STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

APPELLANT

APPELLATE CASE NO. 2014-001497

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because Robert Rushton was a law enforcement officer, within the meaning of the Act, where (A) Rushton's appointment as a Sheriff's Deputy was never approved by the circuit court as required under § 23-13-10; (B) where Rushton admitted that he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and where the State failed to present any evidence that a bond or surety was on file with the McCormick County Clerk of Court as required by S.C. Code Ann. § 23-13-20; and (C) Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident.

II.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because (A) Appellant had failed to prove entry or attempted entry into his dwelling and (B) Appellant had failed to prove that he was not without fault in bringing on the difficulty.

III.

The trial court reversibly erred in refusing to grant a mistrial when, in closing argument, the solicitor repeatedly asked jurors "Who said there was a fox out there?" and later stated "When the officers get out there -- now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that" as these statements constituted improper comments on the Appellant's right not to testify and impermissibly shifted the State's burden of proof to Appellant.

STATEMENT OF THE CASE

On February 22, 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime.

Appellant sought immunity from prosecution under the Protection of Persons and Property Act. On May 31, 2011 and June 1, 2011, a "Stand Your Ground" hearing was held before the Honorable William P. Keesley. Solicitor Donald V. Myers, Assistant Solicitor Ervin J. Maye and Assistant Solicitor H. Franklin Young represented the State. Carson M. Henderson and Billy J. Garrett represented Appellant.

On July 5, 2011, Judge Keelsey denied Appellant immunity in a written order.[1] Appellant moved for reconsideration of the order. On December 8, 2011, Judge Keesley issued an order affirming the denial of immunity.

Pursuant to then-existing procedures Appellant filed a timely notice of appeal. *See State v. Duncan*, 405 S.C. 177, 747 S.E.2d 677 (2013). In preparation for the appeal, Appellant ordered transcripts from Court Reporter Rema Thomas. Thomas informed Appellant that several tapes containing testimony and arguments from Appellant's immunity hearing were stolen during a car break in and, thus, were unable to be transcribed.

Despite large portions of the immunity hearing testimony being unavailable, Appellant filed an Initial Brief and Designation of Matter on April 18, 2012. In the brief, defense counsel attempted to reconstruct the missing portions of Appellant's testimony based upon the notes and recollection of trial counsel.

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

On August 20, 2012, the State filed a Motion to Strike and Require Filing of Amended Initial Brief of Appellant. Appellant filed a return opposing the State's motion and the State filed a reply to Appellant's return. On September 7, 2012, Appellant filed a Motion to Supplement Record on Appeal and Expedite Briefing. The State filed a return opposing the motion and Appellant filed a reply to the State's return.

On December 19, 2012, this Court issued an order granting the State's motion to strike and denying Appellant' motion to supplement the record and expedite briefing. Accordingly, Appellant filed an Amended Initial Brief of Appellant and Amended Designation of Matter on January 8, 2013 conceding that the missing testimony was critical to a "full and fair consideration of the matters" on appeal and that the portion of the record remaining was insufficient to allow for meaningful review.

On February 7, 2013, the State filed a Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter. On February 15, 2013, Appellant filed a Reply to the State's motion to remand. On March 6, 2013, Appellant filed a motion to remand to the circuit court for a *de novo* hearing.

On March 28, 2013, this Court granted the State's motion to remand for reconstruction of the missing portions of the hearing transcript. In the same order, this Court also denied Appellant's motion for remand for a *de novo* hearing on the issue of immunity.

On June 14, 2013, a reconstruction hearing was held before Judge Keesley. Solicitor Donald V. Myers, Assistant Solicitor Ervin J. Maye and Assistant Solicitor H. Franklin Young represented the State. Desa A. Ballard, Carson M. Henderson, and Billy J. Garrett represented Appellant.

On August 21, 2013, while the motion for reconstruction was still under consideration by Judge Keesley, the South Carolina Supreme Court issued its decision in *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013), holding that the denial of a defendant's request for immunity under the Protection of Persons and Property Act is not subject to immediate appeal.

That same day, this Court issued an order rescinding the remand to Judge Keesley and dismissing Appellant's appeal. Judge Keesley never determined whether the missing portions of the immunity hearing record could be adequately reconstructed. This Court instructed the parties to "proffer to the court any testimony relevant to the immunity motion that is not presented to the jury." Appellant's motion for reconsideration was denied. R. 795 - 796.

On November 20, 2013, Appellant filed a petition for writ of certiorari with the Supreme Court seeking to reinstate the reconstruction. The petition was still pending when Appellant proceeded to trial. On May 7, 2014, the State filed a motion to dismiss Appellant's petition for writ of certiorari. On June 25, 2014, the South Carolina Supreme Court issued an ordering denying Appellant's petition for a writ of certiorari and denying the State's motion as moot.

On December 16-20, 2013, Appellant proceeded to trial on one count of assault and battery with intent to kill and one count of possession of a weapon during the commission of a violent crime before the Honorable R. Lawton McIntosh and jury. R. 797. Solicitor Donald V. Myers, Assistant Solicitor Ervin J. Maye and Assistant Solicitor H. Franklin Young represented the State. Desa A. Ballard, Carson M. Henderson, and Billy J. Garrett represented Appellant.

Appellant was convicted on both charges. *Id.* at p. 1638, l. 21 – 1639, l. 8. On June 30, 2014, Appellant was sentenced by Judge Macintosh to a combined sentence of twenty years imprisonment. R. 1795, l. 24 – 1797, l. 6.

On May 4, 2016, Appellant filed a motion to hold Appellant's appeal in abeyance and motion to remand for reconstruction of the pretrial immunity hearing. This Court remanded the case to Judge Keesley for reconstruction. R. 1799 – 1807.

Judge Keesley convened a reconstruction hearing on October 25, 2016. R. 1810. On December 30, 2016, Judge Keesley submitted his report to this Court regarding the reconstruction. R. 1847 - 1860. On January 27, 2017 this Court ended the abeyance and remand. This appeal follows.

ARGUMENTS

I.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because Robert Rushton was a law enforcement officer, within the meaning of the Act, where (A) Rushton's appointment as a Sheriff's Deputy was never approved by the circuit court as required under § 23-13-10; (B) where Rushton admitted that he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and where the State failed to present any evidence that a bond or surety was on file with the McCormick County Clerk of Court as required by S.C. Code Ann. § 23-13-20; and (C) Rushton was not certified by the South Carolina Criminal Justice Academy at the time of the incident.

Introduction

In the early hours of November 15, 2009, the darkest night of the month, Defendant used a rifle to shoot and injure Robert Rushton, who was on a the property of Appellant's mother in conjunction with two McCormick County Sheriff's deputies, Nick Moore and Sara McAllister, who were investigating a report of shots being fired earlier that night. R. 33, ll. 1-11. Appellant's bullet struck Ruston's gun, destroying it, and caused significant injury to Rushton's hand.

Immunity Hearing Held Pursuant to the Protection of Persons and Property Act

On May 31, 2011 and June 1, 2011, Judge Keesley presided over an immunity hearing held pursuant to the "Protections of Persons and Property Act". S.C. Code § 16-11-401, *et seq.* At the hearing it was established that the property owned by Appellant's mother where this tragic incident occurred is on Lake Thurmond in a rural section of McCormick County.

The 911 call concerning the gun shots was placed by Alan Sheffield, the next door neighbor, at the behest of his wife. This was the first time that Sheffield had requested the police address the night shooting. Sheffield claimed that he had filed a complaint with local law enforcement on a prior occasion, but there is no evidence that this complaint was ever communicated to Appellant. R. 148, l. 18 – 155, l. 7.

At the immunity hearing, Sheffield conceded that he often heard gunshots in the area, including at times when Appellant was not present, and that Appellant would frequently shoot a gun late at night. *Id.* Sheffield further admitted that, while he had asked Appellant's mother to speak with Appellant about the late night disturbances, he was uncertain if she did. *Id.*

Sheffield acknowledged that the Worley family cat, Sweet Pea, had been injured by a fox some months before the shooting. *Id.* On the night of the incident, Sheffield never attempted to notify Appellant or his mother that he had called the police. *Id.* While accounts differ, the call to 911 occurred sometime between 3:30 a.m. and 4:00 a.m. Rushton was first notified of the call sometime after 4:00 a.m. *Id.* at p. 30, l. 9 – 38, l. 22.

At 4:27 a.m., Moore reported to dispatch that he, Deputy McAllister and Rushton were still looking for the Worley residence. *Id.*; see also R. 203, l. 8 – 209, l. 15. Rushton stated at the hearing that it was so dark, both Moore and McAllister accidently drove past the Worley residence's driveway and, instead, stopped at the Sheffield residence. *Id.*

Likewise, Sheffield would testify that, even though he and his wife were expecting law enforcement to arrive and had their windows open; they were surprised when the deputies' and Rushton's cars finally pulled up. **Neither Rushton, nor the deputies activated their blue lights or sirens.** R. 87, l. 2 – 92, l. 25.

Neither of the deputies nor law enforcement dispatch nor Rushton attempted to contact Appellant's residence to advise them of their impending 4:30 a.m. arrival. *Id.* Rushton, who had only been rehired by the McCormick County Sheriff's Department on November 1, 2009, after a four year stint as private security contractor for DynCorp in Iraq, was wearing "military style" pants and a dark green collar shirt with no embroidered badge or other police markings on it. *Id.* at p. 8, l. 25 – 14, l. 16).

At the time of the incident, Rushton had not completed the re-certification classes required by the South Carolina Criminal Justice Academy. *Id.*; see also R. 1145, l. 5 – 1148, l. 17. While Rushton had completed a firearms recertification class, the McCormick County Sheriff's Department failed to transmit his employment information to the Criminal Justice Academy within the three working day statutory time limit that would have allowed Rushton to have the authority of a certified police officer while he waited to be certified by the Academy. *Id.*; see also S.C. Code Ann. § 23-23-43.

Rushton did not remember taking an oath to the South Carolina Constitution, although a written one was later produced with his signature on it. R. 232 – 235. However, he did not recall ever having taken the second, statutory oath specifically required of Sheriff's deputies prior to assuming their duties. R. 8, l. 25 – 14, l. 16. Nor did he know if there was a bond or surety on file with the McCormick County Clerk of Court. Finally, he did not recall ever having his appointment approved by a resident judge of the Eleventh Judicial Circuit. *Id.*

He had not been issued McCormick County's standard deputy uniform. Despite having them in his car, he was not wearing any reflective items such as a vest, a hat or a jacket that would identify him as law enforcement. *Id.* at p. 21, l. 13 – 25, l. 9. His badge was in a holder attached to his belt. Rushton parked his car behind a vehicle in Appellant's driveway. He then walked over to the Sheffields' house and spoke briefly with them. *Id.* at p. 92, ll. 11-12; p. 41, l. 1 – 44, l. 21.

Deputies Moore and McAllister approached the Worley residence, under a covered porch, knocked on the door and rang the doorbell. *Id.* The ground level door that the deputies knocked on, and where the doorbell is located, is the only entrance to the house. *Id.* The Worley residence, built by Appellant's father a career engineer at the Savannah River Site, was described

as a kind of garage with an apartment on top of it. The house is made out of concrete blocks and is heavily insulated. *Id.* at p. 213, l. 4 – 214, l. 9.

There is no window or peephole on the door. There are no windows on the side of the ground floor that the door is on. The only windows on the same side of the house as the door are located on the second story in front of a balcony. There is sliding glass door that leads on the balcony. The windows and the sliding glass door are oriented towards the lake; facing away from where the deputies and Rushton parked their cars. These windows are double planed glass. In front of the windows and the sliding glass door is a baloncy that extends out to the edge of the lower story and blocks a view of the ground level door from inside the house. *Id.*

Consistent with Appellant's reconstructed testimony, Deputies McAllister and Moore testified that they rang the Worley residence's doorbell and knocked on the ground level door repeatedly, all while purportedly identifying themselves as Sheriff's deputies. After receiving no response from inside the residence, McAllister and Moore walked around to the back of residence, away from the lake and were getting ready to leave, when the flood lights, which face the lake, briefly came on and off. Moore and McAllister then returned to the front door and began ringing the doorbell and knocking on the door. *Id.* at p. 40, l. 3 – 53, l. 9.

Rushton would testify that, when the flood light came on and then off, he stopped talking with the Sheffields and started walking towards the Worley residence. *Id.* at p. 162, ll. 6-25. He estimated that he talked to the Sheffield's for roughly three minutes. *Id.* at p. 43, l. 4 – 46, l. 14. Rushton walked one hundred thirty seven feet from the Sheffield's to the front door of the Worley residence. *Id.*

Rushton's and Deputies McAllister and Moore's Testimony

From this point, Appellant's account and the accounts of Rushton and the deputies begin to diverge. Rushton and the deputies claimed that – despite McAllister and Moore having previously knocked, rang the doorbell, and purportedly identified themselves as law enforcement without response – someone from inside the residence finally responded on this second attempt, asking "who is it?" *Id.* at p. 58, l. 7 – 59, l. 12. Deputy McAlister did not recall hearing any response from the house. *Id.* at 196, l. 16 – 202, l. 25.

Rushton and the deputies alleged that when they stated that they were the Sheriff's Department, someone inside the house responded, "I don't give a fuck." Rushton claimed that, after receiving this response, he heard the sliding glass door on the porch above them open. He decided to walk backwards, out from under the cover of the front door and into the yard so as to see who was stepping onto the balcony. As he walked backwards through the dark, he drew his gun. *Id.*

Next, Rushton claimed that he saw Appellant – through the near total darkness of a moonless night – step out from the doorway with a rifle in "the port position", pointing upward – not aimed at anyone. *Id.* Rushton admitted that Appellant did not point his gun at anyone until after the flood lights turned on and revealed that Rushton was already pointing his gun at Appellant. Rushton further conceded that Appellant never threatened to shoot anyone. *Id.*

Rushton averred that he was blinded by the flood lights coming back on. Deputy Moore would claim that a final call of "Sheriff's office" and "gun!" were made, after which Appellant immediately fired. It was undisputed that the shooting happened almost contemporaneous with Appellant opening the door and turning on the flood light. Rushton recalled that "it just happened so fast right then." *Id.*; *see also Id.* at p. 63, ll. 1-22.

Evidence presented at the hearing regarding the angle of trajectory and damage to Rushton's weapon and hand confirmed that his pistol was aimed at Appellant when Rushton was struck.

The force of the bullet's impact with Rushton's hand and gun knocked him to the ground. Despite being armed with a semi-automatic rifle capable of firing multiple rounds without reloading, Appellant did not immediately fire again. *Id.* at p. 46, l. 18 - 66, l. 6.

Instead, Rushton was able to crawl or run towards Deputy Moore, who was standing under the balcony of the Worley Residence by the front door. Appellant then fired a second time, but did not hit anything. Deputy Moore then helped Rushton flee towards McAllister's patrol car. McAllister who had been standing near the side of the Worley residence had run to her car after Rushton was shot. She made an "officer down" and "shots fired" call at 4:31 a.m., less than three minutes after the deputies and Rushton arrived.

As Rushton and Deputy Moore ran towards Deputy McAllister's waiting car, they claimed that Appellant shouted "where you at you sonofabitch?" or words to that effect. However, there were no additional shots after the first two and Rushton and the deputies were able to drive away.

Appellant's Reconstructed Testimony

Appellant's stated – based on a reconstruction of his testimony – that he had fired at a fox earlier in the night because he did not want the fox to attack Sweet Pea, the Worley family cat, again. R. 1854 - 1858. Appellant said that after the last time he fired at the fox he went to bed. He next awoke to the doorbell repeatedly ringing. *Id.*

He recalled that there had been attempted burglaries at the Worley residence before and other houses in the neighborhood had also been burglarized. Appellant decided not go downstairs to answer the door because there was no peephole or window near the entrance. Appellant did not turn on any lights. *Id.* at p. 8 – 12.

Instead, Appellant walked to the sliding glass door leading on to the balcony. Looking out, he could not see any blue lights or car lights. The night was almost totally black. When the

doorbell ringing continued, he decided to get dressed and load his father's old rifle. Appellant then returned to the sliding glass door and opened it. As he opened the door and prepared to step out on to the balcony, he turned on the flood lights and saw a burglar with a gun a "dinky flashlight". *Id.*

With respect to the shooting, in its reconstruction report, the trial court concluded that:

> [E]vents happened rather instantaneously once [Appellant] opened the sliding glass door and stepped outside with the rifle. The court accepted that the evidence indicates that . . . Rushton spun out from underneath the deck area with his gun drawn, point it at [Appellant] on the elevated deck, and [Appellant] fired the first shot immediately upon seeing . . . Rushton with the gun drawn.

R. 1858 n. 3. Disputing Rushton and Deputy Moore's accounts, Appellant was adamant that he never had a verbal exchange of any kind with Rushton and the deputies "during which he asked who they were, and he heard anyone say that they were law enforcement officers prior to or during the incident." *Id.* at p. 12-13. This conformed with Deputy McAlister's testimony at the hearing.

Appellant denied ever saying that he "did not give a fuck" that the people outside claimed to be law enforcement. Appellant stated that he acted "instinctively for his own protection" and was in fear for his life before and after the shooting. *Id.* Appellant also denied ever being told by law enforcement to put his gun down. *Id.*

Policing Expert Dr. George Kirkham's Testimony

The defense retained a policing expert, Dr. George Kirkham, a former police officer and current professor at Florida State University. Dr. Kirkham testified that, based on his review of the incident scene and Worley residence there was no way to see the police cars from the second story of the house. R. 115, l. 1 – 135, l. 12. Dr. Kirkham concluded that Rushton's car, without its blue lights or siren on, was parked on the other side of the house out of Appellant's line of sight. *Id.* at p. 137, l. 13 – 142, l. 14.

Similarly, Moore's car and McAllister's car were parked at the Sheffield residence and would have been out of Appellant's field of vision. Dr. Kirkham testified at length that Rushton's shooting was a tragic, but typical example of an accidental shooting that could have been avoided had Rushton and the responding deputies simply taken the time to assess the situation and properly plan an approach. *Id.*

Dr. Kirkham specifically highlighted the failure to effectively announce their presence by activating their patrol cars' blue lights. *Id.* at p. 115, l. 1 – 135, l. 12. He also explained that they should have called the Worley residence or used a public address system to speak with the residents of the house in order to have Appellant and his mother come speak with them. Instead, Rushton and the responding deputies unnecessarily placed themselves in an exposed position where Appellant could reasonably think they were burglars. *Id.*

Dr. Kirkham noted that there was no prior record of police contact with the Worley residence and no suggestion that Appellant harbored anti-government or anti-law enforcement views or was mentally ill. Further, while the 911 call reported gun shots, there was no active shooting when the police arrived. According to Dr. Kirkham, Rushton, McAllister, and Moore all failed to observe proper police procedure as set out by the South Carolina Criminal Justice Academy and that their failure to do so was the primary cause of the tragic confrontation and that it was reasonable for Appellant to doubt whether or not Moore, McAlister and Rushton were law enforcement. *Id.*; *Id.* at p. 138, l. 15 – 139, l. 20.

Investigation by McCormick County Sheriff's Department

Despite having an employee shot only hours before, McCormick County Sheriff George Reid along with Deputies McAlister and Moore, among others, drove to the Worley residence.

Sheriff Reid would testify at trial that Appellant and his mother were walking around their yard with flashlights as if they were looking for something. R. 1187, l. 1 – 1190, l. 14.

When Appellant shined his flashlight in Sheriff Reid's eye, the Sheriff nonchalantly asked him to point the light away from. Seemingly unafraid of Appellant, the Sheriff demanded to know if Appellant realized he had just shot one of his employees. *Id.* Appellant explained to the Sheriff that he had placed the remains of the Rushton's gun in his patrol car. Appellant then purportedly told Sheriff Reid that his deputies and employee had "no business" ringing his doorbell at 4:00 a.m. The Sheriff then placed Appellant under arrest without further interrogation. *Id.*

Notwithstanding their having been involved in the incident, Deputies McAllister and Moore both remained heavily involved in evidence collection at the incident scene and in the investigation into the shooting. *Id.* Curiously, McAllister had been fired from DNR for lying to investigators and obstructing an investigation into a fatal boating accident that she had been involved in. R. 190, l. 8 – 195, l. 1. She testified at the immunity hearing, but the State did not call her at trial.

Amended Order Denying Immunity

On December 11, 2011, the trial court issued a lengthy written order titled "Amended Order on Reconsideration the Defendant's Motion to Bar Prosecution" denying Appellant immunity. In denying Appellant immunity, the court concluded that – despite their inconsistencies and expert testimony regarding their deficient, reckless conduct – Rushton and the deputies' versions of events was "far more believable" than Appellant's testimony. R. 1758.

The court concluded that, as a matter of law, Appellant could not receive immunity under the Act because Rushton qualified as a law enforcement officer at the time of the incident. *Id.* at p. 7 – 14. The court observed that the Act made an exception when the person:

> [A]gainst 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 officials 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.

§ 16-11-450(A). The court summarily rejected the defense's argument that Rushton's failure to have his appointment approved by a circuit court judge as required by § 23-13-10 meant that he was not a law enforcement officer at the time of the shooting. *Id.*

Without citing to any legal precedent or authority, the Court opined that § 23-13-10, first enacted by the General Assembly in 1937, was unconstitutional: "[t]o the extent that part of this statute provides for judicial approval of executive branch appointments, it is a clear violation of the separation of powers doctrine. It simply cannot withstand scrutiny." *Id.* at p. 10.

Having summarily exenterated statutorily mandated judicial oversight of deputy hiring, the court next eviscerated the requirement that a sheriff's deputy "shall" take a second, statutory oath found in § 23-13-40, "before entering upon the discharge of his duty." "The court concludes that the failure to take an additional or supplementary oath . . . does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive [Rushton] from asserting that he is law enforcement for purposes of the Act." *Id.* at p. 14.

The court identified no legal support for its contention that this oath was merely "additional or supplementary" to the more general oath required of all state office holders. *Id.* Likewise, the court ruled that the State's failure to provide any evidence that Rushton entered into a bond or that McCormick County had a blanket bond on file with the Clerk of Court, also required under § 23-13-20, was immaterial. Rather, the defense had failed to prove that the bond did not exist. *Id.* at p. 11.

The court also ruled that, as an additional or alternative ground for denying immunity, Appellant "has not established that he had a reasonable belief that he was not firing upon law enforcement." *Id.* at p. 14. The court reasoned that even if Rushton was not law enforcement due to the above referenced deficiencies, Appellant still would not be able to claim immunity as Rushton, McAllister, and Moore identified themselves as law enforcement at the time Appellant fired and it was not reasonable for Appellant, under the circumstances, to disbelieve them. *Id.* at p. 14.

The court further concluded that, because Rushton was a law enforcement officer, Appellant was also precluded from receiving the presumption that he acted in reasonable fear of death or great bodily injury that he would have been entitled to under § 16-11-440(A). *Id.* at p. 14 - 19. The court then reasoned that, since Rushton was law enforcement, his entrance or attempted entrance into Appellant's home was not unlawful. *Id.*

Next, the court found that Appellant's conduct brought on the difficulty. Again, the court found that Appellant "knew or should have known" that Rushton, standing in Appellant's yard at 4:30 a.m. and pointing a gun at him was a law enforcement officer because Rushton, McAllister, and Moore were purportedly yelling that they were. *Id.* at p. 21.

The court rejected the defense's argument that Rushton was at fault in bringing on the difficulty when he: pointed his pistol at Appellant; decided not to wear any visible signifiers of his possible law enforcement status; and when he failed to properly and effectively identify himself by activating his car's blue lights, using its PA system, or having dispatch make a telephone call.

Instead, Appellant was at fault for not simply taking Rushton, McAllister, and Moore's word that they were sheriff's deputies. The court reasoned that once an intruder claimed to be a law enforcement officer, the burden shifted to the homeowner to undertake an investigation to ascertain whether the intruder's claim is true before he can act in self-defense. *Id.*

The court absolved Rushton of any responsibility for the incident, noting that Appellant left the "security of the walls of his residence out onto his deck with a loaded rifle. Mr. Rushton acted appropriately in meeting that condition, and [Appellant] fired upon him." *Id.* Thus, the court concluded that Appellant was the aggressor, despite being in his "castle" at the time of the shooting.

Discussion

The Act provides that "[a] person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: . . . (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." § 16-11-440(A)(2).

In addition, the Act provides states, "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . ***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." § 16-11-440(C) (*emphasis added*).

In signing the Act into law, the General Assembly stressed 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.***" § 16-11-420(E) (*emphasis added*). Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must prove all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).

Thus, to be entitled to immunity the defense must prove the following elements: (1) the

defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; and (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013).

The Act contains specific exceptions where an individual uses force against a "law enforcement officer." For instance, the provision where an individual "is presumed to have a reasonable fear of imminent peril" when using force against a person attempting unlawful and forcible entry of the individual's residence, is inapplicable when the individual attempting the entry is:

> [A] law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his official duties, and he identifies himself in accordance with applicable law or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

S.C. Code Ann. § 16-11-440(B)(4). Likewise, an individual who uses deadly force as permitted under the act is immune from civil or criminal prosecution:

> [U]nless 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.

§ 16-11-450(A). The Act does not define "law enforcement officer."

A. The trial court committed a reversible error of law by denying Appellant immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act on the grounds that Robert Rushton was a law enforcement officer where Rushton's appointment as a Sheriff's Deputy was never approved by the an Eleventh Judicial Circuit Court judge as required under S.C. Code Ann. § 23-13-10.

At the immunity hearing, Rushton testified that his appointment had never been approved by a circuit court judge as required by S.C. Code Ann. § 23-23-10. R. 103, ll. 4-16; *Id.* at p. 210, l. 5 – 220, l. 21; R. 727 - 756. Nevertheless, the trial court denied Appellant immunity because, among other reasons, the court believed that Rushton was a "law enforcement officer" within the meaning of the Act. R. 1762 – 1767.

The court concluded that § 23-13-10 was a "clear violation of the separation of powers" to the extent that it gave the judicial branch oversight of deputy hiring. *Id.* Thus, pursuant to the statutory exclusions included in the Act for force used against a law enforcement officer, the trial court ruled that Appellant could not claim immunity. *Id.* This ruling constituted an error of law.

Rules of Statutory Interpretation

Section 23-13-10 states: that "the sheriff may appoint one or more deputies **to be approved by** the judge of the circuit court or any circuit judge presiding therein." (*emphasis added*). The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)).

All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577

(Ct.App.1999) *cert. denied as improvidently granted, State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.*

In addition, courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577.

Finally, penal statutes must be strictly construed against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper construction should be resolved in favor of the citizen against the state. *State v. Cutler*, 374 S.C. 376, 264 S.E.2d 420 (1980); *see also Yates v. United States*, 135 S.Ct. 1074 (2015) (ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

The Act is a penal statute. It is listed in Title Seventeen of the South Carolina Code, which details criminal procedures for state courts. Any ambiguity regarding the meaning of the terms used in the Act should be determined in favor of the citizen claiming its protections. *State ex rel. Moody v. Stem*, 213 S.C. 465, 468, 50 S.E.2d 175, 176 (1948) ("The principle is well established that penal statutes are strictly construed, and one who seeks to recover a penalty for failure on the part of the defendant to discharge some duty imposed by law, must bring his case clearly within the language

and meaning of the statute awarding the penalty. Such laws are to be expounded strictly against the offender and liberally in his favor.").

Accordingly, an individual claiming to qualify as a law enforcement officer under the Act, negating all protections the Act would otherwise afford a citizen, should be required to prove strict compliance with all constitutional, statutory, and regulatory requirements relating to law enforcement.

The language of § 23-13-10 makes clear that the legislature intended that any deputies a sheriff wished to appoint be subject to the approval of the resident circuit court judges. By contrast, § 23-13-40 allows "**the sheriff, without seeking the approval of the circuit judge, may appoint special deputies** as the exigency of his business may require for the service of process in civil and criminal proceedings only." (*emphasis added*)

Harmonizing these two statutes strongly suggests that the legislature envisioned two kinds of deputies. One class of deputies acting as general agents of the sheriff, subject to the approval of the resident circuit court judge or judges, and a second class of deputies, not subject to circuit court approval, but whose appointment is limited in scope and circumstance. *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004) (holding that statutory terms must be construed in context and their meaning determined by looking at the other terms used in the statute).

Section 23-13-10 should be afforded its plain and obvious meaning: that the approval of a resident circuit court judge or judges is a prerequisite to a deputy's employment as an agent of the Sheriff and to the deputy's qualification as a law enforcement officer under the Act.

Section 23-13-10 and Separation of Powers

All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Davis v. County of Greenville,* 322 S.C. 73, 470 S.E.2d 94 (1996). A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. *Westvaco Corp. v. South Carolina Dep't. of Revenue,* 321 S.C. 59, 467 S.E.2d 739 (1995). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution. *Id.*

Contrary to the summary conclusion of the trial court, imposing judicial oversight on the power of an executive branch officer does not violate the separation of powers doctrine. R. * (Amended Order p. 10). Similar oversight and confirmation requirements are an integral part of South Carolina law that "prevents concentration of power in the hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis*, 278 S. C. 307, 312, 295 S. E. 2d 633, 636 (1982). The state constitution mandates that:

> There **shall** be elected in each county by the electors thereof a . . . sheriff . . . All of these officers **shall** serve for terms of four years and until their successors are elected and qualify. **The General Assembly shall provide by law for their duties and compensation.**
>
> **The General Assembly also may provide by law for the age and qualifications of sheriffs . . . and the selection, duties, and compensation of other appropriate officials to enforce the criminal laws of the State,** to prosecute persons under these laws, and to carry on the administrative functions of the courts of the State.

S.C. Const. Art. V, § 24 (*emphasis added*).

Thus, the legislative branch is specifically empowered to define the duties of sheriffs and "of other appropriate officials." *Gentry v. Taylor*, 192 S. C. 145, 152, 5 S. E. 2d 857, 859 (1939) (stating that "it is not within the province of the courts to change the clear meaning of any

constitutional provision by construing the language in order to give it a different meaning from that which is clearly intended"). Concomitant with the authority to define a position's power and duties is the power to impose limitations on that position's exercise of discretion.

Moreover, the power to appoint public officials, defined as those "individuals charged with duties involving an exercise of some part of the sovereign power" of the State, is commonly divided between the three branches of state government. *Sanders v. Belue*, 78 S.c. 171, 58 S.E. 762 (1907) (defining "public official"). This division of appointment power continues at the county and local government level.

The most frequent division of appointment power is between the Governor and one or both houses of the General Assembly, most commonly the Senate. For instance many state agency directors and other appointed officials "must be appointed by the Governor with the advice and consent of the Senate." *See* § 24-21-10(A),(B) (controlling the appointment of Board and Director of Probation, Parole, and Pardon Services); *see also* § 22-1-10(A) (controlling the appointment of magistrate court judges).

The power to remove appointed officials is follows a similar division of authority. S.C. Const. Art. V, § 24; S.C. Const. Art. XV, § 3; *see also* § 1-3-240(A),(B). Importantly, the constitution and the General Assembly limit the executive branch's power to remove certain appointed or elected officials without the agreement of the General Assembly and a hearing for the officer sought to be removed. *Id.*

While the division of appointment power between Governor and the General Assembly is the most common division, it is far from the only division of power. In areas of judicial concern, such as the state's indigent defense system, the legislature has given all three branches of

government a share in the power to appoint and remove officials. *See* § 17-3-310(A),(B) (providing for the appointment of members of the Commission on Indigent Defense).

For appointed officials whose remit only extends to one or two counties, it is common for the Governor to appoint them on the recommendation of a majority of the relevant counties' legislative delegation." *See Russell v. Lyon*, 90 S.C. 5, 72 S.E. 496 (1911) (holding that rural policeman recommended by legislative delegation, but not appointed by governor are not qualified to act as policemen); *see also State v. Verdier*, 91 S.C. 394, 74 S.E. 934 (1912) (holding that officers appointed as township commissioners by governor without recommendation from county legislative delegation were "mere usurpers"); *see also* § 4-23-10, *et seq.* (creating multiple county fire safety districts).

When evaluated pursuant to S.C. Const. Art. V, § 24 and in light of the other divisions of appointment power found in our state government, prior judicial approval of potential sheriff's deputies by the resident circuit court judges is constitutional. At a minimum, it is not patently unconstitutional. *Cf: Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (enjoining referendum on video game machines on grounds that statute authorizing referendum was an unconstitutional delegation of legislative authority to the people).

The sheriff is an elected county executive position. The sheriff is, for the most part, not accountable to county government. *See* § 4-9-650; *see also* § 4-9-33; *see also Botchie v. O'Dowd*, 299 S.C. 329, 384 S.E.2d 727 (1989) (holding that deputy not entitled to discharge hearing before county council). The Sheriff cannot be removed from office except by impeachment or by the Governor with the concurrence of two thirds of both houses of the General Assembly. *See* S.C. Const. Art. XV§ 1-3.

Therefore, the only branch capable of exercising an effective, short-term check on the Sheriff's hiring decisions when there are "cases of fraud, clear abuse of power, or where unreasonable or capricious acts have occurred," are the resident circuit court judges. *S.C. Elec. & Gas Co. v. S.C. Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777 (1949) (affirming that generally "courts will not interfere with such discretionary powers of a subordinate governmental agency except in cases of fraud or clear abuse of power or where unreasonable or capricious."

Under S.C. Const. Art. V, § 24, the General Assembly acted within its power in passing § 23-13-10 requiring resident circuit court judges approve sheriff's deputies prior to their appointment. Accordingly, the trial court erred in ruling that § 23-13-10 violated the separation of powers and erred as a matter of law in concluding that Rushton was a law enforcement officer within the meaning of the Act when Rushton's appointment had not been approved by a circuit court judge. R. 1763.

B. The trial court committed an error of law by denying Appellant immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act on the grounds that Robert Rushton was a law enforcement officer where Rushton admitted that he had never taken the statutory oath required of sheriff's deputies prior to the commencement of their duties and where the State failed to present any evidence that a bond or surety was on file with the McCormick County Clerk of Court as required by S.C. Code Ann. § 23-13-20.

As discussed *supra*, the Act is a penal statute that must be strictly construed in favor of the accused. At the immunity hearing, Rushton testified that he did not recall taking any oath prior to being re-hired by the McCormick County Sheriff's Department on November 1, 2009. R. 6, l. 24 – 18, l. 24; *Id.* at p. 103, ll. 4-21.

Rushton also stated that he did not know if there was a bond on file with the McCormick County Clerk of Court so as to insure "the faithful performance of his duties and for the payment to the county and to any person of all such damages as they or any of them may sustain by reason of

his malfeasance in office or abuse of his discretion." *Id.* at p. 210, l. 5 – 211, l. 18; *see also* § 23-13-20.

In response the State produced a piece of paper signed by Rushton that they claimed satisfied the requirement under S.C. Const. Art. VI, § 5 that Rushton take an oath to the state constitution. *Id.* at p. 107, l. 9 – 109, l. 3; *see also* R. 232 - 235. The piece of paper did not include the second oath specifically required of sheriff's deputies by § 23-13-20. The State produced no evidence that any bond or surety was on file with the Clerk of Court. *Id.*

In denying Appellant immunity by concluding that Rushton was a law enforcement officer within the meaning of the Act, the court ruled that the statutory oath was merely "an additional or supplementary oath" to the constitutional oath. R. 1767. Without elaboration, the court reasoned that Rushton's failure to take the oath required by law of sheriff's deputies, "does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive [Rushton] from asserting that he is law enforcement for purposes of the Act" *Id.*

Despite the State having earlier produced Rushton's signed constitutional oath from the Clerk of Court's Office while simultaneously failing to produce any documentation that the bond existed, the court held that the defense failed to prove that a bond did not exist. *Id.* Accordingly, the court determined that Appellant could not claim immunity from prosecution because Rushton was a law enforcement officer and, thus, exempt. *Id.*

Section 23-13-20 requires that all deputy sheriffs:

> **[S]hall before entering upon the discharge of his duty, enter into bond in the sum of one thousand dollars, with sufficient surety, to be approved by the sheriff of the county,** conditioned for the faithful performance of his duties and for the payment to the county and to any person of all such damages as they or any of them may sustain by reason of his malfeasance in office or abuse of his discretion. **He shall, in addition to the oath of office now**

> **prescribed by Section 26, of Article III, of the Constitution, take the following oath (or affirmation) to wit:** "I further solemnly swear (or affirm) that during my term of office as county deputy, I will study the act prescribing my duties, will be alert and vigilant to enforce the criminal laws of the State and to detect and bring to punishment every violator of them, will conduct myself at all times with due consideration to all persons and will not be influenced in any matter on account of personal bias or prejudice. So help me, God." **The form of such bond shall be approved by the county attorney and, with the oaths, shall be filed with and kept by the clerk of court for the county.**
>
> A blanket bond may be used in any county to fulfill the bond requirement of this section upon approval of the County Council and the County Attorney.

(*emphasis added*). There is little case law regarding the impact of the failure to take either of the two required oaths on the authority of a purported sheriff's deputy.

In *Town of Denmark v. Corley*, the Supreme Court affirmed the grant of a new trial for the defendant, in part, because arresting officers "had not qualified or taken the constitutional oath" in S.C. Const. Art. III, § 26. 100 S.C. 433, 433, 84 S.E. 884, 884 (1915):

> The court is of the opinion that **the record having disclosed the fact that the officers of the town not having taken the constitutional oath, as required by the Constitution,** as aforesaid, and **not holding over, having been just elected, they are not officers *de facto*,** and this exception is sustained.

Id. at 433, 84 S.E. at 885 (*emphasis added*). By contrast, in *State v. McGraw*, the Supreme Court held that a sheriff's deputy, who had never taken the oath of office and never had his appointment approved by the circuit court, was "at least a *de facto* officer" for the limited purpose of summoning jurors. 35 S.C. 283, 283, 35 S.C. 630, 631 (1892); *see also* § 23-13-40 (statute authorizing special deputies).

More recently, this Court decided in *State v. Griffin*, that the failure of the Georgetown Sheriff's deputy hiring process to follow any of the requirements of § 23-13-10 and § 23-13-20

did not render a traffic stop unlawful. 413 S.C. 258, 776 S.E.2d 87 (Ct. App. 2015) *affirmed as modified* 413 S.C. 258, 776 S.E.2d 87 (2016). Relying on *McGraw*, this Court concluded that the deputies conducting the traffic stop was a *de-facto* officers as they had all been employed with the department for a significant amount of time ranging from eight to twenty eight years. *Id.* at 264, 776 S.E.2d at 90.

However, the Supreme Court modified this opinion in *State v. Griffin*, 416 S.C. 266, 785 S.E.2d 786 (2016). The Supreme Court excised the portions of this Court's opinion addressing the failure to comply with the statutory requirements, determining "such an analysis unnecessary" in light of well-established precedence holding that the illegality of an initial arrest does not bar later prosecution. *Id.* at 268, 785 S.E.2d at 787.

Here, the trial court erred, as a matter of law, in ruling that the statutory oath is merely "additional or supplemental" to the constitutional oath and had no impact on whether Rushton qualified as a law enforcement officer under the Act. Appellant's case is procedurally distinguishable from the *Griffin* cases.

Griffin dealt with the impact of a potentially illegal arrest on the defendant's later prosecution. As the Supreme Court noted, "it is well established that 'the illegality of an initial arrest [does] not bar the accused person's subsequent prosecution and conviction for the offense charged.'" *Griffin*, 416 S.C. 266, 267, 785 S.E.2d 786, 786. In addition, the deputies in *Griffin* had all been working for the department for a significant period of time, a key factor in determining whether an individual qualifies as a *de facto* officer. *Corley,* 100 S.C. at 433, 84 S.E. at 884.

Here, Appellant moved to bar prosecution under the Act. Appellant was not challenging the legality of his arrest. He was asserting that he was entitled to immunity from prosecution. As discussed at length *supra*, the Act is a penal statute. As such, the term "law enforcement officer"

should be construed in Appellant's favor and against state. This means that the failure to follow the statutory requirements surrounding the appointment and approval of sheriff's deputies should have precluded Rushton from taking advantage of the exceptions given to "law enforcement officers" under the Act. R. 1767.

C. The trial court committed an error of law by denying Appellant immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act on the grounds that Robert Rushton was a law enforcement officer where Rushton's certification as a Class I law enforcement officer had lapsed, and the training necessary to recertify was not completed prior to the incident.

Rushton was rehired by the McCormick County Sheriff's Department on November 1, 2009. Prior to rejoining the department, Rushton worked for DynCorp as a private military contractor and police trainer for four years. R. 6, l. 24 – 16, l. 6. This was not military service. Rushton was an employee of a government contractor.

During his time as a private military contractor, Rushton allowed his law enforcement certification to lapse. Upon being rehired, he "had to catch up all the training hours I had missed for the previous four years." *Id.* at p. 9, ll. 11-12. Rushton alleged that he had "requalified" with his pistol and had taken "legal updates" and "criminal domestic violence updates." *Id.* at p. 13, ll. 1-22.

However, no record of any such training is listed on Rushton's training report that the defense entered into the record at the immunity hearing. R. 757 - 794. The training report states that Rushton was certified as a Class I officer on June 26, 2010, nearly seven months after the incident. *Id.*

Investigator Joseph Collier, the officer responsible for training, testified that Rushton's hiring date was November 1, 2009 and that he submitted all of Rushton's paperwork to the South Carolina Criminal Justice Academy on November 5, 2009. R. 1146, l. 2 – 1147, l. 25. Collier also

claimed that the Academy notified him that Rushton's time working for DynCorp could qualify as a military service.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid–State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Id.* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

The South Carolina Law Enforcement Training Council has the authority to "certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the [C]ouncil." S.C. Code Ann. § 23-23-80(6). A law enforcement department is not allowed to hire an officer unless that officer has been certified by the Council. S.C. Code Ann. § 23-23-40; *see also* SC. Code Ann. § 23-23-10(E) (defining "law enforcement officer" as an "appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed.").

South Carolina law requires all law enforcement officers be certified prior to an employee having the authority to "perform any of the duties of a law enforcement officer" with respect to the general public:

> No law enforcement officer employed or appointed on or after July 1, 1989, by any public law enforcement agency in this State is authorized to enforce the laws or ordinances of this State or any political subdivision thereof **unless he has been certified as qualified by the council,** except that any public law enforcement agency in this State may appoint or employ as a law enforcement officer, a person who is not certified if, within one year after the date of employment or appointment, the person secures certification from the council; provided, **that if any public law enforcement agency employs or appoints as a law enforcement officer a person who is not certified, the person shall not perform any of the duties of a law enforcement officer involving the control or direction of members of the public or exercising the power of arrest until he has successfully completed a firearms qualification program** approved by the council; and provided, further, **that within three working days of employment, the academy must be notified by a public law enforcement agency that a person has been employed by that agency as a law enforcement officer, and within three working days of the notice the firearms qualification program** as approved by the director must be provided to the newly hired personnel.
>
> Notwithstanding another provision of law, **in the case of a candidate for certification who begins one or more periods of state or federal military service within one year after his date of employment or appointment, the period of time within which he must obtain the certification required to become a law enforcement officer is automatically extended for an additional period equal to the aggregate period of time the candidate performed active duty or active duty for training as a member of the National Guard, the State Guard, or a reserve component of the Armed Forces of the United States, plus ninety days.**

S.C. Code Ann. § 23-23-43 (*emphasis added*). In addition, officers must be re-certified every three years. § 23-23-60(C); *see also* S.C. Code Ann. Regs. 37-006(D)(4) (requiring a law enforcement candidate with a break in service of three years or more to complete all the requirements of § 23-23-60).

Investigator Collier's testimony makes clear that Rushton's hiring date was November 1, 2009. Rushton's first three working days were November 2-4, 2009. Collier did not submit

Rushton's application to the Academy and Council until November 5, 2009. R. 1146, l. 2 – 1147, l. 25. This was beyond the three day statutory window that allows a non-certified officer to exercise the authority of a certified law enforcement officer during his first year of employment. § 23-23-43.

Nor does Rushton's four year employment with DynCorp somehow "froze" his certification status as the State contended at trial. R. 6, l. 20 – 20, l. 22. A plain reading of the law enforcement certification statutes only allows an officer's certification requirements to be suspended in the event that they are called to "active duty or active duty for training as a member of the National Guard, the State Guard, or a reserve component of the Armed Forces of the United States." S.C. Code Ann. § 23-23-43.

DynCorp is not a branch or component of the Armed Forces of the United States. It is a privately owned military contractor. Rushton quit the McCormick County Sheriff's Department and went into private employment for four years. On his return to public employment, he was required to be completely recertified.

Even if the Council approved Rushton's time with DynCorp as equivalent to military service, the clear, unambiguous terms of the certification statutes do not give the Council authority to do so. *See Triska v. Dept. of Health & Environmental Control,* 292 S.C. 190, 355 S.E.2d 531 (1987) (holding that an administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.).

Rushton's certification as a Class I law enforcement officer had lapsed. The McCormick County Sheriff's Department failed to follow the statutory requirements that would have allowed Rushton to exercise the duties of a law enforcement officer prior to being recertified. Accordingly, the trial court erred in concluding that Rushton was a law enforcement officer within the meaning of the Act.

II.

The trial court committed an error of law by ruling that Appellant was not entitled to immunity from prosecution for assault and battery with intent to kill under the Protection of Persons and Property Act because (A) Appellant had failed to prove entry or attempted entry into his dwelling and (B) Appellant had failed to prove that he was not without fault in bringing on the difficulty.

A. Appellant established that an unlawful entry was being attempted and was entitled to the presumption afforded to him under the Act and immunity.

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

The trial court erred as a matter of law in ruling that Appellant failed to prove entry or attempt at entry into Appellant's dwelling. Section 16-11-430 defines "dwelling." The Worley residence was, without any dispute, Appellant's dwelling. Under common law, the protected area where a dwelling's resident has no duty to retreat extends to the dwelling's curtilage. *State v. Sampson*, 12 S.C. 567, 1880 WL 5588 (1880) (an outhouse is considered part of a dwelling); *see also State v. Osbourne*, 200 S.C. 504, 21 S.E.2d 178 (1942) (resident "may repel trespassers in or upon the house . . . as if he were under his own doors.").

Rushton had entered or attempting to enter the dwelling, given that he was standing in the middle of the night under the balcony roof of the house. This is very type of place "where the property owner alone has the right to be, to the exclusion of the general public" at 4:30 a.m. By

contrast, in *Duncan*, the deceased was only on the porch of the shooter's residence, which the Court determined to have been within the scope of the Act's definition of dwelling. 392 S.C. at 407, 709 S.E.2d at 663.

As detailed *supra,* Ruston's entrance was unlawful because he was not a law enforcement officer and thus could not have been acting within the proper scope of his duties while on Appellant's premises at 4:30 a.m. Accordingly, the court erred as matter of law in concluding that there was no unlawful or attempted unlawful entry of Appellant's residence.

B. Appellant established that he was without fault in bringing on the difficulty that precipitated the incident.

An individual who provokes or initiates an assault may not assert self-defense. *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *Id.*

Here, Appellant was without fault in bringing on the difficulty. The Act provides that "it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others" and that "persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes." § 16-11-420(B) and (D).

Appellant stated, in testimony corroborated by Sheffield, that he was attempting to shoot at a fox that had injured his cat. The Worley residence is located in a rural, unincorporated part of McCormick County. Sheffield further testified that he regularly heard gun shots. Even Rushton admitted that when he first received the 911 call, he believed that someone was likely poaching deer. R. 36, l. 2-23. It simply cannot be said that, as a matter of law, firing a gun at night in a rural

part of a South Carolina is reasonably calculated to bring on a violent confrontation with law enforcement. *See State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232, n. 8 (2014) ("[o]ne who merely does an action that affords an opportunity for conflict is not thereby precluded from claiming self-defense.").

It was undisputed that the layout of the Worley residence was such that, in addition to being highly insulated, there was no way to definitively ascertain the identity of the individuals knocking at the ground level door without walking out onto the balcony. Dr. Kirkham's testimony makes clear that Rushton and Deputies Moore and McAllister did not follow proper police procedure and needlessly risked themselves and Appellant. Crucially, they did not activate their blue lights. Rushton was not in uniform and had no apparel identifying him as law enforcement.

Appellant has no criminal record and there was no evidence of any motive for the shooting. *Cf: State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) (holding that defendant not without fault when he entered an on-going fight he was previously not involved in with a loaded weapon). Appellant simply attempted to visually identify the individuals ringing his doorbell at 4:30 a.m. *State v. Wiggins,* 330 S.C. 538, 548 n. 15, 500 S.E.2d 489, 494 n. 15 (1998) (holding the absence of a duty to retreat also extends to the curtilage of one's home, which includes the dwelling's yard).

He was not armed in anticipation of a confrontation. He was armed out of a sense of self-preservation. *See State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("the defense of habitation provides, defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection." (*citing State v. Bradley*, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)) .

Even in a light most favorable to the State, all Appellant could determine from looking through his house's window was that one or more people were claiming to be law enforcement. He

saw no blue lights. He knew that he had not called the police. His neighbors had never before called the police about his shooting a gun. He knew that that there had been burglaries in the area. There was nothing to suggest that Appellant, a man with no criminal record, had a reason to suspect his neighbors had decided to notify law enforcement.

Appellant had no duty to retreat in his own house in the face of an unlawful attempted entry and did not "bring on the difficulty". § 16-11-440(A)(2). The court's determination that Appellant had brought the difficulty was unsupported by the evidence and constituted an abuse of discretion.

III.

The trial court reversibly erred in refusing to grant a mistrial when, in closing argument, the solicitor repeatedly asked jurors "Who said there was a fox out there?" and later stated "When the officers get out there -- now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that" as these statements constituted improper comments on the Appellant's right not to testify and impermissibly shifted the State's burden of proof to Appellant.

Relevant Facts

Appellant's trial proceeded in similar fashion to his immunity hearing. In addition to Dr. Kirkham, Appellant's brother also testified about the construction and layout of the Worley residence. R. 1229, l. 17 – 1248, l. 10. Appellant's brother outlined for the jury in great detail how insulated and sound proof the house was. *Id.*

As at the immunity hearing, Dr. Kirkham stated that, based on his expertise and experiments conducted at the house, Appellant likely would have been unable to see the police cars on the night of the shooting and that it was reasonable for Appellant to believe Rushton and the deputies were burglars. *Id.* at p. 1323, l. 10 – 1350, l. 9.

Dr. Kirkham further testified that he could not hear anything from the outside when he went to the house. *Id.* As at the immunity hearing, he explained the numerous ways in which Rushton and the deputies failed to follow proper police procedure and how those failures were primarily responsible for the incident. *Id.* Petitioner did not testify. *Id.* at p. 1471, l. 8 – 1472, l. 21.

State Closing Arguments

Circuit Solicitor Donnie Myers gave the final closing arguments for the State. From the onset, Solicitor Myers heaped insults on the defense's case. "Oh, what a tangled web we weave when first we begin to deceive." *Id.* at p. 1555, ll. 12-17. He called Dr. Kirkham a "traveling medicine man" from Florida and then asked jurors:

And what did [Kirkham] tell you? Well, what about this? Well, what about that?

Well, let's look at what's not here. First of all, didn't that medicine man -- **that traveling medicine man talk about a fox? There's a fox out there.** There's an old country and western song, A fox on the run. **Who saw a fox? Who got on that stand and said, on November the 15th of 2009,between two o'clock in the morning and four o'clock there was a fox out there?**

Well, **the brother testified,** and he's in Florida. The traveling medicine man is in Palm Beach in that big ol' house down there. **[Police Officer] Bo Willis testified. That's their three witnesses. Who said there was a fox out there?**

If y'all heard it, disregard what I say and hold it against me. I'm bad, too; I'm the Solicitor. **But who said there was a fox out there? I'm half deaf, but I swear I didn't hear it.**

Oh, but the fox been out there before, the fox on the run. **I just didn't hear anybody say there was a fox out there that night.**

You know, they said at the beginning, Mr. Worley had only shot one other time, in September. Well, that ain't right.

Mr. Sheffield right here, what did he say? He started coming out, cussing, yelling, shooting around the lake. They didn't want to confront Joe Worley because he said Joe Worley's eccentric. We'll talk to the reasonable person. We'll talk with Mrs. Worley. . . .

November the 15th, here we go again: Cussing, yelling, shooting. And I think -- and y'all take this right -- I think, from what I heard Mr. Sheffield say, it started about 2:30, three o'clock in the morning. You take what he heard.

Here we go again. Light's on. Twenty minutes later, shooting again, cussing again. I ain't going to wait for the third shot. We have filed a report with the sheriff and said, don't do anything, we just want y'all to know what hell we're living under out there in our neighborhood on the weekends. The rest of the time, everything's nice, but on the weekends, we just want to let you know what's going on.

Well, he ain't going to wait for the third shot. And you know what? Alan Sheffield, what a scoundrel he is, because he didn't go over

> there and talk with Joe Worley. What good would it have done? Already talked with mama. Already begged and pleaded.
>
> So they call the sheriff's department. The light's still on. **When the officers get out there -- now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that.**

Id. at p. 1556, l. 23 – 1559, l. 21. Defense counsel immediately objected and moved for a mistrial, noting that Solicitor Myers had just repeatedly mentioned Appellant's failure to testify. *Id.* at p. 1559, l. 22 – 842, l. 3.

The trial court took the motion under advisement and allowed the parties to finish closing arguments. *Id.* The trial court continued to delay its ruling on the mistrial motion while the jury deliberated. Appellant renewed his motion for a mistrial prior to the jury returning its verdict. *Id.* at p. 1636, l. 22 – 1637, l. 19.

Forced to rule, the Court denied the motion for a mistrial. The court found that "in no way was [the comment] burden-shifting nor did it suggest or infer that the defendant is guilty because he failed to testify." *Id.* at p. 1637, ll. 8-19. In so ruling, the court specifically cited *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 516 (Ct. App. 2012) for the proposition that the solicitor's comments were simply addressed to the lack of evidence that there was a fox on the night in question. *Id.*

Discussion

The State's closing argument constituted a direct comment on Appellant's right to not to testify. Generally, "the State may not comment on a defendant's exercise of a constitutional right." *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). (citing *Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000)). The propriety of a solicitor's closing argument is left to the trial

court's discretion, including the decision of whether to grant a defendant's motion for mistrial. *State v. Copeland,* 321 S.C. 318, 468 S.E.2d 620 (1996).

However, prosecutorial comment, whether direct or indirect, on the defendant's failure to testify is impermissible. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Cooper,* 334 S.C. 540, 514 S.E.2d 584 (1999). "Where the solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify." *State v. Sweet,* 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct.App.2000).

Here, the State both indirectly and directly commented on precisely what it was forbidden to address: Appellant's exercise of his right not to testify. *See Id.*; *see also Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.").

This trial tactic by the State was an impermissible comment on the defense's failure to testify because only Appellant could have supplied the information necessary to rebut the State's straw man argument. *See McFadden*, 342 S.C. at 640, 539 S.E.2d 391, 393. Unlike, in *Meggett*, where presumably others could have testified that the victim was a prostitute, if she in fact was; Appellant was truly the only one who could have given first-hand testimony as to whether or not he shot at a fox on the night in question. 398 S.C. 516, 523, 728 S.E.2d 492, 497.

Appellant was denied a fair trial by the State's impermissible comments and, thus, prejudiced. *State v. Brown,* 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct.App.1998) (holding that, "any alleged impropriety must be examined on appeal in light of the entire record."). The State directly referenced Appellant's failure to testify multiple times before concluding with **"I don't know because there ain't no testimony to that."** R. 1559, ll. 16-21. Solicitor Myers tied Appellant's

failure to testify directly and inexorably to Appellant's self-defense, mistake, and accident theories. Appellant's theory of the case was plausible and was supported by defense witnesses. *See Sweet*, 342 S.C. at 348-349, 536 S.E.2d at 94.

The solicitor making the closing arguments deliberately chose to reference Appellant's failure to testify despite having had several cases overturned on appeal because of his conduct, including during closing arguments. *Kelly v. State*, 534 U.S. 246, 122 S .Ct. 726, 151 L. Ed. 2d 670 (2002) (reversing conviction on the failure to give a jury instruction on parole ineligibility where Solicitor Myers placed defendant's future dangerousness at issue during penalty phase, including when he called defendant "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid" in closing); *Bennett v. Stirling*, 170 F. Supp. 3d 851, 862 (D.S.C. 2016) (granting federal habeas relief where Solicitor Myers referred to black defendant as "King Kong," a "monster," a "cave man," and a "beast of burden" in during closing arguments front of an all-white jury, in addition to several other racially charged remarks); *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007) (reversing death penalty where Solicitor Myers' declared in closing arguments that it would be "open season on babies in Lexington County if death penalty was not returned, repeatedly told jurors he "expects" the death penalty, and where he produced a large black shroud and draped it over victim's crib and wheeled crib from the courtroom in a staged funeral procession); *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) (reversing conviction and disqualifying Solicitor Myers' officer where senior deputy solicitor participated in clandestine videotaping of defendant's conversations with his attorney); *see also In re Myers*, 355 S.C. 1, 584 S.E.2d 357 (2003) (Solicitor Myers issued a letter of caution for failing to supervise senior deputy that engaged in clandestine videotaping of defendant's conversation with attorneys and for failing to alert defendant's attorneys of videotaping).

The State's comments regarding jurors having not "heard" from Appellant, despite having heard from his brother and Dr. Kirkham were totally improper. The solicitor deliberately reference to Appellant's failure to testify was a calculated trial tactic that transformed Appellant's exercise of a constitutional right into a weapon for the State. Such comments improperly injected fact and opinion to the jury not arising from testimony or other evidence presented in the current trial. *See Vaughn*, 362 S.C. at 169, 607 S.E.2d at 75 ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.").

Finally, comments on Appellant's failure to testify, were made in the context of an appeal to the jury's emotions and attempt to induce the jury to identify with Rushton. The inflammatory comments on Appellant's reliance on a constitutional right rendered that appeal improper. *See Liberte*, 336 S.C. at 654 n.2, 521 S.E.2d at 747 n.2 (Ct. App. 1999) (noting a closing argument by the solicitor improperly appealed to the jury's emotions and attempted to induce the jury to identify with the law enforcement officers in the case).

As previously indicated, the evidence was less than overwhelming in this case which, at bottom, was founded upon the credibility of Rushton and Moore, both of whom had made inconsistent statements and failed to follow police procedure. Ultimately, whether the State intended to inflame the jury's passions or prejudices by its comments is irrelevant. *Id.* 336 S.C. at 657, 521 S.E.2d at 749.

What is relevant is that the comments encouraged the jury to believe that Appellant's defense was not credible defense because Appellant did not personally explain his actions to them. *State v. Brown*, 289 S.C. 581, 589-90, 347 S.E.2d 882, 887 (1986). The trial court's general charge to the jury did not likely cure the error as the case was a credibility battle. *See, e.g. Id.*; *McFadden*, 342 S.C. at 642, 539 S.E.2d 394; *Sweet*, 342 S.C. at 349, 536 S.E.2d at 95 (holding the trial court's

general jury charge on defendant's right not to testify was insufficient to cure the error when the evidence in the case was less than overwhelming). Thus, the State's closing argument prejudiced Appellant by "so infect[ing] the trial with unfairness as to make the resulting conviction a denial of due process." *Liberte,* 336 S.C. at 658, 521 S.E.2d at 749.

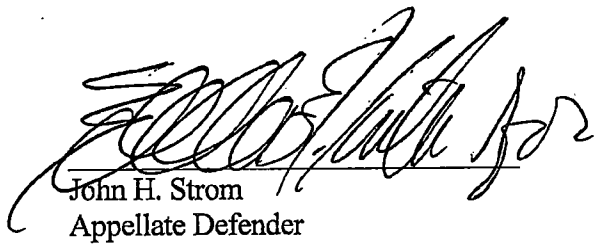
The State attempted to justify its comments as a legitimate attack on the credibility of a defense. R. 1578, l. 11 – 1597, l. 25. This argument is without merit. Criminal defendants have a right to both present a case and rely on their right not to testify. Boundaries governing proper closing argument exist and must be enforced. *Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 747 ("In this case, however, the prosecutor's argument went far beyond the outer boundaries of proper closing argument.").

Accordingly, under the particular circumstances of this case, the trial court abused its discretion by refusing to grant a mistrial. R. 1634, l. 12 – 1638, l. 19.

CONCLUSION

By reason of the foregoing arguments, Appellant Joe Ross Worley's convictions should be reversed and his case remanded to the McCormick County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

November 13th, 2017

John Harrison Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOE ROSS WORLEY,

APPELLANT

CERTIFICATE OF SERVICE

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

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

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

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.