

 ORIGINAL

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY

Alison Renee Lee, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

ALIRIO ORTIZ,

APPELLANT

APPELLATE CASE NO. 2012-211933

RECORD ON APPEAL

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January 12, 2012

18 THE COURT: Thank you. Good morning,
19 everyone. We are here this morning on a motion that's
20 been filed by the State -- I'm sorry -- by the Defense
21 in the case of The State versus Alirio Ortiz, indictment
22 numbers 2011-GS-40-00580 and 00586. Both of these
23 indictments are for -- true billed indictments for
24 assault and battery of a high and aggravated nature
25 involving Donald Calef and Maria Calef.

1 The State -- I'm sorry -- the Defense has requested
2 a hearing under the provisions of Section 16-11-440,
3 basically 16-11-420 et seq, under the protection of
4 persons and property act seeking immunity from
5 prosecution under the provisions of 16-11-440.

6 Pursuant to case law, the parties are entitled to
7 have a hearing to determine whether or not the act
8 applies and whether he's entitled to immunity before
9 prosecution or trial takes place. It's my understanding
10 that under the case law that the burden is on the
11 Defense and that it is a burden based upon the
12 preponderance of the evidence and that the information
13 is provided before the Court. We've previously had some
14 discussions in chambers with all the attorneys present
15 to discuss the procedural parts, only the procedure, and
16 to get a brief factual background. Based upon those
17 conversations, we set the hearing for this week and
18 established the parameters for the hearing today.

19 I have received from the State, the State's
20 response to the Defendant's request for immunity from
21 prosecution with case law. I've also received a
22 proposed order, which requested, with case law attached.
23 From the Defense, I've received their motion, of course,
24 as well as the discovery that was provided to them by
25 the State. I received two separate orders, as well as

1 case law from the Defense. And since I'm somewhat
2 familiar with the circumstances surrounding the events
3 and what led to the charges, we can have a brief opening
4 statement but I don't think we need to. I understand
5 that there's a dispute between adjacent property owners,
6 that the Calef's daughter lives next door to Mr. Ortiz,
7 and that there's been an on-going dispute about a
8 boundary line on the property and that an altercation
9 took place. And there appears to be a factual issue
10 about not only who started the altercation, but where it
11 took place, whether it was on Ortiz's property or
12 whether it was on Calef's property. And, additionally,
13 I think there are some other issues which we may need to
14 discuss.

15 But we can -- if there's nothing else we can go
16 ahead and start with testimony and we can take up those
17 other issues near the end.

18 MR. MAY: Yes, ma'am. I'm asking for one
19 moment just to tell him what's going to happen.

20 Your Honor, at this time, the Defense calls Alirio
21 Ortiz.

22 MS. SAMPSON: Your Honor, before testimony,
23 you've asked them if there are any other issues of the
24 Defense. I didn't get a chance to respond.

25 THE COURT: Okay. Yes, ma'am.

1 MS. SAMPSON: Thank you, Your Honor, may it
2 please the Court. It would be the State's position that
3 a hearing is not necessary and not warranted because the
4 State does not feel that this particular act is
5 applicable to these facts. As stated in the motion,
6 Your Honor, even if we take the facts given by Defense,
7 in the light most favorable to the Defense, this
8 incident did not take place with the victim attempting
9 to enter the home or attempting to enter the residence.
10 The act specifically defines dwelling and residence and
11 does not outline curtilage at all, it does not mention
12 it at all. And, in fact, gives definitions that include
13 a roof, that include entry into a door, that include
14 talking about porch, but did not talk about the yards or
15 curtilage. I understand the Defense's position may be
16 that because curtilage was used in discussion of Castle
17 in prior common law, that they are arguing that this act
18 applies to curtilage, but we would say that it does not.
19 Because had the Legislature intended for it to, it would
20 say curtilage and they could have put that in there.
21 But because they specifically defined residence and
22 dwelling, and did not use the words property, did not
23 use the words curtilage, did not use the words outside
24 of, they're very specific. And they also -- when it
25 comes to occupied vehicle, require it to be occupied.

1 Had they intended for it to count from ground to
2 vehicle, they would have used that language instead.

3 I have given you the case law as far as statutory
4 construction. And it would be our position that even
5 statutory construction, using plain language, as we are
6 addressed to do by the Court, that this act is not even
7 applicable, even if you believe the Defendant's version
8 as the -- the Calef's never entered, attempted to enter
9 or tried to enter, the residence. I can go more into
10 that if Your Honor would like and I believe -- that
11 would take care of Section A as it applies. It would
12 not apply, we would argue, to this case. We would also
13 then need to go to section C, which states that he may
14 be able to assert this act if he is acting lawfully and
15 if he's in a place that he had a lawful right to be.

16 THE COURT: Are you talking about Section 16-
17 11-440?

18 MS. SAMPSON: Yes, Section C of that Act, of
19 that Section, Your Honor. And we would again state that
20 because there's a question of fact as to where this
21 occurred, we cannot make that determination at a pre-
22 trial hearing. Their witnesses are going to state, my
23 understanding is that this happened -- began on the
24 outside of the fenced property. And if I may approach,
25 Your Honor, just to give you an idea, I was going to

1 show you the photographs, because I believe you're
2 looking at this blind whereas all of us know exactly
3 what we're talking about as far as what the property
4 looks like. I have shown the Defense these photographs,
5 but I'm going to show Your Honor Defense Exhibits 1
6 through 5. Starting with number 1, that is a photograph
7 of Cynthia Calef's property and as you see there's a
8 fence that goes around the property. Photograph number
9 2 is Mr. Ortiz's property. That's the fence that
10 outlines his property. And where you see the bushes is
11 where Ms. Calef's property begins. And in that
12 photograph, I believe you can see a little bit, at the
13 very bottom, a pink flag. That is the stake that is
14 still there now. Those photographs were taken last week
15 and that shows where the properties. That's a bigger
16 photograph to show the property. If you're looking at a
17 picture of the property, on the right is Mr. Ortiz's.
18 The property on the left is Ms. Calef's. And then this
19 is where the altercation -- there's probably about where
20 the altercation began, where the bushes are is where
21 they start to argue as to where that fence ends. That's
22 where we would allege the fight, the incident, occurs.
23 My understanding is Mr. Ortiz stated that it may have
24 started there, but it continued on into his property and
25 that's just another photograph of -- a closer-up shot.

1 So that's just to give Your Honor an idea of the
2 property that we're talking about.

3 We would allege and argue that this incident
4 occurred on that area of grass in front of the bushes,
5 in between the two residents where the fences end. And
6 we would have testimony from the surveyor that states
7 that that property is state property, that it is -- and
8 we have the plat. The property of both the Ortizs and
9 the Calefs stop where their fences stop. The property
10 of the rest -- the rest of that property is for the
11 State so they can address sewer problems, pipe problems,
12 any of that. That strip of grass between the bushes or
13 the end of the fence and the road is state property.

14 Because Mr. Ortiz would not have an ability to legally
15 eject anyone from that property because it is not his,
16 we would allege that he did not have a lawful right to
17 be there and, therefore, (C) would not apply to either.

18 The other part of (C) again would be that he had to be
19 acting lawfully when he was -- if you want to say,
20 attacked, assaulted, when the incident occurred. We
21 would argue that that is a question of fact because that
22 is the one thing we can't even agree on. In all of the
23 case law that we've given you, that Mr. May has give
24 you, every case they agree at least on the where it
25 occurred. There was no question of the fact. It either

1 occurred on the Defendant's property. It occurred on
2 the street. It occurred while the Defendant was
3 ejecting someone from his property. That was never
4 questioned. Whether self-defense could be asserted was
5 what was usually in question as to whether he was
6 without fault, whether it was like force, whether it was
7 reasonable. All of those things may be in question.
8 But the actual locations was never in question. We
9 would argue that that's a question of fact for the jury.
10 And as Your Honor knows, questions of facts are to be
11 determined by the jury not by Courts. And, therefore,
12 we would say that this Act is not applicable to these
13 set of facts. And, therefore, a hearing is not
14 required.

15 When you read the case on *Duncan*, it doesn't say a
16 hearing is required. It says that there is a pre-trial
17 determination and they make a distinction between
18 hearing and determination. They state that other Courts
19 who have this same act require hearings. When you go to
20 what they require us to have, they use the word
21 determination. They never once require us to have a
22 hearing. They don't even outline how we're supposed to
23 deal with it. They just state that they have to prove,
24 Defense has the burden, that it's preponderance of the
25 evidence, and there has to be a pre-trial determination,

1 versus a determination made in trial.

2 Therefore, we would argue you don't need to have a
3 hearing if, in the beginning, we can prove that this
4 case is not -- this act is not applicable because of
5 these set of facts. And based on all of that, we don't
6 feel that a hearing is necessary.

7 Lastly, Your Honor, I don't feel that the denial of
8 a hearing is immediately appealable because the wording
9 and the language that allows it to be appealable says,
10 an order denying entry of evidence, denying a particular
11 thing or allowing a particular thing. You would not be
12 denying by granting an order. You would just be denying
13 a hearing. And, therefore, it's not immediately
14 appealable.

15 In this Circuit, that has been done both by Judge
16 Cooper and Judge Benjamin. Judge Benjamin did that in
17 August on a case with an assault where it occurred on
18 the outside of a bar on a public sidewalk. Judge Cooper
19 did it when the incident occurred, and it was Mr. May's
20 case, in the house of the Defendant because he said
21 there were too many questions ---

22 THE COURT: Well, let me stop you there
23 because if you're claiming that there are factual issues
24 and that I don't have a right to determine factual
25 issues, how can I make a determination? Because if

1 there is a question as to whether -- even assuming that
2 there's an agreement that it did not specifically occur
3 behind the fence, the fence line, but there's a question
4 about whether it occurred on the grassy area, if there's
5 a dispute as to that, is there not a requirement that
6 there be some testimony so that a determination could be
7 made as to whether or not the act would. I mean, I have
8 to make a factual decision as to some of the facts, and
9 at least a preliminary factual decision, and there's got
10 to be some evidence presented, other than just the
11 arguments of the attorneys.

12 MS. SAMPSON: What I'm saying, Your Honor, is
13 that you could take the Defendant's version, Mr. May
14 could proffer his version. It still would not make
15 these facts applicable to the Act, even if you agree
16 with his version of the facts, even if he just proffered
17 them, without even putting up a witness, if you agreed
18 with his version.

19 THE COURT: So you're saying that even if he's
20 on -- your argument basically is that because it's not
21 his dwelling or it's not his house, not a residence, a
22 dwelling, or an occupied vehicle, pursuant to the
23 provisions of the Act, that, therefore, it doesn't apply
24 and he's not entitled to immunity on that basis?

25 MS. SAMPSON: Correct.

1 THE COURT: Okay. Separate and apart from all
2 the other issues?

3 MS. SAMPSON: Separate and apart from all the
4 other issues. If you believe the evidence in the light
5 most favorable to the Defendant, and that would be
6 taking the versions of facts in his proposed order, you
7 still don't reach the level necessary for the Act to
8 apply. Then we would need to move to Section C and that
9 is where I would need to start to get into the questions
10 of facts that the jury would have to render a decision
11 on.

12 THE COURT: So if I talk about Section C then
13 that does talk about the Act being applicable, does it
14 not?

15 MS. SAMPSON: If you go to Section C then --
16 if we were to go into Section C and ignore A, Section C,
17 the first thing you have to do is show that you're
18 acting lawfully and that you had a legal right to be.
19 And I'm saying because we can't even agree as to the
20 location, Section C, again, is not necessarily
21 applicable.

22 In all of the case law that we have, they agreed at
23 least on where it occurred. And so they could go ahead
24 and assume that fact into evidence, putting up anybody
25 or not, they could proffer it, they could agree to it.

1 We don't even have that. And because we can't agree on
2 the facts, with or without testimony -- we have three of
3 their witnesses saying it happened in this location and
4 three of ours saying it happened in a different
5 location. So I understand your problem and ---

6 THE COURT: But if there has to be a
7 determination as to whether or not he's entitled to the
8 provisions of the Act, there has to be some
9 determination as to the facts in order to arrive that.
10 And even though the facts may be disputed, there still
11 has to be some determination of the facts.

12 MS. SAMPSON: And what I'm saying is in the
13 two times that I have seen the Court address this issue
14 and not have a hearing, in both of those instances, the
15 Court said because there is a -- excuse me. In the one
16 case with Judge Cooper, the Court said because all of
17 that is a question of fact, they were not going to have
18 a hearing. They were going to leave it up to the jury
19 to determine that. And in the case where we said it
20 occurred on the sidewalk, we all agreed that it occurred
21 on the sidewalk and, therefore, the Court said it didn't
22 apply and, therefore, we didn't have to have a hearing.
23 I was just using those as examples of times that it's --
24 and this is all new to all of us. Unfortunately,
25 there's not a whole lot of case law to go on.

1. And, lastly, and then I will have -- let them reply
2 and sit down, if we're going forward and saying that (A)
3 doesn't apply, I would just like that -- I would like to
4 know that from the beginning because it would change
5 what we need to do about questioning. I would just
6 argue that even if we're going forward, it should be
7 only on (C) because there are different levels that you
8 have to prove. With (A) is a presumption of fear,
9 whereas with (C) there is not. And, therefore, if we're
10 going to go forward, I would argue that if you do go
11 forward with the hearing, (A) is not applicable at all.
12 We should just move to (C).

13 THE COURT: Mr. May, Ms. Hines?

14 MR. MAY: Yes, ma'am. May it please the
15 Court, Your Honor. Where would Your Honor like me to
16 start?

17 THE COURT: From the beginning.

18 MR. MAY: Okay. Your Honor, whether or not
19 this is a question of fact, is solely in the province of
20 this Court during this hearing. In *State v. Duncan*, the
21 Court referenced a Florida case of *Peterson v. State*,
22 which is 383 So.2d 27. In that case it was referenced
23 as the proper procedure. I believe it states that the
24 State response suggest, among other things, that any
25 factual dispute should defeat a claim of statutory

1 immunity, and further suggest in that motion under --
2 the section should be treated or brought under a
3 different section in the Florida Court. We reject the
4 State's suggestion and hold the Trial Court correctly
5 handled the motion the right way, meaning that in that
6 case the Court held a hearing and made a factual
7 determination as to what happened. Now, in that case
8 the Court ruled in favor of the State and said immunity
9 wasn't present. But there was a hearing where a factual
10 determination was made by the Court. As I said,
11 *Peterson v. State* is what the South Carolina cases don't
12 hit upon as the correct way as well as the correct
13 standard of ethics.

14 Therefore, I believe that the only way we'd have
15 motions are when there are factual disputes.
16 Furthermore, *Peterson* goes on to say that it is the same
17 standard as a suppression motion or a PCR, it's a
18 preponderance of the evidence. So, Your Honor, I
19 believe that because there's a factual dispute is the
20 reason why Your Honor must make a determination.
21 Regarding the other contentions by the State, Your
22 Honor, the Protection of People and Places Act states
23 that it's meant to codify the common law. There's the
24 Legislature trying to expand the protections and
25 privileges of the Citizens of South Carolina. It was

1 not meant to limit, which the State is trying to say.
2 Prior to the Castle Doctrine, which is commonly referred
3 as Castle Doctrine, was the Protection of People and
4 Places Act, it was a defense of habitation, which is
5 seen in *State v. Rye*. In *State v. Rye* is a case where a
6 man did not live on the property, was forcefully
7 ejecting people from said property and killed them.
8 That's basic -- that's protection of habitation and core
9 defense of habitation should apply.

10 We trace back through common law, back to William
11 Blackstone's commentaries, Volume 4, he talks about the
12 Castle defenses, which is the defenses around one's
13 home, which that, back in old England days meant the
14 turrets, the moats. Here, Mr. Ortiz was erecting a
15 fence to keep the Calefs out. That is the reason why
16 the fence is coming up. He was erecting a fence. The
17 fence was not complete at the time this occurred. He
18 was actually working on the fence. There's an
19 allegation of a post hole digger being used. He's
20 actually putting in the post for the fence and it was to
21 protect his property and himself and his family from,
22 what he believed, was some sort of danger.

23 Your Honor, I believe that because he was putting
24 up the fences to protect himself that the Castle
25 Doctrine extends to that. We're not talking about in

1 the country where barbed-wire fences go for acres.
2 We're talking about a neighborhood where a fence was
3 erected to protect himself and his family from neighbors
4 who, there is no doubt, both sides agree upon, there's
5 bad blood. Your Honor -- yes, ma'am?

6 THE COURT: Go ahead.

7 MR. MAY: Your Honor, we believe that because
8 it says that the intent of the Legislature is to codify
9 the common law, we believe the Castle Defense is the
10 standard and, therefore, it should be applied in this
11 case.

12 THE COURT: What about specifically that the
13 immunity applies, at least under sub-section (A), it
14 refers specifically to, you know, the residence or the
15 dwelling or the occupied vehicle, which are very clearly
16 defined in the act. Sub-section (C) appears to go on to
17 talk about being in some place other than the residence
18 or dwelling or an occupied vehicle. So would you at
19 least agree that (A) does not apply?

20 MR. MAY: Your Honor, we would say that
21 because at the beginning of the People Protection Act,
22 it states that the intent is to codify the common law.
23 When one looks at the common law, which is the defense
24 of habitation in this State prior to this act, we
25 believe that the defense of habitation extends within

1 curtilage, and it's specifically in this case, as he was
2 building a fence to protect his home, the fence is
3 appurtenant to the home and, therefore, should be
4 considered part and parcel and should be considered
5 under Part (A).

6 THE COURT: But you also understand that while
7 that may be the intent that was expressed in the
8 preamble, I also have to look to the words and phrases
9 that are used in the Act?

10 MR. MAY: Yes, ma'am.

11 THE COURT: And, you know, the Legislature
12 simply could have said, you know, the Castle Doctrine is
13 hereby, you know, incorporated into the law of the State
14 and ended it right then and there. But they chose to
15 make definitions. They chose to give presumptions under
16 certain circumstances. They chose to define what a
17 dwelling is, what a residence is. They did not refer to
18 surrounding property. They didn't define curtilage.
19 They didn't even mention curtilage in the Act, so if --
20 and as you are well aware, you know, I am required to
21 construe the terms and phrases and language specifically
22 in the code sections that we're talking about. So how
23 do I get past the determination that (A) doesn't apply?

24 MR. MAY: Yes, ma'am. Your Honor,
25 respectfully, it appears that the Statute is

1 inconsistent with itself. It appears that while it
2 codifies the common law, the common law is not codified.
3 I believe that any -- case law states that any
4 inconsistency of law should be construed in favor of the
5 Defendant. Your Honor, that's our argument. I
6 understand completely what the Court's saying. I
7 understand that it is -- that there is a specific
8 definition of what's protected under it, Your Honor.
9 Notwithstanding, we believe that the other part of law,
10 which is the codification of -- which it says that it's
11 attempting to codify the common law, we believe when one
12 reads that in conjunction with (A) and with this case in
13 particular, it was a defense of his home, was what the
14 fence was meant to be, that (A) applies. But, Your
15 Honor, regardless, we believe (C) applies.

16 THE COURT: And certainly even if I were to
17 rule against you on this particular, that there's no
18 immunity from prosecution, you still have the
19 opportunity to raise those defenses. Is that not
20 correct? I mean, you still have not only defense of
21 habitation, but you've got self-defense as well.

22 MR. MAY: As well as defense of others, yes,
23 ma'am, we do. We'd agree with that.

24 THE COURT: Yes.

25 MR. MAY: But when I read *Duncan*, when I read

1 the statute itself, it is clearly intended to protect a
2 citizen from prosecution. That's the reason why it's
3 immediately appealable.

4 And Ms. Sampson referenced a case, a murder trial
5 that I did. That murder trial came up before *Duncan*.
6 He was found not guilty of murder, but guilty of
7 voluntary and after talking with the appellate
8 attorneys, they believe that there's no doubt it's
9 coming back because we did not have a hearing. Again,
10 that was before *Duncan* was decided. That case was tried
11 in November of 2010. *Duncan* was decided early 2011. It
12 is inapplicable to -- it's not the same thing. While,
13 yes, this does not preclude any defenses that we may
14 raise at trial, it still -- if Your Honor denies a
15 hearing then Mr. Ortiz goes on trial, which is the exact
16 reason why *Duncan* was decided, was to protect people
17 from going to trial without a determination by a Court
18 that they shouldn't, Your Honor.

19 THE COURT: And in reading *Duncan*, *Duncan*
20 clearly involves a situation in which it occurred at a
21 dwelling or residence. I mean, clearly the incident
22 occurred basically at the front door, on the porch of
23 the property, which was attached to the house, so it
24 became part of the dwelling or the residence.
25 Certainly, I don't know whether you're referring to Rye

1 being the other case?

2 MR. MAY: Yes, ma'am.

3 THE COURT: Rye involved, and I believe Ms.

4 Sampson mentioned that as well. Rye involved the

5 situation in which the property was not his primary

6 residence and there was activity occurring on the

7 property, not the house itself. And under that

8 situation, I believe that the question presented to the

9 Court was about the defense of habitation. Well, it was

10 remanded because of the jury charge related to the

11 defense of habitation. I don't think it squarely and

12 adequately discussed the provisions of these code

13 sections that we're discussing at this particular

14 point, although there was some discussion, I believe,

15 about the Castle Doctrine and the defense of self-

16 defense as well.

17 It clearly appears -- and I might say that the code

18 section is not a new code section. This act was enacted

19 in 2006. And so there have been occasions in which,

20 apparently, it was addressed and there have been a few

21 cases that have gone up on appeal and come back. The

22 only thing I gather clearly is that under *Duncan*, which

23 was decided in 2011, that clearly the Court determined

24 that there should be some type of pre-trial

25 determination about the issue of immunity and whether or

1 not the provisions of the act applied.

2 And as I stated, in *Duncan*, if I recall the facts
3 correctly, I've had the case in front of me, it involved
4 a situation where very clearly it was on the -- at the
5 dwelling, on the porch, the dwelling and the residence.
6 And under the provisions of the Act, clearly there was
7 no question that the discussion about the dwelling or
8 the residence would apply.

9 Is there any further argument about whether (A)
10 applies or (C) applies?

11 MR. MAY: Beg the Court's indulgence.

12 Your Honor, just to reiterate, we believe that (A)
13 does apply. Again, this is a defense of the Castle was
14 the enacting of the fence. But even if the Court does
15 not believe that (A) applies in this case, we would, of
16 course, object to that. And we would still believe that
17 (C) applies, and that (C) has the same duty provision as
18 (A) does.

19 THE COURT: Looking at the provisions of
20 Section 16-11-440, this section creates a presumption of
21 reasonable fear of imminent peril of death or great
22 bodily harm, in sub-section (A), under certain
23 circumstances. And that is if the person against whom
24 deadly force is used is in the process of unlawfully and
25 forcefully entering a dwelling, residence, or occupied

1 vehicle or if he removes or is attempting to remove
2 another person against his will from the dwelling,
3 residence, or occupied vehicle and uses deadly force or
4 has reason to believe that an unlawful and forcible
5 entry or unlawful and forcible act is occurring or has
6 occurred. And sub-section (B) talks about the
7 exceptions to the presumption, which are not at issue
8 and -- those exceptions are not at issue in this
9 particular case.

10 Section 16-11-430 defines a dwelling as a building
11 or conveyance of any kind, including an attached porch,
12 whether the building or conveyance is temporary or
13 permanent, mobile or immobile, which has a roof over it,
14 including a tent, and is designed to be occupied by
15 people lodging there at night. Residence is defined as
16 dwelling in which a person resides, either temporarily
17 or permanently or is visiting as an invited guest.
18 Vehicle means a conveyance of any kind, whether or not
19 motorized, which is designed to transport people or
20 property. Clearly, in this case, the occupied vehicle
21 does not apply and so I won't spend any time discussing
22 that.

23 So the question is whether under sub-section (A)
24 we're talking about a dwelling or a residence. As I
25 understand the undisputed facts of this case, there is

1 no question that it occurred outside, not under -- not
2 in a building or a conveyance of any type or an attached
3 porch. Not in a -- what I would consider to be a mobile
4 home or a tent. It was clearly out in the open, out on
5 what I'll call real property. Apparently, the dispute
6 seems to be whether it was the real property belonging
7 to Ortiz, the real property belonging to Calef or, as I
8 hear today, the real property belonging to the State,
9 the State or the County.

10 And so based upon the definitions under the statute
11 itself, which was enacted in 2006, I would make a
12 finding that Section (A) does not apply because it does
13 not involve a situation in which the person against whom
14 deadly force is used is in the process of entering a
15 dwelling, residence or occupied vehicle. And I think
16 that that has to be a requirement in order for sub-
17 section (A) to apply.

18 Then the question becomes, under Sub-section (C) of
19 Section 16-11-440, that Section states that a person who
20 is not engaged in an unlawful activity and who is
21 attacked in another place, where he has a right to be,
22 including but not limited to his place of business, has
23 no duty to retreat and has the right to stand his ground
24 and meet force with force, including deadly force, if he
25 reasonably believes it is necessary to prevent death or

1 great bodily injury to himself or another person or to
2 prevent the commission of a violent crime as defined in
3 Section 16-1-60.

4 Under this Sub-section, I interpret this to mean
5 that there have to be three elements that are satisfied.
6 One is that the person is not engaged -- the person,
7 meaning the Defendant, is not engaged in an unlawful
8 activity, and who is attacked -- that's the first
9 element. The second element is he is attacked in
10 another place where he has a right to be, including but
11 not limited to, his place of business.

12 And third, I think the third element is that he
13 reasonably believes it is necessary, the force that he's
14 using is necessary to prevent death or great bodily
15 injury to himself or to another person or to prevent the
16 commission of a violent crime. I believe Sub-section
17 (C), this section would apply to those areas which we
18 commonly refer to as the curtilage. That is areas that
19 are not the dwelling, areas that are not the residence,
20 the porch, not the occupied vehicle as previously
21 defined at the beginning of the Statute or under the
22 Act. And so I think that under Sub-section (C) that a
23 determination would have to be made as to whether or not
24 the person -- whether the Defendant is not engaged in
25 unlawful activity and is attacked in another place and

1 he reasonably believes it's necessary to use that force
2 to prevent death or great bodily injury to himself or to
3 others or to prevent a violent crime.

4 So under the provisions of Sub-section (C), I think
5 that the Defendant would be entitled to have a pre-trial
6 determination of those circumstances to determine
7 whether or not the remaining provisions of the Act would
8 apply. Specifically, I note that Sub-section -- that
9 Section 16-11-450 under the Act states specifically that
10 a person who uses deadly force as permitted by the
11 provisions of this article or other applicable provision
12 of law is justified in using deadly force and is immune
13 from criminal prosecution and civil action for the use
14 of deadly force. And gives some exceptions, which would
15 not apply in this particular case. So I take that to
16 mean that under *Duncan*, there would have to be a pre-
17 trial determination as to whether or not, under the
18 circumstances of this particular matter, there would
19 have to be a pre-trial determination as to whether the
20 Act applies and whether or not Mr. Ortiz would be
21 entitled to immunity. And so -- now, I don't know how,
22 getting to the second point that Ms. Sampson raises, and
23 I'm not so sure that I clearly understand the argument
24 that's been made on that, you know, whether -- I
25 understand that the case law says pre-trial

1 determination, and I think a pre-trial determination
2 means whatever method is necessary for the Court to make
3 that determination, whether it's in the form of a
4 hearing, whether it's in the form of arguments.
5 Certainly, if the facts are undisputed, I think that
6 clearly makes it more of a question of law for the Court
7 to determine. But to the extent that there is a
8 requirement that I have to determine whether or not Mr.
9 Ortiz meets the qualifications of Sub-section (C), I
10 think that that may necessarily imply that there has to
11 be some type of a factual finding. And if the facts are
12 disputed or if the State is not -- I'm sorry -- if the
13 Defense is not able to establish by a preponderance of
14 the evidence that he's entitled to those protections,
15 then I think it would be required using that standard to
16 deny relief to him and a trial would go forward
17 ultimately for the State to be able to establish whether
18 or not it can meet its burden.

19 I still think that that leaves, even if I were to
20 state that Mr. Ortiz -- and I haven't heard any
21 testimony, so I'm not prejudging anything, but even if I
22 were to decide that Mr. Ortiz has not met that burden
23 based upon a preponderance of the evidence, that would
24 still allow him to be able to raise the defenses, which
25 would required the State to disprove self-defense and

1 disprove the defense of habitation. So it will clearly
2 leave the burden with the State to prove beyond a
3 reasonable doubt that he engaged in the activity and has
4 no defenses to the assault and battery of a high and
5 aggravated nature.

6 So I'm not sure that I answered the State's request
7 as it related to a hearing as to Sub-section (C), but I
8 think a hearing -- that there has to be some type of a
9 hearing. And even if it's a prima facie case that's put
10 up to make some decision, and if I decide that it's
11 State property, there's still a question as to whether
12 or not the parties have a right -- there's evidence
13 established that he has a right to be where he is at the
14 time that it occurred. So I think there's got to be
15 some testimony about that.

16 Does that answer any -- Ms. Sampson, did I
17 adequately address your ---

18 MS. SAMPSON: May I just reiterate to make
19 sure that I understand of where we're going? Section
20 (A) isn't applicable to this case, so we're just going
21 forward on Sub-section (C)?

22 THE COURT: Yes.

23 MS. SAMPSON: Okay. That's all. I just
24 wanted to make sure I was understanding.

25 THE COURT: Yes. I am ruling that Sub-section

1 (A) is not applicable because it's not a dwelling or
2 residence or occupied vehicle.

3 And to further address the argument of the Defense,
4 I think that (A) and (C) together address all of the
5 provisions of the Castle Doctrine. I think what the
6 Legislature has said is that when you are in your home
7 or you are on -- whether it's your dwelling, your
8 residence, your porch or you're in a place where you are
9 sleeping and someone comes on and forcibly tries to come
10 onto your property, you have the right to defend that
11 property. And if you use deadly force, you have no duty
12 to retreat because you are defending the place where you
13 are physically living and you are physically sleeping.
14 I think it goes on to say that when it comes to the
15 curtilage, there's got to be a little bit more. You
16 have to demonstrate that you are in fear and that you
17 believe that the force that you're using is necessary to
18 prevent injury to yourself or to another person or to
19 prevent the commission of a violent crime. And I think
20 that that's squarely what the Castle Doctrine requires
21 and I think the legislature broke it up into provisions
22 to make it absolutely clear, but I think that's what the
23 law requires. So are we ready to go forward?

24 MR. MAY: Yes, ma'am.

25 THE COURT: Okay. Anything further from the

1 State at this time before we start?

2 MS. SAMPSON: Your Honor, we have one matter
3 that involves -- I don't know if I need to do this
4 because normally do a *Lyle* issue prior to the testimony
5 of a witness. We need to address with Mr. Ortiz, during
6 his testimony, or I was planning to address, there was a
7 previous incident or three, rather, incidents with a
8 sewer worker, water worker, for lack of a better term,
9 where Mr. Ortiz attacked him with a machete on three
10 different occasions. I was planning to ask him about
11 that based on *Lyle*. And because it's a *Lyle* issue,
12 normally in trial we do it pre-trial. I don't know how
13 we handle that in this type of hearing, so I'm bringing
14 that up now because I understand Mr. Ortiz is their
15 first witness.

16 MR. MAY: Your Honor, I've received absolutely
17 no notice, no discovery of any of this information.
18 I've not seen anything. I would at least ask for a
19 brief recess to go over it with Mr. Ortiz because that
20 way I don't even know how to respond. I've not seen
21 this.

22 MS. SAMPSON: It's my understanding it was
23 given to them in discovery. I have only had this case
24 since March. They were given discovery prior to me
25 getting this case. It's an incident that he had with a

1 Mr. Thomas Jackson, who's on the witness list in 2009,
2 over a period of -- a four-month period. It occurred
3 from June of 2009 until October of 2009. I can hand it
4 to him. And I don't mind if we need to take -- however
5 Your Honor wants to deal with that.

6 THE COURT: I'll put it this way. If the
7 Defense gave to me all the discovery that the State had
8 given to them, it was not in the material I saw.

9 MS. SAMPSON: And I will say, Your Honor,
10 normally we sit together before we go to trial and make
11 sure that everybody has everything. We didn't do that
12 before this and I'm not -- I just assumed -- and I will
13 take -- I assumed they had it because this was someone
14 else's case before me. And so I am receiving this case
15 as they gave it to me and they gave them discovery
16 prior. So I will take that ---

17 THE COURT: I'll let y'all look at it and see
18 what ---

19 MR. MAY: You've got everything that we have,
20 so ---

21 THE COURT: It was just some statements
22 involving this particular incident.

23 MR. MAY: Yes, ma'am.

24 MS. HINES: Your Honor, if there's any
25 additional discovery that we can -- I'll give you

1 everything that we have -- I just assumed -- what we
2 have is very limited.

3 MR. MAY: Your Honor, we have another witness
4 that we can go ahead and get to and then we can come
5 back to this.

6 MS. SAMPSON: I'll get them copies of
7 everything right now.

8 THE COURT: The only question I would have is
9 as it relates to this particular incident, while the
10 Lyle issue may be relevant otherwise, I'm not so sure
11 that -- as to whether he has a belief in this particular
12 case that Mr. or Ms. Calef was coming after him and that
13 he believed that he was under -- that the force that he
14 used was necessary to prevent great bodily harm would be
15 applicable -- whether those prior acts would be relevant
16 in determining his belief at this particular point.

17 MS. SAMPSON: Well, if I can just explain sort
18 of what we're -- and I think they're doing some of the
19 similar things with some of their witnesses. These --
20 both the Calefs and the Ortizs have a history of calling
21 and involving law enforcement over and over and over
22 again. I believe this goes to their -- and they're
23 going to be arguing, goes to their credibility and
24 they're calling at least two witnesses that I know of to
25 talk about other instances where the Calefs have called

1 the police, the police have come and they have not --
2 the allegations have not come to fruition. Or that
3 these witnesses are saying this didn't happen or that
4 didn't happen, the Calefs were saying that it did. And
5 because they are doing -- I'm not bringing up any of
6 those incidents. It's my understanding they are. And
7 due to that, all of this boils down to the preponderance
8 of the evidence and credibility of a witness. That's
9 all we've got. That's part of the reason I was bringing
10 up the machete incident because they are bringing up
11 other instances that don't involve this case.

12 MR. MAY: Your Honor, we can easily not -- we
13 have Investigator Gonzales with the Richland County
14 Sheriff's Department and Amy Zimmercheck [phonics], a
15 member of the Bar here, who have both had -- the Calefs
16 have brought allegations against them of improper
17 conduct. Actually Ms. Zimmercheck approaches at a
18 burglary. We have them here simply for the option of
19 doing that, but we don't have to by any means, because
20 truly it doesn't go towards this incident. The only
21 question in this incident is what happened between
22 Ortiz, the Calefs. So, I mean, we don't even have to
23 get into that. We have them here because Mr. Ortiz
24 wanted to call fourteen different people to talk about
25 bad blood. I still think it's a lot easier in two

1 distinguished members of the community.

2 THE COURT: Well, I think you all can probably
3 stipulate that there's been repeated disagreements
4 between the parties.

5 MS. SAMPSON: I have no problem in stipulating
6 to their disputes. I have no problem stipulating that
7 the officers have come and investigated what Mr. Ortiz
8 has said and decided not to do anything about it.
9 They've come and investigated things that the Calefs
10 have said happened and have done nothing about it, if
11 he's willing to make that stipulation.

12 MR. MAY: Sure. And then the only question is
13 who has first-hand knowledge of what happened ---

14 MS. SAMPSON: On this incident.

15 MR. MAY: That's fine. And we can go ahead
16 and release Investigator Gonzales from our subpoena. If
17 that's -- if the Court is okay with that stipulation.

18 MS. SAMPSON: That was the only reason I was
19 bringing it up, because it was my understanding that
20 they were making this a question of credibility, and I
21 needed to respond accordingly.

22 THE COURT: Okay. Let's make sure that the
23 stipulation is clear so that we understand where we're
24 going. That there's been on-going disputes between
25 Ortiz and the Calefs, that law enforcement has been

1 called on numerous occasions by both parties, and that
2 as a result of those investigations by law enforcement
3 no further action was taken by law enforcement in the
4 form of a prosecution.

5 MR. MAY: Yes.. And that law enforcement found
6 both that there was no cause of action ---

7 THE COURT: No probable cause to pursue the
8 matter further?

9 MR. MAY: Yes, ma'am. Allegations of both.
10 That's completely accurate.

11 THE COURT: No probable cause to pursue the
12 allegations of either the Calefs or the Ortizs with
13 respect to those calls?

14 MS. SAMPSON: That is correct, Your Honor.

15 MR. MAY: And with that, Your Honor, we do
16 release Investigator Gonzales from his subpoena.

17 THE COURT: Okay. Anything further?

18 MR. MAY: Not from the Defense, Your Honor.

19 THE COURT: Okay.

20 MS. SAMPSON: Not on that issue, Your Honor,
21 no.

22 THE COURT: All right. Then you need to call
23 your first witness.

24 MS. HINES: The Defense calls Herbert Smith.

25 THE CLERK: Do you swear or affirm the

1 testimony you're about to give in this case will be the
2 truth, the whole truth and nothing but the truth, so
3 help you God?

4 THE WITNESS: Yes, ma'am.

5 THE COURT: Thank you. Have a seat in the
6 witness stand, please. State your name for the record.

7 THE WITNESS: Herbert Smith.

8 HERBERT SMITH,

9 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

10 THE COURT: Yes, ma'am.

11 MS. HINES: Thank you, Your Honor. May it
12 please the Court.

13 DIRECT EXAMINATION

14 BY MS. HINES:

15 Q. Mr. Smith, how are you doing today?

16 A. I ain't too bad.

17 Q. Okay. And can you tell the Court where you live?

18 A. I live over on Omega Drive, directly across the
19 street from Mr. Ortiz.

20 Q. Okay. On August the 7th of 2010, were you home?

21 A. Yes, ma'am.

22 Q. Do you remember what happened that day?

23 A. Yes, ma'am. My wife, she was going to work and as
24 she opened the door, I could see outside, Mr. Calef was
25 standing there talking to Mr. Ortiz. And they had had,

1 like y'all said earlier, several disputes. So I
2 actually asked her to kindly close the door so I didn't
3 have to, like, get involved with it, you know, see what
4 was going on or whatever. You know, you just get tired
5 of seeing that all the time. Then Mr. Calef, I
6 understand it's his son and his wife come up and they
7 got out of the car, and Mr. Calef's wife had a -- some
8 kind of -- it looked like maybe some kind of folder or
9 something another, and started hitting him with it.

10 Q. Let me just stop you. Who was she hitting with it?

11 A. Mr. Ortiz.

12 Q. Okay.

13 A. And then I went out the door to go over there,
14 because his son was running around there. He didn't
15 never actually hit Mr. Ortiz, but the way he run around,
16 it looked like he had the intention to. And he had one
17 hand in his pocket. So I didn't know if maybe he had a
18 weapon or something. As it turns out, he said he was
19 trying to get his cell phone out. But I didn't know
20 what was going on. So I was trying to get over there to
21 break it up. And at some point, because my back got
22 turned to the action, at some point, Ms. Calef
23 apparently chased Ortiz around a vehicle in his yard
24 because her purse was found ---

25 Q. Did you see that?

1 A. I seen her as she went to go into the yard, but I
2 didn't actually see it happen. But her purse was found
3 on the other side of the vehicle. That's the only ---

4 Q. Okay. All right. Just talk about what you saw.

5 A. Yes, ma'am.

6 Q. So you saw her as she was going into the yard?

7 A. Well, actually, it was all in the yard anyways
8 because Ortiz was standing in his yard digging a post
9 hole. So it was actually all in his yard anyways.

10 Q. Okay. And so you saw their son running around with
11 one hand in his pocket. What did you see after that?

12 A. Well, by that time, I had got over there and I was
13 like pulling him back.

14 Q. The son?

15 A. Yes, ma'am. And Mr. Calef and Ms. Calef, they was
16 right there at Ortiz and that's when she was hitting him
17 with the papers and stuff or -- he'd done got to
18 running. And I never did see -- well, I guess I need to
19 wait for you ask the question before I answer that.

20 Q. Okay. Did you see anything in Mr. Calef's hands?

21 A. No, ma'am.

22 Q. So you didn't see Mr. Calef with the post hole
23 digger?

24 A. I didn't see him with them, you know, at first.
25 But I got -- he had his hand on them when they was

1 arguing, but they was still in the hole. And I got hit
2 in the back with the post hole diggers twice.

3 Q. You got hit in the back with the post hole diggers?

4 A. Yes, ma'am.

5 Q. Do you know who hit you?

6 A. I can't say because my back was turned.

7 Q. Okay. So what -- can you describe how it came
8 about that you got hit in the back with the post hole
9 diggers?

10 A. Well, when I grabbed, when I grabbed the son to
11 pull him back, Ms. Calef eventually come over there
12 where I was. I guess she was like trying to defend her
13 son. And she was like standing on my feet, like
14 scratching me and stuff. And it was just a big -- it
15 was just a bunch going on at one time, you know.

16 Q. And someone hit you in the back with the post hole
17 diggers?

18 A. Yes, ma'am. And about that same time, Ms. Calef's
19 hand was cut in the process of all of this. And all
20 this was happening about the same -- everything was
21 pretty fast. You know how these incidents are. And the
22 police was coming up and Mr. Ortiz had the machete in
23 his hand. I saw that. So I would have assumed that it
24 would have had to have been one of them that hit me with
25 the post hole diggers. Because at that point, the post

1 hole diggers were no longer in the hole. They was
2 laying on the ground.

3 Q. Okay. So you did see Mr. Ortiz with the machete in
4 his hand?

5 A. Yes, ma'am. But I never actually seen him hit
6 anybody.

7 Q. Okay. And did you see the incident before -- who
8 was the first person you saw hit anybody?

9 A. Ms. Calef.

10 Q. Ms. Calef?

11 A. Yes, ma'am.

12 Q. And how did -- when Ms. Calef hit Mr. Ortiz, how
13 did he respond the first time?

14 A. He jumped up and went to go around the car and Mr.
15 Calef -- I'm not saying he was grabbing the post hole
16 diggers to use them, but he had his hands on them
17 possibly to keep -- if he was thinking maybe Mr. Ortiz
18 was going to grab them, you know what I'm saying?

19 Q. Okay.

20 A. So in other words, I know he had his hands on them
21 at that point and then we got in a struggle with me and
22 the son and Ms. Calef. And at some point in that, Ms.
23 Calef got hurt, got her hand cut. I don't know if the
24 machete cut her, the post hole diggers cut her when they
25 was hitting me, if she cut her hand on the fence.

1 Q. Okay. And you said that her purse was found by the
2 car?

3 A. Yes, ma'am. On the other side, between the car and
4 the house.

5 Q. Okay. And when you first looked out and saw them,
6 did you see her purse?

7 A. No, ma'am. When I first saw them, it was just Mr.
8 Calef and Mr. Ortiz standing there. Mr. Ortiz had a
9 camera on. I suppose he was anticipating problems,
10 because there was always problems. So he had a camera
11 on.

12 Q. Okay. And when Ms. Calef pulled up, when she got
13 out of the car, did you see her with her purse? Or do
14 you recall?

15 A. I don't recall. I just remember she had that, like
16 a -- that may have actually been her purse that she was
17 swinging then, but it was like papers coming out, so I'm
18 thinking maybe it was a folder or something.

19 Q. All right. But she was swinging something?

20 A. Yes, ma'am.

21 Q. How big was it?

22 A. Ma'am?

23 Q. How big was the thing that she was swinging?

24 A. It was like about the size of a folder.

25 Q. Okay.

1 A. And I was mostly concentrating on their son because
2 I felt that with the other two already right there at
3 Mr. Ortiz, he was the bigger threat reaching into his
4 pocket at the time.

5 Q. Right. And where -- let me show you some pictures
6 of the property. Do you recognize that picture?

7 A. Yes, ma'am.

8 Q. Okay. Can you describe what's in that picture?

9 A. The fence -- the gate was like closed with the
10 garbage can behind it. That post to this hole was the
11 post Mr. Ortiz was putting in the ground.

12 Q. Can you turn it around?

13 THE COURT: Can you tell us what the Exhibit
14 Number is, too, please?

15 MS. HINES: This is the State's Exhibit Number
16 3.

17 Q. This post?

18 A. Yes, ma'am. That was the one over -- it's between
19 their two houses. He was putting it in the ground and
20 Mr. Ortiz was like up in his yard. It was -- all of it
21 happened in his yard. If the gates would have been
22 closed, it couldn't have happened.

23 Q. Okay. So it would have been inside the fence if
24 the gates had been closed?

25 A. Most definitely inside the fence, yes, ma'am. Most

1 definitely.

2 Q. Okay.

3 MS. HINES: Beg the Court's indulgence. No
4 further questions.

5 THE COURT: Any cross?

6 MS. SAMPSON: Yes, Your Honor. I would beg
7 the Court's indulgence.

8 CROSS-EXAMINATION

9 BY MS. SAMPSON:

10 Q. All right, Mr. Smith. I want to slow this down a
11 little bit because I was hearing a little going back and
12 forth, so I just want to try to figure this out.

13 A. Yes, ma'am.

14 Q. When you first see Mr. Ortiz and Mr. Calef -- I'm
15 going to show you what's been marked as State's Exhibit
16 3 and 4. On these two, where were they?

17 A. Mr. Calef, at that time, was standing right here.
18 He would have had like -- it would have been on the
19 outside of the fence, okay.

20 Q. Can I interrupt you just for a second? Is this
21 fence that is in this picture, was that there back in --
22 when this incident occurred?

23 A. Well, now, which one? Over there?

24 Q. This fence right here?

25 A. The tallest one?

1 Q. Yes.

2 A. No, ma'am. That's what he was putting up at that
3 time.

4 Q. Okay. So this fence that we see in this picture
5 wasn't there?

6 A. Not -- this fence was not, no, ma'am.

7 Q. Okay. The fence that goes over the driveway didn't
8 exist?

9 A. No, ma'am. That's what he was putting up.

10 Q. Okay. Did this part of the fence that's between
11 the property, did that exist?

12 A. Yes, ma'am.

13 Q. Okay. And did it have this ---

14 A. But that's Mr. Calef's fence.

15 Q. And this one that goes in the front, was that
16 there?

17 A. No, ma'am. That's what he was putting up then.

18 Q. So none of this front fence existed?

19 A. No, ma'am.

20 Q. Okay. And where were they -- they were -- I think
21 you pointed where the little stake is in the picture.
22 They were standing right there?

23 A. No, ma'am. Mr. Ortiz was on the inside.

24 Q. Of the fence?

25 A. Yes, ma'am.

1 Q. So the fence was between him and Mr. Calef? I'm
2 asking.

3 A. I done told you there wasn't a fence there.

4 Q. When I see you pointing, I can't tell if you're
5 pointing on the yard part or on the other side of the
6 fence. I'm just trying to clarify.

7 A. He was in his yard. In other words, this over here
8 is Mr. Calef's yard.

9 Q. Right.

10 A. This is Mr. Ortiz's yard.

11 Q. Okay.

12 A. Mr. Ortiz was in his yard.

13 Q. Okay. But there is a fence between the two yards,
14 correct?

15 A. Between the two houses, yes, ma'am.

16 Q. Okay. Were they on -- either one of them on that
17 part of the yard or were they in front?

18 A. Mr. Ortiz was in his yard, on his side of Mr.
19 Calef's fence?

20 Q. So he was on the other side of the fence when they
21 were first talking?

22 A. Right. And Mr. Calef was outside the fence,
23 standing right here. In other words, he could -- where
24 he was standing at, there wasn't no fence interfering
25 had he wanted to hit Mr. Ortiz. I mean, I ain't saying

1 he done that, you know what I'm saying? There wasn't
2 nothing there to interfere. In other words, he was
3 standing like where the stake is.

4 Q. So it'd be fair to say he's on the edge, but not --
5 there was no fence between where he was?

6 A. Right. Right.

7 Q. Okay. I just wanted to make sure. When they were
8 talking, that's where he was?

9 A. Yes, ma'am. And then when he put his hands on the
10 post hole diggers, because that was when he entered Mr.
11 Ortiz's yard.

12 Q. Now, where is the post hole digger that you're
13 talking about? Where is it?

14 A. This post right here?

15 Q. Right?

16 A. It was digging that post.

17 Q. So it was in the ground?

18 A. Yes, ma'am.

19 Q. Okay. And who was digging the hole?

20 A. Mr. Ortiz.

21 Q. So it was his post hole diggers?

22 A. Yes, ma'am, in his yard.

23 Q. In his yard?

24 A. I'm assuming that their boundary is right. You
25 know, I'm ---

1 Q. Exactly.

2 A. I can't get into all of that, you know. That was

3 ---

4 Q. So what you're saying is Mr. Ortiz was putting up
5 that, what we see in this picture, this fence?

6 A. His fence, yes, ma'am.

7 Q. Okay. And he was using his post hole digger to do
8 that?

9 A. Yes, ma'am.

10 Q. You never saw Mr. Calef swing the post hole digger
11 at anybody?

12 A. No, ma'am, I didn't. But they was -- Mr. Calef was
13 out there within reach of everything and Ms. Calef ---

14 Q. Uh-huh (affirmative).

15 A. --- and her son.

16 Q. Uh-huh (affirmative).

17 A. And myself.

18 Q. And my question is, did you see either Mr. Calef,
19 David or Donald, swinging a post hole digger?

20 A. I know they didn't -- Ms. Calef, me, nor her son
21 couldn't have swung them.

22 Q. Okay.

23 A. If Mr. Ortiz had the machete, he couldn't have
24 swung them.

25 Q. Okay.

1 A. So that only left one person because the wind
2 didn't swing them.

3 Q. And, again, I'm going to ask you. Maybe I'm not
4 being clear. Did you see ---

5 A. I done already said I didn't see him.

6 Q. Okay. So you did not see him swing the post hole
7 diggers?

8 A. How many times do I need to say it?

9 Q. You keep adding things so I need to be clear.

10 A. Well, that's because I'm trying to get the story
11 out right.

12 Q. Okay.

13 A. I'm not trying to get twisted.

14 Q. Okay.

15 A. I'm trying to tell the truth. The man asked me to
16 tell the truth and I'm trying to tell the truth.

17 Q. And that's exactly what I want you to do.

18 A. Thank you, ma'am.

19 Q. When you got hit in the back, did you see who hit
20 you in the back?

21 A. No, ma'am, because I was facing the front.

22 Q. And when did you see Mr. Ortiz pick up the machete?

23 A. I never saw him pick up the machete.

24 Q. Okay. So you don't know what hit you in the back?

25 A. Well, yeah, I know it was the post hole diggers.

1 because the cuts in my back and the bruises on my back

2 was the shape of a post hole digger.

3 Q. Did you file a police report?

4 A. No, ma'am. I don't call the police.

5 Q. Okay.

6 A. I've never called the police in my life.

7 Q. And you said when -- was Mr. -- was the son, David,

8 did he touch Mr. Ortiz?

9 A. No, ma'am, he never touched him.

10 Q. And when you say -- you said Ms. Calef hit Mr.

11 Ortiz with what -- initially, you said a folder. And

12 then later you said maybe it was her purse?

13 A. Yeah. But I'm not positive what it was because I

14 was looking across the road.

15 Q. How tall is Ms. Ortiz -- I mean, Ms. Calef?

16 A. I don't know. But I would guess maybe about five

17 foot, but I really don't know.

18 Q. She's small?

19 A. Yes, ma'am. She's small.

20 Q. How big would you say that Mr. Ortiz is?

21 A. He's a small man too.

22 Q. Is he bigger or shorter than her?

23 A. He's probably a little taller than her.

24 Q. Okay. And you didn't actually see how Ms. Calef

25 got injured?

1 A. No, ma'am.

2 Q. And you actually never saw her purse. You talked
3 about -- and I just want to go back to the pictures
4 again because I'm a little confused. Where did you
5 talk about there being a car?

6 A. Yes, ma'am.

7 Q. Where's the car? Let me show State's Exhibit 3.

8 A. Up in the yard. Up in the driveway.

9 Q. Where? Can you point to me where in the driveway
10 it would have been?

11 A. Up in here.

12 Q. Okay. So it was up in the driveway?

13 A. Yes, ma'am. And did you find the purse or who
14 found the purse?

15 A. The police, when they got there, the purse was
16 picked up and carried to there.

17 Q. Okay. And it was in Mr. Ortiz's yard?

18 A. On the opposite side of the car, yes, ma'am. In
19 his yard, yes, ma'am.

20 Q. But you don't know when it got there?

21 A. During the incident.

22 Q. Did you see it get there during the incident?

23 A. I saw her going around the car and then all of a
24 sudden it was there.

25 Q. But I thought you said you didn't see her purse?

1 A. I just told you I saw her with a purse or a folder
2 or something and hit him.

3 Q. Or something. I'm just trying to clarify. Did you
4 see a purse?

5 A. Naw, you're trying to twist my words. I done said
6 in my statement.

7 Q. Uh-huh (affirmative).

8 A. I done told you I'm not going to lie for nobody.

9 Q. No.

10 A. I don't have a reason to lie. I don't have a stake
11 in this thing. As a matter of fact, I wish I'd let them
12 stayed over there and killed each other and not even got
13 involved.

14 Q. In fact, didn't you tell the Calef's that initially
15 you said you saw Mr. Ortiz -- Mr. Calef swinging a post
16 hole digger, but you were wrong about that?

17 A. No, ma'am.

18 Q. You never told them that?

19 A. No, ma'am, I did not.

20 Q. You didn't say you would recant that statement to
21 them in a conversation?

22 A. No, ma'am, I did not. No, ma'am.

23 MS. SAMPSON: Your Honor, at this time the
24 State would need to play a tape. I don't know if it's
25 proper at this time or if I need to lay a foundation or

1 how you want me to do this. But I didn't expect this to
2 come up yet.

3 MR. MAY: Your Honor, we'd object. We've been
4 given no tape.

5 MR. SAMPSON: Again, I didn't know if he was
6 going to deny saying it.

7 MR. MAY: Regardless, Brady ---

8 MS. SAMPSON: Under the rules, Your Honor, for
9 impeachment purposes, I don't have to give it to him
10 prior to. Under ---

11 THE COURT: It was a statement of a witness,
12 right?

13 MS. SAMPSON: It's a tape that Mr. Calef made
14 of a conversation he had with Mr. Smith. And if Mr.
15 Smith had just admitted that he'd had a conversation, I
16 wouldn't even play it. But it's for impeachment
17 purposes. And right now I can't remember the rule, but
18 under the rules, if it's evidence that -- impeachment,
19 not in my case in chief, with their witness, I can't
20 provide them what I don't need to provide, need to know
21 that I need to provide, until I have to provide it,
22 which would be now.

23 THE COURT: So the tape was made by Mr. Calef?

24 MS. SAMPSON: Correct. Not by me, not by my
25 office. I didn't even know about it until a couple of

1 days ago.

2 MS. MAY: Your Honor, respectfully, *Brady v.*
3 *Maryland*, as well as our Rule 5, I believe, requires
4 them to disclose any impeachment evidence. This would
5 be impeachment evidence under *Brady* because they had a
6 statement taken of Mr. Smith's, at the location -- or
7 regarding the incident. It's referenced in their
8 discovery.

9 MS. SAMPSON: No, this is a statement -- it's
10 not referenced in my discovery.

11 MR. MAY: Wait a second. Let me at least
12 finish.

13 MS. SAMPSON: Uh-huh (affirmative).

14 MR. MAY: That is represented in their
15 discovery. Your Honor, additionally there's
16 authentication issues as well as she has not complied or
17 laid the foundation under 607, I don't believe.

18 MS. SAMPSON: I agree with that because they
19 called him out of order.

20 THE COURT: I understand.

21 MS. SAMPSON: I don't disagree with anything
22 he just said. My problem with it -- because he had the
23 statement also from Mr. Smith that I asked him to turn
24 over, that he's yet to give them to me as well. Because
25 it's impeachment purposes. And I understand he doesn't

1 have to give it to me until the witness has testified.

2 He still hasn't given it to me for impeachment purposes.

3 MR. MAY: And we don't have an actual

4 statement. We have a summary ---

5 MS. SAMPSON: It's the same.

6 MR. MAY: --- which is work product from our

7 investigator. There is no *Brady* requirement on the

8 Defense and the Rules are different between the State

9 and the Defense. I'd ask the Court to inquire from the

10 State when they were made aware of this tape and when

11 they actually heard it for the first time.

12 MS. SAMPSON: I heard it for the first time

13 about five minutes before this proceeding. I wasn't

14 sure if they were calling Mr. Smith or not, so there was

15 no reason for me to even bother to listen to the tape.

16 But when I found out that they were calling Mr. Smith, I

17 found equipment to listen to the tape because I didn't

18 have it and I stood outside listening to it. When Mr.

19 Smith -- he wasn't here. So I didn't know if he was

20 even going to be called as a witness. When he finally

21 did get here, I now know he's going to be called as a

22 witness. I would not know that he was going to say he

23 didn't have a conversation in order to provide

24 impeachment evidence to them, until he just now stated,

25 didn't have a conversation with them. This is not

1 evidence I created at all. The Calefs did. And as far
2 as authenticating it, I haven't put them up to
3 authenticate it. Normally, that would be the way that
4 we'd do it, but we're doing everything backwards and the
5 Defense is putting up witnesses first. Otherwise, I
6 would have asked the Calefs about that when they
7 testified. And I wouldn't need the tape because they
8 could testify as to what he told them then.

9 THE COURT: I'll allow the statement to be
10 played and would then order that you provide a copy of
11 the statement -- of the tape to the Defense. And I
12 understand that there are authentication issues. And if
13 it's not properly authenticated, since it's not before a
14 jury, I think I can make a decision as to whether or not
15 it should be considered.

16 MS. SAMPSON: Thank you, Your Honor.

17 (WHEREUPON, the tape was partially played in open
18 court.)

19 MS. SAMPSON: Your Honor, I need time to cue
20 it. It had a lot of just nothing on the front of it.

21 Your Honor, I think in order to complete this, I
22 think that we should ---

23 THE COURT: How long is it?

24 MS. SAMPSON: The conversation portion of it
25 is maybe five minutes. But there is a lot of silence

1 and the doors open and close and squeaking of doors.

2 THE COURT: How long is the entire tape?

3 MS. SAMPSON: Honestly, I have not listened to
4 the entire tape. I don't know. Maybe ten -- I wouldn't
5 think it would be more than ten minutes based on the
6 conversations I've had with Mr. Calef. I could take a
7 short break and get it ---

8 THE COURT: Yeah. Let's take a recess and
9 I'll ask that y'all listen to it together. Mr. Smith,
10 I'm going to ask that you step down. Your testimony's
11 not completed so you should not discuss your testimony
12 with anyone. We're going to take a break so that they
13 can listen to that tape and then we'll come back and
14 continue on with your testimony.

15 MR. SMITH: Yes, ma'am.

16 THE COURT: But I ask that you not discuss
17 your testimony with anyone during the break.

18 MR. SMITH: Yes, ma'am.

19 THE COURT: Let's take a break and we'll come
20 back.

21 MR. MAY: Yes, ma'am.

22 (WHEREUPON, the Court stood at recess for a short
23 break.)

24 THE COURT: Okay. Y'all have had the
25 opportunity to listen to the tape?

1 MS. HINES: Yes, Your Honor. Your Honor, we
2 would just request that Ms. Sampson lay a proper
3 foundation under 613(b) in order to admit extrinsic
4 evidence prior to playing it for the Court.

5 THE COURT: Do you have any response to that?

6 MS. SAMPSON: The only response I have, Your
7 Honor, is I will try. With this witness, I'm not sure
8 that I can with him since he denied having the
9 conversation. I'm not sure he can then lay the
10 foundation of when he had the conversation. I won't say
11 he denied having a conversation, he denied making that
12 statement. I can go into more questions with him before
13 I play it, if you'd like.

14 THE COURT: Yes. If you'll lay the additional
15 foundation before you play it. And I understand that
16 there may be still some other issues relating to another
17 witness that we'll take up if and when that witness
18 testifies.

19 MS. HINES: And what I would refer to under
20 613 it's not admissible unless the witness is advised of
21 the substance of the statement, the time and place it's
22 allegedly, and the person to whom it was made and is
23 given an opportunity to explain their denial of the
24 statement. I don't think we've heard anything about
25 time and place as to when it was made.

1 THE COURT: And those are questions to lay an
2 additional foundation. That's fine.

3 MS. SAMPSON: Thank you, Your Honor.

4 Q. So Mr. Smith, I'm going to talk a little bit. Do
5 you remember having a conversation with Mr. and Ms.
6 Calef at a grocery store?

7 A. Yes, ma'am. I had a conversation. And also I
8 don't know how much I'm going to be allowed to talk or
9 whatever.

10 Q. Well, let me ask the questions ---

11 A. Yes, ma'am. Okay.

12 Q. --- and then we'll go back.

13 A. Yes, ma'am.

14 Q. And you had this conversation. Do you remember
15 when it was?

16 A. I would say -- no, ma'am. I don't know.

17 Q. Was it last year?

18 A. Oh, it was -- definitely it was last year, yes,
19 ma'am.

20 Q. Would it have been in the fall?

21 A. I would actually think it was probably spring.

22 Q. But at some point you had a conversation with them?

23 A. Yes, we did. We had ---

24 Q. Where were you when you had the conversation?

25 A. In front of the grocery store.

1 Q. And were you just standing in the front of the

2 grocery store or were you in peoples' cars or ---

3 A. We were in our vehicles.

4 Q. Okay. You were in yours and they were in theirs?

5 A. Yes, ma'am.

6 Q. Okay. And who was there when this conversation was
7 made?

8 A. Me, Mr. and Ms. Calef and the other young man, but
9 I don't really know who he is.

10 Q. But someone that's in the gallery?

11 A. Yes, ma'am.

12 Q. Okay. And did he talk?

13 A. He's one of my neighbors, but I just don't know his
14 name. I'm sorry.

15 Q. That's fine. And what did you all discuss during
16 this conversation?

17 A. The case. We was discussing the case.

18 Q. Okay. And specifically did you talk to them about
19 whether Mr. Calef had hit you in the back?

20 A. Yes, ma'am.

21 Q. And what did you tell them?

22 A. I told them basically what I've already said here.

23 I said Mr. Calef hit me in the back. He said he didn't

24 hit me in the back. And it's just like I told you or

25 the other lady, whoever it was, I didn't see who it was.

1 So I told him if I was wrong, I would recant that.

2 Because I didn't visually see who done it.

3 Q. So you did, you did agree to recant your original
4 statement that Mr. Calef hit you in the back?

5 A. Yes, ma'am. But I already said that because I
6 didn't see him do it.

7 Q. And in that conversation you talked about where it
8 happened, would that be fair to say? Where the incident
9 took place?

10 A. I honestly don't remember that. I mean, I probably
11 did. I mean, it's rather obvious where it was, though.

12 Q. And did you admit that you touched their son?

13 A. Yes, ma'am.

14 MS. SAMPSON: I don't need to play the tape
15 now that he clarified his statement. That was what I
16 was playing the tape for, but because -- I want to just
17 explain to the Court because I don't really know the
18 procedure in doing this hearing, I didn't -- I wanted to
19 stop and do what we did.

20 THE COURT: That's fine.

21 Q. All right. So, just so we're back on point. You
22 got hit in the back but you don't know who hit you in
23 the back?

24 A. Right.

25 Q. Okay. You didn't see Mr. Calef swinging a post

1 hole digger at all?

2 A. No, ma'am.

3 Q. Did you see Mr. Ortiz with the machete?

4 A. With the machete?

5 Q. Yes, sir. In his hands?

6 A. Yes. Yes, ma'am.

7 Q. Okay. And the only thing you saw Ms. Calef hit Mr.
8 Ortiz with was either a purse or a folder?

9 A. Yes, ma'am.

10 Q. Did you see David Calef ever hit Mr. Ortiz?

11 A. No, ma'am.

12 Q. Okay. Did he ever come at Mr. Ortiz in order to
13 touch him or anything?

14 A. Well, it looked like he was. I can't say what his
15 intention was, though.

16 Q. All right. And he was there with his mother and
17 his father?

18 A. Yes. Well, his father was there first and then
19 they come up. When it first happened, I seen Mr. Calef
20 on the phone and I was like, well, he's calling the law,
21 so it'll be straightened up, you know. But then they
22 came before the law every got there, so it just kind of
23 blew up from there.

24 Q. Okay. And I think when Ms. Hines was talking to
25 you, you talked about a gate. Did the gate exist back

1 then, the gate to the fence?

2 A. Well, the gate had been up, but it was like it was
3 propped up, so he took them down to dig his post holes
4 to put them up right. It was like he was putting up for
5 like measurement purposes, I guess.

6 Q. So they were there, but not in the ground?

7 A. Yes, ma'am.

8 Q. Okay.

9 A. But at the moment the incident happened, they
10 wasn't there because he had moved them so he could dig
11 the holes and stuff.

12 Q. So unlike in the picture, it was open?

13 A. Yes, ma'am.

14 Q. Okay.

15 MS. SAMPSON: Beg the Court's indulgence. No
16 further questions, Your Honor.

17 THE COURT: Any redirect?

18 MS. HINES: Briefly, Your Honor.

19 **REDIRECT EXAMINATION**

20 **BY MS. HINES:**

21 Q. Mr. Smith, when you went over -- when you crossed
22 the street, you were going over to protect -- to help
23 Mr. Ortiz, correct?

24 A. I wasn't really going to protect anybody. I was
25 just trying to break up the situation.

1 Q. Okay.

2 A. I mean, I guess you could say that, that it could
3 be viewed that way, but it wasn't really like, I've got
4 to go protect Mr. Ortiz.

5 Q. Okay.

6 A. It wasn't -- that wasn't in my mind. It was like
7 just stopping the situation.

8 Q. Stopping the situation. Did you think that he was
9 in danger?

10 A. Yes, ma'am.

11 Q. Okay. And you got hit with the post hole diggers?

12 A. Yes, ma'am, twice.

13 Q. Twice. But you don't know who exactly hit you?

14 A. No, ma'am. Because I was hit in the back.

15 Q. Okay. And -- but as you testified earlier you know
16 that it wasn't Ms. Calef or ---

17 A. Or her son.

18 Q. --- or her son?

19 A. Right.

20 Q. And that Mr. Ortiz had the machete?

21 A. Yes, ma'am.

22 Q. Okay. And you don't have a dog in this fight, do
23 you?

24 A. No, ma'am.

25 Q. You're just here to tell the Court what happened?

1 A. I'm just trying to tell what happened. That's all.

2 Q. And when you saw -- when you looked up from your
3 house, you saw the Calefs pursuing Mr. Ortiz in his
4 yard, around his car, correct?

5 A. Yes, ma'am. Yes, because Mr. Ortiz, he was
6 stooped, kneeled down on the ground. So it wasn't like
7 he could get up that fast, you know?

8 Q. Right.

9 A. So he was like down on the ground, like checking
10 his hole out or whatever. I don't know.

11 Q. And so the first strike that you saw came from Ms.
12 Calef?

13 A. Yes, ma'am.

14 Q. And it happened on Mr. Ortiz's property?

15 A. Yes, ma'am.

16 MS. HINES: No further questions.

17 THE COURT: Did you say you were finished?

18 MS. HINES: Yes, I'm finished.

19 THE COURT: Oh, I'm sorry.

20 MS. SAMPSON: Your Honor, may I ask one
21 question?

22 THE COURT: Yes, ma'am.

23 **RECROSS EXAMINATION**

24 **BY MS. SAMPSON:**

25 Q. Ms. Hines asked you if you think that Mr. Ortiz was

1 in danger. Did you think Mr. Calef was in danger?

2 A. No, ma'am.

3 Q. When you first went over there, you only thought
4 that he was in danger?

5 A. Yes, ma'am. Because it was basically three there
6 that you would perceive to be on side versus one.

7 Q. So it was just the numbers that made you think
8 that, not any instruments held by the Calefs or anything
9 like that?

10 A. Well, no, ma'am. Except that I thought their son
11 possibly had a weapon in his pocket. But when we were
12 discussing that day at the grocery store, they told me
13 he was trying to get his phone to call 9-1-1.

14 Q. And you never saw him with a weapon?

15 A. No, ma'am.

16 MS. SAMPSON: Nothing further, Your Honor.

17 THE COURT: You may step down. Thank you.

18 MR. SMITH: Thank you, ma'am.

19 MR. MAY: May he be excused?

20 THE COURT: Yes, you may be excused.

21 MR. SMITH: Thank you, ma'am.

22 MR. MAY: Thank you, Mr. Smith.

23 THE COURT: You may call your next witness.

24 MR. MAY: Yes, ma'am. Thank you, ma'am.

25 Defense calls Alirio Ortiz.

1 THE CLERK: Do you swear or affirm the
2 testimony you're about to give in this case will be the
3 truth, the whole truth and nothing but the truth, so
4 help you God?

5 THE WITNESS: Yes, ma'am.

6 THE COURT: Thank you. Have a seat in the
7 witness stand, please. State your name for the record.

8 THE WITNESS: Alirio Ortiz.

9 ALIRIO A. ORTIZ,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. MAY:

13 Q. Mr. Ortiz, where do you live?

14 A. In Omega Drive, 1504.

15 Q. Okay. And you're using an interpreter today,
16 correct?

17 A. Of course, yes.

18 Q. And it's because you're a Spanish speaker?

19 A. Yes.

20 Q. And you've had an interpreter every time that you
21 and I have met, correct?

22 A. Yes.

23 Q. All right. How do you know the Calefs?

24 A. I bought this property and the daughter lives next
25 to me.

1 Q. Okay. And both parties have stipulated that there
2 is an ongoing dispute regarding the property line?

3 A. Yes.

4 Q. And I mean, as well as there's a civil suit
5 regarding that property line?

6 A. Yes, sir.

7 Q. Now, what I'm going to do is I'm going to turn your
8 attention to August 7th, 2010. Do you remember that
9 day?

10 A. Yes, sir.

11 Q. What were you doing?

12 A. I was digging a hole in order to put in the post to
13 support the gate.

14 Q. And when you're saying gate, why do you need a
15 gate?

16 A. Well, it's for the protection of my driveway.

17 Q. Now, there are pictures. Is there a fence
18 currently around your yard?

19 A. At that moment, just the front part.

20 Q. Okay. But currently there's a fence around your
21 yard?

22 A. Now, yes.

23 Q. And that day you were working on that fence?

24 A. Yes, sir. And I repeat, I was digging that hole,
25 which is on my property.

1 Q. Okay. What happened?

2 A. Mr. Donald come in, arrived with a telephone,
3 cellular telephone. And he stood in front of me. And
4 then I remember that I squatted down to put some water
5 in the hole that I was digging.

6 Q. Why would you put water in the hole you were
7 digging?

8 A. Because the dirt was very hard.

9 Q. Okay. So you're squatting down and then what
10 happened?

11 A. Well, I was squatting down and then a white car,
12 supposedly from his son, arrived. And then Ms. Maria
13 started hitting me.

14 Q. And where were you at this time?

15 A. On my property.

16 Q. Okay. And then what happened?

17 A. And then she hit me with a big purse, very, very
18 hard. A purse that perhaps weighed fifty kilos.

19 Q. Okay. And then what happened?

20 A. Well, I started running around a car, a Chevrolet
21 Lumina, which was parked on my property. And I started
22 running around it because there were several of them
23 trying to hit me.

24 Q. At any time, did anybody come over to your property
25 to help you?

1 A. Well, Mr. Smith was watching the whole case.

2 Q. Okay. At some point did he come onto your
3 property?

4 A. Yes. He came in to try to calm things down and he
5 was also hit.

6 Q. Who hit Mr. Smith?

7 A. Mr. Calef hit him three times in the back with the
8 ground shovel that's used to dig post holes.

9 Q. During this time, were you ever scared?

10 A. Of course I did because there were several of them
11 and it was me by myself.

12 Q. And where did all this action take place?

13 A. All of this happened on my property, which is
14 legally my property.

15 MR. MAY: Beg the Court's indulgence, Your
16 Honor.

17 Just briefly.

18 Q. And you were in fear for your life because there
19 were so many of them?

20 A. Of course, yeah. Four or six people against one,
21 yeah.

22 Q. And so what did you do to defend yourself?

23 A. Well, I remembered that the machete was in the
24 corner where I was going to dig the hole. And I grabbed
25 the machete, but I didn't injury anyone. There's no

1 evidence.

2 Q. Well, that's not the -- Mr. Ortiz, just answer my
3 questions, okay? But so you had a machete?

4 A. Yes, sir. I had it in my hand.

5 Q. Did you hit anybody with it?

6 A. No, sir. I was just trying to defend myself from
7 all of them who are on my property.

8 MR. MAY: Beg the Court's indulgence one more
9 time.

10 I have no further questions at this time, Your
11 Honor.

12 THE COURT: Any cross?

13 MS. SAMPSON: Beg the Court's indulgence.

14 CROSS-EXAMINATION

15 BY MS. SAMPSON:

16 Q. Mr. Ortiz, I want to show you what's marked as
17 State's Exhibit Number 4. Do you recognize this?

18 A. Yes.

19 Q. And is this a picture of your property?

20 A. Yes.

21 Q. And on -- in the picture to the side where these
22 bushes are, that's Ms. Calef's property, correct?

23 A. When you say bushes, what are you trying to say?

24 Q. Right here.

25 A. Yes. But all of this from here to here is my

1 property.

2 Q. Correct.

3 A. Go ahead.

4 Q. Sorry I interrupted. I know enough Spanish to know
5 what you were saying. I'm sorry. But from your -- from
6 this fence post to the left is Ms. Calef's property?

7 A. Yes, ma'am.

8 Q. There it is in this picture. You can plainly see a
9 survey marker or a marker. Is that true?

10 A. Of course, yes.

11 Q. And that is part of the dispute over where this
12 fence should be, correct?

13 A. Yes, there are two markers. And I'm on my
14 property.

15 Q. Okay. I just want to clarify that that's what you
16 all are arguing over where this should go?

17 A. Yes.

18 Q. Now, could you tell me -- I believe you said that
19 when Ms. Calef hit you, she hit you with her purse and
20 it weighs fifteen kilos?

21 A. More or less. It was a large purse, very large,
22 black.

23 Q. Do you know how many kilos is in a pound? I don't.

24 A. I don't know. I just know it was a very large,
25 heavy, heavy purse. Around fifty weight.

1 Q. Fifty pounds?

2 A. More or less kilos. It was very heavy.

3 Q. Oh, okay. Did you get cut?

4 A. I don't know, but I had, for four or five days,
5 some bruises here.

6 Q. Did you take pictures of those bruises?

7 A. No, because I was unjustly sent to the jail.

8 Q. When did you get out of jail?

9 A. The next day.

10 Q. And you didn't take pictures when you got home?

11 A. No, because I didn't have a camera.

12 Q. Did you go purchase a camera?

13 A. I didn't have time to go purchase a camera. The
14 camera I had didn't have any film.

15 Q. Did you go to the Sheriff's Department and have
16 them take photographs?

17 A. No.

18 Q. And you stated that there were four to six people
19 in the yard.

20 A. Yes.

21 Q. Who?

22 A. Maria Calef, Donald Calef, Cynthia Calef and two or
23 three kids.

24 Q. Were the kids part of the dispute?

25 A. They weren't kids. They were already grown up.

1 One of them is present.

2 Q. But you just said there were Maria, Donald, David,
3 and two kids.

4 A. No, there were no kids. They were all adults.

5 There was about six people there.

6 Q. Okay. So I just want to be straight on who's
7 standing out there. Maria, Donald, David. And who are
8 the other adults?

9 A. And four people arrived in a car.

10 Q. So when did they arrive?

11 A. When I was digging the hole and I was hit.

12 Q. So when you say four people arrived, are you
13 talking about when Ms. Calef arrived?

14 A. That moment they arrived and they started hitting
15 me.

16 Q. Who started hitting you?

17 A. Maria Calef.

18 Q. Okay. So four people get out of the car and Ms.
19 Calef hit you?

20 A. Yes, ma'am.

21 Q. Cynthia Calef was one of those people who got out
22 of the car?

23 A. No, she came in another car.

24 Q. Oh, so there's another car?

25 A. There was another car, yes.

1 Q. Okay. And when did that car arrive?

2 A. Around the same time. They all came up like ants.

3 Q. And, according to you, you were squirting -- you

4 were putting water in the hole, you never squirted

5 anybody with the water?

6 A. No, ma'am. I didn't get anyone wet there. It was

7 with a gallon bucket.

8 Q. Okay.

9 MS. SAMPSON: Beg the Court's indulgence.

10 No further questions, Your Honor.

11 THE COURT: Anything further from the Defense?

12 MR. MAY: No, ma'am.

13 THE COURT: Is there any objection if I ask a

14 couple of questions?

15 MS. SAMPSON: I'm sorry. I ...

16 THE COURT: Is there any objection if I ask a

17 couple of questions?

18 MS. SAMPSON: None from the State.

19 MR. MAY: No, ma'am.

20 **EXAMINATION BY**

21 **THE COURT:**

22 Q. Mr. Ortiz, when the car with Ms. Maria Calef

23 arrived, where was it parked?

24 A. They just came into my driveway, ma'am.

25 Q. So was the car parked in your driveway?

1 A. Yes, ma'am.

2 Q. And what about the other car that arrived in which
3 Ms. Cynthia Calef was riding?

4 A. It was on the side of her property.

5 Q. Looking at State's Exhibit Number 4 can you tell me
6 and show me where you were located at the time that Ms.
7 Calef started to hit you with the purse?

8 A. Right here. And the red car was here in the
9 driveway.

10 Q. Can you hold it up and show me so that I could see,
11 please?

12 A. This wasn't here yet, the gate. And this was over
13 here. And this was open toward my house. My red car
14 was in here and they came in up to here. And they
15 started hitting me here in my property and I started
16 running here, around and around my car. And I ran to
17 the house and knocked on the door and yelled to my
18 children to call the police. And when they started
19 chasing me, I remembered that I had left my machete
20 here, next to this piece of wood that's here. At that
21 point, Mr. Smith came. And Mr. Calef got the post hole
22 digger from the hole and hit Mr. Smith three times on my
23 property. The sons of Mr. Smith -- I'm sorry, the sons
24 of Mr. Calef grabbed Mr. Smith by the throat and began
25 choking him.

1 Q. And you indicated earlier that there are two
2 markers?

3 A. Yes. One's here for them and the other's here for
4 me.

5 THE COURT: I don't have any additional
6 questions. Is there anything further from the Defense?

7 MR. MAY: No, Your Honor.

8 THE COURT: Anything further from the State?

9 MS. SAMPSON: Beg the Court's indulgence.

10 No further questions, Your Honor.

11 THE COURT: You may step down. Thank you.
12 You may call your next witness.

13 MR. MAY: Your Honor, that is the extent of
14 the evidence the Defense is putting up to establish
15 protection under 16-11-440.

16 THE COURT: Anything from the State?

17 MS. SAMPSON: At this time, Your Honor, and I
18 -- because I don't know how these hearings work.
19 Normally, when one side finishes their presentation the
20 other side argues that, you know, for a directed verdict
21 or for whatever the case may be.

22 THE COURT: Well, considering it's not a
23 trial.

24 MS. SAMPSON: Yeah. At this time, I just
25 would like to argue that I don't -- since they do have

1 the preponderance of the evidence, I would like to put
2 on record I don't think they've met that burden at this
3 time, Your Honor.

4 Since we are proceeding under Section (C), a person
5 who's not engaged in an unlawful activity, and as you
6 stated, there would be three things that they would have
7 to prove by a preponderance of the evidence in order for
8 them to be granted immunity. The three things were that
9 first the Defendant not be engaged in an unlawful
10 activity. Second, that he was attacked in a place where
11 he had the right to be. And third he reasonably
12 believes force is necessary to keep from bodily harm or
13 death or to keep some other felony from occurring. I
14 would state that, first prong, they haven't met by a
15 preponderance of the evidence. He's digging in a place
16 that we've all agreed he may or may not should have been
17 digging at that -- the whole thing is they're having a
18 dispute over where that -- what he is trying to put in
19 goes. So if he is digging a hole in Ms. Calef's
20 property, then that would be unlawful. And they can't
21 prove by a preponderance of the evidence or they didn't
22 establish. All they put was him. There was no surveyor
23 here to say where that hole goes. There was no one here
24 to prove that he is digging on his property, other than
25 him saying it.

1 So that would be -- I would argue that first of all
2 he is -- there is not a preponderance of the evidence to
3 show that he is engaged in a lawful activity. I believe
4 he's engaging in an unlawful activity.

5 Secondly, we go back to being attacked in a place
6 where he has the right to be. Again, because we are
7 disputing where he is. They haven't put up people to
8 say that it happened in their property, on his property.
9 So I would just move on. I would agree that maybe
10 they've met the preponderance of the evidence that the
11 attack took place on the inside in the yard. But I
12 would argue that even their own witnesses disagree on
13 almost everything. Mr. Smith says there's only a car
14 parked in the yard. Mr. Ortiz says that Calefs suddenly
15 drove up there and parked in his yard. Mr. Ortiz stated
16 that there are six people in the yard. Mr. Smith said,
17 no, there's only three. So as far as -- we move to the
18 reasonably believes, there's no weapons used by the
19 Calefs, according to Mr. Ortiz, other than a purse.
20 Now, we didn't get into the size of Ms. Ortiz [sic]
21 because we haven't put her up yet. She's a very small
22 woman. Mr. Ortiz is still bigger than her. At worst,
23 according to him, she hit him with a purse. He then
24 pulls out a machete. And Mr. Smith said it could have
25 been a folder. I don't think that rises to the level of

1 him believing he was going to get serious bodily injury
2 or death. He didn't testify Mr. Calef ever picked up
3 that post hole digger to come at him. He stated that
4 Mr. Calef hit Mr. Smith with the post hole digger and
5 that was when Mr. Smith was attacking Mr. Calef's son.
6 So that's an entirely separate incident, even if you
7 believe their two witnesses, who tell two entirely
8 different stories.

9 I just don't think that they have been able, by a
10 preponderance of the evidence, rise to the level that he
11 reasonably -- that it was reasonable for him to believe
12 he needed to pull out a machete and use it. And he's
13 not even saying -- in fact, he denied it. So if he
14 didn't use any force, shouldn't even be having this
15 hearing. He was denying having used any force. He said
16 he didn't cut Ms. Calef. He said he didn't hit Mr.
17 Calef. We're back to why we're having this hearing if
18 he didn't use any force, which is what his own witness
19 testified to. And Mr. Smith said he didn't see him use
20 the machete. He saw him holding the machete and that
21 Ms. Calef was cut. So if he didn't use any force, if
22 there were no injuries caused, we're back to whether he
23 did this crime, not to whether the defense is
24 applicable. And we're back to this not being applicable
25 and immunity not being proper.

1 THE COURT: Any response by the Defense?

2 MR. MAY: Yes, ma'am. Your Honor, both Mr.

3 Smith and Mr. Ortiz testified that he was digging a hole

4 for a post on his property to put up the fence line or

5 be part of the gate, but it was to surround his

6 property. I believe that one is allowed to enclose

7 one's property with a fence, therefore, I believe that

8 that is a lawful activity. He was attacked on his

9 property. He had the right to be on his property. And

10 assuming arguendo in the light most favorable to the

11 State that he did not have a right, he retreated, as

12 testified by both Mr. Smith and Mr. Ortiz, he had

13 retreated onto his property. And the fact that he would

14 have retreated would re-establish the fact that he was

15 in a place where he was rightfully able to go. He was

16 retreating and he was pursued.

17 Therefore, Your Honor, I believe that -- I think

18 that (C) attaches both in his digging this post, a hole

19 for his post, as well as after he retreated, assuming

20 the argument that he was wrong in digging the hole, that

21 the retreat would give him the ability then to defend

22 himself because he was being pursued onto his property.

23 Your Honor, he reasonably believes the force that

24 was used was necessary. The allegations in the

25 indictment are clear, that he hit both of them. He

1 denies -- he denied hitting either of them. Under Ms.
2 Sampson's argument, you would have to shoot somebody,
3 you would have to actually have hit them, pulling out a
4 gun to eject somebody from your property, and that would
5 be enough. Then he'd be charged for pulling out a gun.
6 And you would only get the protections of this statute
7 if you actually delivered a blow. I don't believe
8 that's what the statute says. He ejected them. And
9 from that ejection he is charged in this indictment.
10 Your Honor, we believe that (C) is directly on point.
11 We think he is entitled to immunity, as what appears to
12 be the only non-biased witness has clearly stated that
13 he believed Mr. Ortiz was in fear. That's the reason
14 why -- I mean, was in danger. That's the reason why he
15 went across the street. The Court saw that man had an
16 oxygen tank. It's not an easy man to get up and run.
17 He believed that Mr. Ortiz was in fear so he ran across
18 the street to try to help him or to break it up, that
19 Mr. Ortiz was in danger. Mr. Ortiz stated that he was
20 in fear for his life.

21 Your Honor, we believe all three prongs have been
22 met by a preponderance of the evidence, Your Honor.

23 THE COURT: Yes, ma'am.

24 MS. SAMPSON: Your Honor, I just want to
25 clarify something. I believe, again, that Mr. May is

1 confusing defense of habitation with Castle. With not
2 Castle, I'm sorry, but with the Act. There are two
3 separate and distinct things. We're talking about
4 ejectment. (C) does not talk about ejectment. (C)
5 says, a person who is not engaged in an unlawful
6 activity, who is attacked in another place where he has
7 the right to be, including but not limited to his place
8 of his business, has no duty to retreat and has the
9 right to stand his ground and meet force with force,
10 including deadly force, if he reasonably believes it is
11 necessary to prevent death or great bodily injury to
12 himself. Mr. Ortiz specifically stated he didn't use
13 any force. He stated he didn't cause their injuries.
14 He didn't do anything, according to him. So by the
15 preponderance of the evidence, they haven't shown that
16 any force was used. It doesn't say threat of force. It
17 says force.

18 I would agree with him on defense of habitation
19 allows you to eject someone. We're not talking about
20 defense of habitation. We're talking about Section (C)
21 -- Sub-section (C) of Section 16-11-440. It does not
22 talk about habitation. It does not talk about defense
23 of habitation. It does not talk about ejecting. It
24 does not talk about the reasonableness of such ejection.
25 All of that is defense of habitation, which does not --

1 is not in this section. He's asking you to broaden the
2 definitions that are given in this Statute.

3 And, again, we go about Statutory construction. He
4 has to prove by a preponderance of the evidence under
5 *Duncan* that force was used because Section (C) says
6 force with force. The only force they have show to you
7 is that Ms. Calef hit him with a purse or a folder,
8 depending on which witness you want to believe. There
9 was no weapons used by the Calefs, other than a purse,
10 according to their witnesses, against Mr. Ortiz.

11 Therefore, if he didn't make any -- use any force --
12 that didn't keep them from using the defense of
13 habitation at trial. That doesn't prevent them from
14 using self-defense at trial. Those are two separate and
15 distinct defenses that they can use. But it's not in
16 Section (C). And, therefore, they have they burden, I'm
17 arguing they haven't met, because there was no force.

18 Your Honor, I just wanted to address one more issue
19 that I would feel remiss if I didn't state. In 16-11-
20 450, it specifically -- and this is to address what Mr.
21 May said about me requiring a shooting. I don't require
22 a shooting or actual force, the Legislature does. It
23 says a person who uses deadly force and is justified in
24 using deadly force is immune. You have to actually use
25 force. And their own Defendant said he didn't. If that

1 had been the facts that they presented at the beginning
2 of this hearing and then the fact pattern that was
3 presented, I would have argued that's why we didn't need
4 to have this trial -- this hearing, is that he didn't
5 use any force at all.

6 THE COURT: Yes, ma'am.

7 MS. HINES: Your Honor, I think that use of
8 force does not actually have to be a blow to -- I mean,
9 we have testimony that he did brandish a machete.
10 That's a sign of force. I think that that is
11 sufficient. We -- at this point, what we've done is
12 we've presented evidence as to each of the elements that
13 Your Honor discussed at the beginning of this hearing,
14 as to the three elements that need to be established,
15 the three elements which do need to be established by a
16 preponderance of the evidence. At this point, this is
17 the only evidence that's been presented. And I don't
18 think that we have to prove that force was used, that a
19 blow was delivered. I don't think that is our burden to
20 prove that a blow was delivered. I think that force was
21 ---

22 MR. MAY: A show of force.

23 MS. HINES: A show of force. We've presented
24 evidence as to each of the three elements. And, as to
25 the State's argument about defense of habitation,

1 earlier in this hearing Your Honor said that the defense
2 of habitation and the Castle Doctrine was encompassed
3 within the entire statute, that when you're talking
4 about within the walls of the dwelling, you're talking
5 about under (A). When you're talking about the
6 property, it is under (C) and that encompasses defense
7 of habitation, which is why we are referring to the
8 defense of habitation cases and to the right of
9 ejectment. That is all -- what was codified in the
10 entire statute, and as evidenced by the Legislature's
11 intent in 420 (A). And that's where we think those
12 cases are relevant and the common law cases discussing
13 defense of habitation, discussing ejectment, discussing
14 all the self-defense issues were not just thrown out the
15 window by this Statute. They were incorporated into the
16 Statute.

17 THE COURT: I think that the Defense has put
18 enough evidence up to, at least on a prima facie basis,
19 meet the elements of Sub-section (C). I understand the
20 disputes about the testimony and the inferences to be
21 drawn from the testimony. But considering the evidence
22 in the light most favorable to the Defense on this
23 particular motion, I think there has at least been prima
24 facie evidence that satisfies the elements of Sub-
25 section (C) that would require the State to go forward.

1 So I'm going to ask the State to go forward.

2 MS. SAMPSON: I'm sorry. I didn't hear the
3 very last sentence.

4 THE COURT: So I'm going to ask the State to
5 go forward and present -- if they wish to present
6 anything, they can present it.

7 MS. SAMPSON: Beg the Court's indulgence. Can
8 I just ask a few questions to clarify your ruling?

9 THE COURT: Sure.

10 MS. SAMPSON: You said prima facie, and I just
11 want to ---

12 THE COURT: Well, let's put it this way. I
13 think that the testimony that I'm relying on is that Mr.
14 Ortiz says he was on his property. He was on his
15 property at the time that the initial contact came
16 between he and Ms. Calef. That he was on his property
17 at the time that she was pursuing him, he ran around the
18 car. That whether it's three people out there or six
19 people or four people, there is evidence that there were
20 several people there who would tend to be engaged in --
21 who would be in favor of the Calefs, which created a
22 reasonable fear. And the fact that he was being chased
23 around the car on his property, that Mr. Calef had
24 picked up a post hole digger, and although he was
25 pursuing Mr. Smith, that he had armed himself, that --

1 and I think it's reasonable that he would be in fear for
2 his own personal safety. And that being pursued that he
3 armed himself, and he armed himself with the only other
4 thing that was out there left to arm himself with, which
5 was a machete. I understand that the testimony is is
6 that he didn't strike anyone, but what I heard him say
7 was that he was fending off. And there were no
8 questions asked with how he fended himself off, but what
9 I gather there is that he did not attempt to strike
10 anyone with the machete, but he used it in a defensive
11 manner to prevent himself from receiving blows.

12 And I think under those circumstances, I think that
13 that's sufficient, at least, to have the State try to
14 dispute or otherwise challenge his testimony in showing
15 that it's not a preponderance of the evidence. And to
16 the extent that there is a dispute about the property
17 line, I don't think the fact that there's a dispute
18 about the property line changes the information. What I
19 understand is that there is a marker and there may very
20 well be two markers, that looking at the marker with the
21 stake, that based upon the pictures, that the fence is
22 inside that line.

23 Now, I understand that there's still on-going
24 disputes and that there is a civil lawsuit regarding
25 where the property line occurs. And so each is going to

1 believe that they're within their rights on their
2 particular property. So in terms of whether or not he
3 was on his property lawfully digging the post, that's
4 not going to be decided until such time as the civil
5 case is over. But I think he has -- the testimony at
6 this point is that that's the belief -- his belief that
7 it's his property based upon his understanding of where
8 the stake is located. And so I think that that's prima
9 facie evidence that he was lawfully engaged in activity
10 on his own property. And even if he were not at the
11 time that they pulled up, once -- according to the
12 testimony, once he was being struck by Ms. Calef, he's
13 on his property. I mean, if he's being chased around
14 his own property, around a car on his property, and he
15 arms himself while he's on his property, I think that
16 that's -- that that falls under Sub-section (C).

17 Now, I understand that the State's testimony may be
18 different. But that's what I understand at this
19 particular point.

20 MS. SAMPSON: And just to be clear, and I hate
21 to say it but I don't know how else to say it, you're
22 not requiring the State to disprove what they've
23 presented, because they have the burden of proof, And I
24 guess -- and I'm not really sure. That's why I'm asking
25 because I don't ---

1 THE COURT: No, I'm saying to the -- well,
2 and, you know, and I guess that's why I said if the
3 State wishes to put up evidence. If you don't wish to
4 put up evidence, that's fine. Then we can go -- I mean,
5 I'll make my findings of fact and do an order rule on
6 the law. If you wish to put up evidence that would tend
7 to negate the preponderance of the evidence, because the
8 standard is still preponderance, it's not beyond a
9 reasonable doubt.

10 MS. SAMPSON: Right.

11 THE COURT: And I'm not trying to shift any
12 burden, but we're not -- this is not a criminal case
13 where we're, you know, a criminal hearing where we're
14 talking about burden shifting. I mean, they ---

15 MS. SAMPSON: I know. I just needed to know
16 all of that.

17 THE COURT: Yeah.

18 MS. SAMPSON: I understand this will probably
19 be appealed by either side and so I just want the record
20 to be clear on what I need to do.

21 THE COURT: I understand. And, you know,
22 there are a lot of questions about this particular
23 statute and what the procedure is and how it's to be
24 done. I know we're just trying to follow as best we
25 can.

1 But I think at the end of the presentation of all
2 the information for me to consider, I will have to
3 determine whether or not they've met the burden of
4 proof.

5 MS. SAMPSON: Thank you, Your Honor. May I
6 have a moment to confer before we determine what we'll
7 do?

8 THE COURT: Sure.

9 MS. SAMPSON: Your Honor, we will be putting
10 up a case or witnesses. The reason I was conferring
11 with co-counsel is just to establish how long we through
12 this -- we have the first two witnesses here. The
13 others were told to be here at two, but I can go call
14 them and tell them to be here sooner if you would like.
15 I just assumed we'd take a lunch break.

16 THE COURT: Yeah. We will take a lunch break,
17 but we can start with the ---

18 MS. SAMPSON: We can do the Calefs right now.
19 They'll take us through for a little bit, but I don't
20 think they would take us until ---

21 THE COURT: That's fine. And we can just
22 start and see how far we get and then we'll take a lunch
23 -- we will take a lunch break at some point.

24 MS. SAMPSON: Okay. Thank you, Your Honor.
25 Then the State would call Donald Calef.

1 THE CLERK: Do you swear or affirm the
2 testimony you're about to give in this case will be the
3 truth, the whole truth and nothing but the truth, so
4 help you God?

5 THE WITNESS: I do.

6 THE COURT: Thank you. Have a seat in the
7 witness stand, please. State your name for the record.

8 THE WITNESS: Donald Calef.

9 DONALD CALEF,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MR. WILLIAMS:

13 Q. Good morning, Mr. Calef?

14 A. Good morning.

15 Q. I want to start by asking you what happened on
16 August 7th, 2010 at approximately ten a.m. in the
17 morning?

18 A. I received a phone call from my daughter and Mr.
19 Ortiz was over there digging up our survey marker.

20 THE COURT: I sorry. I can barely hear you.
21 If you'd pull that microphone a little bit closer to
22 you. You don't have to speak on top of it, just speak a
23 little bit louder.

24 A. On August the 7th I received a phone call ---

25 Q. I think you can back up a little bit from the ---

1 THE COURT: Yeah. As long as you speak up you
2 can back up, but if you're going to talk softly, then
3 you need the microphone.

4 Q. All right.

5 THE COURT: You received a call from your
6 daughter?

7 A. I received a phone call from my daughter that Mr.
8 Ortiz was digging up the marker, the survey we did.

9 Q. Who is your daughter?

10 A. Cynthia Calef.

11 Q. Where does she live?

12 A. 1510 Omega Drive.

13 Q. Where is that in location to Mr. Ortiz?

14 A. It's about three minutes. It's less than five.
15 Approximately, maybe five, between three to five minutes
16 from my house. I mean, from my house.

17 Q. Where is your daughter's property in relation to
18 Mr. Ortiz's property?

19 A. Next door.

20 Q. So it's fair to say they're next door neighbors?

21 A. Yes, sir.

22 Q. What did you do when your daughter called you?

23 A. I drove over and I saw -- I was passing by. I saw
24 Ortiz digging a hole, digging a hole, so I pulled up in
25 the front of my daughter's driveway where the mailbox

1 is.

2 Q. Okay. I'm just going to repeat what you said.

3 You're fading off a little bit. You pulled into your
4 daughter's driveway?

5 A. I pulled up in front of my daughter's driveway, by
6 the mailbox.

7 Q. What did you do next?

8 A. I got out of the car and I walked over and asked
9 Mr. Ortiz, what are you doing?

10 Q. Let the record reflect the State is showing the
11 witness State's Exhibit 1. What is this?

12 A. This is the front of my daughter's house.

13 Q. And what is this?

14 A. Her mailbox.

15 THE COURT: You're saying this and this and
16 nobody can see what you're referring to.

17 Q. This is a picture of what? What is this a picture
18 of?

19 A. My daughter's, the front of her house, her driveway
20 and mailbox.

21 Q. And where did you park that day?

22 A. I parked right about right in here. Right in
23 there.

24 Q. So right here, almost in your daughter's driveway?

25 A. Yes, sir.

1 Q. What did you do once you got out of your car?

2 A. I asked Ortiz -- I walked up and asked Ortiz what
3 he was doing.

4 Q. When you say you walked up, where exactly did you
5 walk?

6 A. About half-way between the corner of the house,
7 about the corner of the house in toward my daughter's
8 house.

9 Q. Were you standing in your daughter's yard?

10 A. Yeah. I was standing in front of my daughter's
11 yard.

12 Q. Were you inside your daughter's fence?

13 A. No.

14 Q. So you were outside your daughter's fence?

15 A. Yes, sir.

16 Q. But you were in front of your daughter's yard?

17 A. Yes.

18 Q. I couldn't hear you?

19 A. Yes.

20 Q. Let the record reflect that the State is showing
21 the witness State's Exhibit 5. Could you point to
22 exactly where you were standing? I think the Judge
23 needs to see.

24 A. I'm going to say I was right about in here.

25 Q. All right. And where was Mr. Ortiz?

1 A. Ortiz was right here. He was digging the hole more
2 toward my daughter's. He had started here and was
3 digging the hole like four or five feet. He had dug out
4 about three or four feet deep, so he was right here in
5 front of my daughter's house.

6 Q. Was his back to you?

7 A. No. He was facing toward me.

8 Q. He was facing you?

9 A. Uh-huh (affirmative).

10 Q. With his back towards his property?

11 A. No, toward me. Yeah. His back was toward his
12 property.

13 Q. So was he beyond that fence pole that we see here?

14 A. Oh, yes. Yes. He was, he was as least a foot or
15 two foot on this side because he was digging it more and
16 more wider.

17 Q. Okay.

18 A. And there was dirt all over the front. He had a
19 hole digger and a hose there.

20 Q. What did you say to him once you got out of your
21 car?

22 A. I said, what are you doing?

23 Q. How did he respond?

24 A. He didn't say much.

25 Q. What exactly did he say?

1 A. He just looked at me. He didn't really say

2 nothing. And then I called the police.

3 Q. Okay. Why did you call the police?

4 A. Because he was removing my daughter's survey

5 markers that we had just had the property surveyed a

6 couple of days before that. He was removing the wooden

7 stake and the metal stakes, trying to remove them.

8 Q. Could you speak into the mic a little bit. What

9 police agency did you call?

10 A. Richland County.

11 Q. What number did you dial?

12 A. 576-3000.

13 Q. Why would you, why would you call them as opposed

14 to calling 9-1-1?

15 A. Because I didn't feel that my life was in danger at

16 that moment.

17 Q. And did you -- who did you talk to at the Sheriff's

18 Department?

19 A. The dispatch.

20 Q. What did they do?

21 A. I just -- I don't know.

22 Q. Okay. All right. After the report you hung up?

23 A. Then I called -- yeah, after the report I hung up.

24 Q. What happened next?

25 A. I called my wife to bring me the paperwork.

1 Q. While you were on the phone, did you move at all?

2 A. From where I was?

3 Q. From where you initially were standing?

4 A. No.

5 Q. Were you always on your daughter's -- in front of
6 your daughter's yard?

7 A. Yes.

8 Q. Why did you call your wife?

9 A. To bring me over some paperwork so I could show it
10 to the officers, that when they arrived I had documents
11 showing the survey that we did.

12 Q. I understand. How long did it take for your wife
13 to arrive?

14 A. I would say about less than five minutes.

15 Q. What was her mode of transportation?

16 A. My son gave her a ride.

17 Q. Excuse me?

18 A. My son gave her a ride.

19 Q. Where did he park his car?

20 A. In front of my daughter's yard, a little bit behind
21 mine.

22 Q. Okay. Was he parked at any time in Mr. Ortiz's
23 driveway?

24 A. No.

25 Q. Do you remember a car being parked in Mr. Ortiz's

1 driveway?

2 A. No.

3 Q. Once your wife arrived, what did she do?

4 A. My wife got out of the car and brought the folder

5 up to me where I was standing. And I said, look what

6 Mr. Ortiz did. Because he had taken ---

7 Q. What were you referring to when you said, look what

8 Mr. Ortiz did?

9 A. Because after I called the police, he had taken

10 that hose and squired all over the bottom of my pants.

11 So I was showing my wife where Ortiz had sprayed mud on

12 my pants. I said, look what he did. The bottom of my

13 pants were soaking wet.

14 Q. When did he do that?

15 A. He did that right after I called my wife to bring

16 them papers.

17 Q. Where were you wet and covered with mud?

18 A. On the bottom of my pant legs.

19 Q. Up to your shins?

20 A. Yeah.

21 Q. What about up to your knees?

22 A. Possibly.

23 Q. So you were wet and covered with mud up to your

24 knees?

25 A. (Affirmative nod).

1 Q. What did your wife do once she saw you were wet and
2 covered with mud?

3 A. She said, did you call the police? I said, yes.

4 Q. What did she say next or what did she do next?

5 A. The next thing that happened was Ortiz took that
6 hose and did the same thing to my wife that he had done
7 to me.

8 Q. And what did he do to your wife?

9 A. Squirted mud on her.

10 Q. What happened next? Before you answer that
11 question, let the record reflect the State is showing
12 the witness Exhibit 5. Where were you and your wife
13 standing when Mr. Ortiz squirted water and covered you
14 with mud?

15 A. Right about in here.

16 THE COURT: I'm sorry. You need to speak up.

17 A. We were at least five to eight, we were at least
18 five to eight feet from the end of the fence.

19 Q. And the end of the fence represents what?

20 A. My daughter's property.

21 Q. Where was he when he squirted you with water and
22 covered you with mud?

23 A. He was like one or two feet on the side of my
24 daughter's property.

25 Q. Is your testimony today he was on your daughter's

1 property when he ---

2 A. Yes, sir.

3 Q. Once he covered your wife with mud, what did you
4 do?

5 A. My wife said, my wife said, call 9-1-1. And I
6 called 9-1-1.

7 Q. Why did you call 9-1-1?

8 A. We felt that we -- our life might be in danger.

9 Q. What happened after you called 9-1-1?

10 A. Ortiz picked up, Ortiz picked up a machete and hit
11 me two times on the left side of my -- on my left
12 shoulder, real hard.

13 Q. How much time lapsed between you calling 9-1-1 and
14 when Mr. Ortiz picked up the machete?

15 A. Almost simultaneously. I was talking with the
16 operator, and boom, boom. I thought I might drop the
17 cell phone when he hit me. He hit me two times here.

18 Q. Was he facing you when he hit you?

19 A. Yes, he was facing me. He lunged forward, he
20 lunged forward with that machete. So when he was like
21 right here, he lunged forward towards us and smashed me
22 with that machete two times in the shoulder.

23 Q. Was this after your wife hit him with her
24 pocketbook?

25 A. My wife never hit him with a pocketbook.

1 Q. Was this was after your wife hit him with the
2 folders?

3 A. She never hit him with the folders.

4 Q. So what prompted him to hit you?

5 A. He had no reason to do that. We were in shock.

6 Q. What did you do once he hit you with the machete?

7 A. Well, after he hit me with the machete two times,
8 my son -- my wife was screaming help, help. And my son
9 was approaching toward us and he said to Ortiz, what,
10 are you crazy?

11 Q. Where was your son before your wife screamed for
12 help?

13 A. In his car.

14 Q. Was he in the car the entire time?

15 A. Yes, sir.

16 Q. Was there anybody else out there with you and your
17 wife before he hit you with the machete?

18 A. No.

19 Q. So what happened after your son got out of the car?

20 A. Well, my son approached up to where we were
21 standing and said, what, are you crazy? And Ortiz took
22 that machete and went to strike my son, was trying, was
23 hitting my son. My wife put her hands up, put her hands
24 up to protect my son so he don't get his throat cut.
25 And that machete, when the machete came down it sliced

1 my wife's hands and she started bleeding.

2 Q. So it's your testimony today that Mr. Ortiz cut
3 your wife's hand?

4 A. Most definitely.

5 Q. What happened next?

6 A. Then me and my son and my wife, we tried to -- I'm
7 sorry -- we tried to, we tried to retreat.

8 Q. I want to stop you there. Again, the State is
9 showing the witness Exhibit 5, State's Exhibit 5.

10 Excuse me. That's Exhibit 4. State's Exhibit 1. Where
11 was your son when he got out of the car?

12 A. My son was probably right around in here. This is
13 probably -- I was parked here. He parked right behind
14 me.

15 Q. You parked in front of the mailbox?

16 A. He was parked approximately there.

17 Q. Was your son on Ortiz's property?

18 A. No.

19 Q. What happens as you all are trying to retreat?

20 A. As we're trying to retreat, this gentleman comes
21 running out of his house, Mr. Smith. He runs out. I
22 never met him before. But he runs out and he pushed --
23 and my wife was trying to show that we're hurt, can you
24 help us? And he pushed my wife and my wife fell, you
25 know. Then he grabbed my son in a choke lock and pulled

1 him towards the street. As I was picking up my wife, as
2 I was picking up my wife, Ortiz struck me again with
3 that machete. This time he hit me on the right side.
4 He was like a wild man with the machete.

5 Q. Then what happened?

6 A. Then the police were coming.

7 Q. What happened once the police arrived?

8 A. Ortiz was -- I'm going to back up a little bit.

9 During this time I called 9-1-1. I believe I called 9-
10 1-1 two or three times and explained to them that Ortiz
11 was still in front of my daughter's house and still had
12 the machete during this time frame. And then when the
13 police were coming, Ortiz was still in front of my
14 house, in front of my daughter's house, and when he saw
15 the police coming, he tried, he tried to get back to his
16 -- toward -- get back toward his residence.

17 Q. Let me stop you. Did he walk -- was he already in
18 his yard when the police came?

19 A. No.

20 Q. Okay. So when the police arrived, he began walking
21 to his car? I mean, where was he walking?

22 A. He was walking towards his residence.

23 Q. His home where he resides?

24 A. Uh-huh (affirmative).

25 Q. Was he -- did he get to his residence?

1 A. No.

2 Q. Where did he stop?

3 A. He stopped -- he might have made it to in front of
4 his yard, in front of his outside, in the street.

5 Q. What did the police do?

6 A. The police told him three times to drop the
7 machete..

8 Q. Did you have an opportunity to talk with the
9 police?

10 A. For a few minutes and I explained to him
11 everything.

12 Q. Where did you take your wife after she was cut?
13 When the police came, where was she?

14 A. My wife was up toward our vehicle.

15 Q. So everybody is outside?

16 A. Yeah. Everybody was out in the street. My wife's
17 pocketbook was out by my car and one of the officers
18 gave it to us. But my wife was still close toward our
19 car. We were trying to get to it.

20 Q. What part of any of the events that you just
21 described happened in Mr. Ortiz's yard?

22 A. None. We never, we never touched Ortiz's property.
23 We've never been in his property or in front of his
24 property. We've never harmed him and, you know, get
25 physical.

1 Q. When did you pick up the post hole diggers and hit
2 Mr. Smith?

3 A. I never touched the post hole digger. I never hit
4 Mr. Smith with the hole digger. Because I was just
5 going to say when the police arrived that hole digger
6 was still in the hole.

7 MR. WILLIAMS: No further questions, Your
8 Honor.

9 THE COURT: You may cross.

10 MS. HINES: Just a moment. Thank you, Your
11 Honor. May it please the Court.

12 **CROSS-EXAMINATION**

13 **BY MS. HINES:**

14 Q. And what is your daughter's address?

15 A. 1510 Omega Drive.

16 Q. Okay. And so who all was out there that day?

17 A. You mean in the yard?

18 Q. You were there?

19 A. I was there.

20 Q. Your wife was there?

21 A. My wife, my son.

22 Q. Your son. Was your daughter there?

23 A. No.

24 Q. Okay. Is your daughter married?

25 A. Is my daughter married?

1 Q. Yeah.

2 A. No.

3 Q. Who else was in the house? Who else was in the
4 home with your daughter?

5 A. My granddaughter.

6 Q. No one else?

7 A. No.

8 Q. Do you know who Yani Heminez is?

9 A. Excuse me?

10 Q. Yani Heminez. Do you know who that is?

11 A. I know him.

12 Q. Who is that?

13 A. That's her boyfriend.

14 Q. Your daughter's boyfriend?

15 A. Uh-huh (affirmative).

16 Q. Was he there that day?

17 A. No.

18 Q. He was not there?

19 A. No. He came, he came like maybe thirty minutes

20 after the police were there. He was not there at the

21 beginning though.

22 Q. Okay. So he wasn't there when the police arrived?

23 A. No.

24 Q. Was he arrested that day there?

25 A. Yes.

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1 Q. By the police? I mean, he was arrested for breach
2 of peace?

3 A. I believe so. Yeah. I wasn't there.

4 Q. Were you -- when this incident happened, were you
5 on your daughter's property?

6 A. Yes.

7 Q. Or were you in front of your daughter's property?

8 A. I was in my daughter's property. In the front of
9 her house.

10 Q. In the front of her house?

11 A. Yeah.

12 Q. How far away from the road were you?

13 A. Excuse me?

14 Q. How far away from the road were you?

15 A. Two or three feet.

16 MS. HINES: No further questions.

17 THE COURT: Any redirect?

18 MR. WILLIAMS: Briefly, Your Honor.

19 **REDIRECT EXAMINATION**

20 **BY MR. WILLIAMS:**

21 Q. The State is showing the Defendant Exhibit -- the
22 witness Exhibit 5, State's Exhibit 5. When you say your
23 daughter's property, do you consider this your
24 daughter's property, the area in front of the fence?

25 A. Yes.

1 Q. Is that where you were standing?

2 A. Yes.

3 Q. Now, was that where your wife was when she was
4 attacked?

5 A. Yes.

6 Q. Is that where your son was when he was attacked?

7 A. Yes.

8 Q. Is that where Mr. Ortiz was when he attacked you?

9 A. Yes.

10 Q. In front of your daughter's house?

11 A. Yes.

12 Q. On what you consider ---

13 A. My daughter's property.

14 MR. WILLIAMS: No further questions, Your
15 Honor.

16 **EXAMINATION**

17 **BY THE COURT:**

18 Q. I'm sorry, Mr. Calef, I just want to make sure that
19 I understand where you say that everyone was standing on
20 Exhibit Number 5. Can you show me, again, the location?

21 A. This is where Ortiz was and digging the hole.

22 Q. You have to speak up so that everybody can hear
23 you.

24 A. Ortiz was right about here, and me and my wife were
25 right about here.

1 Q. All right. Thank you.

2 THE COURT: Any other questions? Anything
3 else?

4 MR. WILLIAMS: Nothing from the State, Your
5 Honor.

6 THE COURT: You may step down. Thank you.

7 THE WITNESS: You're welcome.

8 THE COURT: You may call your next witness.
9 Well, let's take a lunch break.

10 MS. SAMPSON: Thank you, Your Honor.

11 THE COURT: Let's come back at about two
12 fifteen.

13 MS. SAMPSON: Thank you, Judge.

14 (WHEREUPON, the Court stood at recess for a lunch
15 break.)

16 THE COURT: If you would step forward please,
17 and tell me your name, please?

18 MR. GARCIA: Alejandro Garcia. A-L-E-J-A-N-D-
19 R-O, Garcia, G-A-R-C-I-A.

20 THE COURT: And Mr. Garcia, you are -- are you
21 certified or otherwise qualified to serve as an
22 interpreter in the State of South Carolina?

23 MR. GARCIA: For certain parties I interpret
24 from Spanish to English.

25 THE COURT: And do you swear or affirm that

1 you will translate from English to Spanish and Spanish
2 to English the proceedings and the testimony in the
3 matter of the State versus Alirio Ortiz?

4 MR. GARCIA: Yes, I do.

5 THE COURT: Okay. And just for the record,
6 you have been providing some services for translating
7 and interpreting during the testimony of the last
8 witness. Is that correct?

9 MR. GARCIA: Yes, Your Honor.

10 THE COURT: Okay. I just wanted to make sure
11 that the record reflected that. Thank you.

12 MR. MAY: Thank you, ma'am.

13 MS. SAMPSON: Thank you, Your Honor.

14 THE COURT: Are we ready?

15 MS. SAMPSON: Your Honor, a matter has come
16 up. Our next witness is Ms. Calef. And I think in
17 chambers we discussed this once before. She speaks
18 English fine, but she's heavily accented. My
19 understanding is your Court Reporter has requested that
20 she use an interpreter because it would just be easier
21 for her to understand what Ms. Calef is saying.
22 However, Ms. Calef has an issue using an interpreter
23 because it is the Defense's interpreter. So I told her
24 I would leave it up to Your Honor as to how we were
25 going to do that.

1 THE COURT: Well, I guess what I would have to
2 do is I would have to hear her speak.

3 MS. SAMPSON: Okay. The State would call
4 Maria Calef.

5 THE CLERK: Do you swear or affirm the
6 testimony you're about to give in this case will be the
7 truth, the whole truth and nothing but the truth, so
8 help you God?

9 THE WITNESS: Yes, I do.

10 THE COURT: Thank you. Have a seat in the
11 witness stand, please. State your name for the record.

12 THE WITNESS: Maria Calef.

13 MARIA CALEF,

14 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

15 DIRECT EXAMINATION

16 BY MS. SAMPSON:

17 Q. Can you spell your first name, please?

18 A. M-A-R-I-A.

19 Q. And Ms. Calef, how old are you?

20 A. Sixty-six.

21 Q. Sixty-six. So how old were you when this incident
22 occurred?

23 A. Sixty-five.

24 Q. Okay. And you are married to who?

25 A. Donald Calef.

- 1 Q. And how long have you two been married?
- 2 A. About thirty-eight years.
- 3 Q. About how long?
- 4 A. Thirty years.
- 5 Q. Thirty years.
- 6 A. I'm sorry, thirty-eight years.
- 7 Q. Thirty-eight years. Okay.
- 8 A. Sorry.
- 9 Q. And you have how many children?
- 10 A. Three.
- 11 Q. Do they all live here in Columbia?
- 12 A. Yes, ma'am.
- 13 Q. And Cynthia is your daughter?
- 14 A. She is my daughter.
- 15 Q. Is she the middle, the oldest, the youngest?
- 16 A. She's the first one.
- 17 Q. She's the oldest?
- 18 A. She's the oldest.
- 19 Q. And she lives about how far away from you?
- 20 A. About five miles by car, five miles.
- 21 Q. And how long has she lived there?
- 22 A. For three years now.
- 23 Q. How long have you lived in Columbia?
- 24 A. About twenty-seven years.
- 25 Q. Okay.

1 MS. SAMPSON: Has she done enough, Your Honor.

2 THE COURT: I don't have a problem so ... as
3 long as she speaks slowly.

4 MS. SAMPSON: Okay.

5 Q. Just keep that in mind, okay?

6 A. Yes, ma'am.

7 Q. I'm going to move you to the day of this incident.
8 Where were you when Mr. Calef called you?

9 A. In my house.

10 Q. At your house. And who was there with you?

11 A. My sons.

12 Q. Both of them or ...

13 A. Both of them.

14 Q. And when he called, what did he want you to do to?

15 A. He wanted to bring papers for him.

16 Q. Paper? Paperwork?

17 A. Yeah.

18 Q. And what was the paperwork for?

19 A. He wanted to show to the police.

20 Q. And so what did you do?

21 A. I looked for the folder and I asked one of my sons
22 to give me a ride to my daughter's house.

23 Q. And which son took you?

24 A. David.

25 Q. And is he here today?

1 A. Yes, ma'am.

2 Q. Is he sitting right there with the black jacket on?

3 A. Yes, he is.

4 Q. Did your other son come with you?

5 A. No.

6 Q. And when you got there, who was at your daughter's
7 house?

8 A. Inside or outside?

9 Q. Outside?

10 A. My husband was outside. I get out and go to him to
11 hand him the folder.

12 Q. You took him the folder?

13 A. Yes.

14 Q. And was anybody else outside besides your husband
15 and Mr. Ortiz?

16 A. Well, no. No one else outside. No.

17 Q. Okay. So when you first got there, Mr. Smith was
18 not outside either?

19 A. No. No.

20 Q. So when you got there where did you all park?

21 A. Behind my husband's car, in front of my daughter's
22 house.

23 Q. Did you ever park on Mr. Ortiz's property?

24 A. No.

25 Q. And when you got out of the car did your son get

1 out with you?

2 A. No, he didn't.

3 Q. Okay. When you got out, did you go and immediately
4 hit Mr. Ortiz with your purse?

5 A. Never I hit Mr. Ortiz with my purse.

6 Q. Now, I see you today with a purse. Is that the
7 purse you had that day?

8 A. Yes. I don't -- this is the purse that I have on
9 my shoulder.

10 Q. That's the same purse you had that day?

11 A. Yes, yes.

12 Q. And the papers, were they in a folder or did you
13 just have them in your hand?

14 A. No. They were in a folder, a green folder.

15 Q. A green folder?

16 A. Yes.

17 Q. Did you ever hit him with that green folder?

18 A. Never.

19 Q. So you went -- I think you said you went to your
20 husband and gave him the papers?

21 A. Yes.

22 Q. And then what happened?

23 A. He showed me -- he was, look at me, look at what he
24 did to me.

25 Q. Look at what he did? What did you see?

- 1 A. He was all mud, his legs was muddy and wet.
- 2 Q. Muddy and wet?
- 3 A. Yes.
- 4 Q. Were they like that when he left the house?
- 5 A. Oh, no, no, he was okay.
- 6 Q. And did he tell you how he got muddy and wet?
- 7 A. He said look at what he did to me.
- 8 Q. So what did you do when he said that?
- 9 A. I asked him if he called the police.
- 10 Q. You asked who to call the police?
- 11 A. I asked my husband, did you call the police?
- 12 Q. And what did he say?
- 13 A. He said, yes, I did.
- 14 Q. Okay.
- 15 A. And he do the same thing to me.
- 16 Q. And then he did the same thing to you. Who did
- 17 what to you?
- 18 A. Mr. Ortiz took the hose with the power nose ---
- 19 Q. Now, you're doing this. The court reporter can't
- 20 see your ---
- 21 A. He doing like this, yes.
- 22 Q. Okay, so he's -- I'm going to -- he's squeezing
- 23 something or ...
- 24 A. Yeah, he's squeezing something. I assume he had
- 25 some nozzle or something because he put all mud and wet

1 ---

2 Q. Did water come out of it?

3 A. No, just to me. He just, just to my legs and to my
4 -- and put all the mud and water in my skirt, my legs
5 and my shoes.

6 Q. So you got wet and muddy?

7 A. Yes.

8 Q. So then what happened?

9 A. Then I told him to call 9-1-1.

10 Q. You told who to call 9-1-1?

11 A. To my husband, call 9-1-1.

12 Q. And where is your son?

13 A. My son is still in the car.

14 Q. So he's not standing there with you all when you're
15 getting squirted?

16 A. No, he don't know what's transpiring. No.

17 Q. And then what happened?

18 A. Then when I see that, Mr. Ortiz jumped and started
19 hitting my husband.

20 Q. I need you to slow down. You're speeding up again.

21 A. Oh, I'm sorry.

22 Q. When that happened what ---

23 A. Mr. Ortiz picked up a machete from the floor and
24 flash it to my husband, hit it to my husband with the
25 machete in the shoulder.

1 Q. So after he -- when you tell your husband to call

2 9-1-1 ---

3 A. Yes.

4 Q. --- Mr. Ortiz picks up the machete and hits your
5 husband?

6 A. Hits my husband.

7 Q. How many times did he hit your husband?

8 A. I don't know, but I started screaming.

9 Q. You started screaming. What did you scream?

10 A. Help, help.

11 Q. And when he picked up the machete, what did your
12 husband have in his hand?

13 A. He had like a cell phone in his hands.

14 Q. Is that all?

15 A. That's it.

16 Q. Where was the post hole digger?

17 A. It was in one big hole. It was in the hole. There
18 was a lot of stuff there, a hammer, machete.

19 Q. So it was in the hole?

20 A. Yeah, in the hole. Yes.

21 Q. I'm going to show you -- I'm going to interrupt you
22 for just a second and show you State's Exhibit 2. All
23 right. Now, where is all this going on? Is it in this
24 photograph?

25 A. It was over here.

1 Q. And you're pointing to right around where the
2 little pink stake is?

3 A. Like four or five feet over here, there was a big
4 hole that was about towards there. The holes are -- the
5 hammer is right here.

6 Q. Okay. And this fence in the front, was it here?

7 A. Yes. The fence was put up in July.

8 Q. So that fence was there in August?

9 A. Yes. That was put up in July.

10 Q. So he wasn't digging a post to put -- a hole to put
11 the post for this fence?

12 A. No, no, no. This already was there.

13 Q. The hole was already there?

14 A. Yes..

15 Q. The fence was already there. I'm sorry.

16 A. The fence was already there.

17 Q. So you all are over here?

18 A. Yes.

19 Q. Did you ever go onto his property?

20 A. Never.

21 Q. And when I said his property, did you ever go in
22 the front by his driveway?

23 A. Never I went to his driveway or in front of his
24 house or inside his house or inside his yard. Never.

25 Q. Was your purse ever in his yard?

1 A. I don't know. I had it on my shoulder.

2 Q. And you didn't ever take it off and hit him with
3 it?

4 A. Never.

5 Q. Did you chase him around the yard with it?

6 A. Never.

7 Q. How tall are you?

8 A. About four foot, four foot two.

9 Q. I don't usually ask women their weight, but how
10 much do you think you weigh?

11 A. About a hundred thirty, thirty-eight, forty.

12 Q. Is that about how much weighed when this happened?

13 A. Yeah.

14 Q. Are you bigger or smaller than Mr. Ortiz?

15 A. Smaller than him.

16 Q. And what about your husband, is he bigger or
17 smaller than Mr. Ortiz?

18 A. Smaller than him, too.

19 Q. And David, your son?

20 A. He's smaller than him.

21 Q. He's smaller than Mr. Ortiz? When you say smaller,
22 do you mean shorter or thinner?

23 A. No, he's more small than him in height.

24 Q. In height? And how about width and weight, do you
25 think he's bigger than Mr. Ortiz in weight?

1 A. Yes. I'm think in weight he's bigger.

2 Q. So I want to come back to after he hit your
3 husband. You said you yelled, help, help?

4 A. Yes.

5 Q. Then what happened?

6 A. Then my son get out from the car and comes towards
7 -- he's standing -- I had my hands like this, tried to
8 get -- to tell him not hit my husband. Then when my son
9 came, what you doing? What you doing? Are you crazy?
10 He started hitting my son. I have to do like this.

11 Q. You're doing like you're waving your hands in front
12 of him?

13 A. Yes, I'm waving my hands, both hands, begging him
14 for my son, my husband now because my son, he started
15 hitting my son when my son came.

16 Q. Okay. I'm not sure if we need to do this, since
17 this is an evidentiary hearing, but I'm going to show
18 you what's been marked as State's Exhibits Number 1
19 through 5. And I want you to look at them. Take your
20 time and look at all of them for me. One at a time.
21 I'm not going to ask any questions, just look at them.
22 Okay. Look at the next one. And if you would, look at
23 the next Exhibit. And the next one. What I want to
24 know, and I'm going to go ahead and ask you, do all of
25 these photographs, 1 through 5, accurately reflect the

1 way that your daughter's yard and Mr. Ortiz's yard

2 looked back in August of 2010 when this happened?

3 A. Yes.

4 Q. And if you'll look at the other two as well.

5 A. Yes. The marker was right here.

6 Q. The marker was in a different place, but other than
7 that, the photographs accurately reflect the way the
8 yard looked at that time?

9 A. Yes, it is.

10 MS. SAMPSON: We would like to move State's 1
11 thorough 5 into evidence, Your Honor.

12 MS. HINES: If I could just look at them.

13 MS. SAMPSON: Oh, I'm sorry. I thought you'd
14 seen them.

15 MS. HINES: I just want to look one more time.
16 No objection, Your Honor.

17 THE COURT: They're admitted.

18 (WHEREUPON, State Exhibit Numbers 1, 2, 3, 4 and 5
19 were admitted into evidence.)

20 Q. All right. So I'm going back a little bit. I'm
21 sorry to be going back and forth a little bit. You said
22 that you were waving your hands after he hit your
23 husband and then he started to hit your son?

24 A. Yes.

25 Q. So then what did you do?

1 A. I started screaming. I put my hands going on this
2 side.

3 Q. And why were you doing that?

4 A. Because he was hitting both of them. He was doing
5 the machete like this, like this, and this to my son.
6 And I was thinking he would cut here.

7 Q. You thought he was going to cut -- you just pointed
8 and ---

9 A. My son was on this side. I was in the middle. My
10 husband was this side. And he was with the machete
11 trying to hit my son here.

12 Q. And when you say here, where are you pointing?

13 A. The vein over here. On his like ---

14 Q. On his neck?

15 A. He had a jersey and I was like this and I was like
16 this and he was hitting both with the machete and he
17 cut.

18 Q. Did you say he cut you? I'm sorry. I didn't hear
19 you.

20 A. Yeah. He cut my hands. To me he cut like this.
21 To my husband and my son, he was doing like this with
22 the flat side.

23 Q. So he cut your hand?

24 A. He cut my hands right here.

25 Q. And what did you do when that happened?

1 A. Then Mr. Smith came. I told him, look at what he
2 do to me. I was in the middle.

3 Q. Were you calmly saying this or were you screaming
4 or ---

5 A. No, I was screaming. I was screaming. I was cut
6 over here. I was screaming. I was asking for help.

7 Q. Okay.

8 A. Help, help, help, and that's what I was screaming.
9 And when he came I was happy.

10 Q. Why were you happy?

11 A. Because I think that he was assisting us to
12 retreating. He wanted us away from Mr. Ortiz.

13 Q. So you thought Mr. Smith was coming out to help you
14 all?

15 A. Yes.

16 Q. So what happened when he got out there?

17 A. He said, I don't care, bitch. He throw me in the
18 floor.

19 Q. He said what?

20 A. I don't care, bitch.

21 Q. He said, I don't care, bitch. That's what Mr.
22 Smith said ---

23 A. When I showed to him that I was bleeding.

24 Q. Mr. Smith said that to you?

25 A. Mr. Smith said this to me.

1 Q. And speaking of talking, was Mr. Ortiz saying
2 anything while this was going on?

3 A. Not that I remember.

4 Q. Okay. So Mr. Smith says that to you and he pushes
5 you down?

6 A. Yes. On the floor.

7 Q. And then what happened?

8 A. Then my son said, you choking me, because Mr. Smith
9 was grabbing my son by the neck.

10 Q. And choking him?

11 A. Yes. Choking him.

12 Q. So what did you do?

13 A. I hear my son say, you're choking me. You're
14 choking me. And I was more nervous now because I would
15 have two people, one with a machete, you know, waving
16 machete and another was killing, you know, strangle my
17 son and I was bleeding. And I was trying with one hand
18 to pull out my son from Mr. Smith and luckily, the
19 police came.

20 Q. Okay. And when the police came, where were you
21 all?

22 A. Everybody was in front of the house in the middle
23 of the street.

24 Q. In the middle of the street. And when you say in
25 front of your daughter's home, looking at State's 5, do

1 you include this strip between the bushes and the street
2 as your daughter's yard?

3 A. Yes. Everybody was now in the street right here.

4 Because Smith came from here and grabbing my son,

5 pushing here, here, and then I was ---

6 Q. But when you say your daughter's yard, you also are
7 including this strip of area?

8 A. Yeah. This strip area in here, yeah.

9 Q. Even though it's outside of her fence, you still
10 count that as her yard?

11 A. Yeah.

12 Q. And so when the police got there, I think you said
13 y'all were -- you got -- you all were partially in the
14 street or in the street?

15 A. Yes.

16 Q. Where was Mr. Ortiz?

17 A. He tried to retreat from his house and from his big
18 fence, but the police told him to stop it. And told him
19 about three times to drop the machete.

20 Q. And you all were never -- you, when the police
21 arrived, were not in his yard?

22 A. No, I wasn't in his yard. Nobody was in his yard.

23 Even Mr. Ortiz wasn't in his yard.

24 Q. Was in his yard or was not in his yard?

25 A. Wasn't in his yard.

1 Q. Okay. So you never went in Mr. Ortiz's yard?

2 A. Never I went to Mr. Ortiz yard.

3 Q. Did you ever go on the front strip in front of his
4 yard between his fence and the street?

5 A. Never I went in front of his house. I'm scared of
6 him.

7 MS. SAMPSON: Beg the Court's indulgence.

8 Q. Did your husband ever pick up that post hole
9 digger?

10 A. Never.

11 MS. SAMPSON: No further questions, Your
12 Honor.

13 THE COURT: Any cross?

14 MS. HINES: Yes, ma'am. May it please the
15 Court.

16 **CROSS-EXAMINATION**

17 **BY MS. HINES:**

18 Q. How are you doing today?

19 A. Fine, thank you.

20 Q. Now, when Mr. Smith came, did you ever hit Mr.
21 Smith?

22 A. Never.

23 Q. You never hit Mr. Smith?

24 A. Never.

25 Q. And you never hit Mr. Ortiz?

1 A. I never hit Mr. Ortiz.

2 Q. And at the -- when the police came, where was your
3 pocketbook?

4 A. I don't know. Mr. Cherloff [phonics] didn't say.

5 Q. Excuse me.

6 A. Mr. Cherloff, the officer, ask me, he said, Ms.
7 Calef, why did you have your pocketbook here? I don't
8 know where he found my pocketbook. I might -- he had my
9 pocketbook or my purse.

10 Q. Uh-huh (affirmative).

11 A. This one. I look inside and I told him yeah, I'm
12 missing. I'm missing money, my ring and a watch that
13 needed to be repaired. I don't know how or who took my
14 purse when I fell. I don't know.

15 Q. Do you know where the police officer found your
16 pocketbook?

17 A. Not exactly.

18 Q. What?

19 A. Not exactly.

20 THE COURT: Not exactly.

21 Q. Not exactly.

22 A. Right.

23 Q. Okay. Do you know if it was found on Mr. Ortiz's
24 property?

25 A. No, I don't think so. I don't know where was my

1 pocketbook. Because he was the one who took my

2 pocketbook.

3 Q. Okay. And as this incident was going on, the only
4 people that were there were Mr. Ortiz ---

5 A. At that moment when we started, yeah.

6 Q. Mr. Smith, yourself, Mr. Calef and your son, David?

7 A. Yes.

8 Q. And no one else came?

9 A. Who approached us where we was, no.

10 Q. So your daughter wasn't there?

11 A. No. She wasn't there.

12 Q. And her boyfriend wasn't there?

13 A. He wasn't there.

14 Q. Okay. Were they there after the incident?

15 A. Yeah. They came when the police got here and the
16 ambulance and the fire truck.

17 Q. Had they been in the house?

18 A. Inside my daughter's house?

19 Q. Yes.

20 A. No, in the street.

21 Q. So during the incident they were not inside the
22 house?

23 A. They was not in the house at all.

24 MS. HINES: I have no further questions.

25 THE COURT: Anything further?

1 MS. SAMPSON: Just -- I just need to do a
2 couple, Your Honor. A brief redirect, Your Honor.

3 **REDIRECT EXAMINATION**

4 **BY MS. SAMPSON:**

5 Q. I don't think Ms. Hines asked you about Mr. Ortiz
6 hitting you. And I just realized I didn't show you
7 these.

8 MS. HINES: Objection. I don't think I did
9 ask about Ortiz hitting her.

10 MS. SAMPSON: I know. You didn't. I said you
11 didn't ask.

12 MS. HINES: That's outside the scope of cross.

13 Q. Ms. Ortiz [sic], you talked with Ms. Hines about
14 your purse. Did you ever hit anybody with your purse?

15 A. No, I never hit nobody with the purse.

16 Q. And you talked about -- she asked you about when
17 people were. Were any of the people that she asked
18 about, your daughter or Mr. Heminez, her boyfriend, were
19 they there when this incident occurred?

20 A. They was not there and the police know they weren't
21 there because they came when the police was there. They
22 arrived before the police.

23 Q. So they weren't there when the incident occurred?
24 They were there after the incident?

25 A. Yes. There was the police and everybody in front

1 of her house.

2 Q. The only people there when this incident occurred
3 was Mr. Ortiz, you, and Mr. Calef at first, outside of
4 the car, and then your son came from inside the car. Is
5 that correct?

6 A. Yes.

7 Q. And then Mr. Smith came from across the street?

8 A. Yes.

9 Q. And no one else was there when this incident
10 occurred?

11 A. No.

12 MS. SAMPSON: No further questions.

13 THE COURT: Nothing further. You may step
14 down. Thank you. You may call your next witness.

15 MR. WILLIAMS: Your Honor, the State calls
16 Freda Hernández.

17 THE CLERK: Do you swear or affirm the
18 testimony you're about to give in this case will be the
19 truth, the whole truth and nothing but the truth, so
20 help you God?

21 THE WITNESS: Yes, ma'am.

22 THE COURT: Thank you. Have a seat in the
23 witness stand, please. State your name for the record.

24 FREDA HERNANDEZ,

25 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

1 A. My name is Freda Hernandez. And on August the 7th

2 ---

3 THE COURT: One moment, please. Would you
4 please spell your first name?

5 WITNESS: F-R-E-D-A.

6 THE COURT: And if you will only answer
7 questions that are asked of you, please. Thank you.

8 MR. WILLIAMS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. WILLIAMS:

11 Q. Good afternoon, Ms. Hernandez?

12 A. How are you?

13 Q. I'm doing well. Thank you for asking. How do you
14 know the Calefs?

15 A. I'm a very good friend of Cynthia's. She and I
16 have been friends for almost eight years.

17 Q. Okay. What were you doing on the morning of August
18 7th, 2010?

19 A. Cynthia and I had talked roughly around between
20 nine-thirty and ten, and we had planned to go and have
21 lunch. So I proceeded -- I live in the neighborhood. I
22 live actually around the corner. We all live in the
23 same sub-division. And I proceeded down Bywood, which
24 is a street that's off of the street that I live on.

25 And when I got to the end of my Bywood, I could hear a

1 lot of commotion and screaming and hollering. And as I

2 approached the stop sign, which I have to ---

3 Q. Do you mind if I interject and ask a question?

4 A. Sure.

5 Q. When you say commotion, what exactly did you hear?

6 A. Well, from in my car, I could hear some talking and

7 I could hear some screaming.

8 Q. How far were you away from Cynthia's house when you

9 heard this commotion?

10 A. I would say I was no more than, no more than a

11 hundred feet. That's just a rough guesstimate. You

12 know, I've never had to measure it.

13 Q. I'm sorry. I interrupted you. When you heard the

14 commotion, did you see people ---

15 A. Yes.

16 Q. --- at Cynthia's house?

17 A. Yes.

18 Q. Do you remember how many people?

19 A. I saw Mr. Calef, Ms. Calef and I saw Mr. Ortiz.

20 Q. Okay.

21 A. Okay. And I could actually see Ms. Calef. I

22 didn't get there in the beginning of the situation. I

23 got there when everything -- in the heat of the moment

24 when the altercation had already been in progress. And

25 I could see Ms. Calef raise her hands. Ortiz came down

1 with -- it looked like a bush axe, like a real, real
2 huge knife. It's a machete. I saw him strike her. But
3 they were in the street in front of Cynthia's house.

4 Q. When you saw Mr. Ortiz strike Ms. Calef, were you
5 still one hundred -- approximately one hundred feet away
6 or had you moved closer?

7 A. I had moved closer.

8 Q. So at the time you saw Mr. Calef [sic] raise his
9 hand and bring it down on Ms. Calef, bring the machete
10 down on Ms. Calef, how far away were you?

11 A. I was -- I mean, I actually just kind of halted
12 because, I mean, when I saw that knife and all the
13 commotion, I just didn't expect to see what I saw. So I
14 kind of halted. There was a lot of action going on and
15 I feared for my safety because I ---

16 Q. You feared for your safety inside your vehicle?

17 A. Yes. I mean, with all that action going on. I
18 mean, this gentleman, you know, had seen me because I
19 visited the property frequently.

20 Q. I really just want for you to talk about the
21 incident that day, that you saw that day.

22 A. Right.

23 Q. So that day, you were in fear of your safety inside
24 your car?

25 A. I mean, I was in a state of shock.

1 Q. And why? Why were you in a state of shock?

2 A. Because, I mean, when I approached -- when you hear
3 stuff -- I mean, I just didn't expect for all of that to
4 be going on when I'm going to meet my friend. She and I
5 talked. And I see this commotion with her senior mother
6 and father, I mean, I was just in a state of shock. It
7 was just so unexpected to see all of that going on. I'm
8 going to meet her and we're meeting up and going to my
9 property to have lunch.

10 Q. I understand. What did Ms. Calef's injury look
11 like?

12 A. She had blood coming from her hand.

13 MR. WILLIAMS: Your Honor, I'm going to
14 approach the witness, if I may?

15 THE COURT: Yes.

16 MR. WILLIAMS: The State is showing the
17 witness State's Exhibit 7.

18 Q. Do you recognize this photo?

19 A. Uh-huh (affirmative).

20 Q. What is it?

21 A. That's Ms. Calef's hand and she's got stitches
22 there where she had been cut.

23 Q. When you saw her cut on August 7th, was this where
24 she was cut in her hand?

25 A. That's correct.

1 MR. WILLIAMS: At this time, Your Honor, State
2 would move to enter Exhibit 7 into evidence.

3 MR. MAY: I'd ask the Court to just inquire
4 from the witness, is that the state the hand was in when
5 she saw it that day? That's the only question. Is that
6 the hand as was seen when she came up? Or is that the
7 hand as it was seen at a later time?

8 THE COURT: If you'd establish a foundation as
9 to how she knows it's -- that's her hand.

10 MR. WILLIAMS: Yes, Your Honor.

11 Q. How do you know this is Ms. Calef's hand?

12 A. Well, number one, this is her bracelet. And this
13 is Ms. Calef's hand. I mean, this is where -- I mean,
14 this is where she was struck. I mean, she was struck.
15 I actually saw Ortiz in the physical strike, you know,
16 cut while striking.

17 Q. Did you see her hand that day?

18 A. Yes.

19 Q. Did you see where she was cut that day?

20 A. I did.

21 Q. Is this the same location where she was cut on her
22 hand?

23 A. It is.

24 Q. So that's -- if I may just -- and I can make it
25 real easy. Is that a fair and accurate representation

1 of the way her hand looked when you pulled up to the
2 house?

3 A. It was bleeding. I mean, she was bleeding.

4 MR. MAY: All right, Your Honor. No
5 objection.

6 THE COURT: Admitted.

7 (WHEREUPON, State Exhibit Number 7 was admitted
8 into evidence.)

9 Q. Did you see Mr. Calef getting hit?

10 A. No. No, I didn't. I got there after. I didn't
11 see any of the hitting going on with Mr. Calef.

12 MR. WILLIAMS: The Court's indulgence, Your
13 Honor.

14 Q. So at what point do you drive completely to
15 Cynthia's house?

16 A. Well, I mean, I have to make a -- I had to stop.
17 And I wasn't actually stopped and I heard sirens.

18 Q. Where did you stop?

19 A. I stopped at the corner of Bywood and Omega, which
20 is right -- I would say with a clear view, I'd say at
21 that point, maybe a hundred and twenty something feet.

22 Q. Did you park there and get out of your car?

23 A. Yes.

24 Q. Okay. So you parked at the corner of Bywood and
25 Omega?

1 A. Right.

2 Q. All right. And what did you do then?

3 A. I just kind of looked and then I saw a gentleman
4 come from across the street, which would be on my left,
5 in dungarees and he had no shirt on.

6 Q. Okay. What did he do?

7 A. He came over -- he came rushing over, kind of, you
8 know, in a speedy way and I heard Ms. Calef say, you
9 know, look at my hand. Look at my hand. And he said,
10 you know, he don't care, bitch, and pushed her down or
11 slung her down. And with her being so short, she lost
12 her balance.

13 Q. And what did he do then?

14 A. He grabbed David and he had him in a choke hold.

15 Q. Did you see him get hit?

16 A. Mr. Smith?

17 Q. Yes.

18 A. No.

19 Q. Did you see anyone with post hole diggers?

20 A. I saw a post hole digger that was in a hole. But,
21 you know, I didn't see anyone using a post hole digger.

22 Q. So the only assault that you saw that day was Mr.
23 Ortiz's assault against Ms. Calef?

24 A. Correct.

25 Q. There's been a lot of questions about where this

1 happened. Where, exactly, were the individuals you just
2 talked about, Ms. Calef, Mr. Calef, Mr. Ortiz? Where
3 were they when you saw all of this commotion as you
4 described?

5 A. Well, when I was at the stop sign they were in
6 front of Cynthia's house. All were in front of her
7 house. And then as I got up closer, then the action was
8 taking place in the street in front of Cynthia's house.

9 MR. WILLIAMS: Let the record reflect the
10 State is showing the witness Exhibit 5, State's Exhibit
11 5.

12 Q. Do you recognize this photo?

13 A. Yes.

14 Q. What is it a photo of?

15 A. It's a photo of Cynthia's house and the side of
16 Ortiz's gate or fence.

17 Q. Does this photo fairly and accurately depict
18 Cynthia's house and Mr. Ortiz's gate the day of the
19 incident?

20 A. Does it what? I'm sorry.

21 Q. Does it fairly and accurately depict the state of
22 Cynthia's front yard and the state of Mr. Ortiz's fence
23 the day of the incident? Did it look like that the day
24 that ---

25 A. Yeah. Uh-huh (affirmative).

1 Q. Now, I want you to point out to the Judge, point on
2 the -- addressing the Judge, I would like you to point
3 on this photo where was Mr. Calef and Mr. Ortiz?

4 A. Well, at the stop sign, they were in this area. As
5 I got closer, right here, right in here.

6 Q. And that is Cynthia's yard?

7 A. Right. And then when the gentleman come from
8 across the street in the dungarees with no shirt, they
9 were right in this area.

10 Q. Further back in front of Cynthia's yard?

11 A. No. Just in front, but more or less, you know,
12 into the street, in front of Cynthia's house.

13 Q. Further away from Mr. Ortiz's property line?

14 A. Correct.

15 Q. At any time did you see Mr. Ortiz, the Calefs or
16 anyone else for that matter cross this property line
17 here, this fence, and enter his side of the yard?

18 A. Enter whose side?

19 Q. Mr. Ortiz?

20 A. No.

21 Q. At any point did you see anyone chasing Mr. Ortiz
22 around in his yard?

23 A. No. No, I did not.

24 Q. At any time did you see Mr. Ortiz in his yard?

25 A. No. He was outside of the, he was outside of the

1 fence area. No, I did not see him inside his yard.

2 Q. Did you see a hole that day?

3 A. I did.

4 Q. Where was the hole?

5 A. The hole was right in here and it had water in it.

6 There was a lot of water and mess and it had the hole

7 digger inside of the hole.

8 Q. Did you see a water hose?

9 A. I did. I saw other tools and mechanisms, looked to
10 be like a hammer.

11 Q. Would it be fair to say it looked like a work
12 location, where someone's doing some yard work?

13 A. Right.

14 Q. From your perspective or your memory that day,
15 could you tell whether or not the hole was on what you
16 would consider Cynthia's property?

17 MR. MAY: Objection, Your Honor. She has no
18 idea. I mean this is not about the property line. Your
19 Honor's already made that clear and I think we're just
20 beating a dead horse right now.

21 THE COURT: I'll sustain the objection. You
22 can ask her where it occurred and she can point to it.

23 MR. WILLIAMS: Okay.

24 Q. Where did you see the hole?

25 A. The hole was right here. Right here.

1 Q. Now, what happened when the police arrived?
2 A. I kind of stepped back, you know, out of the way
3 because, you know, it really wasn't -- I was just a
4 bystander and I was trying to make it to my property
5 when I saw confusion. I just kind of let them do their
6 thing. I mean, there was a fire truck and an ambulance
7 and a policeman had arrived. One of the polices are in
8 here that actually arrived, but I can't, you know, tell
9 you a whole lot from that. Because it really tore me
10 up.

11 Q. One last question.

12 A. Uh-huh (affirmative).

13 Q. Ms. Hernandez, was there a gate in front of Mr.
14 Ortiz's property?

15 A. Yeah. The gate been there since like ---

16 Q. That day. That day when you arrived ---

17 A. Yes.

18 Q. --- on the scene?

19 A. Yes.

20 Q. Was it opened or closed?

21 A. It was closed.

22 MR. WILLIAMS: No further questions.

23 THE COURT: Yes, sir.

24 MR. MAY: Yes, ma'am, briefly.

25

CROSS-EXAMINATION

1 BY MR. MAY:

2 Q. You've been here most of the time today, correct?

3 A. Today?

4 Q. Have you been in here most of the time today?

5 A. No, I got here ---.

6 Q. Were you here for Ms. Calef's testimony?

7 A. Say again?

8 Q. Were you here for Ms. Calef's testimony?

9 A. Yes.

10 Q. Okay. And as you said earlier, Cynthia is your
11 friend?

12 A. Right.

13 Q. Very good friend?

14 A. Right.

15 Q. And you were going over to see Cynthia that day at
16 ten-thirty in the morning for lunch, right?

17 A. Right.

18 Q. And you said that when you pulled up, and now just
19 because the Court has never been there, I've only been
20 there once, ---

21 A. Uh-huh (affirmative).

22 Q. --- you stopped down the road, right? You're
23 looking down the road at this entire incident, right?

24 A. Right. Because I was just that close to it at
25 Bywood and Omega.

1 Q. But I mean, it's a few houses down?

2 A. No, not a few houses.

3 Q. It's not on the corner, is it?

4 A. Say again?

5 Q. Neither of the houses, either Ortiz or Cynthia is
6 on the corner of Bywood and Omega, is it?

7 A. The end of Ortiz house is on -- he's actually --
8 well, there's a fence from the house on Bywood and then
9 Ortiz house is the next house.

10 Q. All right. Hold on a minute.

11 A. So in looking at the house, the first house would
12 be Ortiz's house.

13 Q. But there's a house that -- I'm looking -- I'm
14 going to show you and show it to the Judge.

15 A. Okay.

16 MR. MAY: I'm sorry, Your Honor.

17 Q. So That way we can get an idea. It's from Richland
18 County on-line. This is Cynthia's house. This is
19 Ortiz's house. I'm assuming that's Smith's
20 house. This is Bywood.

21 MR. WILLIAMS: I don't see any signs.

22 MR. MAY: You see Omega.

23 MR. WILLIAMS: Okay.

24 MR. MAY: You see Bywood.

25 MR. WILLIAMS: All right.

1 MR. MAY: Okay.

2 MR. WILLIAMS: Where are the mailbox numbers?

3 MR. MAY: This is the property tax map.

4 That's Ortiz's house. That's Cynthia's house and that's
5 the house ---

6 MR. WILLIAMS: I'm just asking.

7 Q. Let me show this to you to see if you can help us
8 with it.

9 A. Okay.

10 Q. Let me help you. Omega, Bywood.

11 A. Uh-huh (affirmative).

12 Q. Ortiz's house. He's got the house that runs along,
13 right?

14 A. Right.

15 Q. So you have Ortiz's house and Cynthia's house?

16 A. Correct.

17 Q. All right. And you parked somewhere right about
18 there near the intersection?

19 A. Correct. That was -- I came off of -- where's
20 Bywood?

21 Q. Bywood is this road.

22 A. Okay. And I had to make a left onto Omega to go to
23 Cynthia's.

24 Q. Did you stop right there?

25 A. And this is the house that I told you that was on

1 the corner.

2 Q. Yes, ma'am. I was confused.

3 A. Okay.

4 Q. It's not Ortiz's house on the corner. You have
5 this house that's on the corner and you have Ortiz and
6 you have Calef?

7 A. Right. But that house is actually on Bywood, so

8 ---

9 Q. Yes. I've got you on that. We're saying the same
10 thing. It's just ---

11 A. Okay.

12 Q. --- we got lost in the translation.

13 A. Sure.

14 Q. And as you said, you just came up there as the
15 process was going on and ---

16 A. Correct.

17 MR. MAY: Beg the Court's indulgence. I have
18 no further questions at this time.

19 THE COURT: Any redirect?

20 MR. WILLIAMS: Yes, ma'am. A short one.

21 Briefly, I should say.

22 REDIRECT EXAMINATION

23 BY MR. WILLIAMS:

24 Q. Would you lie for Cynthia?

25 MR. MAY: Objection, Your Honor. That's

1 outside the scope and this is -- that's bolstering. I
2 mean, vouching for the witness.

3 THE COURT: Rephrase the question.

4 Q. You were sworn by the bailiff here today, right?

5 A. Correct.

6 Q. Everything you're saying is the truth?

7 A. That's correct.

8 MR. WILLIAMS: No further questions.

9 THE COURT: You may step down. You may call
10 your next witness.

11 MS. SAMPSON: The State calls David Calef.

12 MR. MAY: And, Your Honor, the Defense would
13 be happy to stipulate that Mr. Calef is going to testify
14 exactly consistent with his parents, Mr. and Ms. Calef.
15 If the State's willing to just -- that he's going to
16 testify exactly the same and we stipulate to that to
17 usher along the process.

18 THE COURT: Any response, Ms. Sampson?

19 MS. SAMPSON: My only concern, Your Honor, is
20 at the end when I discuss my request for not going, you
21 know, to stop at that point, that they had the burden of
22 proof, I was told that we needed to provide evidence to
23 disprove -- well, not ultimately disprove, but to
24 challenge what they have put up. And I feel that I
25 would have -- the only way to do that is to put up all

1 of the people that were there. I mean, if they're going
2 to stipulate -- I guess it would take longer to probably
3 do a stipulation that it would to just put him up.
4 Everything that they agree that they all said, that's
5 the only way I can ---

6 THE COURT: He can testify.

7 MS. SAMPSON: Thank you, Your Honor.

8 THE CLERK: Do you swear or affirm the
9 testimony you're about to give in this case will be the
10 truth, the whole truth and nothing but the truth, so
11 help you God?

12 THE WITNESS: Yes, ma'am.

13 THE COURT: Thank you. Have a seat in the
14 witness stand, please. State your name for the record.

15 THE WITNESS: First name David, last name
16 Calef.

17 **DAVID CALEF,**

18 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

19 **DIRECT EXAMINATION**

20 **BY MS. SAMPSON:**

21 Q. And Mr. Calef, I'm just going to speed you along a
22 little bit. You are the son of Mr. and Ms. Calef who
23 have already testified?

24 A. Yes, ma'am.

25 Q. And your sister is Cynthia?

- 1 A. Yes, ma'am.
- 2 Q. And on the day in question you were at your
3 mother's house?
- 4 A. Yes, ma'am.
- 5 Q. And she asked you to take her somewhere?
- 6 A. Yes. She asked me to give her a ride.
- 7 Q. And where did she want to go?
- 8 A. To my sister's house.
- 9 Q. And how far away would you say your sister's house
10 is from your parent's house?
- 11 A. About two or three streets?
- 12 Q. Two what?
- 13 A. Two or three streets.
- 14 Q. Two or three streets? They're all in the same
15 neighborhood?
- 16 A. Yeah. It's the same sub-division.
- 17 Q. Okay. And why did she want you to drive her there?
- 18 A. She said she had to get some papers to my dad at my
19 sister's house.
- 20 Q. And did you want to take her?
- 21 A. I didn't mind. It was early Saturday morning, but
22 I didn't mind.
- 23 Q. Okay. And so what happened when you got there?
- 24 A. As we were pulling up to my sister's house, to my
25 sister's house, mom got out of the car and I was getting

1 ready to leave, and before I was leaving ---

2 Q. And I'm going to stop you. You were just dropping
3 her off, is that what you're telling us?

4 A. Yes.

5 Q. So you had no -- did you have any intention of
6 staying?

7 A. No intentions.

8 Q. Okay. So were you planning on getting out of the
9 car?

10 A. No. I was planning on dropping my mom off and
11 going back to the house and getting ready to get some
12 more sleep.

13 Q. Okay. So what happened when you dropped her off?

14 A. As I was dropping her off she got out of the car
15 and then she started, she started yelling for help.
16 Help, help.

17 Q. Okay. I'm going to stop you right there. I'm
18 going to show you State's Exhibit Number 1. Is that at
19 your sister's house?

20 A. Yes, that is my sister's house.

21 Q. And where did you pull up when you dropped your
22 mother off? Is that on this ---

23 A. My dad was parked right here.

24 Q. And that would be to the right of the mailbox?

25 A. Right. And I parked -- my car was behind his car

1 as I was dropping off.

2 Q. In front of the mailbox ---

3 A. Right.

4 Q. --- or to the left of the mailbox?

5 A. About right here.

6 Q. When you say, about -- so right in front of the
7 mailbox?

8 A. Right.

9 Q. And so it was your intentions to just drop her off
10 and leave?

11 A. Yes, ma'am.

12 Q. But then you hear her screaming for help?

13 A. Yeah.

14 Q. So what did you do?

15 A. I got out of the car and as I was getting out of
16 the car, my mom was yelling, help, help. And Mr. Ortiz
17 was going towards my dad, hitting him with a machete.

18 Q. And you saw him hitting him?

19 A. Yes, ma'am.

20 Q. Did you ever see your father with the post hole
21 digger?

22 A. No, ma'am.

23 Q. Did you ever see the post hole digger?

24 A. I don't remember. I think it was in the hole.

25 Q. But you saw Mr. Ortiz with the machete?

1 A. Yes, ma'am.

2 Q. And so he was hitting your father?

3 A. Yes, ma'am.

4 Q. So what did you do?

5 A. As I got out of the car I said, are you crazy?

6 What are you doing?

7 Q. And I want to stop you. Were you out of the car

8 when he hit your father with the machete?

9 A. I'm sorry?

10 Q. Were you in the car or out of the car when he hit

11 your father?

12 A. Getting out of the car.

13 Q. So you weren't near them?

14 A. Close. When he got the machete, I got in the

15 middle of it.

16 Q. You weren't in the middle of their -- you hadn't

17 gone over there and helped your father out at that

18 point?

19 A. No.

20 Q. Okay. Were you fighting with Mr. Ortiz at all when

21 he hit your father with the machete?

22 A. No, ma'am. I've never spoken to him in my life

23 before that day.

24 Q. Were you arguing with him at all?

25 A. Never.

1 Q. So as you're getting out of the car, he hits your
2 father?

3 A. Yes, ma'am.

4 Q. And you go up to him and say, what, are you crazy?

5 A. Right. I said, are you crazy? What is going on
6 with you?

7 Q. And then what happened?

8 A. He started coming towards me and my mom came as a
9 shield to try to help me. She put her hands up and
10 that's when he cut her on the hand.

11 Q. So she got cut on the hand?

12 A. Yes, ma'am.

13 Q. At this time when all of this is going on, is Mr.
14 Smith outside yet?

15 A. In the middle of it, he comes outside of his house,
16 half naked, no shirt on. And he comes toward us. And
17 I'm thinking that he's coming like I am to say drop the
18 machete, stop hitting them. Instead, he comes up and he
19 pushes my mom down on the floor, calls her the "B" word
20 and then he puts me in a choke hold.

21 Q. Back up just a little bit from the microphone.

22 A. Okay.

23 Q. You talk loud enough so you don't have to sit
24 there. So I think you said he came up, pushed your
25 mother down and grabbed you?

1 A. Right. He pushed her down on the ground and then
2 put his hands around my neck.

3 Q. And what did you do at that point? You don't have
4 to talk into it. Just talk.

5 A. He has me in a choke hold. I'm saying, what are
6 you doing? You're choking me.

7 Q. Okay.

8 A. And then ---

9 Q. Sorry. And then what happened?

10 A. And then the police come.

11 Q. Okay. Did you tell the police what happened?

12 A. Yes.

13 Q. Did you see your mother's injuries?

14 A. Yes. She had her hand up and there was a big cut
15 right across her hand.

16 Q. Did you see any injury to your father?

17 A. He was holding his shoulder and back in pain and
18 that's when they went off in the ambulance.

19 Q. They did go off to receive treatment in an
20 ambulance?

21 A. Yes, ma'am.

22 Q. Did you ever have an opportunity to see their
23 injuries when they returned from the hospital?

24 A. Yes, my mom showed me her cut. She had a cut right
25 across her hand.

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1 Q. Does State's Exhibit Number 7 accurately reflect
2 what that looked like at the time?

3 A. Yes, ma'am.

4 Q. And what about State's Exhibit Number 6?

5 A. Yes, ma'am.

6 Q. And does State's Exhibit Number 6 accurately
7 reflect what her hand looked like after the injury?

8 A. Yes, ma'am.

9 MS. SAMPSON: At this time, the State would
10 move to move Number 6 into evidence.

11 MR. MAY: No objection.

12 THE COURT: It's admitted.

13 (WHEREUPON, State Exhibit Number 6 was admitted
14 into evidence.)

15 Q. And did you ever see your father's injury to his
16 shoulder?

17 A. He had some bruising to it.

18 Q. I'm going to show you State's Exhibit Number 8.
19 Does that fairly and accurately depict what his shoulder
20 looked like?

21 A. Yes, ma'am.

22 MS. SAMPSON: At this time, we'd ask to move
23 Number 8 into evidence.

24 MR. MAY: Without objection.

25 THE COURT: It's admitted.

1 (WHEREUPON, State Exhibit Number 8 was admitted
2 into evidence.)

3 MS. SAMPSON: No further questions, Your
4 Honor.

5 THE COURT: Any cross?

6 MR. MAY: No, ma'am.

7 THE COURT: You may step down.
8 You may call your next witness.

9 MS. SAMPSON: Your Honor, if we may have just
10 a second. At this time, it's my understanding that the
11 Defense will stipulate to Number 9 being entered into
12 evidence. It is a survey that was done of the property
13 and it shows the boundary lines between the two
14 properties. And it's my understanding that they will
15 also stipulate that the yard, the grassy area in front
16 of the fences, between the fence and the street is State
17 property. And that the survey took place on the date
18 that it says on the survey.

19 THE COURT: Is that correct? Any objections?

20 MS. HINES: No objection.

21 THE COURT: So State's Exhibit Number 9 is the
22 survey?

23 MS. SAMPSON: It is the survey done by Hill
24 Bailey Survey Company. It's done for Cynthia Calef.
25 And it's got the date of August 4th, 2010 of when it was

1 done. And it shows the marks between the property as
2 well as where they're saying there's a new chainlink
3 fence and an old chainlink fence. You can see, Your
4 Honor, but there's other things on it. And we were just
5 going to call the surveyor to testify as to what this is
6 and that the fence line is the end of their property.

7 THE COURT: The fence line as shown in the
8 photographs or as shown in the survey.

9 MS. SAMPSON: Yes, ma'am. Shown in the
10 photographs. It's also the one that's on the plat. It
11 is the end of their property, but that the strip of land
12 that is between the fence and the street is actually the
13 State's property. And he was going to testify to that.
14 And if they will stipulate, I won't call him.

15 MR. MAY: Yes, ma'am. Just the fence is the
16 property line for Mr. Ortiz. I will be happy to
17 stipulate to that.

18 MS. SAMPSON: That the fence line is. And
19 I'll let Your Honor look at it. They -- on here it says
20 that the fence is in the wrong -- it says there's a new
21 chainlink fence that is an encroachment. So I'm just
22 ---

23 MS. HINES: We're actually not going to
24 stipulate to exactly where the property line is. We
25 don't think that's relevant. But this is the survey

1 that was done on the 4th of August and when they put
2 what is State property and ---

3 MS. SAMPSON: We are not trying to get you to
4 stipulate as to where the property line is between the
5 two properties.

6 THE COURT: That's a civil matter.

7 MS. SAMPSON: I am talking about the property
8 line in the front of the properties and that it stops
9 where the fences stop, in front, and goes to the -- from
10 the fence in front to the street is actually State
11 property. That is not on there and he was going to
12 explain how that works because that just shows the end
13 of their property, of the Calefs and the Ortizs. I
14 don't think we dispute that at all. The dispute that
15 everybody is fighting is this line between the two
16 properties, not the front yard.

17 THE COURT: So just to make sure that I
18 understand, there's a survey that was prepared by Hill
19 Bailey that's State's Exhibit Number 9. It's a survey
20 that shows the property lines and shows fences that are
21 on the properties.

22 MS. SAMPSON: Correct.

23 THE COURT: It also shows a fifty foot right-
24 of-way on Omega Drive. And this particular survey does
25 not show a fence going across the front of the yard,

1 which would be presumably the end of the property line
2 before the street. It just shows a fifty foot right-of-
3 way.

4 MS. SAMPSON: Correct.

5 THE COURT: So it's a separate stipulation
6 that the grassy area in front of the fences that face
7 Omega Drive is State property?

8 MS. SAMPSON: That's correct.

9 THE COURT: And irrespective of whatever's
10 reflected in the photographs?

11 MS. SAMPSON: I don't know if it's fifty feet,
12 ten feet, I don't know what that is. I'm not good with
13 measurements. We're just all agreeing that from the end
14 of the fence to the street is State property.

15 THE COURT: Okay. Because there appears to
16 be, and just so to make sure that I'm clear, there
17 appears to be a fence either in the middle of or behind
18 some bushes that are in front of what I think the
19 testimony shows is Ms. Calef's property?

20 MS. SAMPSON: That's correct. In the
21 photographs.

22 THE COURT: In the photographs.

23 MS. SAMPSON: Bushes that grew up over time.

24 THE COURT: And then the fence on Mr. Ortiz's
25 property that runs along the front, what we call -- I

1 think what everyone's referring to as the gate, appears
2 to be closer to the street. And I just want to make
3 sure ---

4 MS. SAMPSON: I would say that I've been there
5 and I think Mr. May has been there. Their fences
6 actually are maybe inches, but very close in the front.
7 They're almost exactly in this ---

8 THE COURT: Despite what ---

9 MS. SAMPSON: It curves a little bit. It's
10 the way road and the way the pictures look.

11 THE COURT: Okay.

12 MS. SAMPSON: But there's not that much
13 difference in the front.

14 THE COURT: I just wanted to make sure that I
15 understood that everybody's saying all of that -- no
16 matter where the fences are, all that's in front ---

17 MS. SAMPSON: yes.

18 THE COURT: -- is State property right-of-way.
19 Is that correct?

20 MS. SAMPSON: That's exactly correct. Yes.

21 MS. HINES: Yes.

22 MS. SAMPSON: And we don't need to call him.

23 THE COURT: Okay.

24 (WHEREUPON, State Exhibit Number 9 was admitted
25 into evidence.)

1 MS. SAMPSON: In that case, the State would
2 call Deputy Stoker.

3 THE COURT: Would call whom?

4 MS. SAMPSON: Deputy Stoker. This will be our
5 last witness.

6 THE CLERK: Do you swear or affirm the
7 testimony you're about to give in this case will be the
8 truth, the whole truth and nothing but the truth, so
9 help you God?

10 THE WITNESS: I do.

11 THE COURT: Thank you. Have a seat in the
12 witness stand, please. State your name for the record.

13 THE WITNESS: Robert Stoker.

14 ROBERT STOKER,

15 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION

17 BY MS. SAMPSON:

18 Q. And where do you work, Mr. Stoker?

19 A. Richland County Sheriff's Department.

20 Q. Deputy Stoker, right?

21 A. Correct.

22 Q. I always want to get y'all's things wrong. All
23 right. And back in August of 2010, what region did you
24 cover?

25 A. Region two, which is the Two Notch Road area,

1 several streets off of that including Decker, Alpine and
2 Parkway to Percival.

3 Q. And was Omega Drive where we're discussing part of
4 your region?

5 A. Yes.

6 Q. And so you -- just to speed us along, you received
7 a call or how did you come to be involved with this
8 incident?

9 A. We received a call for a fight in progress in front
10 of 1504 Omega Drive.

11 Q. Now, you were told it was in front of 1504. Did
12 you know whether it was in front of 1504 or 1510?

13 A. Not at that time, no.

14 Q. Okay. And so when you arrived, what did you see?

15 A. When I arrived, I saw a bunch of people in front of
16 both 1510, I believe it was, and 1504 Omega and they
17 were yelling and screaming at each other.

18 Q. And did you ever determine where Mr. Ortiz was when
19 you arrived?

20 A. They were pretty much right there. They were on
21 the easement inn the front of the fences, right between
22 the property lines.

23 Q. Were the Calefs on Mr. -- in Mr. Ortiz's property?

24 A. No.

25 Q. And did that -- was there a fence in the front, do

1 you remember? Of either property?

2 A. Yeah, both properties had a fence on the front
3 side.

4 Q. Was anybody behind that fence when you arrived?

5 A. No.

6 Q. Okay. Did anybody ever tell you that anything
7 happened behind that fence?

8 A. No.

9 Q. So what happened once you arrived?

10 A. When I arrived, myself and another deputy, other
11 deputies made contact with Ms. Calef, noticed she had a
12 cut on her hand. That's when we also saw Mr. Ortiz with
13 the machete. We ordered him to put it down, which he
14 did. As we turned around, we saw the Calefs. Another
15 deputy saw Mr. Ortiz pick it up and started going
16 towards the house. That's when we asked him to put it
17 down again. He did.

18 Q. And I'm going to stop you.

19 A. Sure.

20 Q. Where is this going on at?

21 A. When he picked it up?

22 Q. When he's dropped it and when he's picked up.
23 Where are you?

24 A. He's in front of his fence, in front of his house.

25 Q. Okay. So in that little area in front of his

1 house?

2 A. Correct.

3 Q. Okay. And so he picks it -- I think you said he
4 does put it down initially?

5 A. Correct.

6 Q. And then he picks it back up?

7 A. Correct.

8 Q. And so what do y'all do?

9 A. We order him to lay it down again and he does. We
10 take possession of it and put him in handcuffs.

11 Q. And when you are speaking with Mr. Ortiz or
12 speaking at him, are you doing it in English or Spanish?

13 A. In English.

14 Q. Did he seem to understand you?

15 A. Yes.

16 Q. Okay. Did you ask him what had happened?

17 A. I did. And he said he didn't want to talk.

18 Q. Did he ever try to give you any idea of what
19 happened?

20 A. Later on after -- we moved locations because there
21 was so much yelling still going on, so I took him to a
22 separate location and started doing paperwork.

23 Q. Where did you take him?

24 A. 1735 Decker Boulevard. It's the parking lot of
25 Family Dollar. I started doing paperwork and asked him

1 again if he wanted to say anything. He said, we had an
2 argument, and that was all he would say. He didn't
3 really say anything else. He started crying after that.

4 Q. Did he ever say, I need someone to talk in Spanish
5 or I don't speak English?

6 A. Uh-uh (negative).

7 Q. I'm sorry?

8 A. No, ma'am.

9 Q. Did he seem to be having trouble understanding you?

10 A. No, ma'am.

11 Q. Did you have trouble understanding him?

12 A. No, ma'am.

13 Q. And did he ever tell you that they hit him?

14 A. No.

15 Q. Did he ever tell you Ms. Calef hit him with a
16 purse?

17 A. No.

18 Q. Did he ever tell you that Mr. Calef came at him
19 with a post hole digger or any other weapon?

20 A. No.

21 Q. Okay. Did he ever tell you that their son came at
22 him at all?

23 A. No.

24 Q. Okay. And then you at some point talked to the
25 Calefs?

1 A. Correct.

2 Q. And what did they tell you?

3 A. Mr. Calef was saying that he was outside while Mr.
4 Ortiz was digging a hole, started taking pictures ---

5 MR. MAY: Objection, Your Honor. This is just
6 hearsay.

7 THE COURT: I sustain.

8 MS. SAMPSON: Okay.

9 Q. What was your understanding after talking to the
10 Ortizs [sic] as to what had happened?

11 A. They had an argument and mud was kicked around and
12 Mr. Ortiz came after the Calefs with a machete.

13 Q. And is that why you charged him?

14 A. Correct.

15 Q. Were you ever able to talk to Mr. Smith?

16 A. I did talk to him at a later date. It was probably
17 about two to three weeks after.

18 Q. But not that day?

19 A. Not that day.

20 Q. Was he out there that day?

21 A. He was, but at that point in time he was saying he
22 wasn't involved in the altercation, so I didn't talk to
23 him about anything.

24 Q. So he didn't tell you that Mr. Ortiz was acting in
25 self-defense at that time?

1 A. Correct.

2 Q. Did he tell you that he got hit in the incident at
3 that time?

4 A. The only thing he stated was that he couldn't find
5 his glasses.

6 Q. But he didn't tell you that Mr. Calef had hit him
7 or that anybody had hit him at that time?

8 A. No, he did not.

9 Q. Did Mr. Ortiz say anything about having any
10 injuries?

11 A. No.

12 Q. Did he ever ask you to photograph any injuries?

13 A. No.

14 MS. SAMPSON: Beg the Court's indulgence.

15 Q. I just want to ask you, when you got there, you
16 said there were other people there?

17 A. Correct.

18 Q. Do you remember who they were?

19 A. I don't. We separated parties and found out the
20 parties that were involved and went through the
21 situation from there.

22 Q. And to the best of your knowledge, who were the
23 parties involved?

24 A. Mr. and Mrs. Calef and Mr. Ortiz.

25 MS. SAMPSON: No further questions, Your

1 Honor. Oh, wait. I'm sorry.

2 MR. MAY: That's okay.

3 Q. You have an incident report. Do you remember
4 putting down how tall Mr. Ortiz is in that incident
5 report?

6 A. Mr. Ortiz is about five-eight.

7 Q. Okay. Do you have on there the height of the
8 Calefs?

9 A. Mr. Calef was ---

10 Q. Is?

11 A. --- or is, I have on here about five-six. Ms.
12 Calef is probably four-seven.

13 Q. And what are their ages?

14 A. Mr. Calef's fifty-seven and Ms. Calef is sixty-
15 five.

16 Q. And what about Mr. Ortiz?

17 A. Mr. Ortiz is fifty-five.

18 Q. Thank you.

19 MS. SAMPSON: No further questions.

20 THE COURT: Any cross?

21 MR. MAY: Yes, ma'am. Briefly. Or I'll try
22 to be as brief as possible.

23 CROSS-EXAMINATION

24 BY MR. MAY:

25 Q. All right. Deputy Stoker, you also have on here a

1 David Calef, correct?

2 A. I do not believe I have a David Calef on this
3 report.

4 Q. Well, you were able to talk about how tall Ms.
5 Marie Calef is -- I apologize. You have a Yani Heminez.

6 A. No, sir.

7 Q. You do not have the additional incident report? Is
8 that from ---

9 A. That might have been taken later. There were
10 several other incident reports taken after that
11 incident.

12 Q. Okay. Now, the reason why you're able to say how
13 old Mr. Calef and Ms. Calef and Mr. Ortiz is, is because
14 you took a report that day, correct?

15 A. Correct.

16 Q. And the report you took, you're doing it
17 simultaneously and the report's accurate ---

18 A. Correct.

19 Q. --- to the best of your ability?

20 A. Correct.

21 Q. All right. Now, you state that pictures were
22 taken, correct?

23 A. Correct.

24 Q. And pictures were taken before Ms. Calef went to
25 the hospital to get medical treatment, correct?

1 A. I thought I took pictures, but I did not. I talked
2 to the other deputies that were out there and none of
3 them had pictures before she went.

4 Q. All right. Now, when you were taking your notes,
5 in your report it says, pictures were taken of Ms.
6 Calef's hand.

7 A. Correct.

8 Q. The next line it says, Ms. Calef was transported to
9 Richland Medical, correct?

10 A. Correct.

11 Q. Now, I'm going to show you something. I got this
12 for the first time today. Did you provide a copy of Mr.
13 Smith's statement today?

14 A. Yes.

15 Q. And Mr. Smith filled this statement out on August
16 22nd, 2010, correct?

17 A. Correct.

18 Q. Were you there?

19 A. Yes, I was there when we took it.

20 Q. And he wrote this in his own hand?

21 A. Correct.

22 MR. MAY: Your Honor, we'd ask to move this
23 into evidence.

24 THE COURT: Any objection?

25 MS. SAMPSON: The only objection I have - I

The State of South Carolina -vs- Alirio A. Ortiz (2011-GS-40-0580 and 0586)
Robert Stoker - Cross Examination by Mr. May

173

1 don't want to muddy the waters. We didn't have the
2 opportunity to ask Mr. Smith ---

3 THE COURT: I'm sorry?

4 MS. SAMPSON: We didn't have the opportunity
5 to ask Mr. Smith about that statement and that is the
6 State's -- because we didn't have it. Mr. Stoker, I had
7 asked him, and we've just been unable to get it and he
8 brought it today when he came. So I don't know if what
9 is in that statement, Mr. Smith would say that's what he
10 said. I don't know.

11 THE COURT: And the same applies to the
12 Defense, right?

13 MS. SAMPSON: Right. I mean, if they want to
14 introduce it, I guess they can introduce it.

15 THE COURT: In other words, you don't think I
16 should consider it at all?

17 MS. SAMPSON: That would be our -- yes.

18 MR. MAY: Your Honor, we couldn't ask him
19 about it because we didn't get it until today. I would
20 have or Ms. Hines would have impeached him as well as --
21 because we have prior inconsistent as well as prior
22 consistent statements in here. And as a result we were
23 unable to. We'd ask that Your Honor considers it
24 because the statement was made -- Deputy Stoker stated
25 that Mr. Smith made this in his own hand. He watched

1 him make it. And it says that it -- while it's not --
2 while there's no notary, it says it's made under oath.

3 Q. Was it made under oath?

4 A. Yes.

5 THE COURT: I'll allow it. Defense Exhibit 1.

6 MR. MAY: Pardon me, ma'am?

7 THE COURT: Is that Defendant's Exhibit 1?

8 MR. MAY: Yes, ma'am.

9 (WHEREUPON, Defendant Exhibit Number 1 was marked
10 and admitted into evidence.)

11 Q. And just to clarify it for the record, this was
12 made -- this was provided after lunch today to Ms.
13 Sampson, who I got it from. This was made by Mr. Smith?

14 A. Correct.

15 Q. In your presence?

16 A. Correct.

17 Q. And was made under oath?

18 A. Correct.

19 MR. MAY: Beg the Court's indulgence.

20 Q. Last question, and I'll let you get off the stand.
21 And while you were doing this, y'all had to break up
22 both parties and Ms. Calef's pocketbook was actually
23 found near Mr. Ortiz's house, correct?

24 A. I'm not sure where her pocketbook was found. I saw
25 her with it probably about ten or fifteen minutes after

1 we already were trying to figure out what was going.

2 Q. Okay.

3 THE COURT: So are you saying you did not
4 retrieve her pocketbook and you don't know where it was
5 retrieved from?

6 WITNESS: Correct.

7 THE COURT: Anything further?

8 MS. SAMPSON: No, ma'am.

9 THE COURT: You may step down.

10 MS. SAMPSON: May Deputy Stoker be excused?

11 MR. MAY: No objection.

12 THE COURT: You may be excused. Thank you.

13 MS. SAMPSON: At this time, Your Honor, that's
14 all of the State's witnesses. I don't know if you want
15 us to break now and argue or go ahead and argue. It's
16 up to Your Honor.

17 THE COURT: Anything in rebuttal?

18 MR. MAY: No, Your Honor.

19 THE COURT: I believe I had requested that you
20 all provide proposed orders. In lieu of further
21 argument, I ask that you take your proposed orders and
22 revise them to include your arguments based upon the
23 testimony and present them to me by Wednesday, January
24 18th by five p.m. And to make all your arguments,
25 because I'm not going to give you a chance to rebut each

1 other's arguments. Make all of your arguments in your
2 order and resubmit them to me. And you can submit them
3 to me in the electronic format and provide a copy to the
4 other side. And the email address is
5 aleelc@sccourts.org.

6 And once I've received those then I will make a
7 final ruling and it will be in written form. You all do
8 not need to include in there any of my rulings relating
9 to Sub-section (A). I'll take care of those. So just
10 as it relates to the testimony, the findings of fact and
11 conclusions as it relates to Sub-section (C). And you
12 don't need to reiterate your arguments about (A), since
13 we've already made them and you've already addressed
14 those. I'll do a separate order on that or I'll do an
15 order to incorporate it into that part.

16 Anything else we need to take up?

17 MS. SAMPSON: Not from the State, Your Honor.

18 MR. MAY: No, ma'am.

19 THE COURT: Then I'll wait to hear from you
20 all not later than the 18th.

21 MR. MAY: Thank you very much.

22 THE COURT: Thank you.

23 MS. SAMPSON: Thank you, Judge.

24

25 (END OF REQUESTED TRANSCRIPT OF RECORD)

1 CERTIFICATE OF REPORTER

2

3 I, the undersigned Danette P. Hanks, Official Court
4 Reporter for the Thirteenth Judicial Circuit of the
5 State of South Carolina, do hereby certify that the
6 foregoing is a true, accurate, and complete transcript
7 of record of all the proceedings had and evidence
8 introduced in the trial/hearing of the captioned case,
9 relative to appeal, in the Court of General Sessions for
10 Richland County, South Carolina, on the 12th day of
11 January, 2012.

12 This transcript may contain quoted material. Such
13 material is reproduced as read by the speaker.

14 I do further certify that I am neither of kin,
15 counsel, nor interest to any party hereto.

16 January 16, 2012

17

18

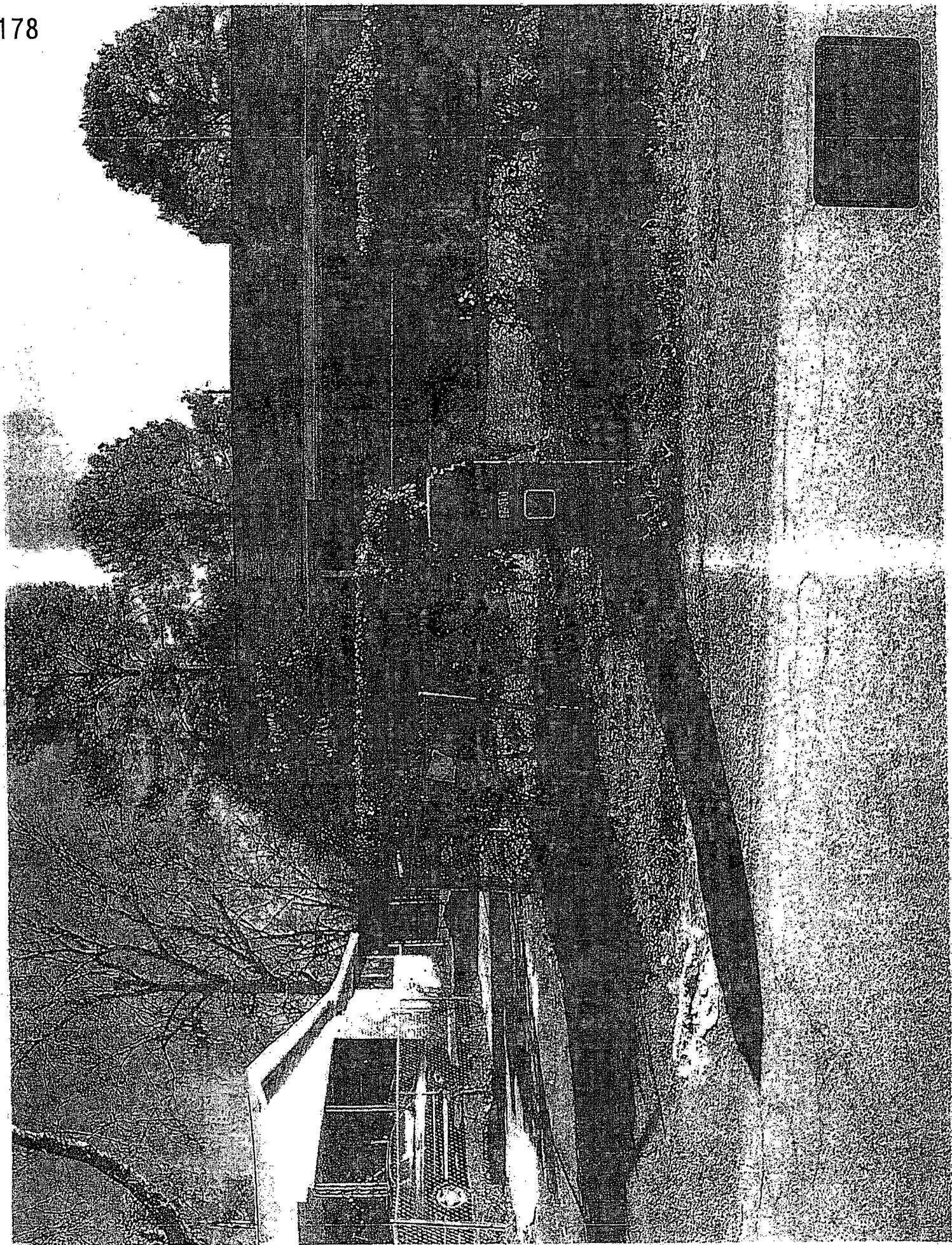
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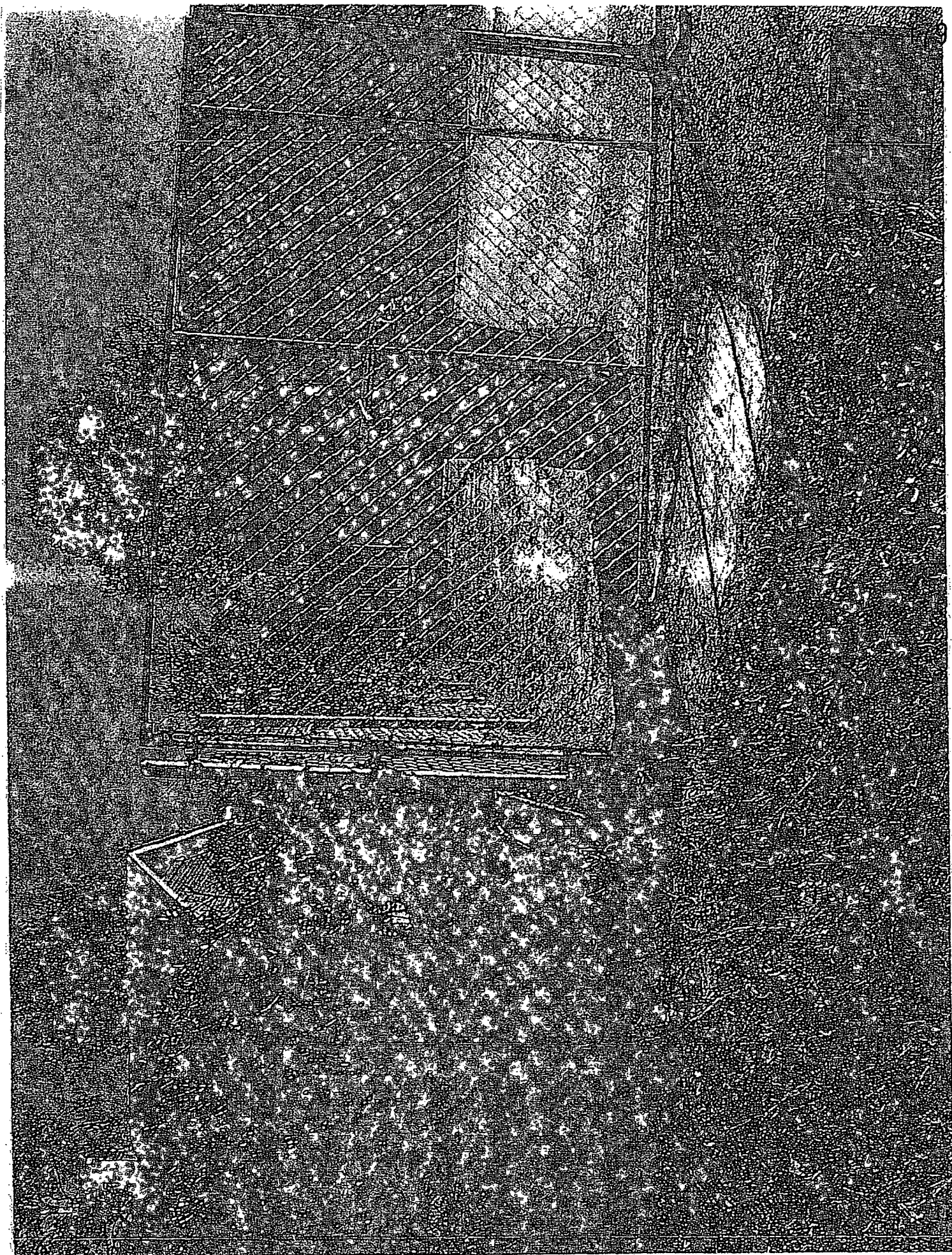
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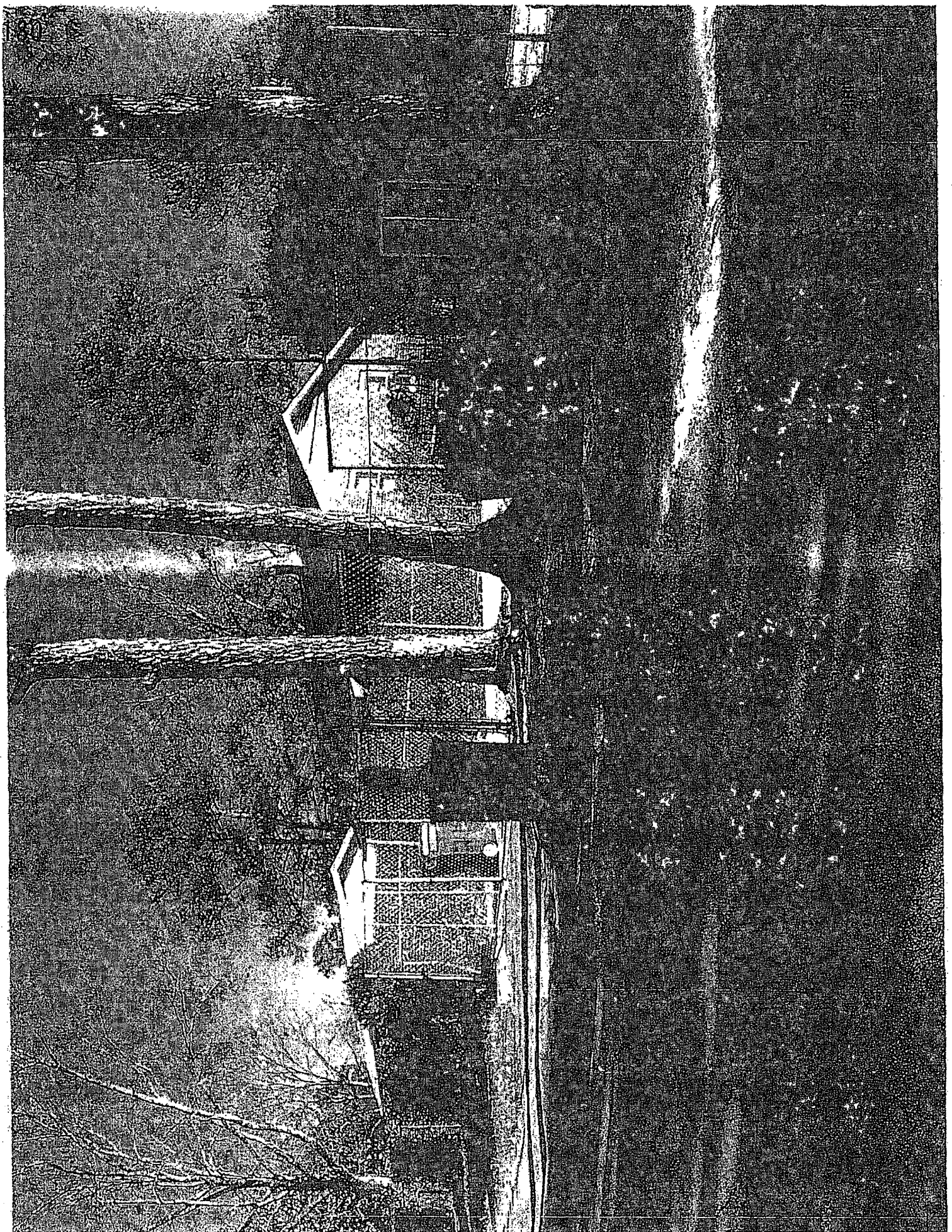
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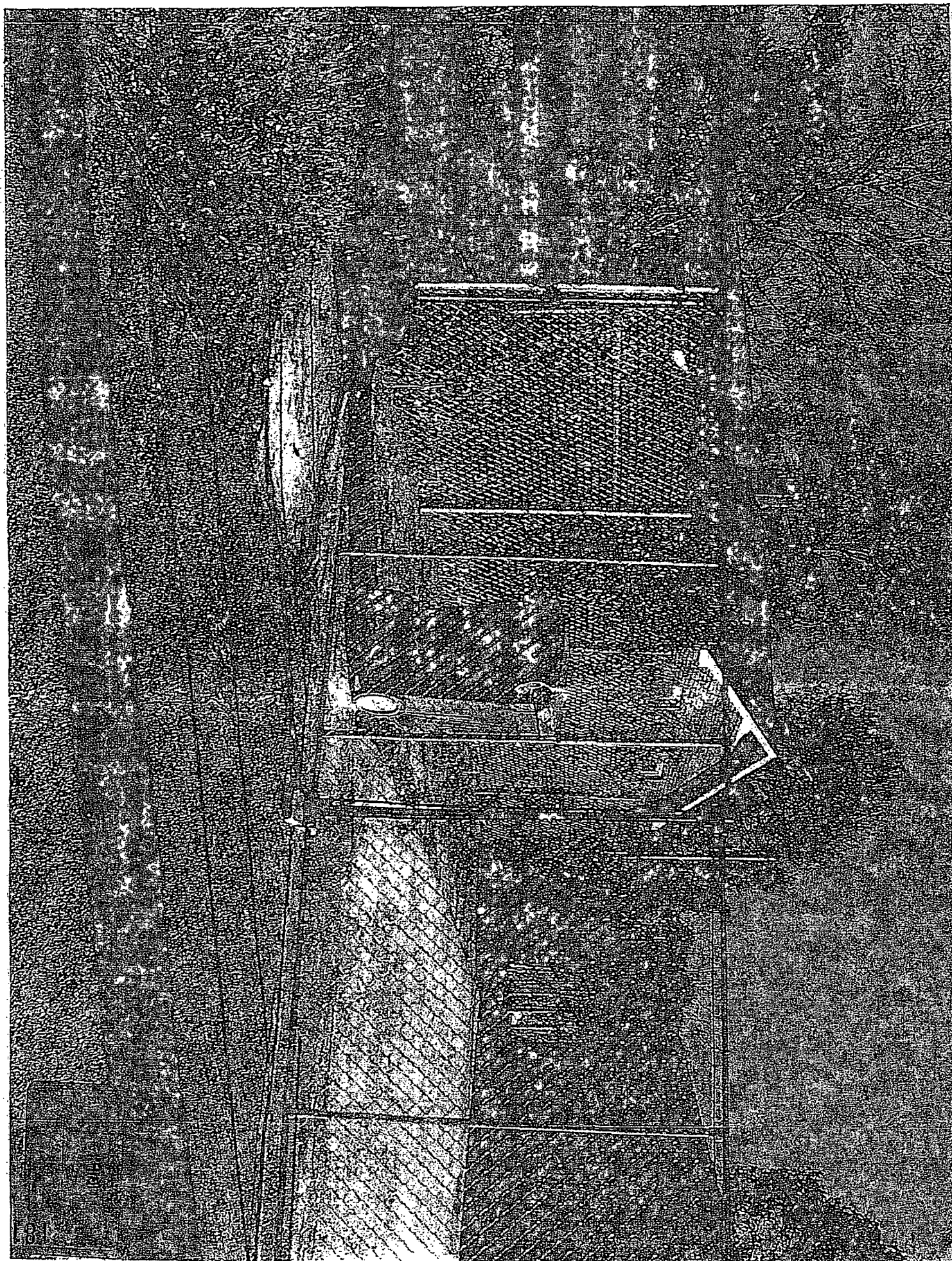
Danette P. Hanks

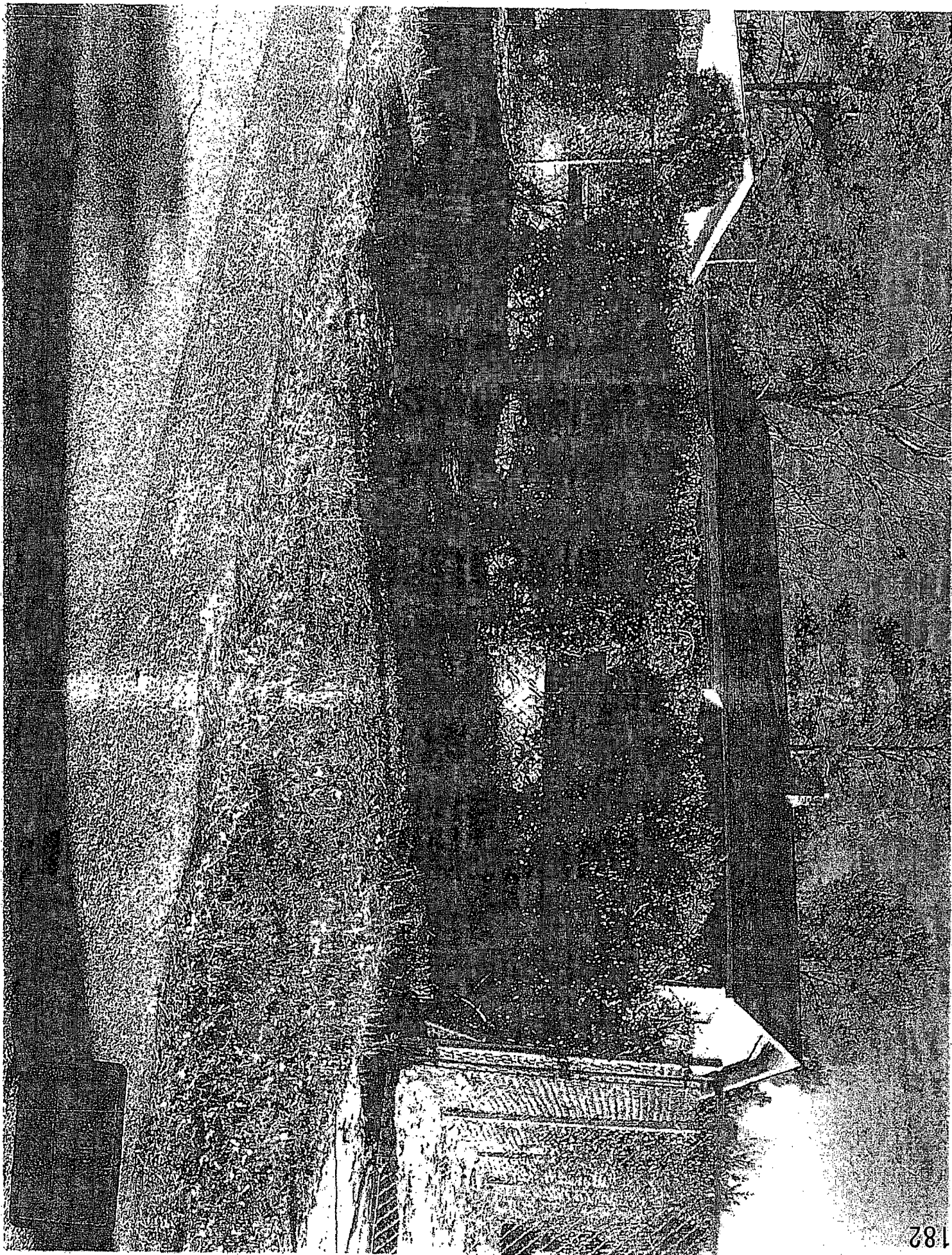
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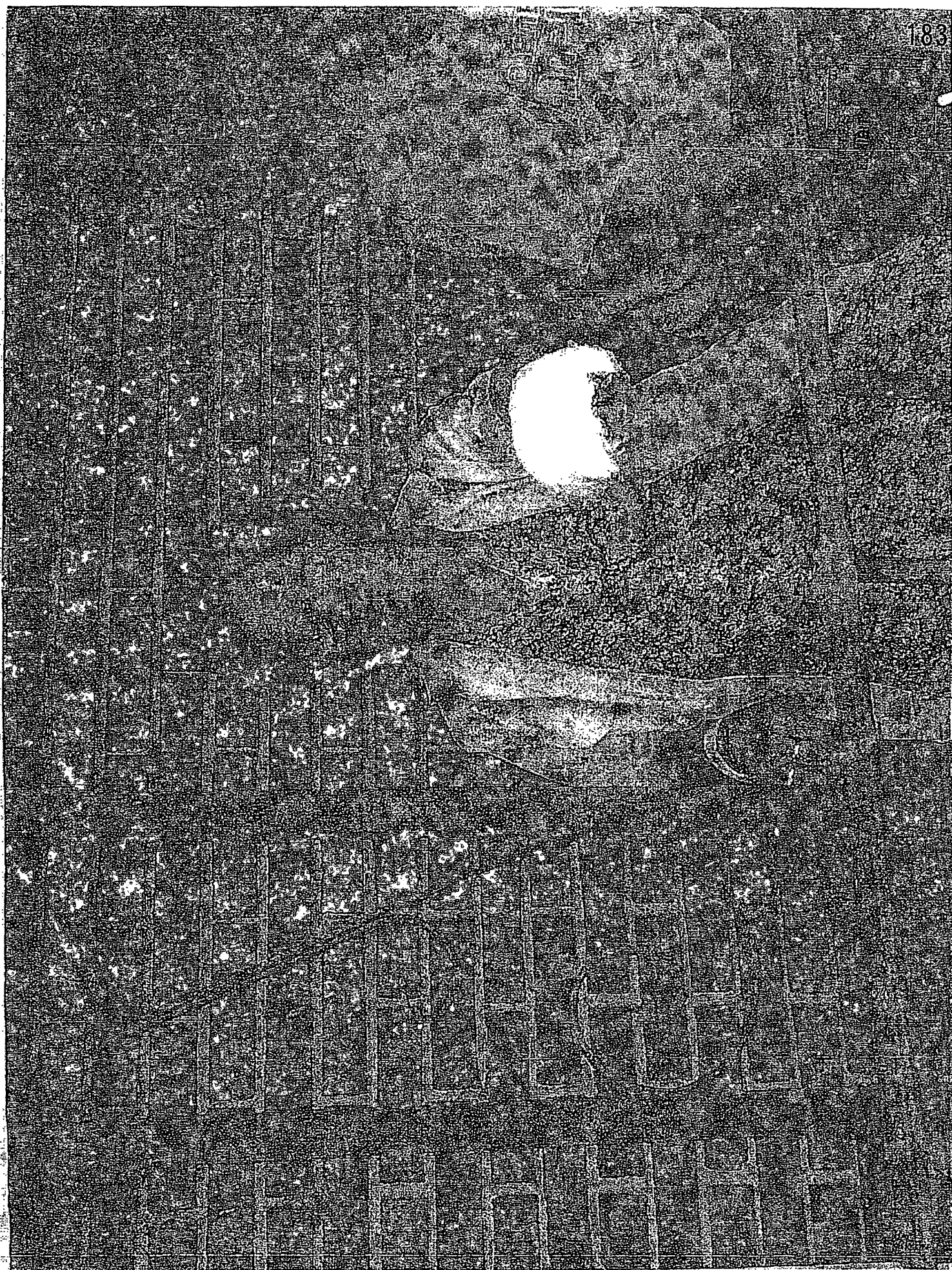


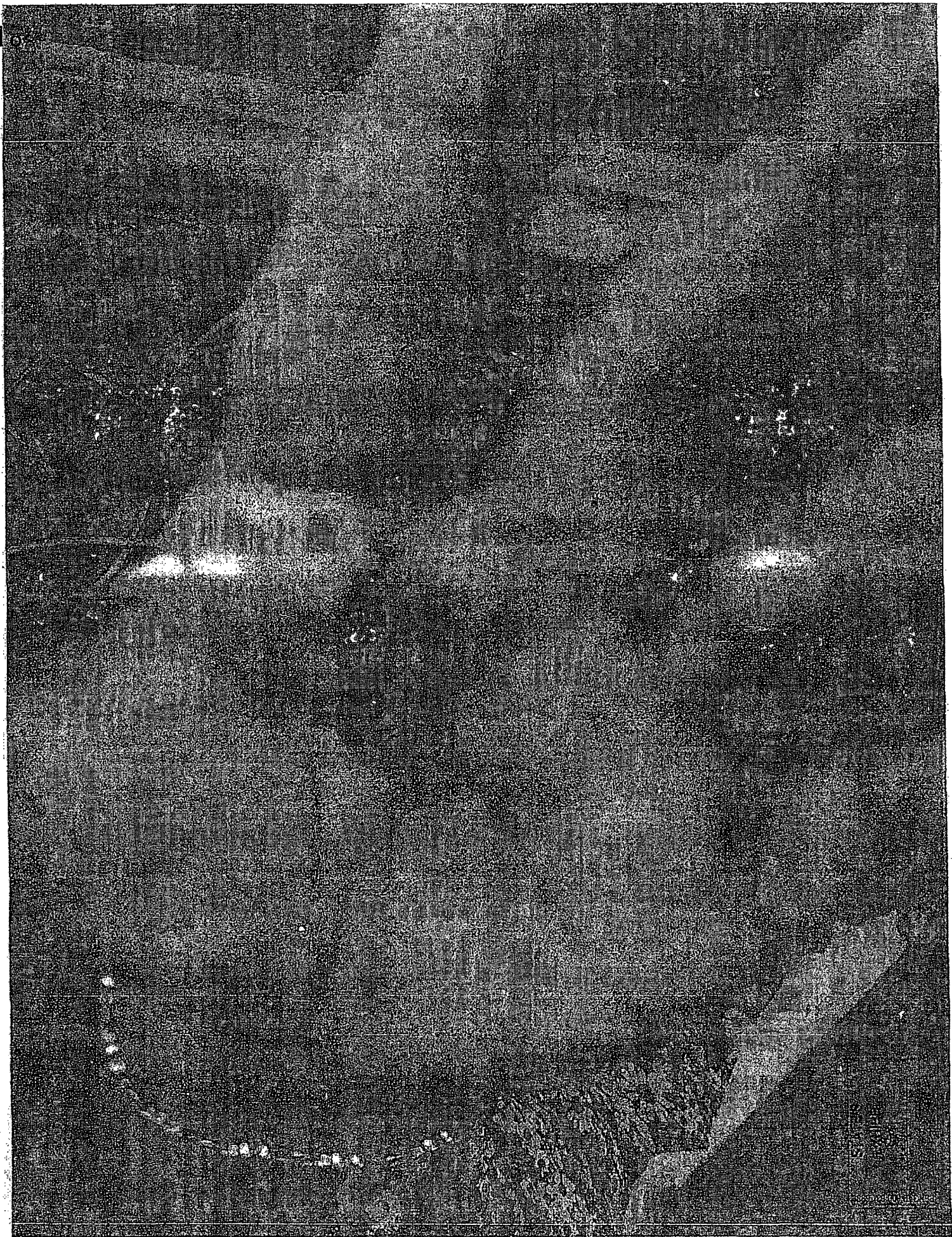


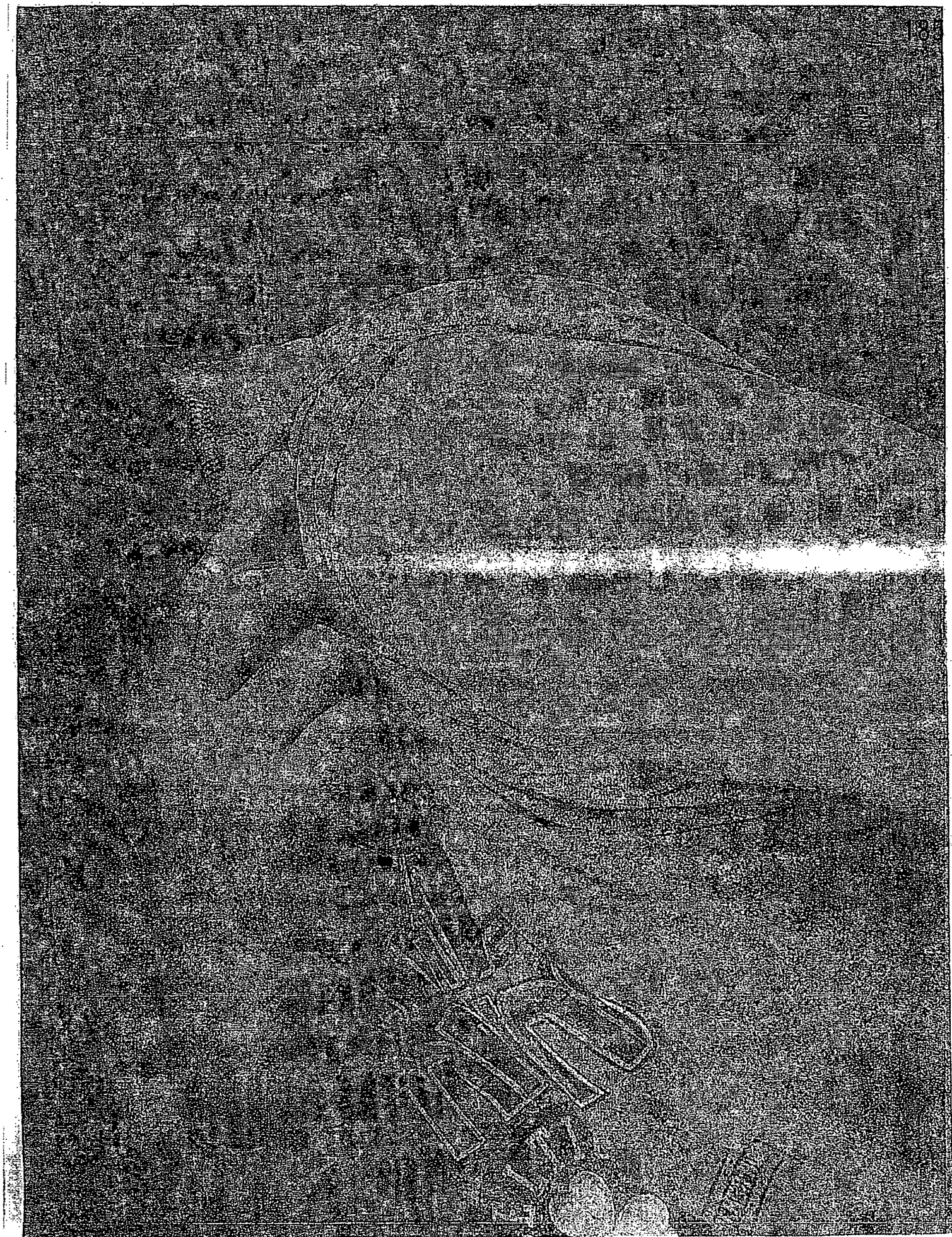






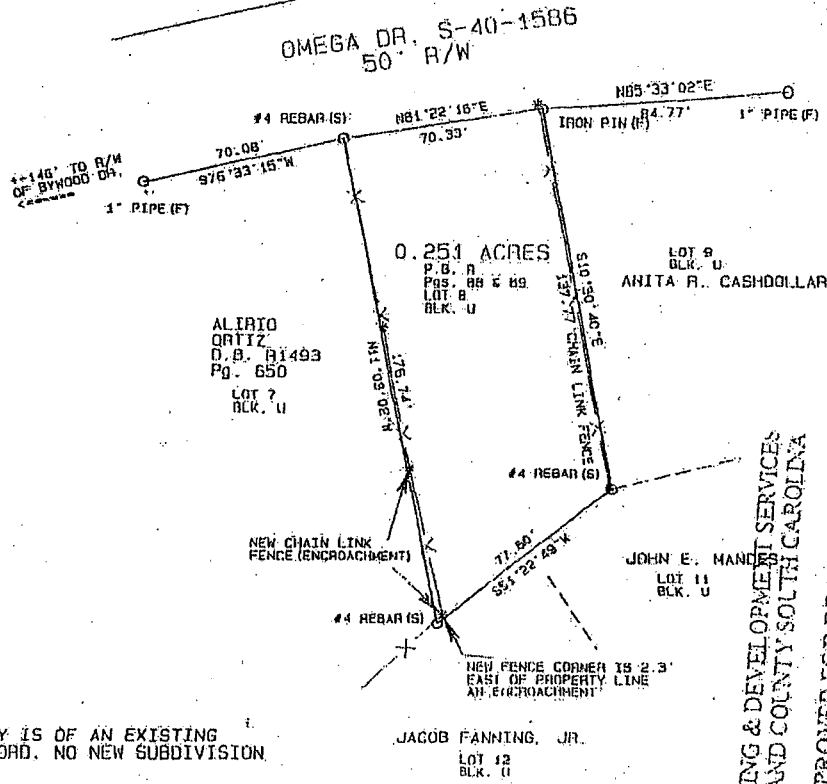
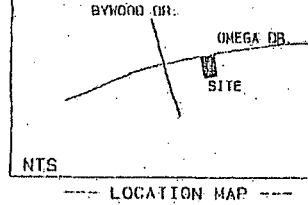






MAGNETIC 2010

Book 1624-1335
2010052364 00/10/2010 14:32:00.050
Fee: \$5.00 County Tax: \$0.00 State Tax: \$0.00
Pilot Standard
2010052364 Richard W. Rodden
Rick Mini Casey R.O.D.



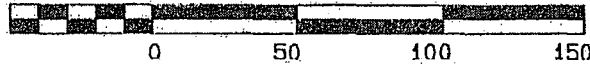
THIS SURVEY IS OF AN EXISTING LOT OF RECORD. NO NEW SUBDIVISION THIS DATE.

I HEREBY STATE THAT TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS "A" SURVEY AS SPECIFIED THEREIN.

LEGEND: (F) - CORNER PIN FOUND
(S) - CORNER PIN SET

NOTES:

GRAPHIC SCALE 1"=50'



BOUNDARY SURVEY FOR		
CYNTHIA CALEF		
NEAR COLUMBIA RICHLAND COUNTY		
STATE OF SOUTH CAROLINA		
TAX MAP #:	R16913-12-03	DFT: 111
REFERENCES:	P.B. R Pgs. 88 & 89, D.B. 726 Pg. 1170	
SCALE:	1"=50'	DATE: 08/04/10 JOB # CALEF
HUEL C. BAILEY SCPLS #14523 135 H & H ROAD DALZELL, S.C. 29040 (803) 972-9587 (803) 428-3924		



PLANNING & DEVELOPMENT SERVICES
RICHLAND COUNTY SOUTH CAROLINA

APPROVED FOR RECORDING

Date 8/10/10
RCF # MS-10-165
Signature H. Bailey

RICHLAND COUNTY SHERIFF'S DEPARTMENT

1008063407

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

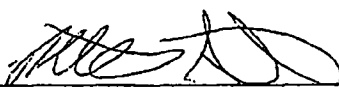
WITNESS STATEMENT

Personally appeared before me this date, an officer duly and legally authorized to administer oaths in the above named County and State aforesaid, comes one

Name: Herbert Smith 1505 Omega Dr.
Cole, S.C. 29223 Date: 8/22/10 Time: 2:23 PM
(Print)Day Telephone: (843) 680-1502 Night Telephone: _____

Who makes the following statement under oath to wit:

Mr. Calef came to Mr. Ortiz house when Ortiz was digging hole for fence Mr. Calef was on phone apparently calling more family over to jump on Ortiz. Because that's what happened. I ran over to try + break it up. I pulled back one of Mr. Calef's sons (I think) + Mrs. Calef chased Ortiz around his car in his (Ortiz) yard, beating him w/ her purse. Mr. Calef hit me in back + on arm with post hole diggers. Mrs. Calef jumped on my back. Another son (I think) Mrs. Calef's daughter + her boyfriend came up. There was at least 2 people as many as three at a time on my back Mr. Ortiz was swinging machete in defense of him + me. Mrs. Calef was cut by either machete or post hole diggers. All this started on Mr. Ortiz property inside his fence with posted signs.

This statement was made in the presence of _____
of the Richland County Sheriff's Department.

(Signature)

Date 08/22/10

WITNESSES:

SWORN TO AND SUBSCRIBED BEFORE ME THIS _____

DAY OF _____, 20____

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: _____



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
Warrant Number: M239913, M239914

The State of South Carolina,)
)
)

vs.)
)
)

MOTION TO ENFORCE THE
PROTECTIONS OF 16-11-45(a)

Alirio Ortiz,)
)
Defendant.)

Alirio Ortiz through undersigned counsel, respectfully moves this Court for a grant of immunity from criminal prosecution for the above captioned charge. This motion is predicated upon the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article § 1, 3, 8, 9, 11, 12, 14, and 15 of the Constitution of the State of South Carolina, South Carolina Code 16-11-450, and South Carolina case law: State v. Duncan 392 S.C. 404 (S.C. 2011).

§ 16-11-450. Immunity from criminal prosecution and civil actions; law enforcement officer exception; costs.

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

On August 7, 2010 Donald and Maria Calef entered on to the property of Mr. Ortiz in a hostile manner, whereby Donald Calef was armed with a post hole digger. Mr. Ortiz attempted to eject the Calef(s) from his property, at which time the Calef(s) attacked Mr. Ortiz. Mr. Ortiz repelled the attack and ejected the Calef(s) from his property using the broad side (non-cutting side) of a machete. Mr. Ortiz and the Calefs' daughter are next door neighbors and have a long running property line dispute.

The Defendant would seek an order of immunity under 16-11-450(a) as his actions are in conformity with 16-11-440(a) and (c).

WHEREFORE, for the foregoing reasons and any others that may appear to this Court after a

RICHLAND COUNTY
FILED
2012 JAN 31 PM 3:23
JEANETTE W. WHITE
C.C. & J.S.

hearing, counsel for Alirio Ortiz, respectfully requests this Court issue an Order granting the Defendant immunity from the above captioned indictment and dismissing the indictment with prejudice.

DATED this 5th day of Jan., 2012.

Respectfully Submitted,


James Hunter May
Attorney for the Defense

JEANETTE W. McBRIDE
C.C.P. & G.S.

2012 JAN -3 PM 3:23

RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

State of South Carolina,

v.

Alirio Ortiz,

Defendant.

RICHLAND COUNTY
FILED

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

JEANETTE W. McBRIDE
C.C.P. & G.S.

Indictment Nos: 2011-GS-40-0580
2011-GS-40-0586

ORDER

This matter is before the Court pursuant to the Defendant's Motion Asserting Statutory Immunity from Prosecution. Defendant's motion is based on the Protection of Persons and Property Act (hereinafter "the Act"), S.C. Code Ann. §§ 16-11-410, et seq. Defendant was indicted for two counts of Assault and Battery of a High and Aggravated Nature following an altercation during which the Defendant is alleged to have struck Donald and Maria Calef with a machete. On January 3, 2012, the Defendant filed a Motion to Enforce the Protections of S.C. Code Ann. § 16-11-440(A) seeking an Order of Immunity from prosecution under the Act and requesting a hearing to determine whether the Act applies to this case. A hearing on this matter was held on January 12, 2012. The State was represented by April Sampson and Justin Williams of the Fifth Circuit Solicitor's Office. Defendant was represented by Kris Hines and James May of the Public Defender's Office.

FINDINGS OF FACT

This Court makes the following findings of fact based upon the testimony of the witnesses and the burden of the Defendant to establish his case by a preponderance of the evidence. At the hearing, the following witnesses testified: Herbert Smith, Alirio Ortiz, Donald Calef, Maria Calef, David Calef, Frieda Hernandez, and Deputy Robert Stoker.

The Defendant lives at 1504 Omega Drive, Columbia, South Carolina. Cynthia Calef, the daughter of Donald and Maria Calef, lives next door. There has been an ongoing property line dispute between the two parties resulting in pending civil litigation. On August 7, 2010, Mr. Calef received a phone call from his daughter Cynthia alerting him that the Defendant was removing survey stakes that had been placed on the property a few days previously by a surveyor. Mr. Calef arrived at Omega Drive to witness the Defendant digging a hole with a post-

And #1

hole digger on or in front of Cynthia Calef's property. The hole was located on or near the border between the two properties. Defendant intended to erect a fence around his front yard. Defendant testified that the Calefs parked their vehicle on the Defendant's property in his driveway. None of the other witnesses testified similarly. Mr. Calef called the Richland County Sheriff's Department to report that Defendant was disturbing the surveyor's stake. He then called his wife asking her to bring the paperwork relating to the property dispute. At some point, Defendant was using a hose to fill the hole and sprayed mud from the hole he was digging onto Mr. Calef.

Mrs. Calef was driven to the property by her son David. When they arrived, Ms. Calef handed her husband the requested documents and was similarly muddled by the Defendant. Mrs. Calef told her husband to call 911 and request emergency assistance. Defendant claims that he was chased by Mrs. Calef who was hitting him with her purse. Defendant also claims that Mr. Calef picked up the post-hole digger. In response, Defendant picked up a machete that was near the hole he was digging and used it to defend himself, striking Mr. Calef twice on the shoulder. Mrs. Calef began screaming. At that point, David Calef exited the car to assist his parents. The Defendant began to swing his machete at the Calefs and struck Mrs. Calef's hands, which she was using to protect herself and her son from the Defendant.

In the middle of this incident, a neighbor, Mr. Herbert Smith, observed Mrs. Calef hitting the Defendant with some type of folder. He then approached the parties to break up the altercation. Mr. Smith pushed Mrs. Calef to the ground and placed David Calef in a chokehold to calm the situation. Mr. Smith observed the Defendant with the machete in his hand but did not see him strike anyone. The police arrived shortly thereafter. The first responding officer, Deputy Robert Stoker, observed the parties standing in front of the properties in the portion of the road typically reserved for an easement adjacent to the street. According to Officer Stoker, when the Defendant noticed the approaching officers, he began walking toward his house with the machete, where he eventually dropped it. Defendant was not on his property when Officer Stoker first saw him. None of the witnesses observed the dispute occurring within either the Calef's or Defendant's property line. Only the Defendant states that the altercation occurred on his property in his driveway.

The Defendant was removed from the area by Deputy Stoker and questioned regarding the incident. When questioned, the Defendant did not mention that Mrs. Calef hit him with her

purse or Mr. Calef came at him with a post-hole digger. He also did not mention to the officer that he was brandishing the machete in self-defense.

DISCUSSION

The Defendant is seeking a grant of immunity from prosecution pursuant to the Act. Specifically, the Defendant claims that S.C. Code Ann. § 16-11-440(A) applies. That section states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A). However, that section applies to the forcible entry of a dwelling or occupied vehicle. Dwelling is defined by the statute as a “building or conveyance of any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.” S.C. Code Ann. § 16-11-430. This section does not apply to the facts at hand because, by all accounts, the dispute occurred outside of a dwelling and did not involve an occupied vehicle.

The Court finds that the appropriate subsection under which to analyze the facts of this case is Section 16-11-440(C). Section 16-11-440(C) provides that one “not engaged in unlawful activity who is attacked in a place where he has a right to be, including, but not limited to, his place of business has no duty to retreat.” Such a person may use deadly force “if he reasonably believes it to be necessary to prevent death or great bodily injury to himself or another person, or to prevent the commission of a violent crime...” Id.

The primary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). “Where the statute’s language is plain and

and
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unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Pittman, 373 S.C. at 561, 647 S.E.2d at 161 (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

A. Defendant was not attacked on his property.

Evidence was presented that the Defendant was digging a hole on or near the border in front of his and Cynthia Calef’s homes, and that his digging of the hole disturbed survey markers indicating the property line. The altercation that ensued spilled from that area onto the public property outside of Cynthia Calef’s home. This Court finds that the portion of the altercation involving the assault by the Defendant did not occur on the Defendant’s property. While being examined by the Court, Defendant stated that David Calef and Mrs. Calef parked their vehicle on the Defendant’s property in his driveway. No other witness, including Defense witness Herbert Smith testified similarly. In addition, Deputy Stoker stated that the parties “were on the easement in front of the fences, right between the property lines” when he arrived at the scene. No witness testified that the Defendant and the Calefs were arguing behind the fence on property that belonged to the Defendant. Deputy Stoker testified that when the Defendant saw the police, he picked up his machete and started walking towards his home. At that time, Deputy Stoker testified that the Defendant was located “in front of his fence, in front of his house.” This is consistent with other witness statements recounting the incident occurring in the street or on the public easement in front of the parties’ properties. Certainly, the Defendant had a right to be on the public easement. Defendant claims he was attacked first by the Calefs.

B. Defendant was not engaged in a lawful activity.

Defendant has not shown by a preponderance of evidence that he was engaged in a lawful activity. As both parties have conceded, prior court cases interpreting the Act involved a party who was clearly on his own property. Here, there is a question about whether the Defendant was on his own property digging the post hole. Without making a determination as to the property line, this Court can find that Mr. Ortiz may have been trespassing onto Cynthia Calef’s property, an unlawful activity. In addition, there was testimony from Mr. and Mrs. Calef that the Defendant intentionally sprayed water and mud on their clothes when they questioned the Defendant about the hole he was digging on or near the property line. The unconsented touching of the Calefs by an instrument controlled by the Defendant would be a battery, another unlawful activity.

and
§ 4

C. Use of deadly force wasn't necessary to prevent death or great bodily injury.

Section 16-11-440(C) allows a person to use "force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person." Great bodily injury is defined under Section 16-11-430 as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of the bodily member or organ." Defendant has not shown by a preponderance of evidence that the use of force was necessary to prevent death or great bodily injury to him. When questioned by Deputy Stoker, the Defendant did not mention that any of the Calefs hit him. He did not mention that Mrs. Calef struck him with a purse. He did not mention that Mr. Calef approached him with a post-hole digger. The Defendant did not say that any of the Calefs did anything with the post-hole digger other than pick it up. Deputy Stoker's statement is consistent with that of the Calefs.

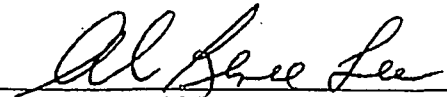
Defendant testified Mrs. Calef instigated the physical confrontation by hitting him with her purse and that he brandished the machete to defend against Mrs. Calef's purse and Mr. Calef's use of the post-hole digger. This Court finds that version of the facts unpersuasive. When Defendant lifted the machete to swing it at the Calefs, Defendant must have had a reasonable belief that he would be killed or seriously harmed. Further, Mr. Smith testified that Mrs. Calef struck Defendant with a folder. The Defendant has not shown that a reasonable person in his situation would have used force such as a machete to repel any threat. Defendant denied using force towards the Calefs at all. When questioned by his attorney, Defendant denied hitting anyone with the machete, stating that "he just had it in [his] hand." Defendant's contention that no force at all was used would further make the Act inapplicable to the present set of facts.

and
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ORDER

For the foregoing reasons, the Defendant has not proven by a preponderance of evidence that he is entitled to receive immunity from prosecution as prescribed in S.C. Code Ann. § 16-11-410.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

April 18, 2012
Columbia, South Carolina

af
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WITNESSES

(S) R. Stoker - Richland County Sheriff

ARREST WARRANT NUMBER

M239913

ACTION OF GRAND JURY**TRUE BILL**

Foreperson of Grand Jury

Date:

JAN 20 2011

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2011-GS-40-0580

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

January TERM 2011

143

THE STATE

vs.

Alirio A Ortiz

**Indictment for
ASSAULT AND BATTERY OF A HIGH
AND AGGRAVATED NATURE**

SC Code: 16-03-0600(B)(1)

CDR Code: 3411

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on January 19, 2011, the
Grand Jurors of Richland County present upon their oath:

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE

That Alirio A Ortiz did in Richland County on or about August 7, 2010,
unlawfully injure Donald Calef and did so by means likely to produce death or
great bodily injury, to wit: defendant attacked victim with a machete. All in
violation of Section 16-3-600 of the SC Code of Laws (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in
such case made and provided.



DAN JOHNSON, SOLICITOR

PAGE 04/05

CRIMINAL RECORDS

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05/30/2012

WITNESSES

(S) R. Stoker - Richland County Sheriff

ARREST WARRANT NUMBER

M239914

ACTION OF GRAND JURY

TRUE BILL

Mena Gardiner

Foreperson of Grand Jury

Date: JAN 20 2011

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011-GS-40-0586

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

January TERM 2011

143

THE STATE

vs.

Alirio A Ortiz

**Indictment for
ASSAULT AND BATTERY OF HIGH
AND AGGRAVATED NATURE**

SC Code: 16-03-0600(B)(1)

CDR Code: 3411

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on January 19, 2011, the
Grand Jurors of Richland County present upon their oath:

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE

That Alirio A Ortiz did in Richland County on or about August 7, 2010,
unlawfully injure Maria Calef and did so by means likely to produce death or
great bodily injury, to wit: defendant attacked victim with a machete causing a
large laceration on her hand. All in violation of Section 16-3-600 of the SC Code
of Laws (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in
such case made and provided.



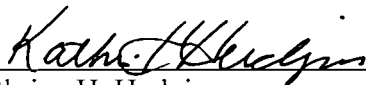
DAN JOHNSON, SOLICITOR

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CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 21st, 2013


Kathrine H. Hudgins
Appellate Defender

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