

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

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

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

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STATEMENT OF ISSUES ON APPEAL

- I. BECAUSE AN AGENT OF THE STATE FAILED TO PRESERVE EVIDENCE OF CRITICAL TESTIMONY FROM THE HEARING REGARDING IMMUNITY, DOES APPELLATE COURT LACK SUFFICIENT RECORD TO CONDUCT MEANINGFUL APPELLATE REVIEW?

- II. DOES PROPER APPLICATION OF THE ACT DURING A PRE-TRIAL HEARING REQUIRE DEFENDANT TO PRESENT EVIDENCE OF THE APPLICABILITY OF IMMUNITY, AND THEN PLACE UPON THE STATE THE BURDEN OF SHOWING AN EXCEPTION TO IMMUNITY?

STATEMENT OF THE CASE

This matter is before the South Carolina Court of Appeals (Court) following Appellant Joe Ross Worley's arrest on or about November 9, 2009. Appellant was charged with three (3) counts of Assault and Battery with Intent to Kill and three (3) counts of Possession of Weapon during a Violent Crime arising from his firing of a rifle at an unknown person, later revealed to be a newly re-hired employee of the McCormick County Sheriff's Department. Appellant remains in jail, without trial, during these pre-trial proceedings of almost three (3) years.

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

Judge Keesley thereafter held a hearing on the applicability of immunity provided by the Act on May 31, 2011 and June 1, 2011. On July 5, 2011, Judge Keesley issued an Amended¹ Order on Motion to Bar Prosecution, denying Appellant's assertion of immunity. In that order, Judge Keesley recused himself from further proceedings in the action, and again denied Appellant's request for bond.

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

On July 6, 2011, Appellant filed a Motion to Reconsider the denial of immunity, and a separate Motion to Reconsider Denial of Bond. Judge Keesley requested briefs² from both Appellant and the State on the immunity issues. Appellant filed his memorandum in support of reconsideration on August 1, 2011 and the State submitted a return on August 12, 2011. Appellant then filed a reply brief on August 22, 2011. On August 22, 2011, Appellant also filed a Motion to Supplement the Record on Rehearing, seeking to have Judge Keesley supplement the record of the hearing on immunity of an attached exhibit that reflected the State's witness Mr. Rushton was not certified as a law enforcement officer at the time of the events in question leading to arrest of Appellant.

Judge Keesley denied the motion to supplement by order dated February 22, 2012. Upon receipt of that order, Appellant realized the exhibit that was submitted in conjunction with the motion to supplement was already part of the hearing record, having been introduced at the hearing, and the actual exhibit intended to be the subject of the motion to supplement had not been presented to Judge Keesley for consideration. Accordingly, Appellant filed a Motion *Nunc Pro Tunc* to Supplement the Record on February 23, 2012. At the time of this initial brief, that motion remains pending before Judge Keesley.

Judge Keesley issued an Amended Order on Reconsideration of the Defendant's Motion to Bar Prosecution that was signed December 6, 2011 and filed December 8, 2011. Appellant timely filed a notice of appeal on January 20, 2012. Appellant subsequently filed two motions for extension of time in which to file the initial Appellant's brief.

² On October 10, 2011, counsel for Appellant provided Judge Keesley with a partial transcript of the proceedings (see discussion in Statement of the Facts *infra*) held before him on May 31 and June 1, 2011, on the immunity issue.

STATEMENT OF FACTS

In the early hours of November 15, 2009, Appellant fired a rifle to shoot an adult male who was pointing a gun at him as he stood on his second floor porch. The shot injured Robert Rushton, who was pointing a gun at Appellant³. Rushton was there with two officers (Nick Moore and Sara McAllister⁴) of the McCormick County Sheriff's Department investigating a report of shots being fired earlier that night. (Tr. p. 33, lines 1 – 11). A hearing on the applicability of immunity provided by the "Protection of Persons and Property Act" at S.C. Code Ann. § 16-11-401 *et seq.* was held on May 31, 2011 and June 1, 2011. Unfortunately, only enough information to compile a partial transcript of this hearing survived a theft from the court reporter's records before a complete written transcript could be completed. (Tr. p. 159, lines 15-17; Tr. p. 231). Regrettably, Appellant's testimony is among the missing portions of the transcript.

At that immunity hearing, a neighbor testified that Appellant's family cat, Sweat Pea, was known to have been injured and that there were foxes in the area. (Tr. p. 152, l. 20 – p. 153, l. 11). Mr. Rushton testified he would not be surprised if Appellant had fired at a fox as Appellant contends. (Tr. p. 41, lines 21 – 23; Tr. p. 93, lines 2-3). Neighbors further testified that they often heard gunshots in the area, although some when Appellant was not at home, and had relayed their objections to the noise to Appellant's mother. (Tr. p. 148, lines 22 – 24; Tr. p. 149, lines 15 – 21). There is no evidence a prior noise report was ever communicated to Appellant by law enforcement. (Tr. p. 86, lines 6 – 9). On

³ The property was owned by Appellant's mother, with whom he resided.

⁴ Entered into evidence was a document detailing the termination of Deputy McAllister from her prior employment with the SC Dept. of Natural Resources. (Defense exhibit 6 from immunity hearing). She was fired because DNR discovered that she had participated in the destruction and concealment of critical evidence in a fatal accident investigation, only to then lie on three separate occasions about her actions during questioning by DNR officials. (Tr. p. 191, lines 8 – 14).

the night in question, the neighbors contacted police regarding shots fired in the area. (Defense Exhibit 4 from hearing).

The neighbors did not advise Appellant they had contacted police, so Appellant had no notice that anyone would be arriving at his home. Testimony conflicted regarding the exact time of the shots heard by the neighbors, with the latest time estimated by a neighbor to be 3:30 a.m. (Statement by Gayle Sheffield dated 11/15/09). Dispatch notified Mr. Rushton of the call sometime after 4:00 a.m. (Tr. p. 30, lines 9 – 11). Appellant shot Mr. Rushton sometime after approximately 4:30 a.m. (Tr. p. 64, line 5).

Appellant testified that by the time of their arrival, he was sound asleep in his bed. (Tr. p. 225, line 9). The neighbors who contacted police were expecting police presence and had their windows open. (Tr. p. 153, lines 20-21). Appellant was located upstairs, inside of a dwelling that he testified was well insulated. (Tr. p. 213, lines 8-9).

Rushton admitted that he believed a deer poacher was active in the area and was responsible for the prior shots. (Tr. p. 35, lines 6 – 8, Tr. p. 36, lines 2 – 5, Tr. p. 41, lines 14 - 15). Rushton did not have on a uniform; instead he was wearing merely khaki pants, a green shirt, and a small badge on his belt. (Tr. p. 21, line 13 – p. 22, line 14). He was not wearing McCormick County's standard deputy uniform, any reflective items such as a vest, or any hat identifying him as law enforcement, even though Rushton had a vest and hat he could have worn. (Tr. p. 22, lines 15 – 23; Tr. p. 25, lines 5 – 9; Tr. p. 24, lines 4 - 8).

Rushton, Moore, and McAllister did not telephone, or have dispatch call, the house in which Appellant was asleep to alert the residents of their impending arrival. (Tr. p. 87, lines 10-22). All arrived without sirens and blue lights in operation; in other

words, they arrived silently. Rushton and Moore approached the house, under a covered porch, knocked on the door, and rang the doorbell. The ground level door that was knocked upon, which was where the doorbell was located and is the only entrance to the house, had no peephole or other means to examine the identity or appearance of the person(s) on the other side. (Tr. p. 213, lines 10-18). There were no windows on the ground level, and no police cars could be seen from the upstairs windows. Id. Rushton's car, without blue lights or siren on, was parked on the other side of the house, out of Appellant's line of sight. (Tr. p. 92, lines 11-12; Tr. p. 213, lines 12-14). Moore's car and McAllister's car weren't parked on Appellant's property, and likewise did not have sirens or lights activated. (Tr. p. 197, lines 24 – p. 198, line 8).

Appellant testified that he had heard media reports of home invasions having occurred in the rural area, his mother's home had been burglarized at least once before successfully, and attempted burglaries had occurred on multiple occasions. (Tr. p. 212, line 23 – p. 213, line 3). Appellant also presented evidence that the night in question was the darkest night of the month. (Tr. p. 125, lines 5-7; Moon calendar submitted as portion of exhibit notebook by Defendant; Amended Order on Motion To Bar Prosecution, p. 3).

Appellant testified that he did not see anyone and only saw total darkness outside. (Tr. p. 213, lines 10-12). Moore and McAllister testified that they saw the light come on initially as they were at the rear of Appellant's house getting ready to leave. (Tr. p. 162, lines 10 – 18.). Every witness is consistent in acknowledging the light was not on continuously. Moore testified that he never had a clear look at Appellant, only seeing his silhouette. (Tr. p. 164, lines 18 – 24). McAllister said she never even saw Appellant. (Tr. p. 196, lines 18 – 21).

The shooting occurred immediately after Appellant stepped onto his balcony, with his weapon in the port position, not aimed at anyone. The State contends there was a verbal exchange prior to that shot wherein Appellant supposedly asked who was at his home, received a response that it was law enforcement, and replied with a statement of non-concern including profanity. (State's Exhibit 2 from immunity hearing).

Deputy Moore's claims a call of "Sherriff's office" and "gun!" were made, after which Appellant immediately fired at Rushton. (State's Exhibit 2 from immunity hearing). It is undisputed that the shooting happened almost immediately after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation between those involved. (Tr. p. 45, lines 25 – p. 46, line 9). Rushton testified that "it just happened so fast right then." (Tr. p. 46, lines 22 – 23.)

Evidence of the angle of trajectory and damage to Rushton's weapon and hand confirm that his weapon was aimed at Appellant when Rushton was struck by Appellant's fired bullet. (Tr. p. 66, lines 6 – 10; Amended Order on Motion To Bar Prosecution). Rushton's testimony confirms that he aimed his weapon at Appellant, despite no menacing, threatening, or illegal action having been taken by Appellant, merely by being in possession of a weapon of self-defense. (Tr. p. 46, lines 18 – p. 47, line 1; Tr. p. 47, lines 22 – 23; Tr. p. 54, lines 10 – 14; Tr. p. 63, lines 1 – 7).

Ruston testified the shot knocked him to the ground. (Tr. p. 52, line 2). Although armed with a semi-automatic rifle at the time and therefore capable of doing so, there is no evidence that Appellant sought to hunt down or further injure the person he had just shot. The notion that Appellant would not have shot Rushton if he had known Rushton was there on behalf of the police is not controverted with any evidence as to motive,

substantial prior criminal history, or evidence of ill will towards law enforcement generally. (Tr. p. 34, lines 4 – 8; Tr. p. 204, lines 6 – 8; Tr. p. 136, lines 25 – p. 137, line 8; Tr. p. 126, lines 15 – 19).

Appellant's expert, Dr. George Kirkham, examined the premises at night and reviewed the actions of Rushton, Moore, and McAllister before testifying that the trio failed to follow proper police procedures in many respects, so much so that "if you were making a training video for officers" the actions of these actors could be used to train for what not to do in such a situation. (Tr. p. 137, lines 24 – p. 138, line 3). Dr. Kirkham further stated "what seems to be clear that could have prevented this tragedy from happening[:] proper police procedure. That's all." (Tr. p. 142, lines 8 – 10).

At the hearing and subsequently upon reconsideration, the issue of whether Rushton was a duly authorized deputy was disputed. Rushton's own testimony was that he never took any oath of office, and that his appointment was never approved by any circuit court judge. (Tr. p. 9, lines 21 – p. 10, line 6). When the State produced an oath form signed by Rushton, Rushton testified only that his signature was on the document, not that he had taken the oath. (Tr. p. 109, lines 2 - 3).

STANDARD OF REVIEW

The Supreme Court, in its one opinion directly applying the “Protection of Persons and Property Act” at S.C. Code Ann. § 16-11-401 *et seq.* (hereinafter “the Act”) and the procedure to be implemented in the application thereof, both at the trial court and upon appeal, was silent as to the appropriate standard of review that should be applied by appellate courts considering initial trial court determinations of immunity. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

The Circuit Court is a general trial court with original jurisdiction in civil and criminal cases. Article V, § 11. The immunity provided by the Act of course only arises in criminal proceedings. Nevertheless, it is civil in implementation, relying on the civil standard of “preponderance of evidence” and civil in the nature of its relief, as it acts not only to bar to conviction, but a complete bar to a wider range of acts constituting “prosecution” generally. See Duncan, at 409, 664 (“the legislature intended to create a true immunity, and not simply an affirmative defense”).

Because the issue of immunity was tried by a judge alone and is equitable in nature, Appellant contends any appellate court considering the judgment should use a standard of review appropriate for equitable actions tried in such a manner. Therefore, the underlying facts in this matter would be reviewed with the ability to find facts in accordance with this Court’s own view of the preponderance of the evidence. See Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENT

I. BECAUSE AN AGENT OF THE STATE FAILED TO PRESERVE EVIDENCE OF CRITICAL TESTIMONY FROM THE HEARING REGARDING IMMUNITY, DOES APPELLATE COURT LACK SUFFICIENT RECORD TO CONDUCT MEANINGFUL APPELLATE REVIEW?

Rule 607, SCACR details the requirements for a state-employed court reporter regarding transcripts and tapes of proceedings in circuit court. State-employed reporters are required to maintain both primary and backup tapes of a proceeding for a full five years after the proceeding. Id. The SC Court Reporter Manual, issued pursuant to order of the State Supreme Court, establishes the standards of conduct of all state-employed court reporters in the South Carolina judicial system. It states that a court reporter “is responsible for obtaining a clear, complete, and understandable record of the court proceedings” and that reporter materials “should be kept in a secure and safe manner.” Id., p. 14, 17.

Nevertheless, the state-employed court reporter that was tasked with creating a transcript of the immunity hearing proceedings held on May 31, 2011 and June 1, 2011 before Judge Keesley has not produced a complete transcript of those proceedings. (Court Reporter Certification, Tr. p. 231). Importantly, Appellant bears absolutely no responsibility for this failure. Fortunately, missing transcripts and incomplete records, and the need and nature of correction thereof, have been addressed previously by courts in South Carolina.

Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired. Adams v. H.R. Allen, Inc., 397 S.C. 652, 656-57, 726 S.E.2d 9, 12 (Ct. App. 2012) (citing China v. Parrott, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278

(1968)). "A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." Id.

Unfortunately, the portions of the immunity hearing transcript that are missing are not limited to mere ancillary matters of record. Rather, the portions missing are of grave and critical importance, including the testimony of the accused himself. Appellant provided that testimony at great risk and jeopardy, requiring first a waiver of his Fifth Amendment right to remain silent, subjecting himself to intense cross-examination by the State well before ultimate trial on the pending charges themselves before a jury of his peers. The critical issues in this matter are determinations of the reasonableness of Appellant's actions on the night in question, and Appellant's proffered information regarding his subjective thoughts and impressions, as well as information regarding the premises at which the events unfolded, are critical to a full and fair consideration of the matters, which is why he willingly waived his right to remain silent and submit sworn testimony at the immunity hearing.

The appropriate remedy for the State's failure should be the augmentation of the record on appeal, which Appellant attempted to bring about through a Motion to Supplement the Record. That motion was denied by order of this Court on December 19, 2012. Absent acceptance of that proffered supplementation then, the matter should be remanded to the lower court with direction to evaluate Appellant's proffered reconstructive materials, as well as any others deemed appropriate through which a meaningful and more complete record for review can be created. Only then is this matter appropriate for appellate review. Recent case law, however, indicates partial

reconstructions may be disfavored. See Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012) (remanding for new trial in light of rejected attempt at partial record reconstruction).

If augmentation of the existing record is ordered instead of complete re-hearing, Appellant should receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. If a party fails to produce testimony of an available witness on a material issue, it may be inferred that such testimony would have been adverse to him. Nelson v. Coleman Co., 249 S.C. 652, 155 S.E.2d 917 (1967). Likewise, when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. Gathers By and Through Hutchinson v. South Carolina Elec. and Gas Co., 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993). Although Respondent did not directly lose the portion of the transcript, the actor that did was a State actor, and thus the actions of the court reporter should be imputed to the State as Respondent.

II. PROPER APPLICATION OF THE ACT DURING A PRE-TRIAL HEARING REQUIRES APPELLANT TO PRESENT EVIDENCE OF THE APPLICABILITY OF IMMUNITY, AND THEN PLACES BURDEN UPON THE STATE TO PROVE AN EXCEPTION

As noted by the State Supreme Court, the Act “does not explicitly provide a procedure for determining immunity.” State v. Duncan, 392 S.C. 404, 409, 709 S.E.2d 662, 664 (2011). However, the Act does clearly articulate the legislative intent was to codify the common law Castle Doctrine, providing for the ability of law-abiding citizens to protect themselves via their constitutional right to bear arms, and thereby protect their right to “expect to remain unmolested and safe within their homes.” S.C. Code Ann. §

16-11-420. The Act provides definitions for certain terms before the critical portions applicable in this matter appear, beginning with the presumption, which provides:

- (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury ... when using deadly force [against] another person if the person:
 - (1) ... has unlawfully and forcibly entered a dwelling ...; 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.

S.C. Code Ann. § 16-11-440.

The actual provision providing for immunity under the Act then reads as follows:

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

S.C. Code Ann. § 16-11-450(A).

The statute thus begins with the explanation of the legislative intent by citing the expectations of the state's citizens, and buttresses that starting point by granting an express presumption in their favor if certain criteria are met. Then the immunity provision comes, which has a clear organization of general grant of immunity, then listing of possible exceptions. The State argues the applicability of an exception to that presumption and immunity, but for purposes of the discussion of the statute and its application to Appellant, proper analysis by the lower court necessarily begins with Appellant seeking to establish applicability of the general presumption and immunity.

The burden of producing evidence shifts from side to side as the proceedings progress. Am. Jur. 2d, Evidence § 123. Generally accepted principles of burden of persuasion and burden of production place upon the party seeking relief, and who are in possession of the means by which an affirmative showing can be made, with the obligation to present evidence. Stanley Smith & Sons v. D.M.R. Inc., 307 S.C. 413, 415 S.E.2d 428 (Ct. App. 1992)(“the burden of evidence is imposed on the party best able to sustain it, that is, the party having peculiar knowledge of the facts or control of the evidence relating to an issue).. “Once the party to whose advantage the presumption operates has proven the basic facts giving rise to the presumption, the burden of persuasion shifts to the party against whom the presumption operates.” Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 12:2 at 472 (4th ed. 2007). Appellant thus contends the burden of persuasion, or at minimum the burden of production, should shift to the State to accomplish application of an exception to immunity.

The lower court, however, goes beyond placing the burden on Appellant of entitlement to the immunity itself, and also places the additional obligation on Appellant of disproving any possible exception. Appellant contends placing that second, additional burden on Appellant beyond mere entitlement to immunity is an error of law necessitating a reversal and remand by the Court of Appeals.

A. Appellant established applicability of the presumption and immunity.

Appellant contends that he has presented evidence that demands application of the statutory presumption and immunity pursuant to the Act, and any factual findings to the contrary would be unsupported by the evidence, clearly wrong, or controlled by error of

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law and thus justify reversal and remand. See State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997)

The lower court erred as a matter of law by determining Appellant failed to prove entry or attempt at entry into Appellant's dwelling. S.C. Code Ann. § 16-11-420(A) is clear in its intent to absorb and continue the wealth of common law related to the Castle Doctrine. Section 16-11-430 thereafter defines "dwelling." It is undisputed that the home where Appellant was staying that night qualifies as his dwelling and his residence. Given that presence in his dwelling, deep-rooted case law extends the area for qualified defensive action to include Appellant's curtilage, an important aspect of South Carolina jurisprudence continued by express incorporation of the statute. See State v. Sampson, 12 S.C. 567 (1880)(an outhouse can be part of a dwelling if connected under the same roof); State v. Osborne, 21 S.E.2d 178, 182, 200 S.C. 504, (1942)("may repel trespassers in or upon the house...as if he were under his own roof or within his own doors").

Rushton had "entered" the dwelling, given his location under the roof and eaves of the house, the very type of place "where the property owner alone has the right to be; to the exclusion of the general public." State v. Dickey, 669 S.E.2d 917, 923, 380 S.C. 384, 396 (Ct. App. 2008)(*cert. granted*). In Duncan, the "victim" was only on the porch of the shooter's residence, which was 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.

The entrance of Rushton was unlawful because he was not a law enforcement officer, as discussed in detail *infra*, and thus could not have been acting within the proper scope of his duties of employment as a "deputy" while on Appellant's premises that evening. As such, he had no right to be on the premises, and was a trespasser. Moreover,

it is clear that Rushton aimed his weapon at Appellant before Rushton was shot. (Tr. p. 66, lines 6 – 10; Amended Order on Motion To Bar Prosecution).

B. The State must respond to Appellant's showing of entitlement to the statutory presumption and immunity by meeting its burden of production to show an exception to immunity.

S.C. Code Ann. § 16-11-450(A) provides an exception to the statutory immunity. The criteria for the exception requires that the person against whom the deadly force was used was a law enforcement officer, that person was acting in the performance of his official duties, and either he identifies himself in accordance with applicable law, or the person using deadly force knows or should have known that the person was a law enforcement officer.

1. The State cannot even meet the first criteria for the exception, as Rushton was not a "law enforcement officer" at the time of the incident.

"Law enforcement officer" is not defined by the Act. Rushton was hired by the county sheriff to be a "deputy," which is defined apart from the Act in other statutory and constitutional provisions. No one becomes a qualified, recognized deputy sheriff without taking certain actions required by law. First, Article III, Section 26 of the State Constitution requires an oath be taken. Next, S.C. Code Ann. § 23-13-10 requires an appointment and approval process be completed, and S.C. Code Ann. § 23-13-20 contains an additional statutory oath that must be completed. The two (2) oaths have to be filed with the County Clerk of Court. No case law or statutory provision creates an "almost deputy" office that can be held. Therefore, as a matter of law, one is either a

deputy or not. Since Rushton is not, he has no other claim to assume the title of “law enforcement officer” within the meaning of the Act.⁵

The lower court’s opinion as written and applied to Appellant, however, expressly invalidates both of the referenced statutory provisions. Appellant submits that all such portions of the Order compelling or evidencing that conclusion and result are errors of law. That error is exploited by the State to qualify Rushton as a deputy, and thereby avail itself of an exception under the Castle Doctrine that it otherwise would not qualify for given the absence of involvement of a “law enforcement officer.”

- (a) Interpreted properly, statutorily mandated judicial approval of deputy appointments does not violate the separation of powers.

S.C. Code Ann § 23-13-10 sets out a requirement that the sheriff’s appointed deputy “be approved” by a circuit court judge. He made this legal determination, apparently, so as to minimize the failure of the State to satisfy its burden of proving that Rushton was properly deputized. The lower court deems this a violation of the separation of powers, to the extent “it provides for judicial approval of executive branch appointments.” (Amended Order on Motion To Bar Prosecution, p. 9). Prior review of the same statutory requirement by the Supreme Court, however, raised no such issues. See Willis v. Aiken County, 26 S.E.2d 313, 315, 203 S.C. 96 (1943) (rejecting argument that deputy was not a separate officer from the Sheriff, and referencing the manner in which deputies were appointed *and* approved). Mere interaction or participation by elements from multiple branches of government is not the equivalent of merger and loss

⁵ Although not made as an argument by the State, Rushton could cite mere employment with the sheriff’s department as sufficient to qualify him as a “law enforcement officer” but such a claim would stretch the meaning of that phrase past its logical limits. Otherwise, any janitor employed by a department would carry the same “officer” title with all the rights, privileges and obligations that go along with it.

of separation as the presiding judge gratuitously determined in what appears to be a ruling to lessen the impact of the State's absence of proof on this issue.

As the order cites, statutes are to be construed first upon their plain meaning if unambiguous, as this statute in question is certainly. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). However, when judging the constitutionality of a given statute, the courts should if possible

construe [] [the statute] so as to render it valid; every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.

City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53 (2011)(citing Moseley v. Welch, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946)).

Instead, the lower court makes a narrow and most extreme interpretation of the term "approved" and imbues the circuit court judge with the power of veto and rejection of the sheriff's employment decisions.

With an eye toward meeting the obligation to construe it in any way so as to render it effective, however, the "approved" language in S.C. Code Ann § 23-13-10 could, and therefore should, be read to merely require the involvement of the circuit court judge to verify the appointment and completion of the necessary oaths/other actions. In essence, such a reading would merely create judicial certification of compliance with a mandatory process, something judges do every day and in many different ways. This very case involves judicial determination of an executive's compliance with statutory law, and no more implicates the separation of powers than when a notary, and executive branch officer, participates by necessity of law in the completion of any number of judicial activities (completion of affidavits, etc.).

Having thus shown that the statutory provision is capable of interpretation so as to render it valid, the statute remains valid, and the consequences for failure to comply must be addressed by the Court in its opinion. Rushton's own testimony was that he never took any oath, and that his appointment was never approved by any circuit court judge. No evidence to the contrary was presented, and thus the only rational conclusion based on the evidence presented was that Rushton had not been approved as required by statute.

As a matter of law, therefore, the State failed to establish that Rushton met the prerequisites to be a "deputy." By extension, the State failed to prove that Rushton was a "law enforcement officer" for purposes of the immunity exception contained within the Act. Even when the State produced an oath form signed by Rushton, Rushton testified only that his signature was on the document. (Tr. p. 109, lines 2 - 3). Rushton did not testify⁶ he took the oath. (Tr. p. 12, lines 2 - 8, Tr. p. 9, lines 21 - p. 10, line 6).

(b) Statutory oath requirement is a distinct and mandatory prerequisite that Rushton failed to satisfy.

The "right, authority, and duty of a deputy sheriff are thus created by statute." Willis v. Aiken County, 26 S.E.2d 313, 316, 203 S.C. 96 (1943). The Supreme Court in that matter was addressing specifically the same requirements now codified in S.C. Code Ann § 23-13-10, which establishes a separate requirement of the taking of an oath by a deputy "before entering upon the discharge of his duty." The statute expressly mentions the Constitutional Oath of Article III, and sets forth an additional oath that must be completed as set forth verbatim. Clearly the legislature's intent was to add a distinct,

⁶ The order references the Constitutional oath, and states that Appellant produced no evidence it was not forwarded to the Secretary of State, as the form indicated it would be. This is an example of the improper placement of burden of production discussed in section III supra, as it was the State's responsibility to prove compliance with all necessary aspects of Rushton's deputization, not Appellant's burden to produce evidence of non-compliance.

mandatory oath *above and beyond* the constitutionally mandated oath, which the Supreme Court in Willis accepted as a given without discussion or rejection. Again, the evidence presented was that Rushton did not recall taking any oaths upon his employment with the County, and Rushton never testified that he took the oath that he signed, which does not comply with the language required by § 23-13-10.

The Court characterizes Appellant's interpretation of the statute as "strict, technical evaluations." (Amended Order on Motion to Bar Prosecution, P. 13). The statute does not require any complex or "technical" actions. It merely, and in plain language, puts recitation of a particular oath as a barrier to qualification as a deputy, a barrier Rushton and the State cannot surmount. Appellant has only made simple demands for compliance with a simple statute. Surely mere compliance with controlling plain language of a statute cannot be devalued and dismissed as a "strict" interpretation.

Treatment of this statutory oath requirement as just "supplemental" to the Constitutional requirement is at its essence a mere a refusal to enforce the clear, mandatory intent of the legislature. It can be fairly characterized as "additional" or "supplemental" to the Constitutional oath, but neither characterization diminishes or excuses failure to comply with its mandatory nature. That result could not have been intended by the legislature, who went through the trouble of crafting the statute to place the requirement, despite acknowledging the existence of a similar oath requirement already.

The legislature's requirement is a minimal barrier to deputization, but any barriers that the legislature deems fit to impose expressly are intended because of the significant

meaning and consequence created once that process is completed. That significance is destroyed by the lower court's nullification of the mandatory nature of the statute.

In the process of nullifying that provision of the State Code, the lower court's conclusion operates to delete the word "officer" from § 16-11-440 and 450. Once the barrier to becoming an officer is removed, the castle doctrine statute would then provide an exception for any member of "law enforcement," not just officers thereof. Under that standard, mere labeling of any county employee as a "deputy," regardless of demonstrated noncompliance with the requirements set forth in § 23-13-10 or 20, is enough to grant that employee the full protections expressly reserved for "law enforcement officers." Surely that result would be the sort of "plainly absurd" result that courts are to avoid when interpreting statutes. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

- (c) Rushton's certification as a Class I law enforcement officer had lapsed, and necessary training to recertify was not completed prior to the events in question.

Rushton left his employment with the McCormick County Sheriff's Department and spent four years working abroad between 2005 and 2009. (Tr. p. 7, lines 21 – p. 8, line 4). He testified upon cross examination that he "had to catch up all the training hours I had missed for the previous four years." (Tr. p. 9, lines 11 – 12). He claimed to have taken a criminal domestic violence update and legal update. (Tr. p. 13, lines 16 – 20). No such training, however, is listed on his training record submitted at the hearing.

(Court's Exhibit 1 from hearing). That same document shows he was certified⁷ as a Class I law enforcement officer on June 26, 2010, nearly seven months *after* the night in question. *Id.* The only evidence of training is thus contradicted by a certified document from the Criminal Justice Academy that was entered into the hearing record as an exhibit.

(d) Failure to qualify as a "law enforcement officer" does not bar prosecution, but merely precludes certain exception to immunity.

The Court justifies its determination that failure to comply with the oath requirement of S.C. Code Ann. § 23-13-20 "does not deprive the State of the ability to prosecute here for shooting a deputy." That first assumes qualification as a deputy, which as shown has not been met as a matter of law. Second, that is an oversimplification of the collateral consequences of Rushton's (and the County's) failures. Failure of an exception is not the equivalent of proof that the underlying immunity applies. The failure here does preclude the State from availing itself of the "law enforcement officer" exception under § 16-11-450, but does not by itself bar prosecution. The bar to prosecution, if any, comes as the result of Appellant's separate preliminary showing of entitlement to the necessary presumption and immunity, as set forth hereinabove in Section III.A.

2. The State cannot support a finding that Appellant knew or should have known Rushton was a law enforcement officer at the time of the incident.

Assuming for the purposes of argument that Rushton is determined to be a "law enforcement officer" as a matter of law or factual finding by the presiding judge, the

⁷ The date referenced is a recertification date. Since Rushton had spent more than three years away from the McCormick County Sheriff's Department, his certification had lapsed. See S.C. Code § 23-23-60. The June 26, 2007 date listed is, upon information and belief, the date of that lapse, and is not indicative of continuous certification that was not renewed until 2010.

State would still need to show that Rushton “identifie[d] himself in accordance with applicable law.” S.C. Code Ann. § 16-11-450(A). The State may also make the requisite showing by producing evidence that Appellant knew or should have known Rushton was a law enforcement officer. *Id.* The evidence, however, compels the conclusion that Appellant acted reasonably in ignorance of the fact that Rushton was (purportedly) a law enforcement officer, in part because of Rushton’s failure to follow proper procedures for responding to a “shots fired” dispatch. Any factual finding to the contrary is “clearly wrong” such that the findings may be set aside on appeal. *See State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997)

- (a) The facts, when viewed properly from the perspective of Appellant as compelled by the common law and codification thereof, compel a finding that Appellant was reasonable in his belief that he was not firing upon a law enforcement officer.⁸

Appellant testified that he was aware of home invasions occurring, and that his mother’s home had been burglarized at least once before successfully, and attempted burglaries had occurred on multiple occasions. (Tr. p. 212, line 23 – p. 213, line 3). The Order mentions that Appellant had discharged his firearm in the area that evening, as he was allowed to do lawfully since his mother’s house was in an unincorporated area, not a “neighborhood” as the order claims, and he was protecting his pet from a fox pursuant to S.C. Code § 50-11-2570(B) (right to shoot at furbearing animal damaging property). The Order mentions neighbor complaints to Appellant’s mother about Appellant’s shooting, but absolutely no firm testimony or evidence indicates that Appellant was ever advised of

⁸ Again, as set forth in detail *supra*, Appellant contends that Rushton was not a “law enforcement officer” within the meaning of the Act,

that conversation. (Tr. p. 149, lines 15 – 18). There is no evidence a prior noise report was ever communicated to Appellant by law enforcement. (Tr. p. 86, lines 6 – 9).

Rushton, Moore, and McAllister did not telephone, or have dispatch call, the house in which Appellant was located, and they were not responding to any contact initiated by Appellant. ((Tr. p. 87, lines 10-22). The neighbors that called the police had not contacted Appellant or notified him of police involvement on the night of the shooting or any previous occasion. (Tr. p. 149, lines 15 – 18). As he testified, Appellant was sound asleep in his bed when the disturbance on the property began.⁹ (Tr. p. 225, line 9). He was upstairs, inside of a dwelling that was well insulated. (Tr. p. 213, lines 8 – 9, Amended Order on Motion To Bar Prosecution, p. 3).

The Court's reference to the ability of neighbors to observe and hear various events is irrelevant and misguided. Those neighbors were expecting police presence, as they had in fact initiated police presence, and they had their windows open. (Tr. p. 153, lines 20-21).

The ground level door that was knocked upon, which was where the doorbell was located and is the only entrance to the house, had no peephole or other means to examine the identity or appearance of the person(s) on the other side, which is submitted as a more than appropriate reason for Appellant to not open this door. (Tr. p. 213, lines 10-18). There were no windows on the ground level, and no police cars could be seen from the upstairs windows. Id. Rushton's police car, without blue lights on, was parked on the other side of the house. (Tr. p. 92, lines 11-12; Tr. p. 213, lines 12-14). It was also

⁹ Testimony conflicted regarding the exact time of the shots, although witnesses seemed to agree that there were only two shots fired. Even using a time later than Appellant's own recollection, the 3:30 a.m. time testified to by the neighbor, still puts an hour between the final shot and when Rushton arrived on scene, which was more than ample time for Appellant to reach a deep sleep prior to awakening suddenly.

parked behind an SUV. (Tr. p. 39, lines 16 – 18). Moore's car and McAllister's car weren't parked on Appellant's property, and likewise did not have sirens or lights activated. (Tr. p. 197, lines 24 – p. 198, line 8). Appellant had no obligation to remove and open the only barrier to entry into his home, just to determine the identity of an uninvited, demanding visitor of unknown purpose or identity in the middle of the night. It is unreasonable to require otherwise.

Appellant presented evidence that the night in question was the darkest night of the month, and the Court stated it had no reason to disbelieve that evidence (Amended Order on Motion To Bar Prosecution, p. 3). That raises the issue regarding the use/non-use of a balcony light. Moore and McAllister testified that they saw the light come on initially as they were at the rear of Appellant's house getting ready to leave. (Tr. p. 162, lines 10 – 18.). This clearly explains why Appellant did not see any person in his yard when he first turned on the light and looked out over the yard from within his house.

Every witness is consistent in acknowledging the light was not on continuously. The Court finds that there was a verbal exchange wherein Appellant supposedly asked who was at his home, received a response that it was law enforcement, and replied with a confrontational statement. (Amended Order on Motion To Bar Prosecution, p. 6).

Appellant maintains no such verbal exchange occurred, and there is no evidence to indicate that Appellant was disposed to, or had any reason on the night in question, have reacted in such a cavalier manner to the supposed announced presence of law enforcement, regardless of the time of night. (Tr. p. 46, lines 18 – p. 47, line 1; Tr. p. 47, lines 22 – 23; Tr. p. 54, lines 10 – 14; Tr. p. 63, lines 1 – 7). Thus Appellant's testimony that he would not have shot Rushton if he had known Rushton was there on behalf of the

police, (Amended Order on Motion To Bar Prosecution, p. 3), is uncontroverted and should be accepted by the Court.

Appellant had no death wish, and had no grudge against law enforcement, and thus the only reasonable explanation for why he would turn on the light and step onto his balcony, which also is the actual explanation, is that Appellant had not yet understood or acknowledged the presence of purported law enforcement. The Court acknowledges that Appellant testified about a failure to see any blue lights, or hear sirens, or see that the area was cordoned off, but "his testimony in that regard is not credible." (Amended Order on Motion To Bar Prosecution, p. 4). However, the reason Appellant did not see any blue lights, hear any sirens, or see a cordoned off area is that those actions were *never taken* by anyone, and thus the testimony is not contested in that regard and cannot be found to be no credible.

It is undisputed that the shooting happened almost immediately after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation between those involved. (Tr. p. 45, lines 25 – p. 46, line 9). Rushton testified that "it just happened so fast right then." (Tr. p. 46, lines 22 – 23.) Deputy Moore's statement to the ATF was that this action was supposedly met with a call of "Sherriff's office" and "gun!" after which Appellant immediately fired at Rushton. (R. ____). Even without agreement with Moore's statement, it is undisputed that the shooting happened within a very brief after Appellant's entrance onto the balcony, and not after a contemplative, observation of and conversation with or dialogue with any particular person. Accordingly, there is no evidence to support the contention that even had those statements been made, that there was sufficient time to process the information prior to Appellant's shot.

- (b) Appellant provided expert testimony regarding the procedural and technical failures of Rushton, Moore, and McAllister that further justify a necessary finding of reasonableness on the part of Appellant.

The lower court ignores the significant and relevant testimony of Appellant's expert, Dr. George Kirkham. Dr. Kirkham, a member of law enforcement himself, examined the premises at night and reviewed the actions of Rushton, Moore, and McAllister on site that morning. (Tr. p. 114, lines 23 – 24). He testified that the trio failed to follow proper police procedures in many respects, so much so that “if you were making a training video for officers” the actions of these actors could be used to train for what not to do in such a situation. (Tr. p. 137, lines 24 – p. 138, line 3). Dr. Kirkham further stated “what seems to be clear that could have prevented this tragedy from happening[:] proper police procedure. That’s all.” (Tr. p. 142, lines 8 – 10).

- (c) Rushton was not in uniform or appearance a law enforcement officer.

The Order states that Rushton did not have on a military style uniform, “but had his badge displayed.” (Amended Order on Motion To Bar Prosecution, p. 6). There is neither evidence nor any indication how the clothing worn by Rushton differed from the stereotypical outfit a burglar might employ, aside from the small badge on a belt. Rushton did not have on a uniform; instead he was wearing merely khaki pants, a green shirt, and a small badge on his belt. (Tr. p. 21, line 13 – p. 22, line 14). He was not wearing McCormick County’s standard deputy uniform, any reflective items such as a vest, or any hat identifying him as law enforcement, even though Rushton had a vest and hat he could have worn. (Tr. p. 22, lines 15 – 23; Tr. p. 25, lines 5 – 9; Tr. p. 24, lines 4 – 8). Appellant testified that he did not see the badge anyway, which is highly likely and

understandable given Rushton's first appearance to Appellant involved a gun aimed at Appellant on a dark night.¹⁰

Appellant's actions after shooting Rushton support this belief, and actions in conformity therewith up until that point, that he was protecting himself within his castle and not mistakenly shooting a purported member of law enforcement. There is absolutely no evidence that Appellant maliciously sought to hunt down or further injure the person he had just shot. Ruston testified the shot knocked him to the ground. (Tr. p. 52, line 2). Appellant was armed with a semi-automatic rifle that contained additional unspent ammunition, including a round in the chamber. (State's Exhibit 2 at immunity hearing, p. 3 (Statement of Moore)). Appellant could have easily fired multiple shots at Rushton if he had intended to be as evil as portrayed by the State.

Instead, Appellant fired a warning shot into the air over Ruston's head. Then, consistent with someone protecting himself and not intent upon attacking known law enforcement, Appellant remained within the protection of the home for a short time, then searched the premises and even helpfully placed Mr. Rushton's damaged pistol inside the patrol car before meeting with the Sheriff who arrived on scene later. (State's Exhibit 2, p. 11 (Sheriff Reid's statement)).

The Order repeats Appellant's statement as "Where are you, you son of a b_____?" (Amended Order on Motion To Bar Prosecution, p. 7). Although not clear from the order, it is important that the statement be clarified as definitively referring to a single person, as Appellant contends he was only aware of a single, un-uniformed person on his premises that evening, and not the trio that the State wants to focus on. Moore

¹⁰ As the Court notes in its order, evidence of the angle of trajectory and damage to Rushton's weapon confirms that it was aimed at Appellant when struck by Appellant's fired bullet.

testified that he never had a clear look at Appellant, only seeing his silhouette. (Tr. p. 164, lines 18 – 24). McAllister said she never even saw Appellant. (Tr. p. 196, lines 18 – 21). These statements, even without reliance upon anything Appellant testified regarding, compel but one factual finding supported by evidence, that Appellant was reasonably ignorant of the presence of more than one person, let alone multiple persons with law enforcement, that dark morning.

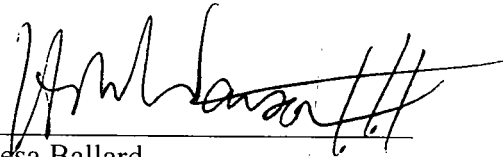
Retrospectively, of course, it is obvious that Rushton, Moore and McAllister were trying to serve the community and do their jobs. But when examined from the perspective of Appellant, or any other reasonable person placed in his shoes, at the relevant time when Appellant was making decisions about what to do, the only evidence available compels a finding in favor of Appellant as to this personal or imputed knowledge, and thus the inapplicability of the State's attempt at proving an exclusion to immunity. The root source of such a perspective is longstanding precedent that says a man may defend his castle "if necessary or apparently so." State v. Bradley, 120 S.E. 240, 242, 126 S.C. 528 (1923). Appellant's actions exist squarely, and necessarily, within the boundaries of "apparently so" without any evidence that may be relied upon to justify a contrary factual finding.

CONCLUSION

Appellant respectfully submits that an insufficient records exists by which this Court can engage in a meaningful review of the relevant facts presented at the hearing, necessitating at minimum a remand for augmentation of the record with an inference in favor of information submitted by Appellant, or in the alternative a complete re-hearing.

However, even on the limited record preserved, appropriate application and enforcement of all relevant provisions of statutory law and common law principles discussed in this memorandum compels extension of immunity to Appellant and rejection of the State's attempted application of an exception thereto. As such, Appellant respectfully requests the denial of immunity from prosecution be reversed, with remand for issuance of a proper order dismissing these matters against Appellant, and for such other and further relief as this Court may deem necessary and proper.

Respectfully submitted,



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