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This article originally appeared in the Wild West History Association Journal, Volume 9, Number 4 (December 2016), pp. 53-58.

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By Kim Allen Scott



merican common law differs from its English origins in many ways, but one of the most consequential departures is an acceptance that a person threatened with bodily harm has no duty to retreat.

"Stand your ground" laws in many states absolve a person from a responsibility to flee from a perceived threat before responding with deadly force and a mythic interpretation of this concept has become enshrined in motion pictures for more than a century. In the standard cinematic (usually a Western movie or television episode) aftermath of a homicide, witnesses crowd around to insist that the dead man "drew first" and the killer is subsequently dismissed with a nod from the sheriff. However, the actual historical record of nineteenth century America refutes this fantasy of instant absolution for the survivor of a gun duel. Homicides have always been taken seriously by local justice systems, and in even some of the most remote jurisdictions documentation can be found showing at least a formal court hearing on any self-defense plea.

An interesting case in point took place in Pike County, Arkansas in 1867. Unfortunately documentation is hard to come by. Two nineteenth century courthouse fires in Murfreesboro effectively obliterated the early history of Pike County.¹ How efficiently the antebellum civil court system worked, and how it continued to function during the upheaval of the Reconstruction era, can only be glimpsed through the infrequent mention of Pike County events in the Arkansas Gazette and other distant newspapers.² The Union army never placed a garrison in the county, even during the potentially violent reaction to the 1867 Congressional Reconstruction Act.

However, at least one report on the 1867 killing has survived that demonstrates a functioning (if not entirely unbiased) legal system operating in Pike County's Missouri Township. On the surface, the report is an inconclusive fragment that only demonstrates the limits of the occupation army's reach in a "no duty to retreat" case. But by using the internet, contemporary



Lt. Charles Tripler Witherell. (Author's Collection)

researchers can take a deeper look at the fatal encounter and its aftermath, starting with the back story of the 28th U. S. Infantry officer who recorded the case.

Lt. Charles Tripler Witherell was born October 11, 1836 in Maine. The extent of his early education is unknown, but from circumstances it can be surmised that if he had not actually read the law to be an attorney, he at least at some point became familiar with basic American jurisprudence.

When the Civil War began, Witherell enlisted in the Sixth Maine Volunteer Infantry as a private and gained promotion to lieutenant and then captain by the end of 1863. He saw extensive combat with the Army of the Potomac, took part in the storming of Marye's Heights at Fredericksburg, Virginia and suffered dangerous wounds in an attack at Rappahannock Station on November 7, 1863.³

Recovering his health, Witherell reenlisted with the First Maine Veteran Volunteers on August 21, 1864 and took a commission as a first lieutenant with the regular army after the war's end. In 1867 he and his comrades of the 28th U. S. Infantry were posted at Washington, Arkansas to help pacify the countryside and facilitate the registration of freedmen voters for a new state constitution. Witherell served as the judge advocate for the post, and in addition to prosecuting legal infractions by military personnel, he also investigated civilian criminal cases.

While functioning as a military court official in Arkansas' Washington during the late summer and early fall of 1867, Witherell took note of a murder in neighboring Pike County. The origins of the fatal encounter were not as important to the officer as its subsequent handling by Pike County's court system and he felt compelled to carefully explain its progress to his superiors. The reasons for the violence Witherell portrayed cannot be ascribed to postwar bitterness over former military allegiances as most of the participants were Confederate veterans. Regardless, the incident escaped any mention at all within the contemporary columns of the *Arkansas Gazette*, a newspaper that regularly reported on rural homicides when local citizens alerted the paper. In this case, no one appears to have written anything regarding the particulars, making Witherell's version the only source available for analysis. What the report amply demonstrates is that even in the back country of Arkansas, far from any army garrison or large settlement, a claim of self-defense for the victor in a gunfight would still be subject to a procedural vetting. In the following transcription the spelling has been standardized, punctuation added, and clarification added within brackets.⁴

*Head Quarters, Washington, Ark.
October 11, 1867*

*Major O. D. Greene⁵
AA General, 4th Military District.
Major,*

I have the honor to submit the following:

On the matter of the killing of Jonathan Rollins⁶ by William L. Kilgore⁷ in Pike County, Ark, on or about July 3, 1867.

The facts, as I understand them, are that on an early hour in the morning the deceased, in company with his brother⁸ and one C. K. Garner,⁹ were passing the dwelling house of Mr. Kilgore. Kilgore came out, meeting them with threatening language addressed to [the] deceased, with a bowie or butcher's knife drawn. The deceased caught up a stick and prepared to defend himself, he and the other two were unarmed. Kilgore, fearing to attack deceased while he held the stick, then returned in a run to his house, swearing that he would get his gun and kill Rollins. He did get his gun and returned. During the interval of his absence, the two Rollins returned by the same road they came. Garner remained at the same point where they had first met. When Kilgore returned with this gun he was pursued by his wife who implored Garner to assist her in stop-

ping her husband. This he attempted to do, but was unable to stop him until he had pursued the two Rollinses some hundreds of yards. After Mr. Kilgore had been stopped, Garner joined the Rollinses and went to the house or residence of Garner. At the residence of Garner, they came in company with John Garner,¹⁰ a brother of C.K. Garner. The deceased proposed to go to a magistrate and take out a "peace warrant" for Kilgore and had determined to do so.¹¹ Before going he applied to John Garner for the loan of his gun, but Garner refused until Rollins pledged himself that he was not going to seek Kilgore or have any difficulty with him unless in self defense, but from the furious and unprovoked attack of Kilgore upon him in the morning he expected whenever he met him to have to fight, as he knew Kilgore to be a bold and desperate man, and that he might meet him on his way to the house of the Justice. After this explanation, John Garner loaned Rollins his gun. It might be here stated that Kilgore repeatedly threatened during the difficulty in the morning to kill Rollins on sight. A few moments after Rollins obtained the gun he started away (as he said) to go to the house of the Justice. The two Garners and Rollins's brother went in company with

him a short distance. The Garners were going to their work. The Rollins were going together. Very near the house they met one Robert Sate¹² who was in the employ of Kilgore and who was at Kilgore's house in the morning at the time of the first difficulty. He had his gun. A few moments after he came up and while they were still talking over the difficulty of the morning Kilgore came in sight riding a mule. When first discovered he was some thirty or forty yards distant. The view seemed to be simultaneous. Kilgore immediately dismounted with much haste and presented his gun, a double barreled shot gun. Rollins presented his gun about the same time Kilgore's gun fired and Rollins fell dead. There is some conflict as to whether Rollins's gun snapped.¹³ The brother of the deceased caught up the gun of his fallen brother when Kilgore snapped the second barrel of his gun at him. The Garners fled. Kilgore remained near the body for some half hour and would not permit anyone to approach until an old man came and begged permission to attend to the dead man.

Upon the application of Francis Rollins, brother of the deceased, Esquire John Elkins¹⁴ issued a warrant for the apprehension of Kilgore, who surrendered to the bailiff. It may be remarked that it was Elkins gun with which Kilgore did the killing. On the trial before Elkins, sitting as an examining court, upon the motion of Kilgore, the evidence of Francis Rollins and C. K. Garner was excluded who [were] the only eye witnesses of the whole transaction. He also excluded the evidence of John Garner who was present at the killing, but admitted the evidence of Sate, who was in the employ of Kilgore. These persons were not then under arrest. No complaint had been made against them. The witnesses, who alone knew anything of the whole transaction, who saw the first attack, who heard the threats and declarations of Kilgore, and who were able and competent to give a clear, succinct, and creditable statement of the whole transaction, being [excluded from the proceeding resulted in a ruling] in favor of Kilgore and

he was discharged.

Immediately on his discharge, doubtless under competent advice, he caused a warrant to be issued by the same Esquire Elkins under competent advice, he caused a warrant to be issued by the same Esquire Elkins against the two Garners and the surviving brother of Rollins and had them arrested upon a charge of assault with intent to kill. Kilgore himself, his wife, and the man Sate who lived with him were the material witnesses. The result was they were held to answer at the circuit court¹⁵ for an assault with intent to kill upon Kilgore. Upon their evidence, reduced to writing, and without calling them again, the Grand Jury returned a bill against them according to the charge. This has the effect to disqualify them as witnesses by the civil law against Kilgore. The Grand Jury made no investigation and he [Kilgore] goes acquitted of a crime of some grade, whether murder or a lesser crime, remains to be tried.

The manipulation by which the only eye witnesses were disqualified is one of the finest pieces of legal shrewdness perhaps to be found in the history of criminal jurisprudence. Whether with the connivance of the magistrate is unknown, but circumstances weigh heavily against him.

No court could ever find Rollins and the Garners guilty of an assault since neither of them had any arms or anything wherewith to make an assault, and the surviving Rollins could only have done so, and did only do so, after his brother had fallen dead.

Kilgore's attack in the morning and [his] subsequent pursuit along the same road to the house of Garner where he knew they had gone shows a degree of malice that cannot be easily reconciled.

The above are the facts substantially as I have attained them by conversing with many persons and the material witnesses in the case. All of which is respectfully submitted.

I am Major, Most respectfully your servant

Charles T. Witherell,

1st. Liet. 28th US. Inf. Judge Advocate

The story of the Pike County murder begins and ends with the submission of Witherell's report, but some scraps of information regarding the principals add an interesting epilog to the tragedy. The decision of Squire Elkin's court in the interpretation of the "no duty to retreat" concept were entirely consistent with proper procedure, and Witherell's credibility suffered from his superior's criticism of his handling of military cases at the Washington garrison. In light of those facts, Witherell couldn't have followed through with prosecution of Kilgore even if he had wanted to.¹⁶ Petty crimes among his own soldiers occupied his attention for the remainder of his time in Hempstead County, and he kept busy prosecuting the various rapes, assaults, and public intoxication cases among the members of his command. A decade later, though, Witherell again got involved with a homicide that used the "no duty to retreat" concept as a defense for the killer.

Witherell eventually landed a position as a quartermaster at Fort Elliott, Texas in 1877. During that year, he got involved with an English-born frontiersman named Philip Joseph Goodfellow whose rumored dealings in stolen government property also tarnished Witherell's reputation.¹⁷ On a military patrol led by Witherell to track down some pilfered items, Goodfellow rode up to the home of John Bottom, a rancher in the Texas Panhandle. Almost as soon as Bottom identified himself, Goodfellow shot him twice with a rifle at close range. Once they returned to Fort Elliott, Witherell and Goodfellow both signed affidavits that Bottom had "gone for his gun" before he was shot, but other witnesses at the ranch house disagreed. The post's commanding officer had Goodfellow arrested and later delivered to civilian authorities in spite of a written appeal from Witherell to the British legation to intervene in the case. Goodfellow never made it to a courtroom after the army turned him over to a sheriff's posse. Just ten miles outside of Fort Elliott, vigilantes took the prisoner and lynched him.¹⁸

Witherell was subsequently court-martialed for accusations that he had profited along with Goodfellow from the stolen government property and for his violation of army policy by writing to the British ambassador on Goodfellow's behalf. His sentence of dismissal was commuted by President Rutherford B. Hayes and

Witherell stayed with the army for another twenty years. Unfortunately he gained national notoriety in 1898 from accusations of other fiscal improprieties that he claimed were caused by "mental instability" from an attack of yellow fever.¹⁹ This time he was allowed to resign rather than be discharged, and he died in Detroit, Michigan on the last day of 1928.

Squire John M. Elkins, the justice of the peace who gave Kilgore the gun he used to shoot Rollins and later facilitated the killer's release from prosecution, was also involved in another gunfight. He continued to serve as a justice of the peace in Pike County until 1869, the year he had a fatal encounter with a man on the road from Antoine Township to Murfreesboro. Again, the particulars of the feud are unknown, but Elkins put three shots into Michael C. Nash, killing him instantly. Although Nash had been described as a "sort of braggadocio, trouble-making character" by the Washington (Arkansas) *Telegraph*, Elkins likely realized he could make no credible "no duty to retreat" claim for shooting Nash because the fatal bullets had entered the victim's back. Elkins fled to Texas and he died there in Hill County in 1871.²⁰

Another Pike County resident who ran off to the Lone Star State was none other than William L. Kilgore. After killing Jonathan Rollins, Kilgore left Pike County for Fannin County, Texas sometime prior to the 1870 census. By 1880, however, he felt confident enough to return to Arkansas with his growing family, settling in Polk County north of the little town of Vandervoort where he filed a homestead claim in 1890. He moved on to Cleveland County later that decade, probably to be closer to his adult children living near Fordyce in adjacent Dallas County. There is no record that his "bold and desperate" character ever resulted in another act of violence before his death in 1903.

Sometimes good can indirectly result from even the most senseless of violent acts, such as the fatal encounter in Pike County between Rollins and Kilgore. Had Kilgore not fired first, or pulled the trigger on the other barrel of his gun that misfired, Rollins might have become the victor in the incident. And if that had happened, Kilgore would have never had a daughter nine years later that he named Ida. She grew up to marry Wilson Monroe Bryant, a

Dallas County farmer, and among their many children was one of the most successful college football coaches in American history, Paul W. "Bear" Bryant of the University of Alabama.²¹



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Endnotes

¹ So obscure is Pike County's nineteenth century history that even the date of the second courthouse fire is unclear. The only book on the history of the county claims both 1885 and 1895 as the year of the conflagration which completely razed the building in Murfreesboro, destroying all the records from the 1860s. Pike County Heritage Club, *Early History of Pike County, Arkansas: The First One Hundred Years* (Murfreesboro, Ark: 1978), 15-16.

² Pike County did not get its first newspaper until 1883. *Early History of Pike County*, 35

³ Charles T. Witherell, "Civil War Related By A Participant," *Detroit Free Press*, November 30, 1913; Francis B. Heitman, *Historical Register and Dictionary of the United States Army* (Washington: GPO, 1903), 1052.

⁴ Charles Taylor Witherell, letter to O.D. Greene, Washington, Arkansas, October 11, 1867. Letters Sent and Received, Issuances, Reports, Returns, and Other Records of the Fourth Military District, 1867-1870, Records of Military (Reconstruction) Districts, 1867-71, RG 393. Records of United States Army Continental Commands, 1821-1920, National Archives and Records Administration, Washington, D. C.

⁵ Oliver Duff Greene was a native New Yorker and an 1849 West Point graduate. Decorated for several combat actions during the Civil War, he attained the rank of lieutenant colonel by war's end. He was the assistant adjutant general for the Fourth Military District of the Reconstruction forces under the command of Major General Edward Ord. *Historical Register and Dictionary of the United States Army*, 475.

⁶ Jonathan Rollins (sometimes spelled "Rawlins") was a native of Georgia who moved to Arkansas from Alabama sometime after 1860. According to his pedigree on Ancestry.com, he was born in 1826 and married Jane Conine in 1849. There is no positive record Rollins joined the Confederate Army, in either Alabama or Arkansas. At the time of his murder he would have been about 41 years old. "GFS65 family tree." Retrieved from <http://person.ancestrylibrary.com/tree/73303852/person/34270220502/facts>. Ancestry Library Edition. Ancestry.com. Accessed January 5, 2016.

⁷ William L. Kilgore, a Georgia native, came to Arkansas sometime prior to 1860, the year he first appears on the Federal Census roles for Clark County. He lived with the Price family, whose daughter, Laura, he would eventually marry. In 1862 Kilgore enlisted in the 33rd Arkansas Infantry, but he was discharged after only two months in uniform for an unspecified disability. "Kilgore family tree." Retrieved from <http://person.ancestrylibrary.com/tree/61557909/person/48071301181/facts>. Ancestry Library Edition. Ancestry.com. Accessed January 5, 2016.

⁸ Francis Rollins was born in Georgia around 1835. He came to Arkansas sometime after 1860, likely in company with his brother Jonathan and sister Minerva. He enlisted in the 19th Arkansas Infantry and survived the war, applying for a pension in 1901. He died sometime after 1902. Desmond Walls Allen, *Arkansas Confederate Pension Applications from Clark, Garland, Hot Spring, Montgomery, and Pike Counties* (Conway, Ark: Arkansas Research, 1991), 46; "GFS65 family tree." Retrieved from <http://person.ancestrylibrary.com/tree/73303852/person/34270220483/facts>. Ancestry Library Edition. Ancestry.com. Accessed January 5, 2016.

⁹ Columbus K. Garner was born in Arkansas in 1840 and had grown up in Pike County. He enlisted in the 4th Arkansas Infantry and served until war's end. He qualified for a pension from the state of Arkansas in 1901. A farmer, Garner married twice, the second time at the age of 64 after the death of his first wife, Eliza. "Floyd and associated families." Retrieved from <http://person.ancestrylibrary.com/tree/16927493/person/28893145123/facts>. Ancestry Library Edition. Ancestry.com. Accessed January 5, 2016; Allen, *Arkansas Confederate Pension Applications*, 43.

¹⁰ John W. Garner was also born in Arkansas in 1843 and was a farmer. He enlisted in the 19th Arkansas Infantry, attained the rank of sergeant by war's end, and was captured at the battle of Arkansas Post in 1863. He was married to Minerva Rollins, the sister of Jonathan and the person who applied for a Confederate pension as his widow in 1903. Allen, *Arkansas Confederate Pension Applications*, 43; "Floyd and associated families," retrieved from <http://person.ancestrylibrary.com/tree/16927493/person/28893144428/facts>. Ancestry Library Edition. Ancestry.com. Accessed January 5, 2016.

¹¹ The nineteenth century equivalent of a restraining order, a peace warrant required the person who made the threat to be arrested and post a bond to a local justice of the peace guaranteeing their good behavior. Peace warrants had been codified in the Arkansas criminal statutes ever since the territorial days. John Steele, *Laws of Arkansas Territory* (Little Rock: J. Steele, 1835), 356.

¹² Robert Sate seems to have escaped census notice in Arkansas for both the 1860 and 1870 surveys.

¹³ Percussion caps, the common ignition agent for firearms at this time, occasionally failed to detonate once the hammer of the firearm dropped against them, thus causing the gun to "snap" without discharging.

¹⁴ John M. Elkins was born in Arkansas in 1829. His family was prominent by frontier standards and Elkins township in Clark County was named for them. John moved to Pike County in early 1860 where he became a justice of the peace in Missouri Township, and he served in the 19th Arkansas Infantry during the war. "Grober-Prather-Morgan, " retrieved from <http://person.ancestrylibrary.com/tree/14861486/person/20473688286/facts>. Ancestry Library Edition. Ancestry.com. Accessed January 5, 2016; Pauline Williams Wright, *Clark County, Arkansas: a Genealogical Source Book*, v. 1 (Baltimore, Maryland: Gateway Press, 1982).

¹⁵ Rather than the hearing at Squire Elkin's Justice of the Peace docket, a circuit court would have transferred the proceedings to the much more stringent review of circuit court authorities in Murfreesboro.

¹⁶ "General Orders no. 19, October 12, 1868," United States. Army. Department of Louisiana. [General orders no. 1-25]. New Orleans, 1868), retrieved from <http://hdl.handle.net/2027/uc2.ark:/13960/t0dv1d30t>. Hathi Trust.org. Accessed January 5, 2016.

¹⁷ Frederick W. Nolan, *Tascosa: Its Life and Gaudy Times* (Lubbock: Texas Tech University Press, 2007), 28.

¹⁸ Philp J. Rasch, "The Murder of the Casner Brothers," *The Branding Iron*, Los Angeles Corral of Westerners, 38 (June 1967), 9-10.

¹⁹ "Captain Witherell's Defense," *Salt Lake Herald* (Salt Lake City [Utah], 22 March 1898.

²⁰ "Nash," *Arkansas Southern Standard*, December 25, 1869, 2. Although the 1869 issues of the *Washington Telegraph* are not available, the *Southern Standard* reprinted the story on the Elkins-Nash killing. See: Allen B. Syler, *Clark County, Arkansas Obituaries and Death Notices : Published in the Arkadelphia, Arkansas Southern Standard Newspaper*, v.1 (Hot Springs, Ark.: Arkansas Ancestors, 1991), 3.

²¹ In a recent biography of Bear Bryant, author Allen Barra wrote, "None of the Bryants seem to have had any interest in tracing their ancestral roots." *The Last Coach : A Life of Paul "Bear" Bryant* (New York: W.W. Norton & Co., 2005), 5. The lineage between Bear Bryant and William L. Kilgore has been established in this study by a careful comparison of several family tree lines on the Ancestry.com website and associated scanned federal census schedules.