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S.C. SUPREME COURT

# The State of South Carolina
# In The Supreme Court

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Appeal from Charleston County
Hon. Deadre Jefferson, Circuit Court Judge

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Case No. 2014-CP-10-4591
Appellate Case No. 2017-002392

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The Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe,

Appellant

v.

City of North Charleston,
Leigh Anne McGowan, individually,
Charles Francis Wholleb, individually,
Anthony M. Doxey, individually,

Respondents

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# Brief of Petitioner

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# Issue on Appeal

> Did the Court of Appeals err in upholding the trial court's jury recharge when the recharge, as the dissent put it, "omitted the only language that would have directly responded to the jury's question," about whether "bodily harm or injury" was needed for a civil rights violation under 42 U.S.C. § 1983?

# Statement of the Case

This appeal is about whether a new trial should be ordered. The trial court received a jury question about whether "bodily harm or injury" was necessary for a civil rights claim, in this case a claim following a warrantless entry.[1] The trial court's recharge omitted language the plaintiff requested, and which had been included in the court's first two recharges, stating the requirements for a section 1983 claim. Over a dissent, the Court of Appeals upheld the trial court's recharge, despite the omitted language. R. App. 966.

The language omitted was that even without proof of other damages, nominal damages must be awarded if a constitutional violation has occurred. The dissent from Judge Geathers observed that the trial court omitted "the only language that would have directly responded to the jury's question," R. App. 975. (Judge Geathers cited *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 802 (2021), that "the violation of a right is itself considered an injury." R. App. 974. Judge Geathers dissented, and would have ordered a new trial. R. App. 975.

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[1] The jury's question is contained in Court's Exhibit 25, R. App. 499:

> For there to be a violation of civil rights, 4th Amendment, the plaintiff must demonstrate through a preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

The warrantless entry was made about 10:30 p.m. on March 27, 2014, at a split-level single family home in a quiet part of North Charleston, R. App. 350, where Jane Doe 202[2] lived with her daughter. R. App. 893.

In 2013 Jane Doe was diagnosed with an aggressive form of early onset Alzheimer's disease. R. App. 373. Under S.C. Code § 43-35-10(11), she was a "vulnerable adult." Her daughter returned to South Carolina, moved in with her, and found a job that let her work largely from home so she could assist her mother while being absent only within the limits doctors advised. R. App. 371- 373. That arrangement had worked well for sixteen months before the night of the warrantless entry. R. App. 371 – 372; R. App. 389 - 390.

By the night of the warrantless entry, Jane Doe was 66 years old and her daughter was 45 years old. R. App. 576. Jane Doe 202 had lost many functions: she was unable to drive, unable to place a telephone call, unable to dress herself, unable to toilet herself, unable to prepare food, and unable to even open a bottle cap or a food wrapper. R. App. 352-353. Her daughter performed those basic functions. *Id*.

That evening, the daughter had a rare evening work function at her employer's office in Mt. Pleasant. She prepared the house and kitchen to accommodate her mother's limitations by, for example, having food and drink readily available to her. She left about 6 p.m. and returned a little after 9 p.m. R. App. 378. Her mother was asleep. R. App.379. About 10 p.m., the daughter went to her car and accidentally locked herself out of the house. She woke her mother by

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[2] The trial court ordered that the plaintiff be referred to by pseudonym, R. App. 001, granting R. App. 079, a motion for that relief. Hereafter in this brief the plaintiff is referred to as Jane Doe. She died in June 2018 and in January 2020 the court ordered her estate substituted as a party.

pounding on their front door and calling to her, and her mother let her in the sliding glass back door, which Jane Doe could still operate. R. App. 380.

At 10:07 p.m., neighbors who lived across the street, and who for some reason disapproved that Jane Doe had Alzheimer's disease, heard the daughter calling to wake her mother and called 911 to report a "verbal disturbance." R. App. 892 (entry at 22:08:34).

At 10:14 p.m. North Charleston police officer McGowan arrived and found all quiet at Jane Doe's home. R. App. 891[3] (Exhibit 2, entry at 22:14:20), R. App. 350, R. App. 361. No one responded when she knocked on the door. R. App. 893 (Exhibit 2, entry at 22:16:11), R. App. 335. Both Jane Doe and her daughter were asleep. R. App. 379.

Officer McGowan proceeded to look about the front and fenced back yard. After seven minutes, at 10:21 p.m., Officer McGowan reported finding fresh blood on the outside surface of a leather bag in the back yard, R. App. 337, R. App. 893 (Exhibit 2, entry at 22:21:07), later described as such a quantity of fresh blood that it justified emergency action and warrantless entry. R. App. 330.

But Officer McGowan neither took immediate action nor reported any emergency. R. App. 329. Instead, she asked the dispatcher to get more information from the neighbor who made the 10:07 p.m. call. R. App. 893 (Exhibit 2, entry at 22:21:07 – "ATT CONTACT W/COMP").

By 10:23 p.m. the dispatcher had spoken with the neighbor who had called 911 and advised McGowan, as appears distinctly in the audio recording in the record, that Jane Doe had dementia. As written in the 911 records, the dispatcher told officer McGowan (R. App. 893, Exhibit 2, entry of 22:23:06):

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[3] In the 911 records, Officer McGowan is referred to as "NC371."

> COMP ADV IT LOOKS TO BE A DISTURBANCE BTWN MOTHER AND DAUGHTER, ***ADV MOTHER DEMENTIA*** AND LOCKED THE DAUGHTER OUT OF THE HOUSE, ADV DAUGHTER WENT OFF TO THE LEFT OF THE RESD, ADV THE MOTHER SLEEPS ON THE COUCH IN THE LIVING ROOM.

(Emphasis added). In the objective evidence of the audio recording, the dispatcher's information about the mother having dementia is clear and distinct.[4]

Officer McGowan still took no action in response to the claimed "emergency." Instead, she asked to, and did, speak with the neighbor who had called police. R. App. 329, R. App. 893 (Exhibit 2, entry at 22:24:07).

At 10:33 p.m., 19 minutes after McGowan first arrived, and 12 minutes after she claimed to have found the "emergency" of substantial quantities of fresh blood, other officers had arrived and all three forced warrantless entry into Jane Doe's house. R. App. 893 (Exhibit 2, entry at 22:33:37). Defendants McGowan and Wohlleb forced entry through a sliding glass door in the back of the house. R. App. 340, R. App. 359-360. Defendant Doxey entered shortly thereafter by the same sliding glass door forced open by his colleagues. R. App. 362.

Inside the house the officers encountered Jane Doe, who had come downstairs. R. App. 361. The daughter was asleep upstairs. R. App. 379 – 380. When the officers encountered Jane Doe they asked her if "everything was okay," and she told them, "yes." 361 – 362. In other words, the officers were told almost immediately upon entry that no emergency was present, and inside the residence there was no sign of any emergency.

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[4] As reflected in the index to volume 2 of the Record on Appeal, the audio recording was provided on a compact disc. Out of an abundance of caution, another copy will be sent to the Supreme Court.

Rather than stop there and withdraw, the officers had Jane Doe escort them upstairs to her daughter's bedroom where defendant McGowan woke the daughter in a dark room with a flashlight in her face, demanding to know how much the daughter had had to drink. R. App. 380. The daughter testified, "I can see a large figure in my room and I started yelling get out of my house. And I was flipped out of my bed…." R. App. 380. The daughter, unaware the intruders were police, thought she was about to be raped, R. App. 383, and yelled to her mother to "stay out of it." *Id*. As a result of the struggle with officer McGowan, the daughter had a series of injuries later documented at a hospital emergency room. App. 380 - 382; R. App. 391 – 392. Officer McGowan claimed the daughter had attacked her, e.g., R. App. 331, but McGowan had no injuries, R. App. 348, and could not explain the daughter's injuries. R. App. 350.

Within eight minutes of first making warrantless entry, police had arrested the daughter for assaulting a police officer, R. App. 893 (Exhibit 2, entry at 22:41:53); R. App. 386 - 387. The daughter was removed and taken to jail. R. App. 893 (Exhibit 2, entry at 22:59:23). Jane Doe was left alone, with no inquiry made about her ability to be alone and no effort made to arrange for either her care or to notify other family. As noted above, Jane Doe had not been alone for any extended period at any point in the previous sixteen months.

S.C. Code § 43-35-25(A) obligates police officers to report a vulnerable adult likely to be neglected. After removing the daughter who cared for her, no report was made about Jane Doe. NCPD had no policy or practice to protect Jane Doe as a person left behind to fend for herself, without the capacities to do so for more than a few hours.

Having made an arrest inside the house after warrantless entry, McGowan and the other officers had the burden of demonstrating a proper basis for having made warrantless entry. E.g., *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990) (arrest overturned due to lack of

justification for warrantless entry). None made a record of the supposed extensive fresh blood on the bag. The leather bag was not preserved. It was not taken into evidence. It was not photographed by any of the officers even though each had a cell phone. R. App. 367.

The leather bag was simply left behind. Only months later, after this action was filed and officers were deposed could the bag McGowan claimed was in the backyard be identified. It was described at trial as

> It wasn't covered like somebody has been gushing blood all over the bag. I mean it was again several droplets of it, fair amount size, probably about a quarter or half dollar size droplets.

Q. So several that are quarter or half dollar size?

A. Yes.

R. App. 359 (testimony of Officer Wholleb). He added that "a couple" of the droplets were dripping "on the edge and onto the pavement." *Id*.

The leather bag, once identified, reflects no such blood stains. It is ten years old, and was used by the daughter as her gardening bag. R. App. 376. It had never been cleaned. R. App. 376. It shows one old blood stain, smaller than a dime, on the surface depicted at R. App. 889. That old stain is not detectable without very close examination of the bag itself. It is so subtle it is not visible in the photograph. The leather bag shows no indication of any of the "several" quarter or half-dollar sized drops of blood described by the officers. The daughter testified she had not been hurt that day (before Officer McGowan entered her bedroom) and to her knowledge the bag had no fresh blood on it at all on March 27, 2014 or thereafter, let alone large quantities of blood suggesting an emergency. R. App. 377 – 378.

It is undisputed that after police removed the daughter that no provision was made for Jane Doe's care. It is undisputed that at the detention center the daughter was not permitted to

make a phone call. R. App. 386. For the first time in sixteen months, Jane Doe was alone at night, and for more than four hours.

Jane Doe would go without food for over 13 hours, until about noon the next day, March 28, when her brother got a voice mail message not from the daughter, his niece, but from a deputy at the jail about his niece having been arrested. R. App. 351. When asked to describe the state he found Jane Doe in when he arrived to check on her, he testified:

> I went first to check on my sister . . . because I knew she had been alone since the night before and made sure physically and mentally what was her state of mind.
>
> Q. How did she seem in terms of her state?
>
> A. She was a wreck, crying, shaking, just kept saying something bad happened. It was terrible. It was terrible.

R. App. 351. He got Jane Doe something to eat, and drink. R. App. 351 – 352. It took 15 – 30 minutes for him to calm her. R. App. 352.

As noted above, Jane Doe had lost the capacity to toilet herself. Because her daughter had been removed without any provision for Jane Doe's care, by the time her brother could get his niece from jail and she could clean Jane Doe up, Jane Doe had spent over 17 hours in the same adult diaper, R. App. 352 – 353, which had been soiled by a bowel movement. R. App. 388.

As a result of the warrantless entry, in addition to caring for Jane Doe, Jane Doe's daughter now had added to her responsibilities both her own injuries that needed treatment and a criminal charge of having assaulted a police officer. The following day, March 29, the daughter arranged to be treated at a local hospital emergency room, and for her uncle, Jane Doe's brother, to look after Jane Doe. Jane Doe's brother found Jane Doe so profoundly confused that he called an ambulance and had Jane Doe examined at MUSC, the Medical University of South Carolina.

R. App. 354.

Doctors admitted Jane Doe to MUSC hospital. She was found to have a urinary tract infection. R. App. 566 – 567 (video deposition of Dr. Broadway at pp. 29-30). Jane Doe was hospitalized for 18 days. R. App. 395. Her doctor agreed that to a reasonable degree of medical certainty, leaving Jane Doe in an adult diaper for over 17 hours increased the risk to her of contracting that urinary tract infection, and such infections can cause confusion. R. App. 566 – 567 (Video deposition transcript of Dr. Broadway at pp. 29 – 30).

Only after counsel was retained could the family understand what had brought police to their home and why police contended there was a basis for making warrantless entry.

After the daughter's criminal defense counsel moved to challenge the warrantless entry, the criminal charge against her was *nol prossed* and is now expunged.

A complaint for Jane Doe was filed July 25, 2014. R. App. 33. The complaint alleged the warrantless entry was unsupported by any "emergency," and in any event were liable for having left Jane Doe to fend for herself after they were told she had dementia. Entering her home and increasing the risk to her by removing the daughter who cared for her were alleged to be violations of her rights and a "state created danger."[5] The objective of the litigation was to make police more attentive to the limitations of those left behind, like Jane Doe, when police conduct isolates them.

The case was called for a jury trial in Charleston County starting October 2, 2017 (R. App. 002) and ending October 13, 2017 (R. App. 002). Judgment was entered October 16, 2017.

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[5] The court has declined to consider the errors of law claimed by the Court of Appeals affirming the directed verdict on the state created danger cause of action. We reserve that issue.

R. App. 002. The notice of appeal was served November 13, 2017.

The initial charge to the jury appears at R. App. 438 - 471. The charge included that liability under 42 U.S.C. § 1983, can be proven without damages, R. App. 457, and that such proof of liability would require an award of nominal damages. *Id*.

During deliberations the jury asked a series of questions (R. App. 474 - 475). The first ones were handled without objection by another recharge that began at R. App. 477, a recharge which included that nominal damages can be awarded even without any other actual injury:

> A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

R. App. 490. After that first recharge concluded, R. App. 497, the jury deliberations continued.

At R. App. 498, the jury asked two other questions, the second of which was, "Do all the criteria under section 1983 claiming the 4th Amendment have to met [sic]." Without objection, the trial court proposed responding to that question, "I will just tell them the answer to their second question is yes." R. App. 498 – 499.

After more deliberation, the jury asked its final question, identified as Court's Exhibit 25. R.App. 499:

> For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

The correct answer to this question is, of course, "No." However, instead of providing that simple and correct answer, as the trial court had done with the second question at R. App. 498, the trial court, at R. App. 499, construed the question this way:

> I'm trying really to figure out what they're asking. I'm not certain whether they have the concept of proximate cause or damages confused. I think the remedy is to

> just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

The plaintiff requested, R.App. 500, that the recharge on "the elements of 42 U.S.C. 1983" include the nominal damage instruction from the initial charge and the first recharge. The court refused that request, even though it had included that language in both the initial charge and the first recharge. The omission made the third recharge an incorrect statement of law generally and an incorrect answer to the jury's question.

The trial court's third recharge appears at R. App. 505 – 512. It *omitted* that Section 1983 liability can be proven without actual damage of bodily or mental injury, the very "nominal damage" charge given in the original charge and the first recharge. The third recharge included only, and in isolation, at R. App. 509, the incorrect statement of law that:

> the plaintiff must prove by the greater weight or preponderance of the evidence that the constitutional violation was the proximate cause of her injuries.

The plaintiff's exception to that recharge is at R. App. 511-512. A motion for a new trial on that ground was denied by the trial court. R. App. 514.

The nominal damage charge requested was the portion of the court's initial charge R. App. 457, and the portion of the court's initial recharge, R. App. 490, which correctly state that the proof elements for a claim under 42 U.S.C. § 1983 include:

> if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claims then you must award nominal damages of one dollar for that claim.
>
> A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

The language the court declined to include in the third recharge is directly responsive to the jury's question. R. App. 512. Without the language, the jury took only thirteen minutes to return a defense verdict. R. App. 513. This appeal followed.

The Court of Appeals panel conceded "There is much force and appeal to the reasoning in the dissent," R. App. 973, but upheld the trial court's jury recharge using an abuse of discretion standard. The panel found the jury's question "awkwardly worded and confusing," R. App. 973, and believed the trial court "believed this indicated the jury was confusing the concepts of an injury and damages," *Id*., even though the appellate panel simultaneously concluded that the trial court "could just as well have reached the conclusion the jury was asking about damages not liability." *Id*.

Rather than require a trial court faced with a confusing jury question either to have the jury clarify its question, or require a trial court address both possibilities of meaning in its recharge, the appellate panel elected to use the admitted confusion as the basis to say the panel could not conclude the trial court had abused discretion. Doing so meant the third recharge gave an exactly incorrect statement of law in response to the jury's question.

The appellate panel also decided that among the three elements for liability under 42 U.S.C. § 1983 (deprived right, action under color of state law, and damages, e.g., R. App. 444) the deprived right is a "threshold" question for liability. As if, contrary to the jury instructions on liability, R. App. 444, elements two and three of liability are reached only after a "threshold" question. R. App. 973.

Judge Geathers dissented from the Court's decision to uphold the trial court's erroneous third recharge to the jury which omitted the correct statement of law that was responsive to the jury's actual question. Judge Geathers found that the trial court had committed an error of law in

omitting "the only language that would have directly responded to the jury's question," R. App. 975, and would have granted a new trial. *Id*.

A petition to rehear was denied, with Judge Geathers again dissenting. R. App. 986.

The Court granted certiorari on the issue of the third recharge.

## Standard of Review

Generally, it is sufficient

(a) for a trial court to include in a recharge only the parts of the initial charge which are necessary to answer a jury's question. E.g., *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996); *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985); and generally,

(b) alleged errors in jury instruction are reviewed for abuse of discretion. *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 414, 717 S.E.2d 765, 770 (Ct. App. 2011).

We have found no precedent for reviewing a trial court's recharge which *omitted* the instructions necessary to answer a jury's question, leaving a recharge which included an incorrect statement of law.

Presumably that too would be reviewed by an abuse of discretion standard.

"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. McDonald,* 343 S.C. 319, 325, 540 S.E. 2d 464, 467 (2000)." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, ___ (S.C. 2006)

## Argument

**Judge Geathers's dissent correctly construes the jury recharge issue: the trial court omitted "the only language that would have directly responded to the jury's question" and a new trial should be granted.**

There are two errors of law contained in the rationale of the Court of Appeals.[6]

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[6] In this argument we assume *arguendo*, without agreeing, that the trial court and Court of Appeals are correct that there are two ways to interpret the jury's question about whether 1983 liability requires proof of bodily or mental injury.

"When a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request." *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993); *accord, Corbin v. Prioleau*, 260 S.C. 171, 194 S.E.2d 875 (1973); *Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (Ct. App. 1985).

Obviously, answering the jury's request requires, first, that the trial court understand the jury's request.

The first error of law in the Court of Appeals analysis is that it fails to require the jury's question be understood and correctly addressed by the trial court. Faced with what a trial court determines is a "confusing" jury question, it is an error of law that fails to meet the obligation to respond to that question. If the appropriate, or acceptable, course of action is not to require the trial court ask the jury to clarify its question but to just pick one of the ambiguities, even if it is the wrong one, then the trial court has failed "to answer the jury's request." *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct. App. 1993).

That is the outcome the Court of Appeals accepted, even though the resulting recharge not only failed to answer the jury's very specific question (whether bodily or mental injury was necessary for a 1983 violation). By giving an instruction that omitted the pertinent answer to the question, the trial court provided an incorrect statement of law. See, *Allegro, Inc. v. Scully*, 400 S.C. 33, 49 n.9, 733 S.E.2d 114, ___ (Ct. App. 2012) (the best practice if a jury verdict form is ambiguous or unclear, is to clarify the verdict to the jury's intent).

The jury asked this question, identified as Court's Exhibit 25. R. App. 499:

> For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages?

As noted above, the trial court, at R. App. 10-13 p. 952, construed the question this way:

> I'm trying really to figure out what they're asking. I'm not certain whether they have the concept of proximate cause or damages confused. I think the remedy is to just reinstruct them on the elements of 42 U.S.C. 1983 and what must be proven in order to establish.

But then the trial court did *not* give the charge she proposed, on the elements of 42 U.S.C. 1983 and what must be proven. She modified her initial charge on the elements of 42 U.S.C. 1983 liability to *omit* in her recharge, as Judge Geathers' dissent states, "the only language that would have directly responded to the jury's question," referring to the nominal damages charge.

The Court of Appeals erred in concluding that there is no abuse of discretion when the trial court picked one of two ambiguities, and picked incorrectly. It is an error of law that ignores the trial court's obligation to properly respond to the jury's actual question. R. App. 973, Order at 8.

Jane Doe explicitly requested that the trial court instruct the jury on the "other" view of the jury's question, the nominal damage charge.[7] Instead, the Court of Appeals affirmed the trial court having omitted language that responded to the question as Judge Geathers and the plaintiff understood it. The Court of Appeals erred in affirming the trial court. The re-charge was misleadingly incorrect, should be reversed, and a new trial ordered. E.g., *Wright v. Hiester Construction Co., Inc.*, 389 S.C. 504, 517-518, 698 S.E.2d 822, 829 (Ct. App. 2010). Damages

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[7] The charge requested was this portion of the court's initial charge (at R. App. 457, 10-12-17 p. 884 in the initial charge, which is required to complete the proof elements for a claim under 42 U.S.C. § 1983):

> if you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claims then you must award nominal damages of one dollar for that claim.
>
> A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the deprivation of a federal right even where you find no actual injury occurred.

from the unconstitutional conduct of state actors is not necessary to find Section 1983 liability; the violation of a constitutional protection is itself a violation.

The second error of law underlying the Court of Appeals analysis is confusing the elements for 1983 liability with the affirmative defense of exigent circumstances. R. App. 973. The trial court correctly instructed the jury that a warrantless entry is *per se* unreasonable, and the defendant bore the burden of proof to establish that an exception existed. Instead, the Court of Appeals transposed this into a "threshold question for liability," R. App. 973, which minimized the trial court's error and compounds the Court of Appeals error that as long as the trial court picked one of the available ambiguities, even the wrong one, and instructed the jury incorrectly by omitting the language responsive to their actual question, it is not an abuse of discretion.

**Conclusion**

The third recharge did not fairly answer the question asked and was affirmatively misleading. The Court is obligated to respond to the jury's question and did not do so.

For the reasons set forth above, a new trial should be ordered.

Respectfully submitted,

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