STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

RETURN TO APPELLANT'S MOTION TO REMAND

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

Procedural History

In November of 2009, Appellant Joe Ross Worley was arrested and charged with three counts of assault and battery with intent to kill and three counts of possession of a firearm during the commission of a violent crime. In February of 2010, the McCormick County grand jury indicted Appellant for three counts of assault and battery with intent to kill and one count of possession of a firearm during the commission of a violent crime. Subsequently, Appellant sought immunity from criminal prosecution pursuant to S.C. Code Ann. § 16-11-450, and a hearing on the immunity issue was commenced in the McCormick County court of general sessions on May 31, 2011, with the Honorable William P. Keesley, circuit court judge, presiding.

Following the hearing, Judge Keesley issued an order on July 5, 2011, denying Appellant's request for immunity from prosecution and recusing himself from further participation in the case. Appellant then promptly moved for reconsideration of Judge Keesley's ruling. On December 8, 2011, Judge Keesley issued an order affirming his earlier ruling and denying Appellant's motion for reconsideration. On January 18, 2012, Appellant filed a notice of appeal appealing Judge Keesley's ruling on the immunity issue. Thereafter, on April 18, 2012, Appellant filed his Initial Brief of Appellant and Designation of Matter in this case.

Following the filing of the Initial Brief of Appellant and Designation of Matter, the State filed a Motion to Strike and Require Filing of Amended Initial Brief of Appellant on August 20, 2012. In response, Appellant filed a return opposing the State's motion, and the State filed a reply to Appellant's return. Subsequently, on September 7, 2012, Appellant filed a Motion to Supplement Record on Appeal and Expedite Briefing. In response, the State filed a return opposing Appellant's motion, and Appellant filed a reply to the State's return.

Thereafter, on December 19, 2012, this Court issued an order granting the State's motion to strike and denying Appellant's motion to supplement the record and expedite briefing. Additionally, this Court ordered Appellant to serve and file an amended initial brief within twenty days of the ruling. Following the issuance of the order, Appellant filed his Amended Initial Brief of Appellant and Amended Designation of Matter on January 8, 2013.

In light of issues raised in Appellant's amended initial brief, the State filed a Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter on February 7, 2013. As part of the motion, the State asked this Court to remand the matter to the trial court to allow the trial judge to attempt to reconstruct missing portions of the immunity hearing transcript that were lost after the court

reporter from the immunity hearing was victimized in a theft. In response, Appellant filed a return to the State's motion, and the State filed a reply to Appellant's return. The State's motion is currently pending before this Court. Thereafter, on March 6, 2013, Appellant filed a Motion to Remand.[1]

Return to Appellant's Request for the Matter to be Remanded for an Entirely New Immunity Hearing

In Appellant's Motion to Remand, Appellant appears to ask this Court to remand the matter to the trial court for an entirely new immunity hearing in light of the fact a portion of the record of the immunity hearing was lost in a theft. In support of that request, Appellant contends it is not possible for just the missing portions of the record to be reconstructed because the trial judge who presided over the immunity hearing recused himself from further participation in Appellant's case. Appellant's motion should be denied, and the matter should be remanded to the trial court to allow for an attempt to be made to reconstruct the missing portions of the record

[1] Additionally, prior to Judge Keesley's ruling on the immunity issue, Appellant repeatedly petitioned Judge Keesley for pre-trial bail. On December 3, 2009, February 23, 2010, and August 11, 2010, Judge Keesley denied Appellant's requests for bail and determined Appellant was a danger to the community. Judge Keesley then recused himself from further involvement in Appellant's case on July 5, 2011, through his ruling on the immunity issue. Subsequently, Appellant moved for reconsideration of Judge Keesley's decision to deny bail. On September 23, 2011, a hearing on Appellant's motion was held in the McCormick County court of general sessions with the Honorable Frank R. Addy, Jr., circuit court judge, presiding. On October 3, 2011, Judge Addy issued an order denying Appellant's bond request. Subsequently, Appellant filed a notice of appeal dated October 12, 2011, and an amended notice of appeal dated October 27, 2011, appealing Judge Addy's ruling on the pre-trial bond issue. Thereafter, on December 2, 2011, Appellant filed a "Petition for Certification Pursuant to S.C. Code § 14-8-210(B) or in the alternative Petition for Writ of Habeas Corpus" in the Supreme Court. In the petition, Appellant sought "an order from [the Supreme Court], certifying the instant appeal from the South Carolina Court of Appeals, expediting the matter, and establishing a procedure for consideration of pre-trial bond in cases involving application of the Castle doctrine, codified as the 'Protection of Persons and Property Act' at S.C.Code Ann. §16-11-401 et seq. and granting such other relief as may be warranted under the facts." On December 16, 2011, the State filed a return to Appellant's petition, and Appellant filed a reply to the State's return on January 3, 2012. On January 25, 2012, the Supreme Court issued an order transferring Appellant's appeal from the denial of bond to the Supreme Court, dismissing the appeal, and dismissing the petition for a writ of habeas corpus. The next day, Appellant filed an Initial Brief of Appellant and Designation of Matter in this Court related to the appeal of Judge Addy's ruling on the bond issue. Then, on February 2, 2012, Appellant filed a Motion for Reconsideration in the Supreme Court. Thereafter, on April 18, 2012, Appellant filed another Initial Brief of Appellant and Designation of Matter in this Court raising the denial of bond issue along with the denial of immunity issue. Subsequently, on May 29, 2012, the Supreme Court issued an order denying Appellant's motion for reconsideration and, on September 7, 2012, issued remittitur in Appellant's appeal of the denial of pre-trial bond. Following the issuance of remittitur, this Court issued an order requiring Appellant to strike any argument regarding the denial of bond issue from his initial brief, and Appellant subsequently filed an Amended Initial Brief of Appellant striking any reference to that issue.

as requested in the State's pending Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter.

" '[T]he inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present sufficient ground for reversal.' " State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007) (quoting State v. Smith, 291 Md. 125, 136, 433 A.2d 1143, 1148 (Md. 1981)). When a portion of a transcript from a trial court proceeding is lost or destroyed, it is proper for the appellate court to remand the matter to the trial court to allow the trial judge to attempt to reconstruct the missing portions of the record. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) ("Where a transcript has been lost or destroyed, a court may remand to have the record reconstructed."), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (remanding a case to the circuit court for reconstruction of the trial record); see also China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968) ("The issues on appeal must therefore be determined on the basis of the record as settled by the trial court."). Such a remand permits a neutral and impartial trial judge to determine the contents of the record and confirm the completeness and correctness of that record, which is solely the trial judge's duty and responsibility, while also allowing all of the interested parties to the case to mutually offer their assistance and input in reconstructing the record. See China, 251 S.C. at 334, 162 S.E.2d at 278 (instructing "the duty and responsibility" of settling the question of what the appellate record should contain rests upon the trial judge in a case where portions of the notes of the trial proceedings were lost before the court reporter was able to transcribe them).

In the case sub judice, Appellant asks this Court **not** to remand for any attempt or effort to be made to reconstruct the missing portions of the record of the immunity hearing but, instead,

to remand for an entirely new immunity hearing and ruling on the immunity issue. Thus, Appellant is asking this Court to declare void a presumptively-valid ruling adverse to his position and grant him a new opportunity to have the immunity issue argued and considered. See Martin v. Carolina Water Servs., Inc., 273 S.C. 43, 46, 254 S.E.2d 52, 53 (1979) ("The order of the lower court is presumed to be correct."); Ehlke v. Nemec Constr. Co., Inc., 298 S.C. 477, 481, 381 S.E.2d 508, 510 (Ct. App. 1989) ("[T]here is a presumption in favor of correctness of an appealed order and the burden of showing error by the trial judge is on the appellant."). However, remand for an entirely new hearing based on the loss or destruction of the record of a trial court proceeding is not an appropriate remedy until it can first be determined that the missing portions of the record cannot sufficiently be reconstructed to permit meaningful appellate review. See State v. Ladson, 373 S.C. 320, 327, 644 S.E.2d 271, 275 (Ct. App. 2007) (reversing and remanding for a new trial based on an incomplete record that was insufficient to permit meaningful appellate review where a good faith effort was made to reconstruct the missing transcript of the trial court proceedings but the effort ultimately proved to be unsuccessful); see also Whitehead, 352 S.C. at 221, 574 S.E.2d at 203 (remanding for reconstruction and notifying the circuit court judge to alert the appellate court if reconstruction was not possible). Accordingly, as requested in the State's pending Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter, the matter should be remanded to the trial judge to allow the trial judge to attempt to reconstruct the missing portions of the immunity hearing transcript. Notably, supporting the possibility that the missing portions of the record can be successfully reconstructed, Appellant has indicated he has his trial counsel's notes from the immunity hearing, and the trial judge who presided over the hearing included a highly-detailed summary of

the testimony presented during the hearing in his order denying Appellant's request for immunity from prosecution. (Exhibit "A" – Amended Order on Motion to Bar Prosecution, pp. 1-7). Therefore, it appears that the missing portions of the immunity hearing record, which included Appellant's testimony, can be reconstructed to a sufficient extent to permit meaningful appellate review, rendering a remand for an entirely new hearing unnecessary.[2]

In support of his request for the matter to be remanded for an entirely new immunity hearing and an entirely new ruling on the immunity issue, Appellant contends the matter cannot be remanded for reconstruction because the trial judge who presided over the immunity hearing recused himself from further participation in the case. However, just as the trial judge's decision to recuse himself did not prevent the trial judge from ruling on Appellant's motion for reconsideration of the ruling on the immunity issue, it would not prevent the trial judge from participating in the reconstruction of the missing portions of the immunity hearing record.[3] However, even if the trial judge were to decline to participate in the reconstruction process, the missing portions of the transcript could still potentially be reconstructed by another trial judge

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[2] Notably, in his order denying Appellant's request for immunity from prosecution, the trial judge expressly found Appellant's testimony during the hearing not to be credible. (Exhibit "A" – Amended Order on Motion to Bar Prosecution, pp. 2-5; p. 7). Thus, the absence of that testimony from the appellate record would be minimally prejudicial to Appellant if prejudicial at all and would not prevent meaningful appellate review in light of the appellate standard of review in criminal cases. See Ladson, 373 S.C. at 325, 644 S.E.2d at 273 ("We believe our supreme court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice flowing from an inadequate record."); see also State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) ("In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. . . . This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." (citations omitted)).

[3] In his order denying Appellant's request for immunity from prosecution, the trial judge recused himself from the case "[b]ecause of the extensive degree of factual determination that are required to decide this motion[.]" (Exhibit "A" – Amended Order on Motion to Bar Prosecution, p. 1). Critically, the trial judge did **not** recuse himself due to any conflicts with the parties or counsel or any issues regarding his partiality, and nothing suggested the trial judge was not impartial in the case, including his ruling denying Appellant immunity. See State v. Langford, 400 S.C. 421, 439, 735 S.E.2d 471, 480 (2012) ("The contention that a judge was biased *solely* because he ruled against a defendant is untenable and insulting towards the court, and it would set a dangerous precedent were we to sanction it." (italics in original)). Thus, there is nothing disqualifying the trial judge from participating in the reconstruction hearing.

with the input of the solicitor and Appellant's trial counsel. See China, 251 S.C. at 334, 162 S.E.2d at 278 ("In order to settle the record on appeal, it became necessary for the trial judge to determine what transpired . . . . In doing so he properly considered the affidavits of counsel and the court reporter as to what happened. The fact that the notes of the court reporter were lost **and the trial judge had no independent recollection of the incident under inquiry** did not preclude him from determining the question upon the basis of the affidavits submitted." (emphasis added)); see also Adams v. H.R. Allen, Inc., 397 S.C. 652, 656, 726 S.E.2d 9, 12 (Ct. App. 2012) ("Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired."). In fact, such a method of reconstruction is routinely required when a trial judge that presided over a hearing requiring reconstruction retires, dies, or is otherwise unavailable to reconstruct the missing portions of the trial record. Accordingly, the fact the trial judge in Appellant's case recused himself from further participation in the matter does not mean reconstruction of the missing portions of the immunity hearing record cannot occur regardless of whether the original trial judge participates or not.

Furthermore, although Appellant now contends he discovered that a complete transcript of the immunity hearing proceedings was unavailable "while preparing the appeal[,]"Appellant acknowledged in his Initial Brief of Appellant and Amended Initial Brief of Appellant that he provided the trial judge with the incomplete partial transcript of the pre-trial hearing in October of 2011 while the matter was still pending before the trial judge and before the appeal was filed. (App. Br. p. 3, n. 2; Amended App. Br. p. 3, n. 2). Despite the fact that Appellant was aware the record from the immunity hearing was incomplete before initiating the appeal, it does not appear Appellant asked the trial judge to attempt to reconstruct the missing portions of the transcript or

to supplement the record with Appellant's missing testimony at that time. See State v. Williams, 321 S.C. 455, 464, n. 4, 469 S.E.2d 49, 55 (1996) ("The burden is on appellant to provide a sufficient record for review."). Instead, Appellant elected to go forward with the appeal with an incomplete trial court record while attempting to use the incompleteness of the record to his advantage by first asserting the incompleteness of the immunity hearing transcript entitled him to receive favorable evidentiary inferences on appeal and by now claiming the incompleteness of the transcript should entitle him to a complete rehearing on the immunity issue and the voiding of an adverse ruling. However, our courts do not permit a party to preserve an error until the error can no longer be corrected and then use such an uncorrected error to the party's advantage. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party cannot take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."). Thus, assuming the missing portion of the transcript from the immunity hearing cannot be successfully reconstructed, Appellant in not entitled to benefit or profit from such an issue by receiving a reversal of the trial judge's ruling and a grant of an entirely new immunity hearing because Appellant specifically declined to address the incompleteness of the record when he had the opportunity to do so after it came to his attention while the matter was still before the trial judge. See State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining Serrette's request to remand for reconstruction of the trial transcript and dismissing Serrette's appeal where "Serrette's own actions [were] the reason a transcript of the proceedings below [was] not available"); see also People v. Paris, 4 N.Y.3d 41, 48, 823 N.E.2d 827, 832-833 (N.Y. 2004) ("A

defendant who wants a reconstruction hearing, however, should be diligent in maximizing the possibility that such a hearing can accomplish its purpose. That means, as a minimum, that defendant should move for a reconstruction hearing promptly after learning that the minutes have been lost. A defendant should also pursue promptly whatever other means are available to increase the likelihood that proceedings can effectively be reconstructed. This might well include, in a typical case, contacting defendant's trial counsel, the prosecutor and the judge, to jog their recollections and to ask that they preserve whatever notes or other records of the proceedings might exist; and also to ask that defendant's trial counsel furnish appellate counsel, without a formal hearing, the benefit of his or her notes or recollection. A defendant who does not proceed diligently is open to the suspicion that he thinks the likelihood of really finding significant appellate issues remote – and would prefer failure in reconstructing the proceedings to success, hoping to claim prejudice when reconstruction proves impossible."). Accordingly, for the foregoing reasons, Appellant's motion seeking a "remand in total" should be denied.

WHEREFORE, Respondent prays that this Court will deny Appellant's Motion to Remand for an entirely new hearing and ruling on the immunity issue; remand the matter to the trial court for reconstruction of the missing portions of the immunity hearing record as requested in the State's pending Motion to Remand for Reconstruction of the Record and Motion to Strike Improperly-Designated Matter from Amended Designation of Matter; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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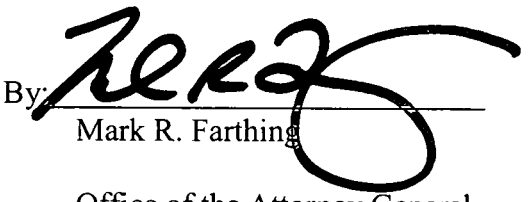
Assistant Attorney General

By: 
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March 18, 2013

EXHIBIT "A"

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF McCORMICK	)	
STATE OF SOUTH CAROLINA,	)	
	)	
-vs-	)	AMENDED ORDER ON MOTION TO BAR PROSECUTION[1]
	)	
JOE ROSS WORLEY,	)	Case Numbers J-036561, J-036562, J-036563, J-036564, J-036565, J-036566
	)	
Defendant.	)	

The defendant moved prior to trial to bar the prosecution of these cases under the immunity provided in S.C. Code Ann. §16-11-410, et seq., the Protection of Persons and Property Act (the Act), which is South Carolina's codification of the common law Castle Doctrine. Pursuant to the holding in *State v. Duncan*, 2011 WL 1744209 (S.C.), the court conducted a full-day pretrial hearing and received testimony from various witnesses, including expert testimony for the defense. The motion is denied. Because of the extensive degree of factual determinations that are required to decide this motion, the court recuses itself from this case and any related civil lawsuit (2010-CP-35-00030). The motion to reconsider bond should be directed to The Honorable R. Knox McMahon for scheduling as Chief Judge for Administrative Purposes for General Sessions Court.

WPC #1

Synopsis of Factual Background

In November 2009, deputies with the McCormick County Sheriff's Department responded to a call of "shots fired" in a residential neighborhood on Lake Thurmond. One of the people who responded to the call, Robert E. Rushton, was injured by a shot

[1] The order of June 23, 2011, which was filed on June 24, 2011, is amended to correct minor typographical and grammatical errors. The attorneys were notified of the court's intent to amend by memo dated July 5, 2011. No substantive changes were made, and the court sees no need to modify the Motion to Reconsider.

fired by Mr. Worley using a high-powered rifle. The bullet from the rifle struck the pistol that Rushton was holding in his hand, blowing off part of his hand.

The defendant lives with his mother, who spends time at the lake house and at another home in another county. The court agrees that the home where Mr. Worley was staying that night qualifies as his dwelling and his residence under the definitions of the Act, specifically §16-11-430(1) and (3).

Mr. Worley admitted firing a weapon earlier in the evening. He testified that he had been trying to scare away a fox that he suspected had injured a pet, and that he had fired the weapon in that fashion on previous occasions. The neighbors are the Sheffields. Because of the previous incidents, Mrs. Gayle Sheffield had made a report to law enforcement months before, but did not want any charges to be brought at that time. Her husband, Mr. Alan Sheffield, testified credibly that he tried to handle the situation in a neighborly fashion. He communicated with Mr. Worley's mother, but the incidents continued to happen and Mr. Worley continued to create loud disturbances in the neighborhood, including firing a weapon at different times, late at night.

Finally, the situation got to the point that the November 2009 call to law enforcement was made. Mr. Worley testified that he had fired the shots to scare the fox on the evening of November 14, 2009, and that he had gone to bed sometime roughly around midnight. Regardless of why Mr. Worley was firing a weapon in a residential neighborhood, the more credible evidence from several prosecution witnesses is that this occurred much later and probably more than once, between 2:00 and 4:00 a.m. on November 15, 2009. Three people responded to the scene: Rushton, McAllister, and Moore, apparently in separate cars.

The defendant raises a claim that Mr. Rushton was a not a law enforcement officer under the Act. There does not appear to be any dispute as to whether McAllister and Moore were law enforcement officers, and the court finds that they were. The court also finds that the greater weight of the evidence supports the determination that Mr. Rushton was a law enforcement officer within the meaning of the Act at the time he was injured. The analysis of that issue is discussed below.

Mr. Worley presented evidence that the night in question was extremely dark, and the court has no reason to disbelieve that evidence. However, the court does not believe that the exterior lights were not turned on at some point prior to the shooting of Deputy Rushton. The court finds no reasonable explanation why a person in his home, perceiving this alleged threat from people who were in his yard, would not cut on exterior lights to see what was happening. Other witnesses testified far more credibly that the lights were turned on.

WPA #3

Mr. Worley's testimony is that he was awakened by a doorbell repeatedly ringing. He makes no assertion that anyone attempted to open a door or window, nor that he heard anyone inside his residence or attempting entry. The court finds no evidence that any of the deputies attempted to enter Mr. Worley's home.

Mr. Worley claims that the house has extensive insulation which prevents noise from being heard. Yet neighbors far away heard and saw a great deal. He denies ever hearing anyone identify himself or herself as a law enforcement officer. He denies seeing any marked patrol cars or blue lights or take-down lights. He denies seeing any badges. In short, he continued to refer to these officers throughout his testimony as burglars, and

emphatically denies that he knew or had any reason to know that the people in his yard were law enforcement officers. His testimony in that regard is not credible.

He states that he got a rifle and came onto his deck, which was on a level above the entry door where the doorbell was being rung. He claims that he saw a figure appear below in the yard, raising a gun and pointing a weapon in his direction. Again, Mr. Worley denies that there was any identification of the people as law enforcement officers, and Mr. Worley fired the rifle in response to what he alleges was an unprovoked threat of death or serious bodily injury. The evidence of damage to the pistol and the angle of the bullet from Mr. Worley's rifle support his position that Deputy Rushton was aiming his Glock pistol at Mr. Worley when the defendant fired.

Mr. Worley states that the impact of the bullet from the rifle spun the person around. The person then ran towards an embankment, realized that the embankment was too steep to safely traverse, and ran back in the direction of the house. People joined the injured person and they left. Mr. Worley said that he then went out into his yard, picked up the Deputy's weapon, and took it up to one of the empty patrol cars, leaving it inside.

Mr. Worley presented expert testimony in the field of criminology. The gist of the testimony related to whether Deputy Rushton and his fellow deputies followed proper police procedures. Expert testimony was elicited that it is probable that Mr. Worley would not have known that the people in his yard were law enforcement officers. It is the expert's opinion that a "shots fired" call is one that presents a very precarious situation of heightened alert. Once the officers determined that there was no active shooter, the proper procedure, according to the expert, was for the officers to stay a safe distance from the dwelling, cordon off the area, activate blue lights on their vehicles so that they would

be easily identified as law enforcement officers, use bullhorns or similar devices, and call the defendant's home to explain why they were there and to establish a dialogue with him. The defendant's expert did not seem to question the right of a law enforcement officer to draw his weapon and point it when he was presented with a person holding a weapon.

With all due respect to the expert, the evidence refuting Mr. Worley's assertions of what occurred is overwhelming and undermines the expert's conclusions. While there are inconsistencies in details and some deviation between the testimony presented and previous written statements of the prosecution's witnesses, the court's assessment is that the most essential elements of the prosecution's version of the events are consistent and far more rational. Defense counsel did a very thorough job of developing evidence, as well as bringing out the inconsistencies in the prosecution's case and attacking the credibility of its witnesses. Defense counsel has obviously done extensive work and research. However, having observed the witnesses and evaluated their credibility, the court finds that the prosecution's version of what happened is far more believable.

In an effort to avoid an unnecessarily lengthy recital of the facts, the following is a summary of what the greater weight of the evidence established. On the evening of the shooting, the neighbors had reached the point where they felt that they had to call law enforcement. Mr. Worley had been firing a weapon in the yard again, in a residential area, late at night, and creating another very troubling disturbance. Three law enforcement officers arrived on the scene around 4:00 a.m. They first spoke to the complaining party, then attempted to make contact with Mr. Worley. They rang the doorbell and knocked on the door. They repeatedly announced that they were law

enforcement officers. When no one answered, the deputies did not attempt to force their way into the home. They went back up to the home of the complaining parties. They saw lights come on at the Worley home and returned to it. The lights may have gone off for a period and come back on, and the court recognizes that there is a dispute in the evidence as to exactly when lights were turned on and where they were located. The court believes that is attributable to the traumatic events that were experienced that night.

Mr. Worley asked who was at his home, and he heard the response that these were law enforcement officers. His response was, "I don't give a f____." The evidence demonstrates very clearly that the officers knocked and announced repeatedly.

Instead of acting as a reasonable person would have done under the circumstances, including such actions as speaking with his mother who was also in the house, calling law enforcement on the phone, or engaging in some dialogue with the people on his yard until he was satisfied that the situation was safe, Mr. Worley's response was to come out on his deck above these officers holding a high powered rifle. The officers yelled, "gun." Deputy Rushton aimed his weapon at Mr. Worley, ordering him to drop the rifle (which he believed at that point was a shotgun). Deputy Rushton was not wearing a military style uniform, but had on clothing indicating he was a law enforcement officer and had his badge displayed.

It does not matter whether or not Deputy Rushton was blinded by a spotlight momentarily. He had every right to point his weapon at Mr. Worley under those circumstances. At the same time, at least one of the other officers was yelling, identifying himself as law enforcement and ordering Mr. Worley to drop the gun. Mr. Worley fired at Deputy Rushton, hitting the pistol and blowing off part of the deputy's

hand. He then fired an additional shot or shots. In the aftermath, he conducted himself as though he was searching for the injured party, not to aid him, but to inflict further harm. He made a statement to the effect of asking, "Where are you, you son of a b_____?" He had absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home. Shell casings were recovered from the deck. The rifle was in the house. The court does not recall any evidence that Mr. Worley attempted to call law enforcement before, during, or after he shot the deputy. It makes absolutely no sense that three law enforcement officers in a darkened area, responding to a "shots fired" call, would fail to identify themselves as law enforcement officers, loudly and emphatically. The court does not find Mr. Worley to be credible.

Analysis

WPU #7

The motion before the court is an assertion that the State is barred from prosecuting the defendant because he is entitled to immunity under the Act. The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so.

The critical statute is §16-11-450(A), which reads as follows:

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

The inclusion of the words "another applicable provision of law" is troubling, because it can be read as requiring judges to have separate pretrial hearings in every case where it is asserted that there was a justifiable use of

deadly force. The legislature could not have intended such a broad reading of the statute granting immunity, and that issue does not appear to have been specifically raised here.

The greater weight of the evidence supports the conclusion that Deputy Rushton was a law enforcement officer acting in the performance of his official duties and identifying himself in accordance with applicable law. The overwhelming evidence is that Mr. Worley reasonably should have known that the person he shot was a law enforcement officer.

Was Deputy Rushton a Law Enforcement Officer?

Mr. Rushton had worked as a deputy, resigned to take a job in the Middle East training law enforcement personnel, and returned to work for the McCormick County Sheriff's Department shortly before this incident. The defendant elicited testimony from Mr. Rushton that he did not remember retaking an oath of office when he returned to employment in McCormick County. However, State's exhibit 1-A is a copy of an oath of office, sworn before Kathryne P. Butler, who was the Clerk of Court and a Notary Public, on November 2, 2009. The court finds that Robert Edward Rushton was appointed as a Deputy Sheriff of McCormick County to serve at the pleasure of the Sheriff, and that he was serving in that capacity at all times in question.

The defendant raises the issue that the oath taken is not the complete oath required for one to be considered a deputy, and the appointment was not approved by a circuit judge. Deputy Rushton signed the following oath on a form entitled "Oath for County and State Officers":

> First, I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the

> office to which I have been elected (or appointed), and that I will, to the best of my ability, discharge the duties thereof, and preserve and protect and defend the Constitution of this State and of the United States.
>
> So help me God.

The form indicates that it was to be sent to the Secretary of State's office. There is no evidence that it was not. The only reasonable interpretation is that this is the oath required under Article III, Section 26 of the South Carolina Constitution.

The defendant claims that this oath is inadequate because it does not contain the language required under two statutes. First, there is the assertion that Mr. Rushton's appointment had not been approved by a circuit judge. The defense is correct that §23-13-10 provides for a circuit judge to approve appointment of deputies.

> **SECTION 23-13-10.** Appointment; approval by court; responsibility of sheriff for acts of deputy.
>
> The sheriff may appoint one or more deputies to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall be evidenced by a certificate thereof, signed by the sheriff, and shall continue during his pleasure. The sheriff shall in all cases be answerable for neglect of duty or misconduct in office of any deputy.

WP #9

To the extent that part of this statute provides for judicial approval of executive branch appointments, it is a clear violation of the separation of powers doctrine. It simply cannot withstand scrutiny. That being the determination of this court, the failure of a circuit judge to sign a form approving the appointment of a deputy cannot reasonably be construed to mean that the deputy is not a law enforcement officer within the meaning of the Act. To rule otherwise would allow the judicial branch to veto personnel decisions made by the Sheriff, a member of the executive branch.

The more seriously argued position relates to §23-13-20, a copy of which was entered as defendant's exhibit 1-A. It reads, as follows:

SECTION 23-13-20. Bond and oath.

> Each deputy sheriff shall, before entering upon the discharge of his duty, enter into bond in the sum of one thousand dollars, with sufficient surety, to be approved by the sheriff of the county, conditioned for the faithful performance of his duties and for the payment to the county and to any person of all such damages as they or any of them may sustain by reason of his malfeasance in office or abuse of his discretion. He shall, in addition to the oath of office now prescribed by Section 26, of Article III, of the Constitution, take the following oath (or affirmation) to wit: "I further solemnly swear (or affirm) that during my term of office as county deputy, I will study the act prescribing my duties, will be alert and vigilant to enforce the criminal laws of the State and to detect and bring to punishment every violator of them, will conduct myself at all times with due consideration to all persons and will not be influenced in any matter on account of personal bias or prejudice. So help me, God." The form of such bond shall be approved by the county attorney and, with the oaths, shall be filed with and kept by the clerk of court for the county.
> A blanket bond may be used in any county to fulfill the bond requirement of this section upon approval of the County Council and the County Attorney.

The issue related to the question of bond was touched upon at the hearing. The defendant has failed to prove that there was no blanket bond in effect sufficient to meet the bond requirement.

WPL #10

The term "law enforcement officer" does not appear to be defined under the Act. So, the court is left to interpret the meaning of the words used in the statute. A word search was done to try to discover every section of the S.C. Code and Constitution that might attempt to define the term "law enforcement officer" or "deputy" or "sheriff." There are a couple of definitions in the Code, but they really do not add much to what one would understand through the common usage of the term.

Statutory interpretation is a matter of law. The oath prescribed by the Constitution was taken by Mr. Rushton.

In the recent case of *City of Rock Hill v. Harris*, 2011 WL 204799, the South Carolina Supreme Court discussed the interaction between constitutional provisions and legislative enactments. Clearly, Article V, Section 24 of the Constitution of South Carolina provides the General Assembly with authority to establish certain requirements governing sheriffs and their offices. *Harris* cites language from *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) which stands for the general proposition that the cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. The general proposition requires a court to refrain from statutory construction and apply the statute according to its literal meaning, where the terms in a statute a clear and unambiguous. *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). The *Harris* court explains further, however, that there is an exception.

WPM #11

> Absent ambiguity, the court will look to the plain meaning of the words used to determine their effect. Hodges, 341 S.C. at 85, 533 S.E.2d at 581. However, the plain meaning rule is subject to this caveat:
>
> > However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.
> >
> > Id. (quoting Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

The *Hodges* case also stands for a proposition that is critical to the court's analysis. Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. When the Act was written, the legislature set forth its legislative intent in §16-11-420, which reads:

§ 16-11-420. Intent and findings of General Assembly.

(A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.

(B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.

(C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.

(D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.

(E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.

WPA #12

The court finds that the General Assembly recognized that exceptions had to be made for law enforcement personnel. Those exceptions are not without limitation, and they are addressed in the Act. The legislature left in place the ability to raise the issue of self-defense against a law enforcement officer and to have one's conduct evaluated in that context by a trial where the State bears the burden of proving beyond a reasonable doubt that the accused did not act in self-defense. The precise issue before the court is the immunity provisions which bar the State from any type of prosecution.

It is the court's finding that the General Assembly did not intend for the protections and restrictions related to using deadly force against law enforcement officers to be subject to the strict, technical evaluations argued by the defendant. In trying to

construe different statutes and examine the legislative intent, the court concludes that the failure to take an additional or supplementary oath in § 23-13-20 does not deprive the State of the ability to prosecute here for shooting a deputy, nor does it deprive the victim from asserting that he is a law enforcement officer for purposes of evaluating the applicability of the Act. In the context of interpreting the Act and evaluating it in light of other statutes, the court determines that the oath in §23-13-20 should be read as supplemental to the Constitutional requirement, where the deputy is swearing to uphold the law, and the failure to have those additional words included on a form should not be construed to deprive the State of the ability to prosecute the defendant.

Failure to Prove Reasonable Belief Regarding Law Enforcement Issue

Even if there is some problem in considering Deputy Rushton as a law enforcement officer because of a technical condition he had not fulfilled, the Act does not preclude prosecution. The defendant has not established that he had a reasonable belief that he was not firing upon law enforcement officers. There were three people in the yard (two of whom appear to have admittedly have been law enforcement officers) and they were repeatedly yelling out their identification as such. Mr. Worley's claim is that he did not know who he was shooting toward, but acted in self-defense when he saw a figure point a gun at him. The defendant may raise self-defense and any other applicable defenses, but the determination of the court is that the Act does not preclude prosecution.

No Proof of Entry or Attempted Entry

Regardless of the position taken on the preceding issue, the Act does not prohibit prosecution because none of the people in Mr. Worley's yard were attempting to enter the home. In order for the immunity to attach, §16-11-450(A) requires that Mr. Worley

establish that he was permitted to use deadly force by the provisions of §16-11-440 or "another applicable provision of law."

Section 16-11-440(A) reads, in part, as follows:

> § 16-11-440. Presumption of reasonable fear of imminent peril when using deadly force against another unlawfully entering residence, occupied vehicle or place of business.
>
> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence . . . ; 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.

WPM #14

The court concludes that the defendant has not established by the preponderance of the evidence that Deputy Rushton was doing anything unlawful. Mr. Worley has not proven that Deputy Rushton was entering or attempting to enter the Worley residence, by force or otherwise. He was there with the other officers, identifying himself as law enforcement, ringing the doorbell and knocking on the door.

Section 16-11-440(B) disallows the presumption of subsection (A), thus making the immunity inapplicable, where the person [subsection (1)] against whom the deadly force is used has the right to be in the dwelling; or, [subsection (4)] where the person against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling in the performance of his official duties, and he identifies himself in accordance with applicable law or the

person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

As to both subsections §16-11-440(B)(1) and (4), again, there is no evidence that Deputy Rushton or any of the other officers were in the residence or attempting to enter it. So, neither subsection would provide immunity from prosecution, in the court's determination.

The failure of evidence regarding entry or attempted entry is fatal to the defendant's argument concerning subsection (B). However, there was a great deal of focus in the testimony concerning subsection (B)(4) dealing with the defendant's assertion that Deputy Rushton either was not a law enforcement officer (an issue that was discussed previously) or that he did follow proper law enforcement procedures. So, the court will address those issues, as well, though it is probably unnecessary and redundant.

The evidence, in the court's view, established that Deputy Rushton was clearly acting in accordance with his official duties and that he identified himself in accordance with applicable law. He was called to the scene and responded with other officers to a call of "shots fired." He spoke with the complaining parties, went to check on the person who was alleged to have fired the shots, and properly reacted when the defendant came out holding a gun. Even the defense's expert supported the assertion that an officer can point his weapon when confronted with someone holding a rifle under these circumstances.

To the extent that the defense expert testified that the deputies did not conduct themselves in accordance with applicable law, the court rejects that

conclusion. The officers repeatedly and consistently identified themselves as law enforcement officers. Law enforcement officers are permitted to "knock and announce," and the evidence indicates that they did that properly. Even under the defendant's version of the events, the people in his yard were announcing their presence by repeatedly ringing the doorbell. It is not a situation where anyone claims that there was a fear of people sneaking into a residence at night. Again, they did not enter the residence or attempt to do so. Thus, while this subsection does not provide immunity from prosecution in any event, the conclusion of the court is that the defendant has also failed to prove that he did not know or that he was reasonable in failing to know that the people in his yard, including Deputy Rushton, were law enforcement officers.[2]

THEREFORE, IT IS ORDERED that the motion to bar prosecution of these cases is denied.

#16

IT IS FURTHER ORDERED that the undersigned judge recuses himself from further involvement in this matter. The attorneys are to notify the Chief Judge for Administrative Purposes, The Honorable R. Knox McMahon, to have a hearing scheduled on the defendant's motion to reduce bond.

AND IT IS SO ORDERED.

July 5, 2011

William P. Keesley, Judge

[2] Though the court does not recall it being specifically raised, there is not immunity under §16-11-440(C), either. That provision does not appear to vary in any significant way from the typical self-defense situation. Mr. Worley was not in "another place." An appurtenant structure would be part of the dwelling, invoking the exclusions related to law enforcement officers. In the trial, Mr. Worley may raise self-defense.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from McCormick County
Honorable William P. Keesley, Circuit Court Judge
Appellate Case No. 2012-210646

THE STATE,

Respondent,

vs.

JOE ROSS WORLEY,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Appellant's Motion to Remand on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Desa Ballard and Harvey M. Watson, III, Esquires
Ballard Watson Weissenstein
Post Office Box 6338
West Columbia, South Carolina 29171

Carson Henderson, Esquire
The Henderson Law Firm, PC
109-B Oak Avenue
Greenwood, South Carolina 29646

Billy J. Garrett, Jr., Esquire
The Garrett Law Firm, PC
109 Oak Avenue
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 18th day of March, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

March 18, 2013

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RE: State v. Joe Ross Worley – Appellate Case No. 2012-210646

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Return to Appellant's Motion to Remand, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/erd
Enclosures

cc: Desa Ballard, Esquire
Harvey Watson, III, Esquire
Carson Henderson, Esquire
Billy J. Garrett, Jr., Esquire
Victim Services