 1976 Annotated Currentness
Regulations
Chapter 38. Department of Public Safety (Refs & Annos)
Article 1. Criminal Justice Academy
Subarticle 1. Law Enforcement Training
38-026. Equivalent Law Enforcement Emergency Vehicle Training.

Training provided by other states, the federal government or private training providers, will be evaluated in a fashion consistent with the provisions of R.38-008. In each instance where an agency or officer submits a request for credit for equivalent training, the employing agency must provide verification that appropriate instruction in the written policies and procedures of the agency has occurred, in accordance with the directives of R.38-023(B) regarding transferred officers.

HISTORY: Added by State Register Volume 21, Issue No. 6, Part 2, eff June 27, 1997. Amended by State Register Volume 27, Issue No. 5, eff May 23, 2003.

S.C. CODE REGS. 38-026, SC ADC 38-026

Current through State Register Volume 35, Issue No. 4, eff April 22, 2011

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Westlaw.

C
Code of Laws of South Carolina 1976 Annotated Currentness
Regulations
Chapter 38. Department of Public Safety (Refs & Annos)
Article 1. Criminal Justice Academy
Subarticle 1. Law Enforcement Training
→ **38-028. Definitions.**

For purposes of R.38-021 and 38-022, the following definitions shall apply:

A. Emergency: A sudden or unexpected occurrence involving an imminent threat to human life or immediate potential for extreme property damage under conditions requiring immediate response to curtail imminent harm to human life.

With respect to the suspected commission of a criminal offense and law enforcement response to such offense, the classification of the crime as felony or misdemeanor shall not be the sole determinative factor of whether an emergency is present; but rather all known factors, in accordance with the first paragraph above, will be weighed in a determination of whether an emergency exists.

B. Non-Emergency: A situation involving conditions routinely encountered in line of law enforcement duty which does not pose an imminent threat to human life or immediate potential for extreme property damage which would require immediate response to curtail harm to human life.

C. Pursuit: An event involving a law enforcement officer attempting to apprehend a person in a motor vehicle while that person is trying to avoid capture by willfully failing to yield to the officer's signal to stop. It also includes the closing of the distance between a law enforcement vehicle and the violator's vehicle under circumstances where the violator is not yet aware of the law enforcement action.

D. Emergency Response: The driving of a law enforcement emergency vehicle by a law enforcement officer in response to an emergency, as defined herein, where the response is conducted in accordance with state law and department policy.

E. Non-Emergency Response: The driving of a law enforcement emergency vehicle by a law enforcement officer in response to a non-emergency, as defined herein. This response involves operation of the law enforcement emergency vehicle in all modes other than emergency response or pursuit mode.

F. Law Enforcement Emergency Vehicle: A motor vehicle, as defined by the laws of this state, whether marked

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or unmarked, used by a law enforcement agency in the conduct of law enforcement operations, in accordance with state law and department policy.

HISTORY: Added by State Register Volume 21, Issue No. 6, Part 2, eff June 27, 1997. Amended by State Register Volume 27, Issue No. 5, eff May 23, 2003.

S.C. CODE REGS. 38-028, SC ADC 38-028

Current through State Register Volume 35, Issue No. 4, eff April 22, 2011

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COPY

SUBPOENA IN A CRIMINAL CASE

COPY

SOUTH CAROLINA GENERAL SESSIONS COURT	COUNTY MCCORMICK
STATE OF SOUTH CAROLINA V. JOE ROSS WORLEY	CASE NO. J-036561/62/63/64/65/66
	SUBPOENA FOR ☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)
TO: MCCORMICK COUNTY SHERIFF'S OFFICE (RECORDS CUSTODIAN)	
☐ YOU ARE HEREBY COMMANDED to appear in the above-named court at the place, date, and time specified below to testify in the above-entitled case.	
PLACE THE GARRETT LAW FIRM, PC. 109 OAK AVENUE GREENWOOD, S.C. 29646	COURTROOM DATE AND TIME WEDNESDAY, DECEMBER 30, 2009, AT 10:00 A.M.
☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s).	
LIST DOCUMENT(S) OR OBJECT(S) SEE EXHIBIT A ATTACHED.	
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.	
CLERK OF COURT Katrina P. Butler	DATE
(BY) DEPUTY CLERK Gwen Chiles	12/11/09
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☐ SOLICITOR ☒ DEFENDANT	ATTORNEY'S NAME AND ADDRESS BILLY GARRETT/CARSON HENDERSON 109 OAK AVENUE GREENWOOD, S.C. 29646

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EXHIBIT A COPY

McCormick County Sheriff's Office
Attention: Records Custodian
P.O. Box 1236
McCormick, S.C. 29835

1. Complete personnel file for Robert E. "Buddy" Rushton, including but not limited to written reprimands for any reason and written summaries of verbal reprimands for any reason;

2. Complete personnel file for Nicholas O. Moore, including but not limited to written reprimands for any reason and written summaries of verbal reprimands for any reason;

3. Complete personnel file for Melissa Hegler McAllister, including but not limited to written reprimands for any reason and written summaries of verbal reprimands for any reason;

4. Complete personnel file for George Reid, including but not limited to written reprimands for any reason and written summaries of verbal reprimands for any reason;

5. All documents indicating whether the patrol car used by Robert E. "Bobby" Rushton on November 15, 2009, at or near [redacted] President's Drive was equipped with an in-car video camera;

6. If Deputy Rushton's patrol car was equipped with an in-car video camera on November 15, 2009, all documents referencing any repairs of any type made to the in-car video system for any reason on or after January 1, 2007;

7. All documents indicating whether the patrol car used by Nicholas O. Moore on November 15, 2009, at or near [redacted] President's Drive was equipped with an in-car video camera;

8. If Deputy Moore's patrol car was equipped with an in-car video camera on November 15, 2009, all documents referencing any repairs of any type made to the in-car video system for any reason on or after January 1, 2007;

9. All documents indicating whether the patrol car used by Melissa Hegler McAllister on November 15, 2009, at or near [redacted] President's Drive was equipped with an in-car video camera;

10. If Deputy McAllister's patrol car was equipped with an in-car video camera on November 15, 2009, all documents referencing any repairs of any type made to the in-car video system for any reason on or after January 1, 2007;

11. All documents indicating whether the patrol car used by George Reid on November 15, 2009, at or near [redacted] President's Drive was equipped with an in-car video camera;

12. If Sheriff Reid's patrol car was equipped with an in-car video camera on November 15, 2009, all documents referencing any repairs of any type made to the in-car video system for any reason on or after January 1, 2007;

13. All documents indicating whether any other patrol car(s) on November 15, 2009, at or near [redacted] President's Drive was equipped with an in-car video camera;

14. If these other patrol cars were equipped with an in-car video camera on November 15, 2009, all documents referencing any repairs of any type made to the in-car video system for any reason on or after January 1, 2007;

15. All documents indicating whether Robert E. "Bobby" Rushton wore a body microphone and/or any other body communication device on November 15, 2009, at or near [redacted] President's Drive;

16. If Deputy Rushton wore a body microphone and/or any other body communication device on November 15, 2009, all documents referencing any repairs of any type made to the body microphone and/or any other body communication device for any reason on or after January 1, 2007;

17. All documents indicating whether Nicholas O. Moore wore a body microphone and/or any other body communication device on November 15, 2009, at or near [redacted] President's Drive;

18. If Deputy Moore wore a body microphone and/or any other body communication device on November 15, 2009, all documents referencing any repairs of any type made to the body microphone and/or any other body communication device for any reason on or after January 1, 2007;

19. All documents indicating whether Melissa Hegler McAllister wore a body microphone and/or any other body communication device on November 15, 2009, at or near [redacted] President's Drive;

20. If Deputy McAllister wore a body microphone and/or any other body communication device on November 15, 2009, all documents referencing any repairs of any type made to the body microphone and/or any other body communication device for any reason on or after January 1, 2007;

21. All documents which detail policies to be followed by McCormick County Sheriff's Office deputies when responding to calls where gun shots have allegedly been fired; and

22. All documents which describe the required dress code and uniform for McCormick County Sheriff's Office deputies.

George H. Reid, Sheriff

December 28, 2009

Billy Garrett / Carson Henderson
109 Oak Avenue
Greenwood, SC 29646

RE: Demand or Request dated December 11, 2009 / State vs. Joe Ross Worley

Dear Billy / Carson:

With regards to your Subpoena referenced above, please allow me to address each of your twenty-two (22) demands individually:

1) Complete personnel file for Robert E. "Bobby" Rushton provided herein (Total pages: 40). No record of written reprimands or summaries of verbal reprimands.

2) Complete personnel file for Nicholas O. Moore provided herein (Total pages: 28). No record of written reprimands or summaries of verbal reprimands.

3) Complete personnel file for Melissa Hegler McAllister provided herein (Total pages: 34). No record of written reprimands or summaries of verbal reprimands.

4) Complete personnel file for Sheriff George Reid provided herein (Total pages: 154). No record of written reprimands or summaries of verbal reprimands.

5) The Patrol vehicle utilized by Deputy Robert E. Rushton, on November 15, 2009, was equipped with an in-car video camera. The audio transmitter for this system was misplaced prior to Deputy Rushton receiving this vehicle.

6) No record of repairs.

7) The Patrol vehicle utilized by Deputy Nicholas O. Moore, on November 15, 2009, was equipped with an in-car video camera.

8) No record of repairs.

211 West Augusta Street · P.O. Box 1236 · McCormick, South Carolina 29835
Office (864) 465-2520 or (864) 465-3200 · Fax (864) 465-3181

9) There is no in-car video camera installed in the Patrol vehicle utilized by Deputy Melissa McAllister on November 15, 2009.

10) Not applicable.

11) There is no in-car video camera installed in the Patrol vehicle utilized by Sheriff George Reid on November 15, 2009.

12) Not applicable.

13) No other McCormick County Sheriff's Department vehicles (other than those previously specified), present at the scene on November 15, 2009, were equipped with an in-car video camera.

14) Not applicable.

15) Deputy Robert E. Rushton was not wearing any type of body microphone and/or any other body communication device, other than a handheld UHF radio, on November 15, 2009.

16) Not applicable.

17) Deputy Nicholas O. Moore was wearing a body microphone / transmitter, as well as a handheld UHF radio, on his person on November 15, 2009. The body microphone / transmitter was not activated.

18) No repairs.

19) Deputy Melissa H. McAllister was not wearing any type of body microphone and/or other body communication device, other than a handheld UHF radio, on November 15, 2009.

20) Not applicable.

21) There is no McCormick County Sheriff's Department Policy or Procedure which details how an officer should respond to a call where gun shots have allegedly been fired.

22) There is no McCormick County Sheriff's Department Policy or Procedure which mandates or describes a required dress code or uniform for McCormick County Sheriff's Department deputies.

Please feel free to contact me should you need any further.

Sincerely,

Joseph E. Collier

Joseph E. Collier, Jr. – Inv.
Narcotics and Training

George H. Reid, Sheriff

December 29, 2009

Billy Garrett / Carson Henderson
Attorneys at Law
109 Oak Avenue
Greenwood, SC 29646

RE: Demand or Request dated December 11, 2009 / State vs. Joe Ross Worley

Dear Billy / Carson:

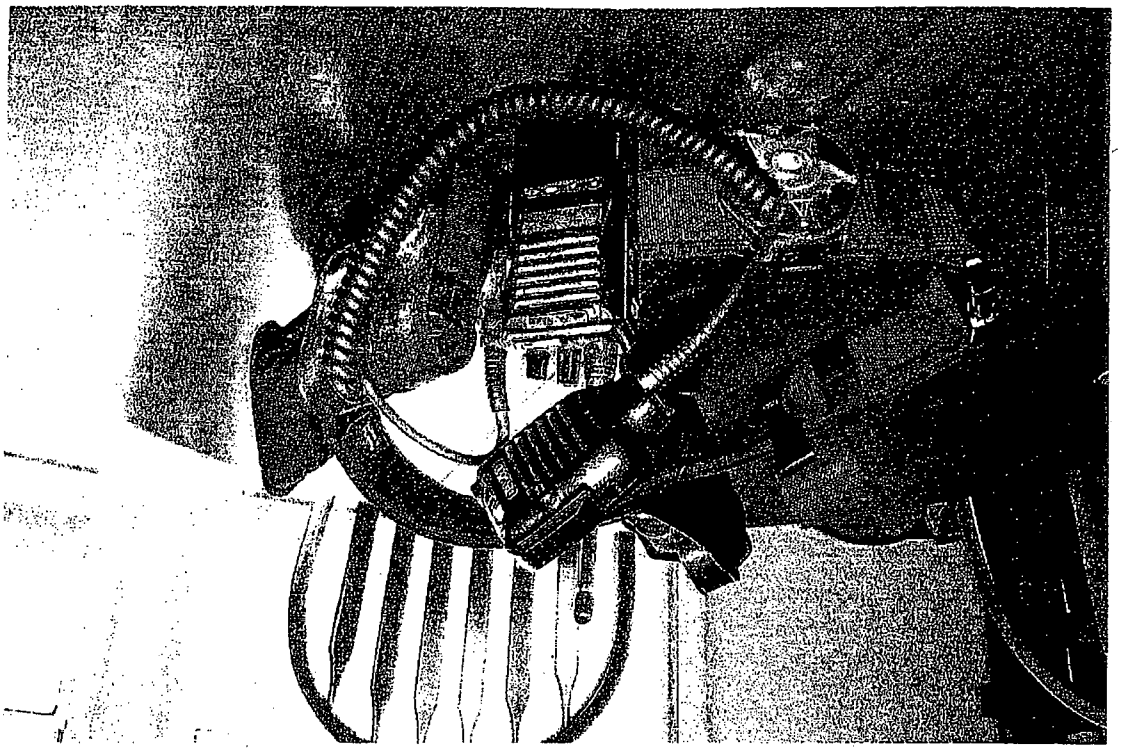
With regards to your Subpoena referenced above, and at the request and direction of Deputy Robert E. Rushton who is currently unable to type or write, please be advised that, with the exception of Deputy Rushton's duty belt (including accessories) and boots, all items of clothing which were worn by Deputy Rushton on the morning of November 15, 2009, at or near [redacted] President's Drive in McCormick, South Carolina, have been lost and/or destroyed. This clothing was removed by medical personnel at the Medical College of Georgia in Augusta, Georgia. Rushton's boots and duty belt / gear were removed before Rushton was transported to MCG for treatment. Six (6) color, digital photographs of those items are provided herein.

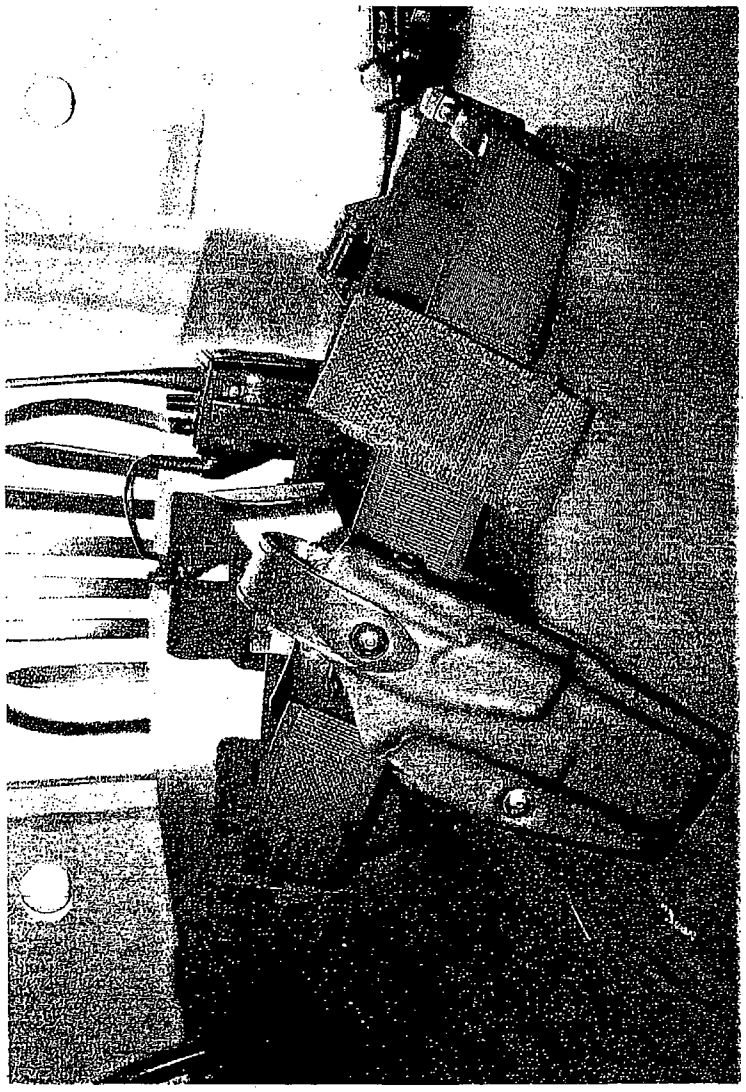
According to Deputy Rushton, he (Rushton) was wearing a pair of tan ("khaki") in color, 5.11 tactical pants and a green in color 5.11 tactical long sleeve shirt on the date specified above. His badge was prominently displayed on the front of his duty belt, as indicated in the enclosed photos.

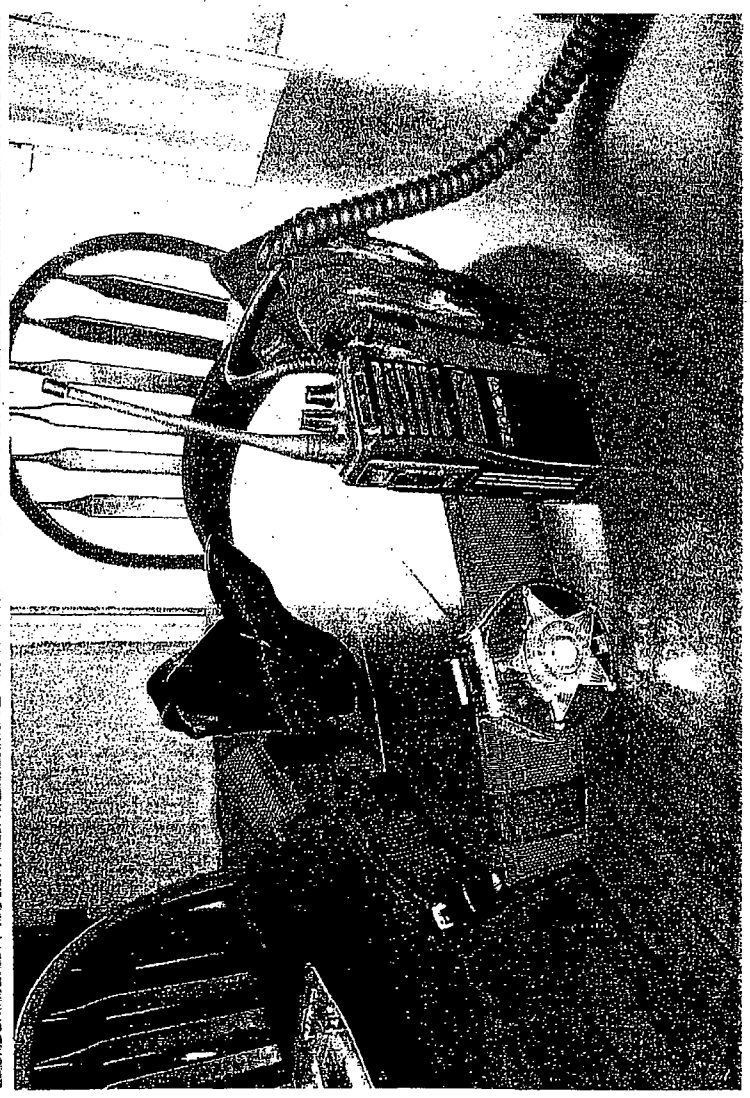
Sincerely,

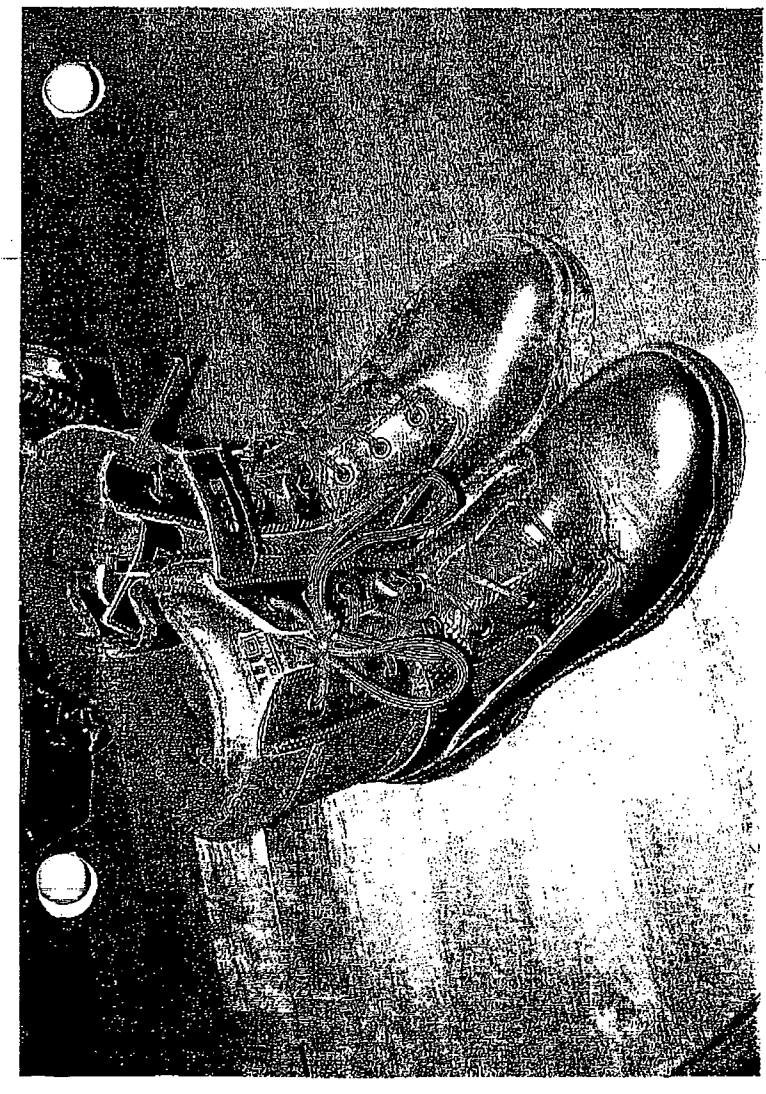
Joseph E. Collier, Jr. / By Direction
(For Deputy Robert E. Rushton)

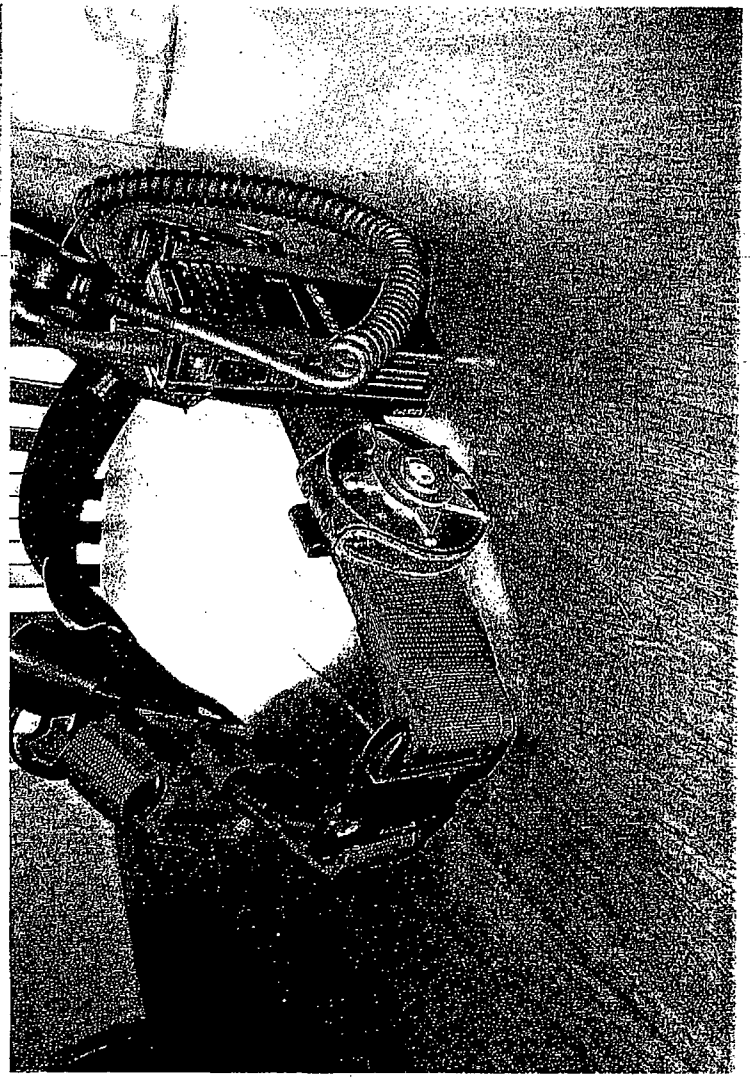
211 West Augusta Street · P.O. Box 1236 · McCormick, South Carolina 29835
Office (864) 465-2520 or (864) 465-3200 · Fax (864) 465-3181











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CJA LESSON PLAN COVER SHEET

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Arrests	L-5	Revised April 2006

TRAINING DEPARTMENT:	TIME ALLOCATION:
Legal	2 Hours

PRIMARY INSTRUCTOR:	ALT. INSTRUCTOR:	LESSON PREPARED BY:
		Joe Lumpkin

DATE LESSON PLAN PREPARED:	JOB TASK ANALYSIS DATE:
February 12, 1998	2005

LESSON PLAN PURPOSE:

To provide the student with a basic understanding of the law of arrest and related materials.

EVALUATION PROCEDURES:

Written Examination, Multiple Choice
70% Minimum Passing Score

TRAINING AIDS, SUPPLIES, EQUIPMENT, SPECIAL CLASSROOM/INSTRUCTIONAL REQUIREMENTS:

PowerPoint

14

PERFORMANCE OBJECTIVES

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Arrests	L-5	Revised April 2006

PERFORMANCE OBJECTIVES:

1. Define arrest.
2. Recognize the constitutional standard governing arrests.
3. Identify their jurisdiction for arrest purposes.
4. Recognize the elements of "probable cause."
5. Identify the requirements for a warrant in felony and misdemeanor cases.
6. Identify exceptions to the warrant requirement.
7. Recognize the limitations placed on use of force in an arrest situation.

LESSON PLAN EXPANDED OUTLINE

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Arrests	L-5	Revised April 2006

I. INTRODUCTION

Arrest is one of the prime functions of an officer. This unit is designed to give the student officers their first exposure to the law of arrest and some of the legal concepts they will use later. They will explore probable cause, jurisdiction, be exposed to warrants, and even a little search law.

II. BODY

A. DEFINITION

To deprive a person of his liberty, by legal authority, for the purpose of holding or detaining him to answer a criminal charge.

Arrest involves:

1. The authority to arrest;
2. The assertion of that authority with the intent to effect an arrest; and
3. The restraint of the person to be arrested.

B. STANDARDS FOR ARRESTS

The Supreme Court has held on numerous occasions that the Fourth Amendment applies to a" seizures of persons; both traditional concepts of arrest and detentions.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The language of the South Carolina Constitution, Article I, Section 10, is almost identical:

Statutory provisions concerning arrest are contained in Title 17 of the South Carolina Code, Chapter 13.

C. JURISDICTION

1. §17-13-40. Police of any city or town may arrest when in pursuit within three miles of corporate limits.

   Section 17-13-40.

   (A) When the police authorities of a town or city are in pursuit of an offender for a violation of a municipal ordinance or statute of this State committed within the corporate limits, the authorities may arrest the offender, with or without a warrant, at a place within the corporate limits, at a place within the county in which the town or city is located, or at a place within a radius of three miles of the corporate limits.

(B) When the police authorities of a county are in pursuit of an offender for a violation of a county ordinance or statute of this State committed within the county, the authorities may arrest the offender, with or without a warrant, at a place within the county, or at a place within an adjacent county.

(C) When a law enforcement officer's jurisdiction is expanded pursuant to this section, the authority, rights, privileges, and immunities, including coverage under the workers' compensation laws, and tort liability coverage obtained pursuant to the provisions of Chapter 78, Title 15, that are applicable to an officer within the jurisdiction in which he is employed are extended to and include the expanded areas of jurisdiction granted pursuant to this section.

Revised 3/19/98

State officers have statewide authority.

Section 17-13-47 allows for other states to pursue in South Carolina if the other states have "similar" law.

2. §23-13-60. Power of arrest.

The deputy sheriffs may for any suspected freshly committed crime, whether upon view or upon prompt information or complaint, arrest without warrant and, in pursuit of the criminal or suspected criminal, enter houses or break and enter them, whether in their own county or in an adjoining county.

Officers outside their jurisdiction possess citizen's arrest authority. (S.C. Code §17-13-10, §17-13-20) However, when a law enforcement officer responds to a distress call or request for assistance in an adjacent jurisdiction, the officer's authority extends into the adjacent jurisdiction. (S.C. Code §17-13-45)

3. §17-13-50. Right to be informed of ground of arrest; consequences of refusal to answer or false answer.

(A) A person arrested by virtue of process or taken into custody by an officer in this State has a right to know from the officer who arrests or claims to detain him the true ground on which the arrest is made. It is unlawful for an officer to:

(1) refuse to answer a question relative to the reason for the arrest;

(2) answer the question untruly;

(3) assign to the person arrested an untrue reason for the arrest; or

(4) neglect on request to exhibit to the person arrested or any other person acting in his behalf the precept by virtue of which the arrest is made.

(B) An officer who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of court or imprisoned not more than ten years, or both.

D. PROBABLE CAUSE TO ARREST (ELEMENTS)

1. A crime has been or is being committed.

2. The person to be arrested "probably" committed it.

Revised 6/30/97

Probable cause exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a reasonable law enforcement officer in believing that the suspect had committed or was committing a crime.

Probable cause must exist at the time the officer makes the arrest. It is not constitutionally permitted for the officer to make the arrest and then investigate further hoping to establish probable cause.

(Beck v. Ohio, 379 U.S. 89 (1964))

An alibi that can easily be checked out or other evidence favorable to the accused must be considered. If the inclusion of this additional evidence removes the level below probable cause, no arrest should be made.

(Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (S.C. 1990))

(The manner of establishing probable cause is set forth in detail in this outline under the heading, "Probable Cause.")

E. ARREST WITH A WARRANT

Felony: The preferred way to make any arrest is with a warrant. Absent exigent circumstances, an arrest warrant is required for a non-consensual entry at a suspect's residence to make a routin felony arrest. The officer should have reason to believe the suspect is in his or her residence at the time of the forcible entry. (Payton v. NY, 445 U.S. 573 (1980)) If the suspect to be arrested is in someone else's residence, a search warrant is required in addition to the arrest warrant. (Steagald v. U.S., 451 U.S. 204 (1981))

Misdemeanor: A warrant is required to make an arrest in all misdemeanor cases except where the crime was committed in the officer's view (presence). (S.C. Code §17-13-30) In this context, "view" is not limited to the officer's sight. There could be probable cause to arrest based on what the officer heard, smelled, etc.

However, where the officer arrives at the scene very shortly after the commission of the crime, and easily observable evidence strongly indicates the crime was "freshly committed," the officer may arrest without a warrant. (State v. Martin, 275 S.C. 141 (1980))

Note: A 1995 informal Attorney General's Opinion states that if an officer spots an individual whose name is listed on a computer sheet of outstanding warrants and radios for verification that a warrant is outstanding on that person, the officer may then lawfully arrest the individual whether or not the warrant is for a misdemeanor or a felony and without having the warrant in his or her hand at the time of making the arrest. However, the warrant must be served on the person immediately upon return to headquarters with the person in custody. (It is important to ascertain that the warrant is still valid prior to making the arrest.)

F. ARREST WITHOUT A WARRANT

Felony: A warrantless arrest may be made in a public place without an arrest warrant even though there was sufficient time to obtain a warrant after probable cause was developed. (U.S. v. Watson, 423 U.S. 411 (1976))

Other exceptions to the warrant requirement include hot pursuit (State v. Peters, 248 S.E.2d 475 (1978) and exigent circumstances (Michigan v. Tyler, 436 U.S. 499 (1978)).

1. Hot Pursuit: Hot pursuit is an exception to the need to obtain an arrest warrant prior to making a forcible entry into a residence. It requires an immediate or continuous pursuit of one who is in flight, although it is not required that the officer continuously have the suspect within view. (Warden v. Hayden, 387 U.S. 294 (1967)) The crime must be serious in nature. (Welsh v. Wisconsin, 466 U.S. 740 (1984))

2. Exigent Circumstances: In Dorman v. United States, 435 F.2d 385 (D.C.Cir. 1970), the Court said that the numerous and varied street fact situations do not permit a comprehensive list of what is covered by these terms but considerations that were material and had particular pertinence in the Dorman case included: a grave crime had been committed, strong probable cause existed, the suspect was reported armed, there was strong reason to believe that the suspect was in the premises being entered, it was likely that the suspect would escape if not swiftly apprehended, the entry was made peaceably even through it was not consented, and the arrest occurred in the night time.

Misdemeanor: The general rule in South Carolina is that law enforcement officers may not arrest, without a warrant, a person who commits a misdemeanor outside their view.

However, where the officer arrives at the scene very shortly after the commission of the crime, and easily observable evidence strongly indicates the crime was "freshly committed," the officer may arrest without a warrant. (State v. Martin, 275 S.C. 141 (1980))

G. OTHER ISSUES

1. Charging Document

When an arrest is made without first obtaining an arrest warrant, the officer must obtain a charging document so that the case can be heard by the court. If the charge cannot be written on a Uniform Traffic Ticket, the officer must appear before a judge and seek an arrest warrant.

The following are appropriately charged on a Uniform Traffic Ticket:

a. Arrests for Traffic Offenses

b. Arrests for Other Offenses Listed in Section 56-7-10. Examples: Public Disorderly Conduct (Section 16-17-530), Littering (Section 16-11-700), Trespassing (Sections 16-11-755, 16-11-600, 16-11-610, 16-11-620)

c. Misdemeanors committed in the officer's presence that are within the jurisdiction of the Magistrate or Municipal Court Judge (Section 56-7-15).

2. Use of Force

A person to be arrested should be aware of the identity and intent of the arresting officers.

Officers are permitted to use that amount of force reasonable and necessary to impos custody and overcome all resistance; ensure the safety of the arresting officer, the arrestee, and others in the vicinity of the arrest. (This includes forcible entry of a residence or elsewhere.)

Temporary restraining devices should be used.

(For a discussion of the Fleeing Felon and Use of Deadly Force, see the separate heading, "Civil Liability.")

3. Exclusionary Rule/Illegal Arrest

An illegal arrest is a violation of the Fourth Amendment, however, a conviction of the defendant will not be overturned on the basis of an illegal arrest alone. The defendant would have to show the constitutional violation deprived him of a fair trial.

(For a discussion of the suppression of evidence associated with an illegal arrest, see in this outline, "Exclusionary Rule.")

Rev. 3/6/97

III. SUMMARY

This unit has provided some basic building blocks upon which to build some of the more difficult concepts later. Coupled with later units, the student officers can begin to put these concepts in focus for later use.

1. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223 (1964)

Where no probable cause had been shown for Beck's arrest, the search of him and the seizure of clearing house slips were invalid under the Fourth and Fourteenth Amendments. Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it.

2. Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (S.C. 1990)

An arresting officer has a duty to accept additional evidence; and when that new additional evidence removes the level below probable cause, no arrest will be made.

3. Payton v. N.Y., 445 U.S. 573 (1980)

The Fourth Amendment prohibits police, in the absence of exigent circumstances, from making a warrantless and nonconsensual entry into a suspect's home for the purpose of effecting a routine felony arrest; an arrest warrant issued on probable cause gives police implicit, but limited, authority to enter the suspect's dwelling, if there is reason to believe the suspect is inside.

4. Steagald v. U.S., 451 U.S. 204 (1981)

The Fourth Amendment requires, in the absence of consent or exigent circumstances, that police armed with an arrest warrant obtain a search warrant before entering the residence of a third party not named in the arrest warrant.

Revised 12/98

5. U.S. v. Watson, 423 U.S. 411 (1976)

The Supreme Court explicitly held that a warrantless arrest could be made in a public place even though there was sufficient time to obtain a warrant after the development of probable cause.

6. State v. Peters, 248 S.E.2d 475 (1978)

The South Carolina Supreme Court, in a footnote, acknowledged several exceptions to the warrant requirement for entry. They said, "These recognized exceptions have included: (1) search incident to a lawful arrest, (2) "hot pursuit,"(3) "stop and frisk," (4) "automobile exception," (5) the "plain view" doctrine, and (6) consent."

7. Michigan v. Tyler, 436 U.S. 499 (1978)

Firemen responded to a fire at Tyler's building. After putting out the fire, the firemen remained on the premises for reasonable time thereafter and investigated the cause of the fire as well as seized evidence of arson in "plain view." This was held not to be a Fourth or Fourteenth Amendment violation because of the Exigent Circumstance Doctrine. However, once the exigent circumstances were over, the fire investigators needed a warrant or consent to return to the building, and therefore evidence seized after the firefighters had left on the morning of the fire was not admissible at the arson trial.

8. Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967)

"The Fourth Amendment does not require police officers to delay (entry) in the course of an investigation if to do so would gravely endanger their lives or the lives of others."

9. Welsh v. Wisconsin, 466 U.S. 740 (1984)

A warrantless nighttime entry into a person's home to arrest him for a nonjailable drunk driving offense was not justified by the need to preserve evidence of intoxication or any other exigency and therefore violate the Fourth Amendment.

10. Dorman v. U.S., 435 F.2d 385 (D.C. Cir. 1970)

Four men committed an armed robbery and an officer saw the men emerge from the store. He pursued one of them but did not apprehend any of the suspects. During the investigation it became apparent that Dorman was one of the suspects. Police feared that he would flee and knew that he was armed and dangerous. The crime that he committed earlier in the day involved violence. Police went to his home about four hours after the crime was committed and were admitted by his mother. The court said, "This was not a case of hot pursuit, unless that term is to be stretched beyond all reasonable meaning. But the ultimate underlying factors were similar to those involved in a case of hot pursuit." The police were still dealing with a relatively recent crime and acted within an hour after they obtained eyewitness identification of the defendant. Furthermore, a magistrate was not readily available to issue a warrant.

11. State v. Martin, 275 S.C. 141, 268 S.E.2d 105 (S.C. 1980)

A highway patrolman, upon arriving at the scene of an automobile accident, found skid marks on the highway and two damaged cars, each bearing paint flecks that corresponded to the color of the other. The defendant admitted being the driver of one of the cars, and, because he appeared highly intoxicated, the patrolman arrested him on a charge of driving a motor vehicle under the influence. This warrantless arrest for a misdemeanor not committed in his view is justified "when the facts and circumstances observed by the officer gave him probable cause to believe that a crime has been freshly committed."

Rev. 3/6/97

INSTRUCTIONAL CONTENT
BIBLIOGRAPHY

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Arrests	L-5	Revised April 2006

1. United States Constitution, Amendment IV

2. South Carolina Code of Laws :

§17-13-40

§23-13-60

§17-13-10

§17-13-20

§17-13-45

§17-13-50

§17-13-30

§56-7-10

§56-7-15

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CJA LESSON PLAN COVER SHEET

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Investigative Detention	L-6	Revised April 2006

TRAINING DEPARTMENT:	TIME ALLOCATION:
Legal	2 Hours

PRIMARY INSTRUCTOR:	ALT. INSTRUCTOR:	LESSON PREPARED BY:
		Joe Lumpkin

DATE LESSON PLAN PREPARED:	JOB TASK ANALYSIS DATE:
February 12, 1998	2005

LESSON PLAN PURPOSE:

To provide the student with a basic understanding of the law of investigative detention and related subjects.

EVALUATION PROCEDURES:

Written Examination, Multiple Choice
70% Minimum Passing Score

TRAINING AIDS, SUPPLIES, EQUIPMENT, SPECIAL CLASSROOM/INSTRUCTIONAL REQUIREMENTS:

PowerPoint
VCR
Video: "Search & Seizure-Stop & Frisk" LERC
Video: Legal update 97-98 "Rodriquez"

PERFORMANCE OBJECTIVES

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Investigative Detention	L-6	Revised April 2006

PERFORMANCE OBJECTIVES:

1. Recognize the concept of stop and frisk.
2. Identify sources of facts when justifying a stop.
3. Recognize the problems and limitations, including use of force, in a Terry Stop.
4. Understand the separate standard for a Terry Frisk.

LESSON PLAN EXPANDED OUTLINE

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Investigative Detention	L-6	Revised April 2006

I. INTRODUCTION

The separate concepts of stop and frisk give the officer significant tools for investigation of criminal activity and officer safety. These concepts need to be second nature to an officer.

II. BODY

A. INVESTIGATIVE DETENTION

1. Investigative detention is the temporary restraint of a person's freedom to walk away when such person is suspected of being involved in criminal activity. The stop is a permissible Fourth Amendment "seizure."

   Investigative detentions (stops) and protective searches (frisks) represent two separate and distinct procedures available to officers when investigating suspicious circumstances or detaining for identification purposes. Each procedure must have its own independent justification based on facts known to the officers. The investigative detention is a seizure and the protective frisk is a search. Thus, each must meet the constitutional standard of reasonableness contained in the Fourth Amendment.

   (Terry v. Ohio, 392 U.S. 1 (1968))

   Most investigative detentions involve persons suspected of committing crimes. The use o this procedure, however, has also been expanded to include detention of objects where the facts known to the officer are insufficient to justify probable cause for a search warrant, yet support a reasonable suspicion that the object contains contraband or other evidence of criminal activity. In such a situation, the officer may detain a package, box, trunk, or suitcase temporarily while attempting to secure additional facts justifying a search warrant. (U.S. v. Place, 462 U.S. 696 (1983)) The privacy of the package and its contents must not be disturbed.

2. Constitutional Standard

   Where the facts known to the officer do not constitute probable cause to arrest, they may satisfy the lesser standard (and lesser intrusion) of "reasonable suspicion" to stop. The courts have generally adopted a simply worded standard: "whether the officer had specific and articulable facts giving rise to a reasonable suspicion of criminal activity." The process is a balancing of the suspect's right to be free from an unreasonable seizure, against the duty of police to investigate suspicious activity.

   The following cases address the seizure of an individual:

   Michigan v. Chesternut, 486 U.S. 567 (1989)

   California v. Hodari D., 499 U.S. 621 (1991)

   State v. Culbreath, 387 S.E.2d 255 (S.C. 1990)

3. Street Encounters Not Amounting to a Stop

There is nothing to prevent an officer from approaching and talking with an individual on the street. The usual test separating a "street encounter" from a "Terry Stop" is whether the individual is detained. Street encounters, however, do not obligate an individual to comply with the officer's request to remain stationary or provide information.

4. Vehicle Stop

Any stop of a moving vehicle is a Fourth Amendment seizure and reasonable suspicion is required. (Delaware v. Prouse, 440 U.S. 648 (1979))

A road block or road check for drugs is a general criminal seizure, and is prohibited by the Fourth Amendment. (City of Indianapolis v. Edmond, 121 S.Ct. 447 (2000)) However, a highway sobriety checkpoint which calls for stopping and briefly detaining all motorists passing through such checkpoint is reasonable and need not be supported by individualized suspicion. (Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990)) The Edmund case also specifically allowed traffic related road checks, road checks, road checks for aliens, and emergency road checks to prevent escape of dangerous criminals.

B. DEVELOPING "REASONABLE SUSPICION"

1. Most courts approach an evaluation of reasonable suspicion much in the way they approach a probable cause determination, on a case-by-case basis. Assessing the totality of factors will determine whether it was reasonable to suspect that the person stopped was involved in criminal activity.

The following may be taken into account:

a. Personal Knowledge and Experience of Officer

b. Suspicious Conduct/Demeanor of Suspect

c. Furtive Moves

d. Attempts to Flee

e. Time and Place

f. Nighttime

g. High Crime Areas — Illinois v. Wardlow, 120 S.Ct. 673, (2000)

h. Near Scene of Crime

Where the suspect gives evasive or implausible answers to routine questions or gives answers the officer knows to be false, this conduct combined with other factors may justify continued detention.

(U.S. v. West, 460 F.2d 374 (5th Cir. 1972))

2. Sources of Information

An investigative stop may be justified by the same sources of information used to find probable cause:

a.	Personal Observation of Officer	
b.	Information from Victims and Witnesses	
c.	Information from Other Law Enforcement Officers and/or Law Enforcement Communications	U.S. v. Hensley, 469 U.S. 221(1985)
d.	Confidential Informants	Adams v. Williams, 407 U.S. 143 (1972)
e.	Standardized Profiles	U.S. v. Sokolow, 940 U.S. 1 (1989)
f.	Anonymous Tip	Alabama v. White, 496 U.S. 325 (1990) Florida v. J. L., 120 S.Ct 1375 (2000)

Each source must meet a standard of reliability and must be sufficient to meet the Terry standard of specific and articulable facts creating a reasonable suspicion of criminal activity.

C. PROBLEM AREAS

1. The reasonableness of an "on-the-scene" warrantless seizure depends on the balance between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers. When reviewed by a court, this balancing test will include, but is not limited to, the following:

a. The seriousness of the offense.

b. The degree of likelihood that the person detained may have witnessed or been involved in the offense.

c. The proximity in time and space from the scene of the crime.

d. The urgency of the occasion.

e. The nature of the detention and its extent.

f. The means and procedures employed by the officer.

g. The presence of any circumstances suggesting harassment or a deliberate effort to avoid the necessity of securing a warrant.

(State v. Rodriquez, 476 S.E.2d 161 (S.C. App. 1996))

In assessing whether a detention is too long in duration to be justified as an investigative stop, it is appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

(State v. Rodriquez, 476 S.E.2d 161 (S.C. App. 1996))

2. Site of Detention: Most detentions occur on the street and involve the stopping of a pedestrian or a motorist. Problems arise when the initial detention site is changed without justification. It should be remembered that any exercise of detention authority should be accomplished with a minimum of intrusion. Moving a detained person should be avoided unless there is a good reason for doing so. (Florida v. Royer, 460 U.S. 491 (1983)) Moving a suspect a short distance is permissible:

   a. to afford better lighting.

   b. to permit officer to use car radio.

   c. to prevent a traffic hazard.

   d. to avoid a hostile crowd.

   An officer may order the driver (suspect) out of vehicle.
   (Pennsylvania v. Mimms, 434 U.S.106 (1977))

   An officer may order passengers out of the vehicle.
   (Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882 (1997))

   Transporting the suspect to the police station is a more serious intrusion and will probably turn the stop into a full custody arrest unless a proper advisement is given that the person is not under arrest and is free to leave. (Dunaway v. New York)

3. Duration of Detention: An officer may detain a suspect for a reasonable time. This is a flexible standard. If the initial stop was justified and the delay is reasonably related to police investigation that will confirm or dispel the suspicion, it can be extended. (U.S. v. Sharpe, 470 U.S. 675 (1985)) When officers stop the driver of a vehicle, they may briefly detain the occupants if there is reasonable suspicion that the occupants are involved in criminal activity. In Sikes v. State, a passenger was detained for 20 minutes although officers determined that the vehicle in which he was riding was neither stolen nor uninsured. The Court held that neither of these reasons gave officers the right to seize or question the car's passenger; and even if they did, a 20 minute detention while officers "went fishing" for evidence of some crime was not brief within the definition of Delaware v. Prouse. (See U.S. v. Place, 462 U.S. 696 (1983) where a 90 minute stop was held to be unreasonable. However, in State v. Kirkpatrick, 462 S.E.2d 884 (S.C. App. 1995), a 90 minute stop was justifiable.)

   In State v. Williams, 571 SE 2d 703 (2002), the court of appeals ruled that asking a person "before you leave, let me ask you a few questions" was a detention and required a lawful reason to continue to detain.

4. Use of Force: In order to effect a stop and enforce a period of brief detention, an officer may employ that degree of reasonable force found necessary under the circumstances, short of deadly force. Use of deadly force has no place in an investigative detention situation and will not be justified under any circumstances. This does not preclude an officer defending himself if assaulted while attempting to make a stop.

Revised 10/99

5. Interrogation--Advisement of Rights: As a general rule, a stop and detention is not such a significant deprivation of freedom as to constitute custody, as that term is commonly understood. Persons temporarily detained for brief questioning by officers who lack probable cause to make an arrest need not be warned of their rights against compulsory sel incrimination and to counsel until such time as the point of arrest has been reached.

D. AUTHORITY TO FRISK

1. A protective pat down search is permitted for weapons only, after meeting two threshold requirements:

   a. There must be a lawful stop;

   b. There must be reasonable suspicion the suspect is armed and dangerous.

2. In justifying the frisk, the officer may consider such factors as:

   a. the type of crime involved;

   b. the reputation of the person detained;

   c. the time and place of stop;

   d. a sudden movement;

   e. a bulge in the suspect's pocket.

3. Intensity of a Frisk: Once the above requirements are satisfied, the officer may pat down the suspect's outer clothing for weapons only. The protective pat down cannot be used as subterfuge for an evidence search.

   If an officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent as contraband, the officer may seize the object and have it admitted into evidence. However, "plain touch" will support a warrantless seizure only when the frisk remains within the bounds of the weapons frisk permitted by Terry v. Ohio.

   (Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993)); (State v. Abrams, 471 S.E.2d 716 (S.C. App. 1996)); (State v. Smith, S.C. 329 S.C. 550, 495 S.E. 2d 798 (S.C. App. 1998))

4. Area of a Frisk: If the facts justify it, the frisk could be extended to include:

   a. Hand Carried Items - unlocked and unsealed where the size and design permits easy access to possible weapon.

   b. Companions

   c. Vehicles

   If, while conducting a lawful frisk for weapons, an officer inadvertently discovers other evidence, he may lawfully seize such evidence, as long as the officer can show that he was justified in believing that a weapon was concealed on the detainee. (Michigan v. Long, 46[illegible] U.S. 1032 (1983))

III. SUMMARY

The ability to stop based on reasonable suspicion of criminal activity and to frisk based on a lawful stop and reasonable suspicion of a weapon provides police with important methods to investigate crime while minimizing the risk to the officer. These concepts will be used constantly in the field.

1. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)

An experienced police officer, seeing what he believed to be two individuals "casing" a store for a holdu detained and questioned Terry and subsequently made a "frisk" of his outer clothing and discovered a weapon. Terry was then arrested. The Supreme Court approved this "stop" and "frisk" in the absence of probable cause because the officer had specific and articulable facts to reasonably warrant a suspicion of criminal conduct. The Court further said the stop is a Fourth Amendment seizure, but justified on the lesser standard of "reasonable suspicion."

2. U.S. v. Place, 462 U.S. 696 (1983)

A law enforcement officer whose observations lead him reasonably to believe that a traveler is carrying luggage containing narcotics may briefly detain the luggage for investigation pursuant to Terry v. Ohio, 392 U.S. 1 (1968), if the detention is properly limited in scope; the exposure of luggage located in a public place to a trained narcotics detection dog is not a "search" within the meaning of the Fourth Amendment; the warrantless detention of a defendant's luggage for 90 minutes at a location removed from his arrival point, by agents who had several hours' notice of when and where the defendant would arrive, was unreasonable under Terry.

3. Michigan v. Chesternut, 486 U.S. 567 (1989)

The test of determining whether law enforcement officers' investigative pursuit of an individual constitutes a Fourth Amendment "seizure" is whether, under all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave; police officers who followed a man for a short distance when he ran upon seeing their patrol car, but who in no way signified an attempt to capture him or intrude on his freedom of movement, did not "seize" him for constitutional purposes and, therefore, were nc required to have an objective basis for suspecting him of criminal activity.

4. California v. Hodari D., 499 U.S. 621 (1991)

No "seizure" occurs for purposes of the Fourth Amendment when a law enforcement officer seeks to apprehend a person through a show of authority, but applies no physical force, and the person does not submit.

5. State v. Culbreath, 387 S.E.2d 255 (S.C. 1990)

The Court held that "full" probable cause is not necessary for a detention. A police officer may briefly stop and detain a person if the officer has a reasonable basis to believe that the individual in question has committed or is about to commit a crime. If the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances.

6. Delaware v. Prouse, 440 U.S. 648 (1979)

The Fourth Amendment prohibits the warrantless, random stop of an automobile being driven on a public highway for the purpose of checking the operator's license and the vehicle's registration in the absence of an articulable and reasonable suspicion that the motorist is unlicensed or that the automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law.

7. City of Indianapolis v. Edmond, 121 S.Ct. 447 (2000)

The city of Indianapolis police were conducting drug road checks. They posted signs announcing the drug road checks ahead and stipulated that the checks were primarily designed to interdict drugs. The Supreme Court held that the drug road checks were general criminal seizures, and were unlawful under the Fourth Amendment. The decision specifically listed sobriety checks, license and registration checks, checks for illegal aliens, and checks to prevent a dangerous criminal from fleeing as being lawful.

8. Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)

The Fourth Amendment does not forbid the initial stop and brief detention, without individualized suspicion, of all motorists passing through a highway checkpoint established to detect and deter drunk driving and conducted in conformity with guidelines on operation, site selection, and publicity.

9. Illinois v. Wardlow, 120 S.Ct. 673 (2000)

In Illinois v. Wardlow the United States Supreme Court held that, in light of the facts in this particular case, a Terry stop of a suspect running from police was permissible. Here, a caravan of police vehicles arrived in an area known for heavy narcotics trafficking. An officer in the last of four vehicles observed Wardlow look in the direction of the police and flee. The officer pursued Wardlow and conducted a stop and frisk, finding a handgun on Wardlow. The Court noted that Wardlow's mere presence in a known crime area was not sufficient to justify the stop, but his presence combined with his flight gave the officer reasonable suspicion that criminal activity was afoot. The Court said that officers should determine whether reasonable suspicion exists based on "commonsense judgments and inferences about human behavior." Additionally, it was held that flight is different from a suspect who merely decides to ignore police and "go on his way." Finally, while the Court upheld the officer's actions in stopping Wardlow, it did not address whether or not he was justified in frisking Wardlow.

10. State v. Butler, 539 S.E.2d 414 S.C. App. (2000)

Defendant was convicted in the Circuit Court of possession of cocaine. Defendant appealed. The Court of Appeals held that mere presence of temporary tag (paper tag) on back of a car, without more, does not provide reasonable suspicion that driver is violating registration or insurance laws or that driver is otherwise involved in criminal activity.

11. U.S. v. West, 460 F.2d 374 (5th Cir. 1972)

West and another individual were detained during a drug investigation. West gave evasive answers to routine questions and the other detainee refused to identify himself and made what were described as "furtive gestures." This conduct justified further detention which led to an arrest. (The actions of the officers were held to be reasonable.)

12. U.S. v. Hensley, 469 U.S. 221 (1985)

Police officers may make a brief stop, of the type recognized as valid in Terry v. Ohio, 392 U.S. 1 (1968), of an individual whom they have reasonable suspicion to believe was involved in, or is wanted in connection with, a completed felony; evidence uncovered in the course of such a stop made by police in objective reliance on a flyer or bulletin issued by another police department is admissible if the department that issued the flyer had a reasonable suspicion to justify the stop and the stop is not significantly more intrusive than the issuing department would have been permitted to make.

13. Adams v. Williams, 407 U.S. 143 (1972)

In the midst of a drug investigation, police received information from a reliable informant that the defendant was in a parked car in a certain neighborhood and had a gun in his waistband on the left side. While the information did not meet the probable cause standard, the Supreme Court found the information did satisfy the "reasonable suspicion" standard and approved the conduct of the officer in approaching the parked car, where the defendant was located, and reaching through the opened window to grab a gun from the defendant's waistband -- the exact location specified by the informant.

14. U.S. v. Sokolow, 940 U.S. 1 (1989)

The circumstances known to federal drug agents at the point at which they confronted a traveler at an airport, including the facts that the traveler had paid $2,100 for two airline tickets from a roll of $20 bills, he was traveling under a name that did not match the name under which his telephone number was listed, his original destination was a drug source city, he had stayed at his destination only 48 hours although the round trip had taken 10 hours, he appeared nervous during the trip, and he checked no luggage, were sufficient, taken together, to support a reasonable suspicion that the traveler was transporting illegal drugs and therefore to permit an investigative stop consistent with the Fourth Amendment.

15. Alabama v. White, 496 U.S. 325 (1990)

An anonymous tip stating that a named person would, at a particular time, drive a particular vehicle from an apartment to a motel, both of which were particularly identified, and would be in possession of cocaine was not, by itself, sufficient to provide reasonable suspicion for stopping the person under Terry v. Ohio, 392 U.S. 1 (1968), given the absence of any indicia of reliability, but it was sufficient to support such a stop when considered together with police officers' corroboration of details of the tip and with the inference of reliability that arose from the informer's ability to predict the person's future behavior.

16. Florida v. J.L., 120 S.Ct. 1375 (2000)

In Florida v. J.L., an anonymous caller reported to police that a black male, wearing a particular type shirt, and standing at a particular bus stop, was carrying a gun. Officers were dispatched to the scene and found three black males, including J.L., who was wearing a shirt consistent with the caller's description. Other than the tip, the officers had no reason to suspect any of the males of any criminal activity. J.L. made no threatening or unusual movements, and no weapons were visible. Nonetheless, one of the officers approached J. L. and conducted a frisk that revealed a gun. Even though J.L. was at the location specified by the tipster and wearing a particular shirt, the Court said that that only went to properly identifying the person the tipster intended to accuse and failed to provide any basis for the tipster's allegation. The Court held that while a Terry stop of a subject based on an anonymous tip may be justified where the information is corroborated, and thus indicating reliability, such was not the case in J.L. and the officer's stop was not justified.

17. State v. Rodriquez, 476 S.E.2d 161 (S.C. App. 1996)

Officers detained a suspect named Rodriquez based on a prior drug related arrest of a person named Rodriquez. While officers talked with the suspect, he was repeatedly advised that he was free to leave. However, officers placed a qualification on his freedom by informing him that all he had to do was cooperate with their request to search his belongings and, if nothing incriminating was discovered, he would be "clear to go." After about 30 minutes, one of the officers contacted a detective and the canine drug detection unit. Rodriquez was told that he would be patted down. When he lifted his hands to gesture, one of the officers saw a pistol in his waistband and placed him under arrest. His bags were then searched an officers found drugs and drug paraphernalia. His attorney made a motion to suppress the contraband. Later, the S.C. Court of Appeals held that the contraband should have been suppressed. Even assuming the validity

of the initial seizure of Rodriquez's person, the Court concluded that the seizure exceeded the reasonableness limitations prescribed in Terry and later cases. His conviction was reversed.

18. Florida v. Royer, 460 U.S. 491 (1983)

Detectives told a defendant they had stopped in an airport that they suspected him of transporting narcotics, and asked him to accompany them to a small, private office without indicating he could leave, brought his luggage to the same office without his consent, retained his airline ticket and driver's license which he had given them, and asked him for the key to the luggage. This exceeded any right they had to detain him under Terry v. Ohio, 392 U.S. 1 (1968). The defendant's consent to the opening of his luggage was tainted by his illegal detention.

19. Pennsylvania v. Mimms, 434 U.S. 106 (1977)

Ordering the driver out of a vehicle after a lawful stop for a traffic violation is permissible. Thereafter, when the officer observed a bulge under the driver's jacket, a pat down "frisk" for weapons was reasonable.

Revised 10/99

20. Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882 (1997)

Court used a "Fourth Amendment balancing test" to develop a "bright line rule" which allows passengers, as well as the driver, to be ordered out of a vehicle after a lawful stop.

21. U.S. v. Sharpe, 470 U.S. 675 (1985)

The permissible length of a stop based on "reasonable suspicion" is determined by reference to the purposes to be served by the stop, the time reasonably needed to effectuate those purposes, and the officers' diligence and choice of investigative means, rather than by reference to any arbitrary time limit; a 20-minute detention of a suspected drug trafficker, occasioned in large part by the suspect's own evasive actions, was reasonable.

22. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993)

An officer patted down a suspect who had just left a building known for cocaine traffic after he observed suspicious activity. He felt a small lump in the front pocket which he examined with his fingers. He determined that it was contraband only after squeezing, sliding and otherwise manipulating the contents of the pocket which he already knew contained no weapon. This overstepped the bounds of Terry and therefore the seizure of the cocaine was unconstitutional.

23. State v. Abrams, 471 S.E.2d 716 (S.C. App. 1996)

An officer, while conducting a "Terry Frisk", felt something he thought was a medicine bottle or film container (not a weapon). He removed what turned out to be an opaque medicine container, the contents of which could not be determined without opening. He opened it to find crack cocaine. Quoting Dickerson above, the S.C. Court of Appeals reminded officers that a "Terry Frisk" is not a search for evidence, but a procedure to protect officers during a lawful investigation. Unless an item is easily recognizable without manipulation as evidence or contraband, it cannot be lawfully seized.

24. Michigan v. Long, 463 U.S. 1032 (1983)

Law enforcement officers who have detained but not arrested the occupant of an automobile may, under Terry v. Ohio, 392 U.S. 1 (1968), conduct a warrantless search of the automobile's passenger compartment, limited to those areas in which a weapon may be placed or hidden, if the officers possess a reasonable belief, based on specific and articulable facts and rational inferences from those facts, that the occupant is dangerous and may gain immediate control of a weapon.

25. State v. Smith, 329 S.C. 550, 495 S.E. 2d 798 (S.C. App. 1998)

The officer, who had eleven years of law enforcement experience, articulated sufficient facts to justify a frisk and testified that when he patted Smith, down he felt a bulge in Smith's left jacket pocket. It we obvious to the officer that it was a baggy containing some type of narcotic. The solicitor asked whether i was immediately apparent to him what the bag was when he first touched it, and he responded, "Correct." The trial judge properly denied Smith's motion to suppress the cocaine.

26. Sikes v. State, 448 S.E.2d 560 (S.C. 1994)

Police arrested Sikes on an outstanding warrant after the vehicle in which he had been riding was stopped by police. At the police station, an officer found a bag of crack cocaine in the back seat of the patrol car that transported Sikes to jail. He was charged with possession with intent to distribute and convicted. He subsequently filed a Post-Conviction Relief application alleging that his attorney was ineffective in failing to challenge the admissibility of the cocaine at trial. He argued that his seizure at the traffic stop was unlawful. The S.C. Supreme Court agreed that his attorney should have moved to suppress the evidence on the basis that it was obtained in violation of the 4th Amendment to the U.S. Constitution.

27. State v. Williams, 571 SE 2d 703 (2002),

The court of appeals ruled that asking a person "before you leave, let me ask you a few questions" was a detention and required a lawful reason to continue to detain.

INSTRUCTIONAL CONTENT
BIBLIOGRAPHY

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Investigative Detention	L-6	Revised April 2006

1. The United States Constitution, Amendment IV

2. Video: "Search & Seizure-Stop & Frisk" LERC

3. Video: Legal update 97-98 "Rodriquez"

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CJA LESSON PLAN COVER SHEET

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Ethics in Law Enforcement	L-10	Revised April 2006

TRAINING DEPARTMENT:	TIME ALLOCATION:
Legal	2 Hours

PRIMARY INSTRUCTOR:	ALT. INSTRUCTOR:	LESSON PREPARED BY:
		George Glassmeyer

DATE LESSON PLAN PREPARED:	JOB TASK ANALYSIS DATE:
February 12, 1998	2005

LESSON PLAN PURPOSE:

To provide the student with an overview of ethical considerations for law enforcement officers.

EVALUATION PROCEDURES:

Written Examination, Multiple Choice
70% Minimum Passing Score

TRAINING AIDS, SUPPLIES, EQUIPMENT, SPECIAL CLASSROOM/INSTRUCTIONAL REQUIREMENTS:

PowerPoint
VCR
Video: "Ethics in Law Enforcement"
Video: "Ethical Dilemma Training Scenarios"

PERFORMANCE OBJECTIVES

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Ethics in Law Enforcement	L-10	Revised April 2006

PERFORMANCE OBJECTIVES:

1. State the definition of ethics.
2. List the four root causes of ethical misconduct, identify the most frequent act of misconduct, and identify the problem areas with strong ethical considerations for the law enforcement officer.
3. Identify the South Carolina statutes relating to ethical conduct and criminal and civil sanctions and define "public employee" and "thing of value" as these terms appear in the State Ethics Law.

LESSON PLAN EXPANDED OUTLINE

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Ethics in Law Enforcement	L-10	Revised April 2006

I. INTRODUCTION

As a law enforcement officer you ought to have a well defined sense of right and wrong. The very nature of your profession calls for the ability to determine good from bad. If one law enforcement officer in any part of this state commits an unethical act, you are all held accountable by the public for that officer's actions. It is important to always keep fresh in your mind the reasons why you became a police officer.

THE LAW ENFORCEMENT CODE OF ETHICS

AS A LAW ENFORCEMENT OFFICER, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality, and justice.

I WILL keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I WILL never act officiously or permit personal feelings, prejudices, animosities, or friendships to influenc my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I RECOGNIZE the badge of my office as a symbol of public faith, and I accept it as a public trust to be held as long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession...law enforcement.

II. BODY

A. ETHICS DEFINED

Black's Law Dictionary speaks of ethics in terms of that which is professionally right or "treating of. duties or conduct." Ethics is the study of moral standards which are used to evaluate human conduct and behavior. Moral standards are the norms we set for ourselves and others based on the values implicitly or explicitly contained in our beliefs, attitudes, and behavior. Our values are a product of socialization, education, and individual reflection of experience.

B. ETHICAL DILEMMAS

In the law enforcement world, what an officer perceives as "professional," may be defined in terms of strict performance of job description or duty. While this view certainly would include an important part of ethical behavior, it fails to view the "complete" picture of an officer as a human being as well as an enforcer of the law.

The binding effect of law and departmental policy may go a long way towards dictating "right" conduct in the duty context but may fall short of clarifying the moral or ethical responsibilities of the officer.

Ethical dilemmas rarely present a question of right and wrong. In most situations, the question becomes more one of which answer is more right than the other. Ethical dilemmas require decision-making skills much like other aspects of law enforcement.

Unethical acts present many problems for the law enforcement officer. They are a major cause of civil litigation, as well as destroying the public's trust, ruining good careers, and can even lead to criminal penalties. Misconduct can cause officers to lose not only their jobs and careers, but their retirement benefits as well as social benefits such as loss of dignity and reputation. Additionally, research shows that many law enforcement officers caught in an ethical misconduct scandal end up committing suicide as a result. Therefore, ethical conduct becomes an officer safety issue, much like firearms and driving conduct.

Research of officers who have been de-certified as a result of unethical behavior tells us that there are four common motivations of individuals who succumb to unethical conduct.

1. Anger
2. Lust
3. Greed
4. Peer Pressure

Other research has shown that it is not new, inexperienced officers who generally get into ethical dilemmas, rather officers with approximately seven years experience. And in fact, the records show that while drug involvement can be the most devastating ethical consideration for a department, the most common unethical acts stem from falsifying paperwork: incident reports, case files, etc.

Professionalism is another way of viewing ethical considerations. Maintaining your professionalism and your integrity as a public official is paramount to your success and authority as a law enforcement officer.

The South Carolina General Assembly recognized the responsibilities that public officials and employees have toward the citizens of this state to act in a professional and ethical manner when they reformed the State Ethics Law in 1992. As employees of a county, municipality, or any political subdivision of this State, police officers are "public employees" and are bound by the provisions of these statutes. This section includes some of the pertinent statutes that you will want to familiarize yourself with, including the provision in §8-13-705, which makes offering, giving, soliciting, or receiving anything of value to influence action of a public employee a felony punishable by up to ten years in prison and a fine of not more than ten thousand dollars. (S.C. code §8-13-100, et. seq.)

C. THE STATE ETHICS LAW

CHAPTER 13 Ethics, Government Accountability, and Campaign Reform

ARTICLE 1 General Provisions

§8-13-100. Definitions.

As used in Articles 1 through 11:

(1)

(a) "Anything of value" or "thing of value" means:

(i) a pecuniary item, including money, a bank bill, or a bank note;

(ii) a promissory note, bill of exchange, an order, a draft, warrant, check, or bond given for the payment of money;

(iii) a contract, agreement, promise, or other obligation for an advance, a conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money;

(iv) a stock, bond, note, or other investment interest in an entity;

(v) a receipt given for the payment of money or other property;

(vi) a chose-in-action;

(vii) a gift, tangible good, chattel, or an interest in a gift, tangible good, or chatte

(viii) a loan or forgiveness of indebtedness;

(ix) a work of art, an antique, or a collectible;

(x) an automobile or other means of personal transportation;

(xi) real property or an interest in real property, including title to realty, a fee simple or partial interest in realty including present, future, contingent, or vested interests in realty, a leasehold interest, or other beneficial interest in realty;

(xii) an honorarium or compensation for services;

(xiii) a promise or offer of employment;

(xiv) any other item that is of pecuniary or compensatory worth to a person.

(b) "Anything of value" or "thing of value" does not mean:

(i) printed informational or promotional material, not to exceed ten dollars in monetary value;

(ii) items of nominal value, not to exceed ten dollars, containing or displayin promotional material;

(iii) a personalized plaque or trophy with a value that does not exceed one hundred fifty dollars;

(iv) educational material of a nominal value directly related to the public official's, public member's, or public employee's official responsibilities;

(v) an honorary degree bestowed upon a public official, public member, or public employee by a public or private university or college;

(vi) promotional or marketing items offered to the general public on the same terms and conditions without regard to status as a public official or public employee; or

(vii) a campaign contribution properly received and reported under the provisions of this chapter.

(2) "Appropriate supervisory office" means:

(a) the State Ethics Commission for all persons required to file reports under this chapter except for those members of or candidates for the office of State Senator or State Representative;

(b) the Senate Ethics Committee for members of or candidates for the office of State Senator and the House of Representatives Ethics Committee for members of or candidates for the office of State Representative.

(3) "Business" means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

(4) "Business with which he is associated" means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

(5) "Candidate" means a person who seeks appointment, nomination for election, or election to a state or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or election. It also means a person on whose behalf write-in votes are solicited if the person has knowledge of such solicitation. 'Candidate' does not include a person within the meaning of Section 431(b) of the Federal Election Campaign Act of 1976.

(6) "Compensation" means money, anything of value, an in-kind contribution or expenditure, or economic benefit conferred on or received by a person.

(7) "Confidential information" means information, whether transmitted orally or in writing, which is obtained by reason of the public position or office held and is of such nature that it is not, at the time of transmission, a matter of public record or public knowledge.

(8) "Consultant" means a person, other than a public official, public member, or public employee who contracts with the State, county, municipality, or a political subdivision thereof to:

(a) evaluate bids for public contracts, or

(b) award public contracts.

(9) "Contribution" means a gift, subscription, loan, guarantee upon which collection is made, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit of money or anything of value made to a candidate or committee, as defined in Section 8-13-1300(6), for the purpose of influencing an election; or payment or compensation for the personal service of another person which is rendered for any purpose to a candidate or committee without charge. "Contribution" does not include volunteer personal services on behalf of a candidate or committee for which the volunteer receives no compensation from any source.

(10) "Corporation" means an entity organized in the corporate form under federal law or the laws of any state.

(11)

(a) "Economic interest" means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influenc an official decision if the only economic interest or reasonably foreseeable benefi that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

(12) "Election" means:

(a) a general, special, primary, or runoff election;

(b) a convention or caucus of a political party held to nominate a candidate;

(c) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or the Constitution of this State; or

(d) a ballot measure.

(13) "Elective office" means an office at the state, county, municipal, or political subdivision level. For the purposes of Articles 1 through 11, the term "elective office" does not include an office under the unified judicial system except that for purposes of campaign practices, campaign disclosure, and disclosure of economic interests, "elective office" includes the office of probate judge.

(14) "Expenditure" means a purchase, payment, loan, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit, transfer of funds, a gift of money, or anything of value for any purpose.

(15) "Family member" means an individual who is:

(a) the spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild;

(b) a member of the individual's immediate family.

(16) "Gift" means anything of value, including entertainment, food, beverage, travel, and lodging given or paid to a public official, public member, or public employee to the extent that consideration of equal or greater value is not received. A gift includes a rebate or discount on the price of anything of value unless it is made in the ordinary course of business without regard to that person's status. A gift does not include campaign contributions accepted pursuant to this chapter.

(17) "Governmental entity" means the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed. "Governmental entity" also means any charitable organization or foundation, but not an athletic organization or athletic foundation which is associated with a state educational institution and which is organized to raise funds for the academic, educational, research, or building programs of a college or university.

(18) "Immediate family" means:

(a) a child residing in a candidate's, public official's, public member's, or public employee's household;

(b) a spouse of a candidate, public official, public member, or public employee; or

(c) an individual claimed by the candidate, public official, public member, or public employee or the candidate's, public official's, public member's, or public employee's spouse as a dependent for income tax purposes.

(19) "Income" means the receipt or promise of any consideration, whether or not legally enforceable.

(20) "Individual" means one human being.

(21) "Individual with whom he is associated" means an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

(22) "Loan" means a transfer of money, property, guarantee, or anything of value in exchange for an obligation, conditional or not, to repay in whole or in part.

(23) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action.

(24) "Person" means an individual, a proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, an estate, a company, committee, an association, a corporation, club, labor organization, or any other organization or group of persons acting in concert.

(25) "Public employee" means a person employed by the State, a county, a municipality, or a political subdivision thereof.

(26) "Public member" means an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

(27) "Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. "Public official" does not mean a member of the judiciary except that for the purposes of campaign practices, campaign disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter.

(28) "Represent" or "representation" means making an appearance, whether gratuitous or for compensation, before a state agency, office, department, division, bureau, board, commission, or council, including the General Assembly, or before a local or regional government office, department, division, bureau, board, or commission.

(29) "Substantial monetary value" means a monetary value of five hundred dollars or more.

(30) "Official capacity" means activities which:

(a) arise because of the position held by the public official, public member, or publi employee;

(b) involve matters which fall within the official responsibility of the agency, the public official, the public member, or the public employee; and

(c) are services the agency would normally provide and for which the public official, public member, or public employee would be subject to expense reimbursement by the agency with which the public official, public member, or public employee is associated.

(31) "State board, commission, or council" means an agency created by legislation which has statewide jurisdiction and which exercises some of the sovereign power of the State.

§8-13-700. Use of official position or office for financial gain; disclosure of potential conflict of interest.

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.

(B) No public official, public member, or public employee may make, participate in making, c in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with

whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;

(2) if the public official is a member of the General Assembly, he shall deliver a copy of the statement to the presiding officer of the appropriate house. The presiding officer shall have the statement printed in the appropriate journal and require that the member of the General Assembly he excused from votes, deliberations, and other action on the matter on which a potential conflict exists;

(3) if he is a public employee, he shall furnish a copy of the statement to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;

(4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;

(5) if he is a public member, he shall furnish a copy to the presiding officer of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause such disqualification and the reasons for it to be noted in the minutes.

(C) Where a public official, public member, or public employee or a member of his immediate family holds an economic interest in a blind trust, he is not considered to have a conflict of interest with regard to matters pertaining to that economic interest, if the existence of the blind trust has been disclosed to the appropriate supervisory office.

(D) The provisions of this section do not apply to any court in the unified judicial system.

(E) When a member of the General Assembly is required by law to appear because of his business interest as an owner or officer of the business or in his official capacity as a member of the General Assembly, this section does not apply.

Police officers may utilize uniforms, weapons, and like equipment in off-duty security work in accordance with §23-24-10, when properly approved by law enforcement agency and governing body and when no additional public expense would be involved. Op S.C. St. Ethics Comm., SEC AO92-154, May 27, 1992.

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§8-13-705. Offering, giving, soliciting, or receiving anything of value to influence action of public employee, member or official, or to influence testimony of witness; exceptions; penalty for violation.

(A) A person may not, directly or indirectly, give, offer, or promise anything of value to a public official, public member, or public employee with the intent to:

(1) influence the discharge of a public official's, public member's, or public employee's official responsibilities;

(2) influence a public official, public member, or public employee to commit, aid in committing, collude in, or allow fraud on a governmental entity; or

(3) induce a public official, public member, or public employee to perform or fail to perform an act in violation of the public official's, public member's, or public employee's official responsibilities.

(B) A public official, public member, or public employee may not, directly or indirectly, knowingly ask, demand, exact, solicit, seek, accept, assign, receive, or agree to receive anything of value for himself or for another person in return for being:

(1) influenced in the discharge of his official responsibilities;

(2) influenced to commit, aid in committing, collude in, allow fraud, or make an opportunity for the commission of fraud on a governmental entity; or

(3) induced to perform or fail to perform an act in violation of his official responsibilities.

(C) A person may not, directly or indirectly, give, offer, or promise to give anything of value t another person with intent to influence testimony under oath or affirmation in a trial or other proceeding before:

(1) a court;

(2) a committee of either house or both houses of the General Assembly; or

(3) an agency, commission, or officer authorized to hear evidence or take testimony or with intent to influence a witness to fail to appear.

(D) A person may not, directly or indirectly, ask, demand, exact, solicit, seek, accept, assign, receive, or agree to receive anything of value in return for influencing testimony under oath or affirmation in a trial or other proceeding before:

(1) a court;

(2) a committee of either house or both houses of the General Assembly; or

(3) an agency, commission, or officer authorized to hear evidence or take testimony, or with intent to influence a witness to fail to appear.

(E) Subsections (C) and (D) of this section do not prohibit the payment or receipt of witness fees provided by law or the payment by the party on whose behalf a witness is called and receipt by a witness of the reasonable costs of travel and subsistence at trial, hearing, or proceeding or, in the case of an expert witness, of the reasonable fee for time spent in the preparation of the opinion and in appearing or testifying.

(F) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be punished by imprisonment for not more than ten years and a fine of not more than ten thousand dollars and is permanently disqualified from being a public official or a public member. A public official, public member, or public employee who violates the provisions of this section forfeits his public office, membership, or employment.

(G) This section does not apply to political contributions unless the contributions are conditioned upon the performance of specific actions of the person accepting the contributions nor does it prohibit a parent, grandparent, or other close relative from making a gift to a child, grandchild, or other close relative for love and affection except as otherwise provided.

The Ethics Reform Act does not prohibit local businesses from establishing committee to solicit contributions from the private sector with which to purchase bulletproof vests and other equipment for Richland County Sheriff's Department. Op. S.C. St. Ethics Comm., SEC AO94-001, July 21, 1993.

§8-13-710. Reporting of particular gifts received by public employee, official, or member on statement of economic interests.

(A) Unless provided by subsection (B) and in addition to the requirements of Chapter 17 of Title 2, a public official or public employee required to file a statement of economic interests under Section 8-13-1110 who accepts anything of value from a lobbyist's principal must report the value of anything received on his statement of economic interests pursuant to Section 8-13-1120(A)(9).

(B) A public official, public member, or public employee required to file a statement of economic interests under Section 8-13-1110 who receives, accepts, or takes, directly or indirectly, from a person, anything of value worth twenty-five dollars or more in a day and anything of value worth two hundred dollars or more in the aggregate in a calendar year must report on his statement of economic interests pursuant to Section 8-13-1120 the thing of value from:

(1) a person, if there is reason to believe the donor would not give the thing of value but for the public official's public member's, or public employee's office or position;

(2) a person, or from an officer or director of a person, if the public official, public member, or public employee has reason to believe the person:

(a) has or is seeking to obtain contractual or other business or financial relationships with the public official's, public member's, or public employee's governmental entity;

(b) conducts operations or activities which are regulated by the public official's, public member's, or public employee's governmental entity.

(C) Nothing in this section requires a public official, public member, or public employee to report a gift from a parent, grandparent, or relative to a child, grandchild, or other immediate family member for love and affection.

§8-13-720. Offering, soliciting, or receiving money for advice or assistance of public official, member or employee.

No person may offer or pay to a public official, public member, or public employee and no publi official, public member, or public employee may solicit or receive money in addition to that receive by the public official, public member, or public employee in his official capacity for advice or assistance given in the course of his employment as a public official, public member, or public employee.

Law enforcement agency would not be prohibited from accepting rewards from military installations for apprehending deserters from installations, there being no reason why such reward could not be accepted by office to assist office in carrying out its mandated responsibilities since no employee receives any personal benefit. Op S.C. St. Ethics Comm., SEC AO92-122, March 25, 1992.

III. SUMMARY

The duty of a law enforcement officer is to the public which he or she serves. Inherent in this concept of public service must be the realization that public, and not private, benefit is the cornerstone of effective law enforcement service. Duty to the public means that the officer will provide fair and just treatment of all citizens, whether suspects or not. Fair and just treatment of the citizen requires that the officer neither personally abuse the trust which the public has reposed in him or her, nor allow other officers to abuse that trust. The law enforcement officer, as a public servant, must not allow the self-serving interests of others to detract him or her from the ethical performance of duty. The isolation or ostracism which an officer may experience by the actions of some colleagues is indicative of the need for reform within the system. Reform, leading to true professionalism and ethical policing, starts with the individual.

INSTRUCTIONAL CONTENT
BIBLIOGRAPHY

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Ethics in Law Enforcement	L-10	Revised April 2006

1. The South Carolina Code of Laws
   §§ 8-13-100, 8-13-700, 8-13-705, 710, 720, 725, 735, 740, 780, 790

2. The United States Constitution

3. Video: "Ethics in Law Enforcement", AIMS Media

4. Video: "The Ethical Dilemma Training Scenario Video Series", The National Inst. of Ethics and The North Carolina Justice Academy

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CJA LESSON PLAN COVER SHEET

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Specific Crimes	L-13	Revised July 2006

TRAINING DEPARTMENT:	TIME ALLOCATION:
Legal	7.5 Hours

PRIMARY INSTRUCTOR:	ALT. INSTRUCTOR:	LESSON PREPARED BY:
		George Glassmeyer

DATE LESSON PLAN PREPARED:	JOB TASK ANALYSIS DATE:
February 12, 1998	2005

LESSON PLAN PURPOSE:

To provide the student with the ability to recognize and classify common crimes.

EVALUATION PROCEDURES:

Written Examination, Multiple Choice
70% Minimum Passing Score

TRAINING AIDS, SUPPLIES, EQUIPMENT, SPECIAL CLASSROOM/INSTRUCTIONAL REQUIREMENTS:

PowerPoint
VCR

PERFORMANCE OBJECTIVES

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Specific Crimes	L-13	Revised July 2006

PERFORMANCE OBJECTIVES:

1. Explain and identify the following specific crimes, including the elements of each:
   - a. Grand Larceny
   - b. Petit Larceny
   - c. Burglary
   - d. Trespass
   - e. Trespass by Acts Inconsistent with Ownership
   - f. Entering Premises After Warning or Refusing to Leave on Request
   - g. Shoplifting
   - h. Breach of Trust with Fraudulent Intent
   - i. Embezzlement (of public funds)
   - j. Obtaining Goods by False Pretenses
   - k. Forgery
   - l. Check Fraud (fraudulent checks)
   - m. Robbery
   - n. Carjacking
   - o. Receiving Stolen Goods
   - p. Unlawful Carrying of a Pistol
   - q. Sale or Delivery of a Pistol to Certain Persons is Unlawful; Possession of a Pistol by Certain Persons Unlawful
   - r. Public Disorderly Conduct
   - s. Driving Under the Influence (DUI)
   - t. Murder
   - u. Voluntary Manslaughter
   - v. Involuntary Manslaughter

PERFORMANCE OBJECTIVES (Continued)

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Specific Crimes	L-13	Revised July 2006

PERFORMANCE OBJECTIVES:

w. Reckless Homicide
x. Felony DUI
y. Threatening Life, Person, or Family of Public Official
z. Assault and Battery with Intent to Kill (ABIK)
aa. Assault and Battery of a High and Aggravated Nature (ABHAN)
bb. Simple Assault and Battery
cc. Resisting Arrest
dd. Assault on Officer While Resisting Arrest
ee. Resisting Arrest with a Deadly Weapon
ff. Illegal Transportation of Alcoholic Liquors
gg. Open Containers of Beer or Wine in Vehicle
hh. Purchase or Possession of Beer or Wine by Person under Twenty-One
ii. Purchase or Possession of Liquor by Minor
jj. Kidnapping
kk. Criminal Sexual Conduct
ll. Criminal Sexual Conduct: Child Victim
mm. Assault with Intent to Commit Criminal Sexual Conduct
nn. Criminal Sexual Conduct: Victim is Legal Spouse (Spousal Sexual Battery – Married and Living Together)
oo. Criminal Sexual Conduct: Victim is Legal Spouse (Married and Living Apart)
pp. Lewd Act Upon a Child
qq. Contributing to the Delinquency of a Minor

Related Offenses

§23-31-400 Using a Firearm While Under the Influence of Alcohol or a Controlled Substance

§16-23-460 Carrying a Deadly Weapon

§16-23-465 Carrying a Firearm Onto a Business Premises

§16-23-420 Carrying a Firearm Onto the Premises of an Educational Institution or Public Building

18. CRIME: PUBLIC DISORDERLY CONDUCT

SOURCE: §16-17-530

CLASS: Misdemeanor

ELEMENTS:

1. The accused was on any highway, public place or public gathering grossly intoxicated, disorderly, boisterous or
2. The accused was using obscene or profane language in hearing distance of school, church, any public place or
3. While under the influence or feigning to be, the accused discharged a firearm, without just cause or excuse, while upon or within 50 yards of any public road or highway, except upon his own premises.

COURT: Summary Court

PUNISHMENT: $100 or 30 Days

NOTE:

1. There is very little case law in South Carolina defining what is or is not a public place. The Supreme Court of South Carolina defined public place in State v. Williams, 312 S.E.2d 555 (S.C. 1984) in quoting Black's Law Dictionary, 4th ed.:

   "A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. People v. Whitman, 178 App. Div. 193, 165 N.Y.S. 148, 149. Roach v. Eugene, 23 Or. 376, 31 P. 825. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Steph.Cr.L. 115. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro. Lewis v. Commonwealth, 197 Ky. 449, 247 S.W. 749, 750."

2. A hotel lobby is a public place. State v. Williams, 312 S.E.2d 555, 556 (S.C. 1984).

3. Physical presence of individuals other than defendant and law enforcement officer who makes arrest is not necessary for disorderly conduct violation to occur. 1991 Op. Atty. Gen. No. 91-33, p. 89.

4. Offense may be committed by a person in a vehicle in a public place such as a highway. State v. Pittman, 537 S.E.2d 563 (2000).

19. CRIME: DRIVING UNDER THE INFLUENCE

SOURCE: §56-5-2930

CLASS: Misdemeanor

ELEMENTS: It is unlawful for a person to drive a motor vehicle within this State while under the:

1. influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired; or

2. influence of any other drug or combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or

3. combined influence of alcohol and any other drug or drugs, or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

COURT: Summary Court (1st Offense)

General Sessions Court (2nd and Subsequent Offenses)

PUNISHMENT: §56-5-2940

1st Offense: $300 or imprisonment for not less than 48 hours nor more than 30 days.

48 hours of public service employment may be substituted for imprisonment by the court but may not be compelled.

2nd and Subsequent Offenses: See §56-5-2940

Revised December 1998

20. CRIME: MURDER

SOURCE: §16-3-10

CLASS: Felony

ELEMENTS: 1. Unlawful killing of another person.

2. Malice aforethought.

COURT: General Sessions

PUNISHMENT: Death, imprisonment for life, or a mandatory minimum of 30 years.

Note: Malice means the defendant acted with hatred, ill will, or evil inten

Westlaw

Code 1976 § 16-17-530

C

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 17. Offenses Against Public Policy
Article 7. Miscellaneous Offenses
§ 16-17-530. Public disorderly conduct.

Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

CREDIT(S)

HISTORY: 1962 Code § 16-558; 1952 Code § 16-558; 1949 (46) 466; 1968 (55) 2842; 1969 (56) 153.

CROSS REFERENCES

Applicability of provisions pertaining to use of uniform traffic ticket, see § 56-7-10.
Use of threatening, obscene or profane language addressed to the driver or passengers of a school bus as disorderly conduct punishable under this section, see § 59-67-245.

LIBRARY REFERENCES

Disorderly Conduct 1, 15.
WESTLAW Topic No. 129.
C.J.S. Disorderly Conduct §§ 2 to 5, 13.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Breach of Peace § 4, Peace Defined.

S.C. Jur. Constitutional Law § 59, Breach of Peace.

S.C. Jur. Disorderly Conduct § 5, Intoxication.

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S.C. Jur. Disorderly Conduct § 6, Boisterous Conduct.

S.C. Jur. Disorderly Conduct § 7, Obscene, Profane or Abusive Language.

S.C. Jur. Disorderly Conduct § 8, Discharge of Firearm.

S.C. Jur. Disorderly Conduct § 9, Public Places Generally.

Treatises and Practice Aids

Employment Coordinator Labor Relations § 2:46, South Carolina.

Employment Coordinator Labor Relations § 40:84, Disorderly Conduct.

Employment Coordinator Labor Relations § 62:206, Criminal Offenses.

ATTORNEY GENERAL'S OPINIONS

Physical presence of individuals other than defendant and law enforcement officer who makes arrest is not necessary for disorderly conduct violation to occur. 1991 Op Atty Gen No 91-33, p 89.

Venue in the case of DUI and Public Drunk in more than one county if the crime was committed in both. 1974-75 Op Atty Gen, No 3960, p 31.

South Carolina Code Section 16-17-420 makes it unlawful to interfere with or to disturb in any way the students or teachers of any school. Fighting would be included within the prohibition of Section 16-17-420. 1994 Op Atty Gen, No 94-25, p 62.

Failure by a student or other person to leave a school campus or school bus, when requested to do so by a principal, could, under particular circumstances, constitute a criminal offense. 1994 Op Atty Gen, No 94-25, p 62.

Use of foul or offensive language toward a principal, teacher, or police officer can constitute a crime. 1994 Op Atty Gen, No 94-25, p 62.

NOTES OF DECISIONS

In general 1
Sufficiency of evidence 2

1. In general

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A belief that a person is or is not a police officer is not an element of the charge of public disorderly conduct. State v. Gault (S.C.App. 2007) 375 S.C. 570, 654 S.E.2d 98, rehearing denied. Disorderly Conduct ⚿ 131

Defendant's yelling of profanities at another person and his mother while they were leaving courthouse and walking across municipal parking lot, accompanied with loud manner in which profanities were spoken, constituted fighting words which were not afforded freedom of speech protection under the First Amendment and, thus, constituted a violation of public disorderly conduct statute; defendant called other person a "crack head" and called his mother a "bitch," and mother testified defendant called her names and used the "f" word. City of Landrum v. Sarratt (S.C.App. 2002) 352 S.C. 139, 572 S.E.2d 476. Constitutional Law ⚿ 1562; Constitutional Law ⚿ 1759; Disorderly Conduct ⚿ 110; Disorderly Conduct ⚿ 127

Arrest of defendant under public disorderly conduct statute was justified, though defendant was a passenger in a motor vehicle, rather than its operator, and defendant's loud, obscene language was directed solely at police officer, where defendant was grossly intoxicated. State v. Pittman (S.C.App. 2000) 342 S.C. 545, 537 S.E.2d 563. Arrest ⚿ 63.4(15)

A conviction for public disorderly conduct was improper where the defendants went to a county Sheriff's office to obtain a copy of an incident report which they needed to obtain a warrant from a magistrate, an employee of the office told the defendants that the report was not ready yet, the defendants became upset and raised their voices but did not use words which would by their very utterance inflict injury or tend to incite an immediate breach of the peace, and the defendants were arrested as they were attempting to leave the Sheriff's office. State v. Perkins (S.C. 1991) 306 S.C. 353, 412 S.E.2d 385.

Probable cause to arrest for violation of this section existed where, having been stopped by police on suspicion of another crime, defendants immediately jumped from car and shouted profanities. State v. Roper (S.C. 1979) 274 S.C. 14, 260 S.E.2d 705. Arrest ⚿ 63.4(15)

Quoted in State v. Hanapole (S.C. 1970) 255 S.C. 258, 178 S.E.2d 247.

The use of abusive, obscene, vulgar or profane language to a woman or woman child over the telephone is not encompassed within the provisions of this section [Code 1962 § 16-558]. State v. Gist (S.C. 1960) 237 S.C. 262, 116 S.E.2d 856. Disorderly Conduct ⚿ 109; Telecommunications ⚿ 1013

2. Sufficiency of evidence

Evidence existed to support a charge against defendant for public disorderly conduct, and thus, magistrate court judge did not err in refusing to direct a verdict; undercover officer testified that after defendant pulled into his place of business, defendant jumped out of his car and screamed, "I don't know you. Somebody is going to kill you for this," and an officer who arrived at the scene shortly thereafter also testified to defendant's continued belligerent, threatening, and disorderly behavior. State v. Gault (S.C.App. 2007) 375 S.C. 570, 654 S.E.2d 98, rehearing denied. Disorderly Conduct ⚿ 141

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A conviction for public disorderly conduct requires a defendant to have used fighting words when the conduct in question was directed toward a police officer. State v. Bailey (S.C.App. 2006) 368 S.C. 39, 626 S.E.2d 898, rehearing denied , certiorari denied. Disorderly Conduct ⚿ 133

Evidence was insufficient to support conviction for public disorderly conduct based on defendant's conduct toward deputies outside of store, even though one deputy testified that defendant was loud and boisterous with them, and other deputy testified that defendant was very loud and became belligerent with him; nothing indicated that anything said by defendant to deputies amounted to fighting words. State v. Bailey (S.C.App. 2006) 368 S.C. 39, 626 S.E.2d 898, rehearing denied , certiorari denied. Disorderly Conduct ⚿ 133; Disorderly Conduct ⚿ 134

In prosecution for resisting arrest with a deadly weapon, a jury question was presented as to whether underlying arrest for disorderly conduct was lawful on ground defendant was conducting himself in a grossly intoxicated and disorderly manner in a public place, in light of evidence that defendant was acting in a loud and boisterous manner and cursing at police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul-de-sac across the street. State v. McGowan (S.C. 2001) 347 S.C. 618, 557 S.E.2d 657, habeas corpus dismissed 2007 WL 914295. Obstructing Justice ⚿ 17.2

Evidence was sufficient to support submission of the disorderly conduct charge to the jury, in prosecution for resisting arrest, disorderly conduct, and assault; police officer testified that when he attempted to arrest defendant the defendant threw his arms up in the air, yelled obscenities, and refused to comply with the officers demands, and defendant taunted two police officers regarding their lack of success in bringing him under control. State v. LaCoste (S.C.App. 2001) 347 S.C. 153, 553 S.E.2d 464, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 353 S.C. 538, 579 S.E.2d 318. Disorderly Conduct ⚿ 149

Code 1976 § 16-17-530, SC ST § 16-17-530

Current through End of 2010 Reg. Sess.

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CJA LESSON PLAN COVER SHEET

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Defensive Tactics/Use of Force	162A	Revised August 2006

TRAINING DEPARTMENT:	TIME ALLOCATION:
Physical Training	2.5 Hours

PRIMARY INSTRUCTOR:	ALT. INSTRUCTOR:	LESSON PREPARED BY:
		Bruce Hancock

DATE LESSON PLAN PREPARED:	JOB TASK ANALYSIS DATE:
September 8, 1998	2005

LESSON PLAN PURPOSE:

Traditionally, the training for police officers in use of force does not address key issues. Upon completion, each student will be familiar with the use of force continuum and all the necessary steps that must be taken prior to using various types of physical force or deadly force.

EVALUATION PROCEDURES:

Multiple Choice, Written Examination
80% Minimum Passing Standard

TRAINING AIDS, SUPPLIES, EQUIPMENT, SPECIAL CLASSROOM/INSTRUCTIONAL REQUIREMENTS:

1 – Controller 2001
1 - PR-24
2 – Straight Batons (Short and Long)
1 – Black Jack
1 – SAP
1 – Dummy Gun
1 – Knife
1 – Pass Con 2000
1 – Handler 12
1 – Expandable Straight Baton
1 – Mag Light
PowerPoint Presentation, Videos
TV, VCR

PERFORMANCE OBJECTIVES

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Defensive Tactics/Use of Force	162A	Revised August 2006

PERFORMANCE OBJECTIVES:

1. Explain the history of the PPCT Management Systems.
2. Identify the three components of acceptability.
3. Identify the four most common types of resistance.
4. Explain case law (Graham v. Connor) and how this case relates to the force continuum.
5. Identify levels of resistance.
6. Identify levels of control.
7. Identify elements of deadly force.
8. Identify deadly force case law.
9. Identify force continuum variables.
10. Identify elements of reporting force.
11. Identify principles of controlling resistive behavior.
12. Identify reaction time.
13. Identify the reactionary gap, and reactionary options to resistance.
14. Identify tactical positioning.

LESSON PLAN EXPANDED OUTLINE

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Defensive Tactics/Use of Force	162A	Revised August 2006

I. INTRODUCTION

Before we begin, examine your training objectives for this class. These are important points to remember.

II. BODY

A. HISTORY OF PPCT

First, we would like to talk a little bit about the history of PPCT.

1. The PPCT Management Systems Inc. is a corporation which specializes in providing research based training systems for law enforcement, correction, military, and private security designed to minimize the ever-present risk of liability.

2. The PPCT system was actually conceptualized in 1979 by its founder, Bruce Siddle. Since that time, the PPCT training system has been an overwhelming success and has been adopted by hundreds of major agencies throughout the United States and the world.

B. COMPONENTS OF ACCEPTABILITY

1. Unlike many current police subject control systems, the PPCT system was developed based upon the most common types of physical resistance faced by patrol officers. In the past, techniques were taught based upon every type of resistance conceivable. These program included complicated physical movements that couldn't be taught or learned in allotted time and could not be performed by officers under stress of actual confrontations. These techniques may work in the gym (static environment), but not on the street.

2. To avoid these pitfalls, the PPCT system was designed. As a result, PPCT techniques are kept to a minimum in number and simple. This is accomplished by developing techniques that control the most common types of resistance. The system examines four categories of resistive behavior that you will see the most on the street.

3. Training from this approach places more emphasis on subject control techniques for realistic resistive behavior, thus maximizing training time and increasing physical abilities to perform techniques.

4. One aspect of the PPCT system that sets it apart from others is the extensive research that makes this system court defensible.

5. This research examined three important perspectives or components of acceptability:

   a. Tactical Acceptability

      (1) Techniques are easy to learn and retain.

      (2) Less is best – The fewer techniques that we learn, the greater potential to remember them in a stressful situation.

(3) Commonality in technique – A lot of the techniques that are taught are similar in nature.

(4) Stimulus response training – Any training that correlates action with a stimulus.

(5) Gross motor skills – Pushing and pulling movements (using large appendages). There are three types of motor skills – fine, complex, and gross. We use gross motor skills the most in stressful situations, especially when our hearts rise above 175 beats per minute.

b. Medical Acceptability – The medical implications of each technique have been researched and are known to us. Through this research, we know what type of medical problems we can expect from using a specific technique.

Normal Use – Technique used at normal speed with no resistance.

Accelerated Use – Technique done at full speed and with full resistance.

c. Legal Acceptability – A force continuum has been developed based on existing non-lethal force and lethal force case law. A department policy on use of force should exist. Officers must be familiar with local, state, and federal laws.

C. CATEGORIES OF RESISTIVE BEHAVIOR

The following categories represent the most common types of resistance that an officer will encounter.

1. Resistance from the escort position.

2. Resistance while applying handcuffs.

3. Passive resistance.

4. Active aggression.

D. INTRODUCTION TO CASE LAW (GRAHAM V. CONNOR)

This unit will explore the PPCT resistance/control continuum. This continuum was developed using case law as a guide to the proper use of force.

In May 1989, the U.S. Supreme Court in Graham v. Connor, 490 U.S. 386 (1989), stated that all claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop or other "seizure" of a person are properly analyzed under Fourth Amendment's "objective reasonableness" standard. So we can safely say that all force used must be reasonable and necessary under existing circumstances.

The Graham Case made it clear that the standard for an officer's use of force upon a "seized free citizen" was whether the officer's force was "objectively reasonable" under the Fourth Amendment.

Use of Force Guidelines

1. All force must be reasonable.

2. All force used must be necessary.

3. Officer's actions will depend on the subject's actions, variables of the situation and the officer's knowledge of his/her own physical abilities.

E. LEVELS OF RESISTANCE

The purpose of the PPCT Defensive Tactics Subject Control System is to control resistive behavior with techniques that have minimal chance of injury.

The PPCT force continuum was designed to give officers a model in which to learn the various levels of subject resistance and the proper subject control response. This is only a model and should be based on the subject's actions, the officer's perception of threat, and the officer's knowledge of his/her own abilities.

Levels of Resistance

These are the levels of resistance from the suspect:

1. Psychological Intimidation – Nonverbal cues indicating the subject's attitude, appearance, and physical readiness. Examples: Karate stance, the finger, or the 1,000 yard stare.

2. Verbal Noncompliance – Verbal responses indicating unwillingness or threats from the subject. Examples: Telling the officer, "I'm not going with you," or "I'm going to kill you."

   Video: Verbal Attacks

3. Passive Resistance – Physical actions that do not prevent the officer's attempt to control. Example: Passive demonstrator sitting on the ground - usually referred to as dead weight.

4. Defensive Resistance – Physical actions that attempt to prevent an officer's control, bu never attempts to harm the officer. Example: Suspect pulls away from the officer, wrestles with the officer, or runs away.

   Video: California Officer

5. Active Aggression – Physical actions of assault against the officer. Example: Suspect punching or kicking the officer.

   Video: Female Officer Attacked on Ground

6. Deadly Force Assaults – Deadly force encounter with the subject. Example: Suspect trying to stab the officer with a knife or shoot the officer with a firearm.

   Video: Ground Encounter

F. LEVELS OF CONTROL

These are levels of control used by the officer:

1. Officer Presence – Identification of authority.

2. Verbal Direction – Commands of direction or arrest. Try to use at least three commands before using force.

3. Empty Hand Control

   a. Soft empty hand control – Techniques that have minimal chance of injury (touch pressure, joint locks). These techniques are designed for low levels of resistance.

   b. Hard empty hand control – Techniques that have a probability of injury (leg strikes, hand strikes, neck restraints). The strikes are used for high levels of resistance.

4. Intermediate Weapons

   a. Soft intermediate weapon control – Impact weapon joint locks and come-alongs.

   b. Hard intermediate weapon control – Impact weapon strikes, chemical agents and electrical devices.

   Video: Tazer Used on Car Stop

5. Lethal Force – Deadly force actions (can occur by using personal weapons, impact weapons, or firearms).

   Video: Suspect Shot Throwing Knife

The officer wants to try to stick to the ladder of force as much as he/she can. Due to other variables, we can't always do this. We may have to jump from Level #1 to Level #5 if the circumstances of the situation change.

We normally use the (1+1) principle when encountering force. We always want to be at one level higher than the suspect. For example, if a suspect is attacking an officer with an impact weapon, then the officer will be on the next level drawing a handgun. Think of the force continuum as an elevator; one can get off on any floor.

What about chemical agents and electrical devices? Both of these should fall within hard intermediate weapons, due to the probability of injury. Medical attention is mandatory after using impact weapons when used to strike. An officer must be trained and be proficient with all weapons that he/she carries.

We also need to identify the three components that must be present prior to the use of deadly force in self-defense, but first, we must define deadly force.

G. ELEMENTS OF DEADLY FORCE

Deadly force is any force that is likely to cause great bodily harm or death. Now, let's examine the three elements of deadly force.

1. Ability – The capability or means to cause great bodily harm or death.

2. Opportunity – In a position to cause great bodily harm or death.

3. Jeopardy – An overt threatening move or gesture that could cause great bodily harm or death.

Allow me to show you some situations that may explain these principles clearly.

Demonstration with a gun and a knife:

* If the suspect has a handgun and it is pointed toward the ground, the ability and opportuni is present, but not jeopardy. Once the suspect points the gun at an officer, or makes any movement toward the officer, then it's a different ball game and the officer would be justified to use deadly force.

* If the suspect is armed with a knife, then you must ask yourself if all three components are present. There is no golden rule to cover every situation. The circumstances and variables are normally different and can change. Normally, the officer will only have a split second to make a decision on the street.

H. DEADLY FORCE CASE LAW

As a direct result of the Tennessee v. Garner, 105 S. Ct. 1694 (1985), case, we have specific justifications in which we can use deadly force.

Deadly Force Justifications

1. To prevent death or serious injury to officer or another. (Graham v. Connor)

2. To prevent escape:

   Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving th infliction or threatened infliction of serious physical harm, deadly force may be used it necessary to prevent escape, and if, where feasible, some warning has been given.

3. The officer should not unreasonably or unnecessarily endanger himself/herself or public in the application of deadly force.

4. The officer should use verbal commands of authority and deterrence whenever feasible.

I. FORCE CONTINUUM VARIABLES

Let's talk for a moment about some of these variables that may come into play in use of force incidents.

These variables may affect an officer's decision in escalating or de-escalating the level of control.

1. Type of crime

2. Officer/Subject Size and Gender

3. Exigent Conditions

4. Reaction Time

5. Access to Weapons

6. Influence of Alcohol or Drugs

7. Injury or Exhaustion of Officer

8. Weather or Terrain Conditions

9. Special Knowledge

J. ELEMENTS OF REPORTING FORCE

The next item we need to examine is the report writing format for use of force incidents.

1. Officer Arrival
   a. Marked unit vs. unmarked
   b. Uniform vs. plain clothes
   c. Number of officers
2. Approach
   a. What officer observed
   b. Officer's initial verbal commands
3. Subject's Actions
   a. Subject's verbal responses
   b. Subject's body language
   c. Subject's physical actions
4. Officer's Actions
   a. Type of control methods used
   b. Duration of resistance
   c. Type of de-escalation methods used
   d. Handcuffed and double locked
5. Transport Procedure
   a. Subject's demeanor and actions
   b. Where transported to
   c. Length of transport

If the supervisor won't allow the officer to record all the above information, simply write a separate statement for personal use later.

It is very important that all details be included within the use of force report. If you are involved in a critical incident, always write supplemental reports to incident after sleep and rest. This should be done at 24 and 48 hour increments, due to the effects of critical incident amnesia. This condition can cause you to forget essential details of the incident.

K. PRINCIPLES OF CONTROLLING RESISTIVE BEHAVIOR

Generally, all subject control techniques utilize one of these principles to control resistive behavior.

1. Pain Compliance – The use of the stimulus pain to control resistive behavior.

   Demonstrate: Transport wristlock and mandibular angle

2. Distraction Technique – Control techniques that weaken motor action by changing the thought process.

   Demonstrate: Knee strike to Common Peroneal

3. Balance Displacement – Control techniques that displace balance through principles of leverage.

   Demonstrate: Pushing hips off line

4. Motor Dysfunction – Control striking techniques that over-stimulate motor nerves causing temporary muscle impairment. In layman's terms, this is a charley horse. It lasts from 30 seconds to several minutes.

   Demonstrate: Radial strike

5. Mental Stunning - Stimulation of overwhelming sensory input; average stun lasts from three to seven seconds.

   Video: Texas Incident

6. Additional Motor Responses:

   a. Flex-reflex response – A response of the affected hand/leg.

   b. Sympathetic reflex response – A response of the unaffected hand/leg.

L. REACTION TIME

Reaction time is the time it takes an officer to perceive a threat and then react to it physically.

If we look closely at what actually happens when we react to a threat, we can break reaction time down into different stages.

Stages of Reaction Time

1. Perception – Using the perceptual senses to recognize resistance or aggression. Identify pre-attack cues. Expect resistance and it may speed reaction time.

2. Analyze/Evaluate – Analyzing or evaluating what has been obtained through the senses. We have five senses, and E.S.P.

3. Formulate Strategies – Develop and formulate a plan to counter the offender's aggression. This plan is normally based on your prior experiences and training. Without either one you may experience a mental stall or lag time.

4. Initiate Motor Action – The brain transmits a message directing the body to respond in a certain manner. If you don't have a plan this final step cannot be completed.

All of these stages occur and are completed within seconds.

We will normally all be able to perceive and analyze a threat pretty easily, but we can't always formulate a strategy because we may have no prior training or experiences. We may also be unable to initiate a motor action if we have weak or no physical abilities to counterattack.

We must be ready for these attacks and prepare ourselves both mentally and physically.

M. REACTIONARY GAP

This is a safety zone between the officer and the offender that affords the officer more time to react to an aggression.

1. The average distance is six feet.
2. The gap will vary with the type of weapon the offender possesses.

The reactionary options to resistance are:

a. Penetrate the gap to attempt a control technique.

b. Disengage to increase the space.

N. TACTICAL POSITIONING

Tactical positioning is a method of tactically analyzing an officer's position in relation to the offender. Let's examine the five levels of tactical positioning:

1. Inside position – Too close to the suspect and should be avoided
2. Level I – Interview position.
3. Level II – Standing beside the suspect.
4. Level II ½ - Escort position.
5. Level III – Directly behind the suspect.

III. SUMMARY

The Resistance/Control Continuum that we have examined today is a foundation that we will build upon in the weeks to come.

INSTRUCTIONAL CONTENT
BIBLIOGRAPHY

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Defensive Tactics/Use of Force	162A	Revised August 2006

1. Siddle, Bruce. Defensive Tactics Student Manual. p. 197. PPCT Management Systems Inc. Millstadt, Illinois. 2001.

2. Siddle, Bruce. Model Use of Force Policy. p. 31. PPCT Management Systems Inc. Waterloo, IL 1984.

3. Siddle, Bruce. Police Defensive Tactics Instructor Manual. p. 197. PPCT Management Systems Inc. Belleville, Illinois. 2005.

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CJA LESSON PLAN COVER SHEET

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Officer Survival	250	Revised February 2006

TRAINING DEPARTMENT:	TIME ALLOCATION:
Physical Training	3.5 Hours

PRIMARY INSTRUCTOR:	ALT. INSTRUCTOR:	LESSON PREPARED BY:
		Bruce Hancock

DATE LESSON PLAN PREPARED:	JOB TASK ANALYSIS DATE:
September 2, 1997	2005

LESSON PLAN PURPOSE:

By examining various trends and reasons why police officers are killed needlessly each year, we can identify these errors and mistakes in hopes of possibly keeping them from reoccurring.

VALUATION PROCEDURES:

Multiple Choice, Written Examination
70% Minimum Passing Standard

TRAINING AIDS, SUPPLIES, EQUIPMENT, SPECIAL CLASSROOM/INSTRUCTIONAL REQUIREMENTS:

PowerPoint Presentation
TV
VCR
Videotapes
Body Armor Samples
Various Equipment

PERFORMANCE OBJECTIVES

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Officer Survival	250	Revised February 2006

PERFORMANCE OBJECTIVES:

1. Identify police lawsuits, assaults and killings.
2. Identify specialized police equipment such as soft body armor.
3. Explain the relationship between distance and the number of police officers killed.
4. Identify police officers killings nationwide by regions
5. Identify various responsibilities of the contact officer and cover officer.
6. Identify the types of ambushes and various ambush countermeasures.
7. Identify deadly mistakes to increase proper survival options and safe tactics
8. Identify tactical circumstances that may lead to police officer killings.
9. Identify tactical options for handgun retention
10. Identify proper countermeasures when attacked with an edged weapon.
11. Identify options when attacked by a vicious dog.
12. Identify knowledge of off duty survival.
13. Identify equipment issues that will increase survival.

LESSON PLAN EXPANDED OUTLINE

CLASS TITLE:	LESSON PLAN #:	STATUS (New/Revised):
Officer Survival	250	Revised February 2006

I. INTRODUCTION

Each year throughout the United States, numerous police officers become fatal casualties. It is really tough to identify the number one reason why. It is our purpose to identify various things that may contribute to these officers needlessly losing their lives so that we don't make the same mistakes.

A. OVERVIEW OF VIOLENCE IN THE UNITED STATES

We live in a very violent society. In the United States alone, each year we have roughly 12,000 homicides. If we did a case study of these murders, which include police killings, we would find that there are three problem areas, or three groups of society, which causes a great deal of our problems. These are called the 3-Ds:

1. The Drunks
2. The Drugged
3. The Deranged

If you pick up the paper or watch the news, you will see these individuals appearing over and over again. Unfortunately for us, many of the homicides in the U.S. each year are police officer killings. We plan to identify some of the causes and reasons why officers die each year.

B. OBJECTIVE OF CLASS

We will not cover the specifics on how to handle things such as domestic disputes, alarm calls, and high risk traffic stops; these things will be covered with you at a later time during patrol procedures. Instead, we will look at trends and mistakes officers have made in the past so that you will not make these same mistakes.

II. BODY

A. LAWSUITS, ASSAULTS, AND KILLINGS

Over the past several decades, the number of lawsuits against police officers has risen. This is probably due to the large number of lawyers in the general population. The number of assaults against officers has also increased steadily over the past number of years. Each year, roughly 57,000 assaults against officers occur, with the suspect's personal weapons being the number one weapon used. A personal weapon is something attached to the body.

Statistics have shown a steady decline in the total number of officers killed nationwide. The primary reasons why we have seen a decrease are better equipment (more officers wearing soft body armor) and better training.

B. BALLISTIC VESTS

The number one weapon used to kill police officers has been and continues to be handguns. This is another very good reason to buy a ballistic vest.

On a national level, 41.3% of officers who are killed each year are killed by medium energy handguns, to include 9 mm, .357 magnum, .40 caliber, and .45 caliber. Low energy handguns, .22 - .38 caliber, are the second most common ranking weapons used in police officer killings, at 32%; rifles follow at 10.6%, and high energy handguns (.41 caliber and 44 magnum) at 4%.

In South Carolina, use of different firearms against police officers are listed below:

1. Handguns 71%
2. Other Weapons 14%
3. Rifle 11%
4. Shotgun 4%

In a study of 164 police officers wounded by firearms who were wearing ballistic vests, 110 had suffered from shots to the head, 52 received shots to the torso region, and two were shot below the waist.

Unfortunately, we cannot control where we will be shot on the body, so we cannot control gunshot wounds to the head or lower torso, but we can control the seriousness of a wound to the torso by wearing soft body armor.

There are various threat levels on ballistic vests and they are listed below:

- Threat level I protects officers from .22, .25, .32, and .38 caliber weapons
- Threat level IIA provides protection from lower velocity .357 magnum and 9 mm weapons.
- Threat level II protects officers from higher velocity rounds from .357 magnum and 9 mm.
- Threat level IIIA vests will provide protection from 44 magnum and 9 mm machine guns.

The Criminal Justice Academy recommends that officers wear a Threat Level IIIA vest with a shock plate, making sure that the vest worn will at least stop whatever round the officer is carrying in his/her weapon, in the event that the weapon is taken from and used against the officer.

There are several considerations to keep in mind concerning the selection and wearing of a ballistic vest. Most manufacturers produce vests that conform to the National Institute of Justice's standards. Depending on the particular threat level worn and the materials used in manufacturing, weights of the vests will vary.

There are two particular types of materials used in the production of ballistic vests. Kevlar has been used since the 1970s and has proven to provide sufficient protection against various types of firearms. Spectra has been more commonly used in the last several years and has been proven to provide good ballistic protection as well. There are some points that need to be made about both.

Kevlar, a nylon material, is heavier than Spectra's plastic woven material. Kevlar loses about 30% of its effectiveness in water, but when it dries, it becomes 100% effective again. Over time, water and perspiration will break Kevlar down, as will sunlight.

Spectra is not affected by sunlight or water. It is 10 times stronger than steel, and a rope of Spectra can be used to lift a patrol car. It is also very lightweight. Because of the recorded success and reliability of Kevlar and the new technology involving Spectra, many manufacturers are producing vests made of a combination of both materials.

Either Kevlar or Spectra will protect the officer against slashes with edged weapons, but if slashes or firearms have damaged a vest, it should be replaced. Some companies will replace a vest at no cost to the officer if the vest is returned with an incident report explaining the nature of the incident. Officers need to be aware that stabs and thrusts by edged weapons will most likely penetrate the vest, and there is a much greater likelihood of serious injury or death occurring from such attacks. Whether damaged or not, ballistic vests should be replaced every five years.

Ballistic vests will also help protect officers from punches and kicks to the torso, as well as injuries caused by automobile accidents. For added protection, shock plates or strike faces can be placed inside the vest's pouches. Shock plates are usually made of a very strong metal. They may or may not provide ballistic protection. Strike faces are usually made of Kevlar, Spectra, or a combination of both, and will usually absorb a round from a firearm.

Another important point is that officers should wear both the front and back panels of the vest. Some officers have stated that because of the weight and thickness of the vest, and because they believed that if shot they would most likely be shot in the front of the body, only wore the front panel. This practice may result in a deadly mistake.

A round taken in a vest will sometimes result in blunt trauma to the police officer, but only a few officers worldwide have died from blunt trauma. Thousands have been saved by wearing them.

Proper fitting of the vests is important because of the differing body types among both males and females. Officers should avoid buying a vest "off the sales rack," instead, they should get measure accurately so that protection by side panels and maximum comfort in both the front and back can be achieved.

Cost is often a factor with police officers who may have to invest personal monies into the purchasing of a ballistic vest. Costs range from $300 to $1,000, depending on the type and manufacturer of the vest. Regardless of the cost, ballistic vests have proven to be a significantly inexpensive form of life insurance.

Ballistic vests do not make an officer immortal. There are some ammunitions which have been developed to penetrate a vest, to include armor piercing. Officers should always seek cover, whenever possible, if dealing with a suspect armed with a gun or edged weapon.

Video: Spectra

Video: Davis Shooting Himself

C. FIREARMS KILLINGS VS. DISTANCE

The relationship between the distance of the suspect to the officer plays a role in the number of officers killed with firearms.

Distance Between Victim, Officer, and Suspect(s)

Nationwide more officers are killed with firearms from 0 – 5 feet than from any other distance. To compensate we must:

1. Maintain safe distances from suspect (6 – 10 ft.).
2. Become more aware of danger signs and suspect's hands.
3. Always maintain a good F. I. stance.
4. Receive weapon retention training.
5. Learn effective disarming techniques.
6. Improve close quarters firearms training.

D. POLICE OFFICER KILLINGS NATIONWIDE BY REGIONS

More police officers are killed in the southern region of the United States than in any other area of the country. Some factors leading to police officers' being killed may include:

1. Border states – illegal aliens and drug trafficking.
2. Drug activity – eastern seaboard, especially from Miami to New York.
3. Gun control – more availability of handguns than in the past.
4. Education – standards have been lowered in the past several years; also, lack of education often leads to lack of job opportunity and more criminal activity.
5. Climate – the southern part of the country suffers from high humidity and high heat indexes.
6. Two vs. One Officer Units – rarely do Police and Sheriff's Departments assign two officers to one patrol unit.
7. Training – unlike the past, the requirement has been changed so that officer recruits are sent for basic law enforcement training before being placed on patrol. Training below par in other states.

The most dangerous time period for assaults and killings of police officers is between 8:00 p.m. and 12:00 a.m.

The southern region also leads in accidental deaths, with vehicular accidents being the primary cause of these deaths.

E. CONTACT VS. COVER OFFICERS

When an officer is dispatched to a serious call, a backup officer should always be sent to assure the first officer's safety. It is very important that officers know what their individual responsibilities are when in a two-officer unit or assisting another officer on a call. By not following these guidelines, it could cost someone his/her life.

1. The Contact Officer conducts all the business of the encounter.
   a. Issues all verbal commands.
   b. Performs handcuffing and searching.

c. Handles all radio communications.

d. Documents the incident.

e. Recovers evidence or contraband.

2. The Cover Officer devotes full attention to the suspects from a position behind cover.

a. Must resist all distractions.

b. Will discourage all hostile acts by suspects.

c. Will stop any escape attempts.

d. Prevents destruction of evidence.

e. Intervenes with force when necessary.

Video: Georgia Trooper

F. AMBUSHES

1. Types of Ambushes

There are three different types of ambushes:

a. Sniper attacks – usually from high places during the hours of darkness.

b. Direct assaults – suspect attempts to "set officer(s) up" for attack.

c. Coordinated attacks – premeditated, usually planned in detail by assailant (terrorists); the most dangerous of ambushes.

2. Characteristics of an Ambush

a. Usually well-planned

b. Uses element of surprise

c. Happens suddenly

d. Uses darkness to conceal position and aid in escape

e. Usually unprovoked attack on victim

3. Tactical Options When Attacked

a. Fight back

b. Flee area; suspect can be dealt with after the officer gets back-up

c. Take cover (use concealment if cover not available)

(1) Cover will stop ballistic round (engine block, concrete wall, tree)

(2) Concealment keeps officers from being seen (grass, bushes, shadows)