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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 23, 1996

Captain Mark A. Keel
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Re: Informal Opinion

Dear Captain Keel:

You have requested assistance in researching the legal ramifications of the new Concealed Weapons Permit as it relates to civilian use of force. You further note that

> ... for the purpose of approving instructor lesson plans and making certain that civilians have the proper training, we need an outline of the minimum State law requirements with reference to civilian self-defense, protection of others and protection of property.

LAW/ANALYSIS

By Act No. 464 of 1996, the General Assembly has enacted the "Law Abiding Citizens Self Defense Act of 1996." By its terms, the Act sets the standards for issuance of a concealable weapons permit. Section 23-31-215 of the Act requires SLED to issue the permit, provided the requirements such as age, residency, proof of training, and a favorable fingerprint review and background check etc., are met. The Act also requires, among other things, that the applicant is "not prohibited by state law from possessing the weapon ...".

Request letter

The new statute also goes to great lengths to preserve much of existing law. Pursuant to Section 23-31-215(M), the Act makes clear that the existing statutory prohibitions whereby firearms may not be possessed are preserved. These include statutes prohibiting the possession of firearms on the capitol grounds, public buildings, school property, the premises of establishment for selling of alcohol for consumption on the premises etc. In addition, this Section refers to a number of other places where a concealable weapon may not be carried, notwithstanding the issuance of a permit. Included in such prohibitions are locations such as law enforcement agencies, detention facilities, courthouses and courtrooms, school and college athletic events, day-care facilities, churches, and medical facilities.

In addition, Section 23-31-215(R) specifically provides:

> [n]o provision contained within this act shall expand, diminish or alter the duty of care owed by and liability accruing to, as may exist at law immediately prior to the effective date of this act, the owner of or individual in legal possession of real property for the injury or death of an invitee, licensee, or trespasser caused by the use of misuse by a third party of a concealable weapon. Absence of a sign prohibiting conceal-able weapons shall not constitute negligence or a lack of duty of care.

Finally, Section 8 of the Act states that nothing in the Act is deemed to limit the following:

1. the right of the public or private employee to limit a person licensed pursuant to the Act from carrying a concealable weapon onto the premises of business or work place or while using machinery or equipment operated by the business;

2. the right of a private property owner or person in legal possession or control of the property to prohibit the carrying of a concealable weapon upon the premises.

Moreover, the proper posting by the owner, employer or person in the legal possession of premises is deemed notice not to bring such weapons onto the premises and a violation thereof is a criminal offense.

It clearly appears to have been the intent of the General Assembly to leave as is the substantive law relative to defense of property, self-defense and the propriety of a private citizen's use of deadly force. While the application of the new Act will undoubtedly alter the current situation as to whether or not a particular individual is in lawful possession of a firearm, the statute does not purport to change the legal elements as to whether or not force may be properly used in a given instance. The issue of lawful possession is capable of arising no matter whether the concealable weapons statute allows a permit to be issued only in certain limited situations, or as it does more frequently, under the new law. Thus, you indicate you are not concerned with the application of the new law to a citizen's use of force, but are interested only in an outline of the substantive law in these areas. Your question thus relates to the law in South Carolina concerning self-defense, defense of others, resistance to an illegal arrest and citizen's arrest as well as the defense of property. Thus, I will address each of these areas in turn.

THE LAW OF SELF DEFENSE IN SOUTH CAROLINA

While in South Carolina, the defense of self-defense must be raised by the defendant, once raised, the defendant is no longer required to demonstrate these elements by a preponderance of the evidence. Instead, the defendant "must merely produce evidence which causes the jury to have a reasonable doubt regarding his guilt." State v. Bellamy, 293 S.C. 103, 105, 359 S.E.2d 63 (1987). The absence of self-defense thus must be proven by the prosecution beyond a reasonable doubt. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989).

The Fuller case also sets forth the elements of self-defense in South Carolina. These are:

(1) the defendant must be without fault in bringing on the difficulty;

(2) the defendant must actually believe he is in imminent danger of loss of life or serious bodily injury or actually was in such danger;

(3) if the defendant believed he was in such danger, a reasonable or prudent man of ordinary firmness and courage would have believed himself to be in such danger; if the defendant actually was in such danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and

courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life;

(4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

DEFENDANT MUST BE WITHOUT FAULT IN BRINGING ON THE DIFFICULTY

The first element is that the defendant must be without fault in bringing on the difficulty. The Court in State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955) emphasized that "one who so pleads (the defense of self-defense) must be without fault in bringing on the difficulty or the necessity of taking human life, it being obvious that one cannot through his own fault bring on a difficulty and then claim the right of self-defense ... ." In Jackson, the Court found that the defendant was not at fault in bringing on the difficulty because "the officer, whose identity as an officer was unknown to the defendant, had actually knocked the door open and was killed as he entered the house, and that his presence in the house was unlawful because without a warrant." McAninch and Fairey, The Criminal Law of South Carolina, (3d ed.), 479.

One typical situation where the defendant is deemed to be not without fault in bringing about the difficulty is mutual combat. The leading South Carolina case with respect to mutual combat is State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). There, defendant and the deceased had quarreled prior to the date of the homicide. Both made threats against the other and appellant purchased a gun on the night before the death occurred. Shortly before the shooting, the combatants quarreled and the defendant waved a pistol in the face of the decedent. Then, the deceased got his pistol. Defendant walked out into the street, virtually inviting an encounter and both parties fired at each other. The Supreme Court affirmed the trial court's instructions to the jury with respect of mutual combat, noting that "[t]here was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point." 260 S.C. at 452. The Court in discussing the doctrine of mutual combat, quoted with approval 40 C.J.S. Homicide, § 122 which states:

> "Where a person voluntarily participates in ... mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he with-

> draws and endeavors in good faith to decline further conflict, and either by word or act, makes that fact known to his adversary ... ."

Id. at 451.

A similar fact situation was distinguished by the Court in State v. Hendrix, 270 S. C. 653, 244 S.E.2d 503 (1978). Over a strong dissent that the participants were mutual combatants, and thus no defense of self-defense was warranted, the Court stated in a footnote that "[t]he fact that appellant was on his own land with no duty to retreat and attempted to avoid the encounter and made this known to his adversary distinguishes this situation from that of mutual combat, for which self-defense is not available." 270 S.C. at 659, n.2.

You should be aware, therefore, that there is often a fine line between mutual combat and the first element of defense of a self-defense claim, a lack of fault in bringing about the difficulty. McAninch and Fairey, appear somewhat skeptical regarding the distinction drawn in Hendrix, as was the dissenting opinion in that case. Thus, the first element will often require a "close reading". McAninch and Fairey, supra.

The use of language can also result in the defendant's losing the defense of self-defense because of having a fault in bringing about the difficulty. In State v. Rowell, 75 S.C. 494, 510, 56 S.E. 23, 29 (1906), the Court stated that self-defense is not available where one uses "language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on." In essence this is the use of mutual combat by words rather than deeds.

Our Court has also suggested, by way of dicta, that even if the defendant is provocative or is lacking in fault in bringing about the difficulty, he can still "redeem" himself, so to speak, where the defense of self-defense becomes available to him. As was stated in State v. Hendrix, supra,

> [w]hile it is not necessary to our position, even if Hendrix's prior actions had constituted provocation, the appellant's act of ordering deceased away would have constituted a withdrawal after aggression which was communicated to the deceased and which would have restored appellant's right of self-defense. See 40 C.J.S. Homicide Sections 121, 133 (1944).

McAninch and Fairey make the argument that if the original aggressor employs non-deadly force which is then met by deadly force from the original victim, such deadly force is excessive, thereby giving the original aggressor the right to defend himself against such deadly force. Supra at p. 481. They correctly note, however, that our Court has not adopted this rule and that in State v. Randall, 118 S.C. 158, 110 S.E. 123 (1921), the Court had refused to overturn the trial court where such instructions were rejected.

And in State v. Hardin, 114 S.C. 280, 291-292, 103 S.E. 557 (1919), the Court affirmed the trial court's instruction to the jury regarding the necessity that the defendant be without fault in bringing about the difficulty. The defendant argued on appeal that in order to deny the defense of self-defense, the defendant's fault must be "reasonably calculated to provoke a difficulty with a person of ordinary firmness, reason, and prudence" and that a "'slight'" fault was thus excusable. The Court rejected this argument implying that the argument that a "slight fault" by the defendant still enabled the defense of self-defense to be maintained was not the law in South Carolina.

BELIEF IN IMMINENT DANGER OR ACTUAL IMMINENT DANGER

The second element of self-defense is stated in State v. Fuller, supra as follows:

> Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.

You will note that this is an alternative, "either-or" test. McAninch and Fairey note that "South Carolina may be unique in its alternative approach ... ." In State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994), the Court emphasized that either of the two tests would meet the second element if evidence were presented thereof, when it was concluded:

> [h]ere Goodson presented no evidence which shows that he believed he was in imminent danger of losing his life or sustaining serious bodily injuries at the time he shot Hemingway. There is also no evidence that Goodson was actually in imminent danger at the time he shot Hemingway. Accordingly, we find that the trial judge did not err in failing to instruct the jury on self defense.

312 S.C. at 280.

The "actual belief" portion of the test was criticized by the dissent in State v. Hendrix, supra. There, Justice Gregory noted that "[i]t is difficult, if not impossible, to prove what a defendant 'believes' unless he does take the stand and testify." Thus, in South Carolina, a defendant can believe himself to be in imminent danger even if such is not the case; or not know he is in imminent danger, yet actually was, and still be entitled to meet this portion of the test.

As to the first prong, the Court has reiterated repeatedly that a person is entitled to rely on reasonable appearances. In State v. Fuller, supra, the Court held that the trial court should have charged that "words accompanied by hostile acts, may, depending upon the circumstances, establish a plea of self-defense ... ." 297 S.C. at 444, quoting State v. Harvey, 220 S.C. 506, 68 S.E.2d 404 (1951) and State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920). And in State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936), it was stated:

> one may act on appearance. He may be mistaken. The law does not hold him to a refined assessment of the danger, provided of course, he acted as the person of ordinary coolness and courage would have acted or should have acted in meeting the appearance of danger. He doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self preservation and prevent his assailant getting the drop on him.

REASONABLENESS OF BELIEF

The third element of the self-defense criteria is the reasonableness of defendant's belief. In Goodson, the Court presented this portion of the test as follows:

> if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; if the defendant actually was in imminent danger, the circumstances were as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life ... .

See also, State v. Lee, 293 S.C. 536, 362 S.E.2d 24 (1987).

While the hypothetical "reasonable man" standard is the applicable test, McAninch and Fairey point out that in State v. Hendrix, the Court was willing to take the defendant's age into account, noting that the defendant at sixty-five was "hardly a physical match for the younger man." Thus, McAninch and Fairey argue that the Court "should consider a person of ordinary firmness but one who shares some of the physical characteristics of the defendant, at least age, general physical condition and gender in contrast to those physical characteristics of the aggressor." Id. at 483.

Also in Hendrix, the Court noted that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased ... ." 270 S.C. at 661.

DUTY TO RETREAT

The final prong of the self-defense test is the duty to retreat before using reasonable force. Goodson states that the defendant must have had "no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance."

In State v. Williams, ____ S.C. ____, 459 S.E.2d 519 (Ct. App. 1995), our Court of Appeals appears to recognize in dicta that the duty to retreat is not required where the defendant claiming self-defense uses non-deadly force.

There are also a number of instances where the duty to retreat is not applicable because of various public policy considerations. In the recent case of State v. Rufus Brown, Op. No. 24380 (1996), for example, the Court reiterated that

> [u]nder the law of self-defense, one who is attacked on his own premises is immune from the duty to retreat. State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (1985); State v. Sales 285 S.C. 113, 328 S.E.2d 619 (1985). Likewise, a lawful guest attacked in the owner's home has no duty to retreat where the attacker is an intruder. State v. Osborne, 202 S.C. 473, 25 S.E.2d 561 (1943); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942). ...
>
> In State v. Chambers, 310 S.C. 43, 425 S.E.2d 45 (Ct. App. 1992), the Court of Appeals held that where the attacker is the homeowner, a lawful guest has a duty to retreat before a claim of self-defense will stand. We now adopt this rule.

McAninch and Fairey identify a whole host of other situations where the duty of retreat is not applicable. These include:

1. In addition to no duty to retreat in one's home, no duty to retreat within the home's curtilage. State v. Jackson, supra or beyond the curtilage. State v. Quick, 138 S.C. 147, 135 S.E. 800 (1926).

2. No duty to retreat in one's place of business even if the aggressor also has a right to be there. State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1928).

3. No duty to retreat if a guest in home of another unless required to leave by the householder. State v. Osborne, 202 S.C. 463, 25 S.E.2d 492 (1942).

4. No duty to retreat where attacked in a person's club room. State v. Marlowe, 120 S.C. 205, 207, 112 S.E. 921, 922 (1921). ["A man is no more bound to allow himself to be run out of his rest room than his workshop."]

5. Where both parties own the premises, neither has the duty to retreat where the other is the aggressor. State v. Gibbs, 113 S.C. 256, 102 S.E. 333 (1920).

6. Where both live in the same home, neither has the duty to retreat if the other is the aggressor. State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953).

7. Where both are guests in the same home, neither has the duty to retreat if the other is the aggressor. State v. Smith, 226 S.C. 418, 85 S.E.2d 409 (1955).

8. Where both are fellow workers on same job site, neither has the duty to retreat if the other is the aggressor. State v. Gordon, 128 S.C. 422, 122 S.E. 501 (1924).

9. One need not retreat "if to do so would apparently increase his danger." State v. McGee, 185 S.C. 184, 190, 193 S.E. 303, 306 (1937).

10. Duty to retreat before using deadly force in self-defense on a public street or highway, even when in own automobile. State v. McGee, supra.

11. Duty to retreat in a store where public is invited. State v. Peeples, 126 S.C. 422, 120 S.E. 361 (1923).

In State v. Finley, 277 S.C. 548, 551, 290 S.E.2d 808 (1982), the Court rejected the idea of "imperfect self-defense". There, said the Court,

> appellant contends an actual, although unreasonable, belief that he was in imminent danger of bodily harm is a defense to the charge of murder which reduces the crime to voluntary manslaughter. This is not the law in South Carolina. Heretofore, we have fully addressed the law of self-defense and its component elements. See State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Appellant's actual belief of imminent danger must be such that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief.

Finally, our Court has expressed the importance of the proportionality of the response in self-defense matters. In State v. Wood, 1 S.C.L. 351, 352 (1 Bay) (1794), the Court emphasized that it is not "reasonable that a man should be banged with a cudgel. That a small blow will not justify an enormous beating."

DEFENSE OF OTHERS

In State v. Hays, 121 S.C. 163, 168, 113 S.E. 362, 363 (1922), the Court approved a "defense of others" instruction. Such instruction was as follows:

> "In such case the right to take the life of such assailant upon such unprovoked assault extends to any relative, friend, or bystander who would likewise have the right to take the life of such assailant if such act was necessary to save the person so wrongfully assailed from imminent danger of being murdered by such assailant. In other words, if the assailant makes a malicious and unprovoked assault with a deadly weapon upon one person with the apparent malicious intention to take the life of the person assailed and thereby commit

> murder, then, where the danger of the commission of such murder is imminent, any relative, friend, or bystander could have the right to take the life of such assailant if necessary in order to prevent the commission of such murder, provided there was no other reasonable means of escape for the person so assailed, and provided both the person assailed and the person coming to his defense were without legal fault in bringing on the difficulty."

South Carolina has adopted the so-called "alter ego" rule with respect to the defense of others. In State v. Cook, 78 S.C. 253, 59 S.E. 862 (1907), the Court summarized this rule:

> [a] person who [intervenes on behalf of another] will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing since the person interfering is affected by the principle that the party bringing on the difficulty cannot take advantage of his own wrong.

In other words, the person intervening is deemed to "stand in the shoes" of the person on whose behalf he is intervening. If that individual "had the right to defend himself, then the intervening party is also protected by that right. If, however, the party had no right to use force ... then the intervening party will also assume the liability of the person on whose behalf he interfered." McAninch and Fairey, p. 494.

The "defense of others" rules apply to "any relative, friend or bystanders ... ." State v. Hays, supra. The same principles of retreat and withdrawal apply as if the individual himself were acting in self-defense rather than on behalf of someone else. If there was no duty to retreat by the person being assisted, there is no duty imposed upon the intervenor.

State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985) clearly illustrates how the general principles of defense of others work. In Sales, defendant intervened on behalf of his sister who was being attacked by her boyfriend. The defendant argued on appeal that the trial judge had erred in refusing to charge that a person attacked on his own premises had no duty to retreat. Summarizing the law with respect to defense of others, the Court agreed, concluding:

> [t]he judge properly charged the jury that under the law of self-defense, a person may not only take life in his own defense, but also in defense of a relative. State v. Hays,, 121 S.C. 163, 113 S.E. 362 (1922). He also correctly stated that the right to intervene to protect the relative is subject to the same limitations as the right of self-defense. He then charged the jury the four elements of self-defense found in State v. Hendrix, 270 S.C. 653, 244 S.E. 503 (1978), including the duty to retreat.

The Court further concluded, however, that the trial court had failed to take into account his charge regarding no duty to retreat on one's own property.

> A person attacked on his own premises, without fault has the right to claim immunity from the law of retreat. State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953). Therefore, the appellant's sister had no duty to retreat. The intervenor assumes the rights and limitations of the person he acts to protect. 40 C.J.S. Homicide § 108 (1944). The appellant thus had no duty to retreat, and the jury should have been so charged.

285 S.C. at 114.

RESISTANCE TO UNLAWFUL ARREST

Of course, there is no right to resist a lawful arrest. Town of Springdale v. Butler, 299 S.C. 276, 384 S.E.2d 697 (1989). An officer may use such force as is reasonably necessary to arrest lawfully. State v. Franklin, 80 S.C. 332, 60 S.E. 953 (1908), affd. sub. nom., Franklin v. S.C., 218 U.S. 161 (1910). It is obvious that the officer may not use excessive force, however and so long as the force used is not excessive, defendant is not entitled to instructions on self-defense. McAninch and Fairey, p.490.

If the arrest is unlawful, the defendant possesses the right to resist, even to the point of use of deadly force. In State v.Jackson, supra, the Court stated that

> [a]ppellant in defending his person from an unlawful arrest had the right to use so much force as was apparently necessary to accomplish his deliverance and no more.

In State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919), the Court stated that "a person's right to resist an unlawful arrest, ... may[be] exercise[d] to the extent of taking the life of another, if it be necessary, in order to regain his freedom. 112 S.C. at 105.

State v. Nall, 304 S.C. 332, 404 S.E.2d 202 (1991) represents a leading case in the area both of citizen's arrest and the right to resist a citizen's arrest. The Nalls were tried for assault and battery with intent to kill. Resisting a citizen's arrest, they contended they merely defended themselves, using only the force necessary and then withdrew. The trial judge granted the Nall brothers motion for a directed verdict at the close of the State's case.

The Court summarized the common law of citizen's arrest as follows:

> [u]nder the modern common law, any person who views a felony being committed has a duty to endeavor to arrest the felon either personally or by calling others to his aid or by seeking out an officer of the peace.
>
> The law also permits a private person to arrest for a felony not committed in his presence if (1) the felony was actually committed and (2) the private person has reasonable cause to believe the one he is arresting committed the felony for which the arrest is made. Both requirements must be met. If it later appears that the felony for which arrest has been made was not in fact committed, the arrest is unlawful. Likewise, if there was no reason in fact to believe the person arrested committed the felony, the arrest is unlawful. On the other hand, if the felony was committed, but it later appears the person arrested did not commit it, the arrest is still lawful if there was reasonable cause to suspect him.
>
> Finally, the law permits a private person to arrest for a misdemeanor committed in his presence, if it constitutes a breach of the peace. A private person has no lawful authority to arrest for misdemeanors not committed in his presence.
>
> Except when made upon view of the felony, a private person making an arrest must give reasonable notice of his purpose to arrest and the cause for the arrest, together with a demand that the suspect submit to arrest. No particular form

> of words must be used. What constitutes a reasonable notice depends on the circumstances of each case.
>
> Once notice is given, it is the duty of the suspect to submit peaceably to the arrest without resistance or disturbance of the peace. If after notice of arrest, the suspect attempts to flee or forcibly to resist arrest, the person making the arrest may use reasonable means to effect it. On the other hand, if the person making the arrest fails to make known his purpose, he may be treated as a trespasser.

The Court referenced Section 17-13-10 which provides that

> [u]pon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.

Noting that Section 17-13-10(b) "changed the common law rule that a citizen's arrest was unlawful if no felony had been committed", the statutory provision authorized a private citizen to arrest upon information that a felony had been committed. Said the Court,

> [a]n arrest upon 'certain information,' is lawful even though no felony has been committed. Burton v. McNeill, 196 S.C. 250, 13 S.E.2d 10 (1941). "Certain information" is that which is positive, credible, reliable, and trustworthy ... . The statute does not change the common law requirement that the person making the arrest must have reasonable cause to believe the person he is arresting is the culprit.

304 S.C. at 240.

Next, the Court turned to the question of whether this particular citizen's arrest was lawful. In this instance, the individual making the arrest relied upon information from his daughter. The crime for which he arrested the Nall brothers - cutting the canvas top of his daughter's automobile - was not a felony, however, but a misdemeanor. Thus, "Mr. Moore had no lawful authority to arrest for a misdemeanor not committed in his presence." Moreover, the Court also determined that Moore had given the Nalls no prior warning or notice that he was making a citizen's arrest. In view of the fact that the

citizen's arrest was not lawful, the Nall Court held that "the trial judge committed error when he refused to direct a verdict for the Nalls on the charge of assault and battery of a high and aggravated nature."

A number of statutes in this area should also be mentioned. Section 50-9-1020(1)(a) speaks to the suspension of hunting and fishing privileges, providing that resisting arrest by the use of force, violence, or weapons against an employee of the department [of Natural Resources] while engaged in his duties, a law enforcement officer aiding the work of the department, or a federally commissioned employee engaged in like or similar employment, constitute 18 points for purposes of suspension of hunting and fishing privileges.

Moreover, Section 16-9-320 makes it an offense to knowingly and wilfully oppose or resist a law enforcement officer in serving, executing or attempting to serve or execute a legal writ or process or resist an arrest made by one whom the person knows or reasonably should know is a law enforcement officer whether under process or not. Subsection (B) makes it unlawful to knowingly and wilfully, assault, beat or wound a law enforcement officer engaged in serving, executing or attempting to serve a legal writ or process or to assault, beat or wound an officer when the person is resisting an arrest made when the person knows or reasonably should know that he is a law enforcement officer, whether under process or not.

Section 16-3-625 provides that after January 1 1996, a person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon, such offense constitutes a felony. First offense violation requires service of at least six months and a second offense or subsequent violation requires the services of at least two years. The provision also states that it does not replace the common law crime of Assault and Battery with Intent to Kill nor does it replace sentencing of eligible offenders under YOA.

CITIZEN'S ARREST

The area of citizen's arrest has already been discussed to some degree above. However, the recent decision of State v. Cooney, ___ S.C. ___, 463 S.E.2d 597 (1995) also must be referenced. Defendant's plumbing supply business was staked out by the owners in an effort to catch a suspected burglar. When the suspect showed up, the owners approached the man and told him they were taking him to the authorities. After confessing to the crime, the suspect attempted to flee. As he ran, the defendant pursued firing shots at him. He was hit in each hip, died and the defendants were charged with murder.

The defendants raised the defense of citizen's arrest. However, the trial judge invoked the United States Supreme Court decision of Tennessee v. Garner, 471 U.S.1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) which had held that the use of deadly force to apprehend a suspect is not warranted where the suspect poses no immediate threat to the person making the arrest or others. Moreover, the lower court concluded that Section 17-13-10 did not authorize the use of deadly force.

The Supreme Court determined that Garner was not applicable because "Cooney was acting free of state influence when he attempted to arrest Williams" and the "Fourth Amendment proscription against warrantless searches and seizures does not apply to searches by private individuals not acting as agents of the state." Therefore, "the holding in Garner does not apply to seizures by private persons and does not change the state's criminal law with respect to citizens using force in apprehending a fleeing felon."

The Court summarized the law in South Carolina as follows:

> [i]n order to invoke the defense of justifiable killing in apprehending a fleeing felon, appellant at a minimum must show that he had certain information that a felony had been committed, Sec. 17-13-10(b), and he used reasonable means to effect the arrest, State v. Nall, supra. There was evidence presented that appellant had certain information that a felony had been committed. However, State courts examining similar situations have found that whether reasonable force was used to apprehend a fleeing felon is a factual question left to the jury. People v. Couch, supra; State v. Clarke, 61 Wash.2d 138, 377 P.2d 449 (1962).

The Court rejected the trial court's finding that "killing an unarmed fleeing suspect is per se unreasonable." Thus, it was "reversible error to not charge the jury on the common law of citizen's arrest and the use of reasonable force since evidence placed appellant's reasonableness in apprehending Mr. Williams in issue."

It should also be noted that Section 17-13-20 deals with citizen's arrests. Prior to 1995 this provision permitted a citizen to

> ... arrest any person in the nighttime by such efficient means as the darkness and the probability of escape render necessary, even if the life of such person should thereby be taken, when such person (a) has committed a felony, (b) has entered a

> dwelling house with evil intent, (c) has broken or is breaking into an outhouse with a view to plunder, (d) has in his possession stolen property or (e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, when he is hailed.

Subsection (b) was altered by amendment in 1995 (Act. No. 53 of 1995) and now reads "has entered a dwelling house without express or implied permission." McAninch and Fairey write the following about the new statute.

> [w]hile the amendment clearly authorizes the use of deadly force in arresting a simple trespasser, the authorization is still limited by the requirement that such force be necessary. The statutory amendment would not, therefore, require a different result in a case such as State v. Green, 118 S.C. 279, 110 S.E.2d 145 (1921) (affirming a manslaughter conviction in the spring gun slaying of a trespasser ...).

DEFENSE OF PROPERTY

The last area regarding use of force by private citizens is the defense of property. The seminal case in this area of the law is State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923). The Court outlined four situations relating to the defense of property and the law as to each. These were:

> "1. When the occupant is the slayer and stands upon the right to protect his habitation, apart from the plea of self defense."

Within this first category, the Court made a number of points. First, the person who "attempts to force himself into another's dwelling or who is in the house by invitation or license and who is then asked to leave and refuses, "is a trespasser" said the Court. As to that person, "the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion". This is the famous doctrine that a person's home is his "castle" and he may defend it against it "even to the extent of killing the assailant if such degree of force be reasonable necessary to accomplish the purpose of preventing a forcible entry against his will." 126 S.C. at 533-534.

The second point the Court made is with respect to the person invited or authorized to be on another's property. That individual "'cannot be lawfully ejected by the use of

violence until he has been requested to depart ... .'" If the individual, after being requested to leave then, refuses, the owner should only use such force as "is necessary to accomplish the ejectment." Clearly, excessive force cannot be viewed in ejecting the person.

Point three in this area is the person who is admittedly a trespasser, but who "'came peacefully and is not misbehaving ... ." The Court here seems to be saying this individual should be treated as the licensee or invitee and should be treated as such, first ordering him to leave. The "peaceable trespasser" cannot be killed upon a "failure to instantly obey an order to leave" or such is murder, said the Court. Again, the Court emphasizes, however, that the violent or reckless or disruptive trespasser, does not require a request to leave. Accordingly, such force as is necessary to eject the trespasser may be employed.

It should be noted at this point that the Bradley case's language that deadly force may be used to oust a trespasser is contradictory to the Court's holding in State v. Green, 118 S.C. 279, 110 S.E. 145 (1921) which is the famous "spring gun" case. In Green, the Court stated:

> [l]ife may be taken, as we have seen, only in the protection and preservation of life, not when mere property rights are at stake.

One distinction between Green and the situation spoken of in Bradley is that in Green, the house was unoccupied. However, in Green, the Court noted that

> [i]t will thus be seen that if the defendant had been present in person, and had killed the deceased, it would have been necessary for him to show by way defense that the circumstances were such as were not only sufficient to justify a person of ordinary firmness and reason in believing that he was in danger of losing his life, or suffering serious bodily harm, but that he himself so believed. In using the spring gun it was impossible for him at the time of the killing, to comply with these requirements.

Moreover, State v. Kibler, 79 S.C. 170, 60 S.E. 438 (1907), the Court recognized that

> [t]he general rule is too well settled to require the citation of authority that, in the protection of one's dwelling, only such force must be used as is necessary, or apparently necessary, to

> a reasonably prudent man. Any greater expenditure cannot be justifiable and is therefore punishable.

McAninch and Fairey point out that "[t]he weight of modern authority limits deadly force in a defense of a dwelling to situations in which the householder reasonable believes that the intruder intends to commit a felony or only when deadly force would be authorized by the law of self-defense."

It should also be noted that in State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928), the Court held that a trespasser ordered to leave may not be forcibly ejected for the failure to leave immediately upon request, but is entitled to reasonable time to depart. See also, May v. Gentry, supra (failure to grant request to instruct on reasonable time to depart not prejudicial error because instruction that occupant may use only such force as is reasonable necessary is sufficient.)

The second situation dealt with in the Bradley case with respect to defense of habitation is as follows:

> [w]hen the occupant is also the slayer and stands upon his right of self-defense, claiming not the right to protect his habitation, but immunity from the law or retreat, which ordinarily is an essential element of the plea [of self-defense].

Here, Bradley, is referring to the defense of self-defense which is available with no duty to retreat before using deadly force in his own home or its curtilage, provided the other elements of the defense are met. This has already been thoroughly discussed above.

The third situation involving defense of property which Bradley mentions is this:

> [w]hen the occupant is the slain and the homicide occurred while he was in the exercise of his right to protect his habitation.

As McAninch and Fairey indicate, provided the occupant of the dwelling used no more force than reasonably necessary in exercising his defense of his property, and provided the slayer had not made an effective withdrawal and was still being pursued by the occupant, this means the slayer possesses no right of self-defense with respect to his actions taken against the occupant of the home. In other words, where the slayer was at fault in bringing about the difficulty, he has no right to self-defense in using deadly force against the property owner.

The fourth Bradley scenario is stated thusly:

> [w]hen the occupant is also the slain and the homicide occurred while he was attempting to eject a trespasser from a part of the premises outside his habitation.

This scenario is like the facts in Bradley. The owner's daughter had a guest who was ejected by the owner. As he was leaving and about 150 feet from the house, the owner yelled out to the trespasser "stop, I am going to kill you". Here, the owner was acting beyond the defense of property.

In that situation, the owner could only conceivably employ a defense of self-defense and, of course, this would require the meeting of all elements (except the duty to retreat on his own land). The Court in Bradley elaborated:

> [u]nder such circumstances, the right of the occupant to expel the trespasser and to use such force as might be necessary, even to killing him, being limited to the place of his habitation (or perhaps of his curtilage ...), it did not exist at the place where the homicide is conceded to have taken place, away from the habitation, away from the curtilage, and at a more remote place on the premises near the road leading from the house to the public highway. The rights of the occupant consisted then only in his immunity from the law of retreat, in case he had slain the trespasser and had entered the plea of self-defense. If he attempted to do what he had no right to do, to kill the trespasser in order to get him off the premises, the right of the trespasser to rely upon the plea of self-defense, was unaffected by the fact that the deceased was on his own premises.

126 S.C. at 537.

McAninch and Fairey make two other points regarding defense of habitation. First, just because of the mere fact that the occupant was killed in his home by a non-occupant, it does not automatically follow that the jury must be instructed on the occupant's defense of property. There must be evidence that the non-occupant was either asked to leave or was a trespasser. See, State v. McElveen, 199 S.C. 1, 18 S.E.2d 528 (1942). Secondly, the authors of their treatise assume that, since defense of habitation is "closely analogous

"to self-defense, the State must disprove beyond a reasonable doubt that there was no valid defense of property.

ACCIDENT

Accident is not an affirmative defense, but simply a lack of intent or mens rea. The defense of accident requires the defendant to have been acting lawfully at the time of the accident. In State v. McCaskill, 300 S.C. 256, 259, 387 S.E.2d 268 (1990), the Court stated that a

> ... homicide is excused when caused by the discharge of a gun ... where the accused is lawfully acting in self-defense and the victim meets death by accident, through the unintentional discharge of a gun or the like ... . On the other hand, a homicide is not excusable on the ground of accident or misadventure unless it appears that the act of the slayer was lawful.

Thus, as McAninch and Fairey conclude, instructions need to distinguish between the right to arm oneself and the right to use a weapon. They note that "[i]nstructions on the former may be necessary for the jury to be able to understand that the defendant was acting lawfully at the time she was pointing the weapon when it accidently discharged." McAninch and Fairey, supra at 551.

In State v. Rogers, ____ S.C. ____, 466 S.E.2d 360 (1996), the Court held that the trial judge's charge that one is not entitled to a manslaughter charge when one controls the killing is accidental is incorrect. The Court, citing State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), stated that where there is evidence to support two defenses, both must be charged.

The foregoing is a summary of the law in the areas you have requested. Due to the pressing and urgent nature of your request, there are undoubtedly other cases and points which could be covered more fully and in considerable more detail. As you can see, I have relied heavily upon McAninch and Fairey in this overview and I thus suggest you use that work to supplement any omissions or oversights contained herein.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

cc: Chief Robert Stewart