

2015-000204

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 2014-UP-411 (S.C. Ct. App. Filed 11/19/14)

2009-GS-40-4647

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**S.C. Supreme Court**

THE STATE,

RESPONDENT,

V.

THEODORE MANNING,

PETITIONER

APPELLATE CASE NO. 2010-176707

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APPENDIX

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STATE OF SOUTH CAROLINA  
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SC Court of Appeals

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S.C. Supreme Court

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Theodore Manning, Appellant.

Appellate Case No. 2010-176707

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Appeal From Richland County  
G. Thomas Cooper, Jr., Circuit Court Judge

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Unpublished Opinion No. 2014-UP-411  
Heard October 15, 2014 – Filed November 19, 2014

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**AFFIRMED IN PART AND REMANDED**

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Luke A. Shealey, of The Shealey Law Firm, LLC, and  
Chief Public Defender E. Fielding Pringle, both of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant  
Attorney General William M. Blich, Jr., both of  
Columbia, for Respondent.

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**PER CURIAM:** Theodore Manning appealed his conviction for voluntary  
manslaughter, arguing the trial court erred by refusing to (1) exclude a photograph  
of the victim's charred skeletal remains; (2) suppress a search warrant and the

evidence seized pursuant to it; (3) conduct a full evidentiary hearing to determine whether he was immune from prosecution under the Protection of Persons and Property Act<sup>1</sup> (the Act); and (4) give a jury charge based on section 16-11-440(A) of the Act. A previous panel affirmed his conviction in a published opinion. *State v. Manning*, Op. No. 5228 (S.C. Ct. App. filed May 7, 2014) (Shearouse Adv. Sh. No. 18 at 16). The panel withdrew the opinion after unanimously granting both the State's and Manning's petitions for rehearing. *State v. Manning*, S.C. Ct. App. Order dated June 26, 2014. We now affirm in part and remand.

Before trial, Manning made a motion requesting that the trial court determine whether he was immune from prosecution under subsection 16-11-450(A) of the Act by conducting a full evidentiary hearing. The court heard arguments from counsel and reviewed a statement Manning gave police, but did not take testimony or consider any other evidence. The trial court denied Manning's motion for immunity, finding the Act inapplicable to his case.

We find the trial court erred in denying Manning's motion without first conducting an evidentiary hearing. Accordingly, we remand this case so that the trial court can conduct an evidentiary hearing and then rule, based upon a preponderance of all the evidence presented at the hearing, whether Manning is immune from prosecution under any provision of the Act. *See State v. Duncan*, 392 S.C. 404, 410-11, 709 S.E.2d 662, 665 (2011) (requiring the trial court to conduct, upon motion of either the defendant or the State, a pretrial evidentiary hearing and decide by a preponderance of the evidence presented during the hearing whether the defendant is immune from criminal prosecution under the Act); *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.").

As to Manning's remaining issues on appeal, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. The trial court properly refused to give a jury charge based on section 16-11-440(A) of the Act. *See State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) ("An appellate court will not reverse the trial

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<sup>1</sup> S.C. Code Ann. §§ 16-11-410 to -450 (Supp. 2013).

judge's decision regarding a jury charge absent an abuse of discretion."); *id.* at 479, 697 S.E.2d at 583 ("To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."); *State v. Burkhardt*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002) ("Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.").

2. The trial court did not abuse its discretion in refusing to exclude the photograph of the victim's charred skeletal remains. *See State v. Green*, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012) (stating the admission of photographic evidence is within the trial court's sound discretion and will not be reversed on appeal absent an abuse of that discretion); *State v. Stephens*, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) (stating this court reviews the trial court's decision regarding Rule 403, SCRE, under an abuse of discretion standard and must give great deference to the trial court's ruling); *State v. Gray*, 408 S.C. 601, 613, 759 S.E.2d 160, 166-67 (Ct. App. 2014) (stating "[p]hotos that corroborate important testimony on issues significant to the case may have very high probative value"); *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) ("Moreover, we have viewed the photographs and find that they were not unduly prejudicial to Appellant.").
3. The trial court did not err in denying Manning's motion to suppress the search warrant and the evidence seized pursuant to it. *See State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error."); *State v. Tench*, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003) ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched."); *id.* at 534-35, 579 S.E.2d at 316 ("A reviewing court should give great deference to a magistrate's determination of probable cause.").

On remand, if the trial court finds Manning is entitled to immunity under the Act, it shall vacate his conviction for voluntary manslaughter. If the trial court finds

Manning is not entitled to immunity, subject to further appellate review, Manning's conviction will stand.

**AFFIRMED IN PART AND REMANDED.**

**FEW, C.J., and KONDUROS and McDONALD, JJ., concur.**

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NOV 25 2014

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

THEODORE MANNING,

APPELLANT.

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

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Unpublished Opinion No. 2014-UP-411

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**PETITION FOR REHEARING**

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Pursuant to Rule 221(a), SCACR, counsel for Theodore Manning petitions the Court for rehearing. Counsel respectfully submits that the Court misapprehended the trial court's error of not charging the jury on the Castle Doctrine; on allowing into evidence the non-material and highly prejudicial photo of the victim's charred skeletal remains, and by not suppressing the flawed search warrant of Manning's home.

**I. Castle Doctrine Jury Charge**

The Court cites State v. Mattison, 388 S.C. 469, 479, 697, S.E.2d 578, 584 (2010) for the principle that "an appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion"...and to "warrant reversal, a trial judge's refusal to give a

requested jury charge must be both erroneous and prejudicial to the defendant.” *Id.* Accordingly, the Court misapprehends the trial court’s error in denying a charge based on the Act given the Act’s distinct differences from the common law. Since there was evidence presented at trial consistent with the Act, a charge under the Act should have been given. The law to be charged to the jury is determined by the evidence presented at trial. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (S.C. 2008). If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (S.C. 1999). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (S.C. 2007). There was evidence presented at trial that the killing occurred in the second story hallway of the Defendant’s home where McPhatter did not live. Manning’s testimony at trial was that McPhatter armed herself inside Manning’s house and leveled a firearm against him. Manning was in fear for his life but successfully wrestled the firearm away and he demanded that she leave his home. However, Manning’s testimony was that McPhatter continued to advance towards him, finally lunging for the firearm, and he shoots causing her death. Tr. 1505, ln 7 - 1508, ln 6. This is evidence that falls within the protections of the Castle Doctrine. Although the trial court did not find it appropriate to submit the Castle Doctrine jury charge, it did however find there was evidence to support a self-defense charge.

“Although self-defense and defense of habitation are analogous, it is insufficient to charge only self-defense when a charge on defense of habitation is warranted.” State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (S.C. App. 2010). Just as it is insufficient to only charge self-defense in a defense of habitation case, it is insufficient to only charge self-defense in a case where evidence has been presented to sustain a Castle Doctrine charge.

## II. Photographs

Manning also raised the issue of whether or not the trial court abused its discretion by refusing to exclude a photograph of McPhatter's skeletal remains. The Court dismissed this issue pursuant to 220(b) and cited State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012) (stating the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion). Green does not address the issue of admissibility of photographs but rather stands for the general proposition that rulings on admission of evidence are rulings that will not be disturbed absent an abuse of discretion by the trial court. Because the trial court abused its discretion in admitting the gruesome, inflammatory photo at issue here the Court should reconsider its affirmance of this issue.

"Although photographs may be used to corroborate other evidence, it is well established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010) (photos calculated to arouse the sympathy or prejudice of the jury should be excluded if they are not necessary to substantiate material facts or conditions); State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (internal citations omitted) (reversing and remanding where the information contained in the photographs was not really at issue, and other testimony negated any arguable evidentiary value of the photographs); see State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (agreeing with the same evidentiary principles, but factually different); State v. Waitus, 224 S.C. 12, 77 S.E.2d 256, 263 (1953); State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) (agreeing with the same evidentiary principles, but factually different); see also

Rule 401, SCRE (defining relevant evidence); Rule 402, SCRE (prohibiting admission of irrelevant evidence).

Additionally, Rule 403 of the South Carolina Rules of Evidence allows for relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). In order to constitute unfair prejudice, "the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 401 S.E.2d 146, 149 (1991)): Probative means tending to prove or disprove a fact in issue at trial. Probative value is "the measure of the importance of "that tendency to the outcome of a case." Collins, at 4. "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "The more essential the evidence, the greater its probative value." Collins, 398 S.C. at 202, 727 S.E.2d at 754 quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007). Thus, the trial court must determine the probative value of a particular piece of evidence, not in a vacuum, but in the context of the specific issues present at trial.

In the present case, the inflammatory information contained in the admitted photograph was neither relevant nor necessary to the disputed issues at Manning's trial. McPhatter's skeletal remains were not at the place of the shooting. The ghastly photograph depicts the scorched remains of McPhatter's skull, spine, and pelvis curled across the spare tire well of the trunk of her burned car located in the woods of Fairfield County, yet the shooting occurred inside the hallway of Manning's house miles away in Richland County. Moreover, the picture did not even indicate the cause of McPhatter's death—the bullet wound to her head was located on the back right side, which is not

visible in the photograph. In fact at the time the photograph was entered into evidence, the cause of death had already been proven at trial by Dr Marcus' testimony using x-rays to show the damage to McPhatter from the bullet. Additionally, Manning never contested how McPhatter was killed; from opening statement to closing argument, Manning's position throughout trial was that he indeed shot McPhatter in self defense. The admission of this photograph was purely gratuitous and designed to evoke an emotional response.

Further, while the issue of malice was contested, the picture of McPhatter's charred remains does not show malice at the time she was killed. The element of malice must be present at the time McPhatter was killed in order to prove murder, not after. As Manning's counsel repeatedly emphasized at trial, the State's case focused primarily on what occurred before or after McPhatter's death rather than the events that occurred inside Manning's home on the afternoon of May 6, 2009. Counsel's concerns were proven correct, as the State's attempt to justify admission of the photograph of McPhatter's burned skull, spine, and pelvis in the trunk of her car was thinly premised on showing malice. However, if anything, the fact that McPhatter's remains were burned in her car at a remote location in Fairfield County indicates Manning's attempt to hide or cover up the crime, not whether he harbored malice at the earlier time McPhatter was shot in Gadsden. Thus, the grotesque imagery of McPhatter's partial remains was irrelevant to even the contested issue of the case, and created a tendency to suggest a decision on an improper, emotional basis. See, e.g., Rules 401 and 402, SCRE; Middleton, 288 S.C. at 24, 339 S.E.2d at 693.

Moreover, the information contained in the photograph was already established by the State. As indicated above, the cause of death was already proven at trial by Dr. Marcus' testimony and McPhatter's x-rays well before the inflammatory picture was admitted. Also, testimony from multiple officers indicated where and in what conditions McPhatter's partial remains were found.

Tr. 722, ll. 7-14; Tr. 967, ll. 10-15; Tr. 1123, ll. 11-15. Therefore, although the photograph corroborates other testimony, its probative evidentiary value was nonexistent as the facts it could prove were both repetitive and uncontested. Accordingly, the only value of the gruesome photograph devolves to the one reason expressly forbidden by law: to arouse the sympathies and prejudices of the jury. See, e.g., Rules 401, 402, and 403, SCRE; Middleton, 288 S.C. at 24, 339 S.E.2d at 693 (reversing conviction where the information contained in prejudicial photographs “was not really at issue,” and where testimony from the forensic pathologist negated any arguable evidentiary value of the photographs.”); Waitus, 224 S.C. at 27; 77 S.E.2d at 263.

Finally, the photograph of McPhatter’s partial remains served to prejudice Manning. The State was permitted to enter a photograph into evidence displaying the scorched and twisted spine, pelvis, and skull of the victim inside the trunk of her burned out car. As in Waitus, the information contained in these photos was not disputed and was already established by testimony. Id. (reversing where four pictures of the victim at the crime scene that showed marks, bruises and abrasions, and the condition of the victim’s clothes, were admitted into evidence even though those facts were not disputed and were already established by testimony). Therefore, the only remaining value of the photographs of McPhatter’s partial remains was to arouse the sympathies and the prejudices of the jury, thus creating a tendency to suggest a decision on an improper basis. Middleton, 288 S.C. at 24, 339 S.E.2d at 693; Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71. Less inflammatory photographs of autopsy pictures have been described as being at the outer limits of what the law permits a jury to consider in a death penalty case. Torres, 390 S.C. at 624, 703 S.E.2d at 229. In Torres the South Carolina Supreme Court specifically cautions “all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory...” Id. In Torres the Court ultimately found that the gruesome photographs were admissible to show the circumstances of the

crime and the nature of the defendant but it is important to note that Torres was a capital case in which other factors are at issue. That is not the case here. In this case the central issue was whether or not Manning killed Ms. McPhatter in self defense. Admitting into evidence this harrowing photograph served no purpose other than to cloud the solitary issue of the trial with emotion rendering the jury incapable of cool reflection and analysis.

Accordingly, the trial court erred in admitting the photographs in Manning's trial and Manning was prejudiced by the erroneous admission, as "[t]he prejudice created by the photographs clearly outweighed any evidentiary value." Id. (emphasis in original) (citing Waitus, 224 S.C. 12, 77 S.E.2d 256, and State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940)); see also Rule 403, SCRE. Therefore, Manning respectfully seeks rehearing of this issue by the Court of Appeals.

### **III. Search Warrant Issue**

Appellant appealed the trial court's failure to suppress the search warrant. This Court affirmed this issue pursuant to Rule 220(b) SCACR citing State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) for the proposition that an appellate court must affirm a Fourth Amendment Search and Seizure issue where there is any evidence to support the ruling. In this case there was no evidence to support the ruling and this Court should grant the petition for rehearing. However, the Court did not address specifically the problematic hearsay that was present in this search warrant. The affidavit was based on multiple levels of hearsay which the State could not establish was gained in a reliable way. RCSD Investigator Tommy Croxton did not have personal knowledge of the facts stated by him in the affidavit and did not provide a substantial basis for crediting hearsay at each level. Upon questioning by the Court at trial Croxton admits that he does not know who typed up the probable cause used in the affidavit to obtain the search warrant. Tr. 513, ln 21 – Tr. 514, ln 7. The information provided in the affidavit by Croxton appears to be hearsay statements of RCSD

Sergeant D. Robinson. The record is replete with the fact that Detective Fitch of CMPD constructed the probable cause for the search warrant prior to ever entering Richland County, and Sergeant Robinson confirms that he obtained Fitch's probable cause from a flash drive and entered it into a RCSD form. Tr. 521 112-10. Robinson admits on cross examination that he essentially cut and pasted Fitch's probable cause into a RCSD form and that his affidavit was virtually identical to what Fitch had previously prepared. When pressed on the subject Robinson claims that he did author the final conclusory phrase "[b]ased on these facts, it is believed that there is probable cause to believe that evidence of murder contained within the residence located at 8047 Bluff Road, Gasden, South Carolina 29052." Tr. 525-526, Tr. 526, ln 11 – Tr. 528, ln 8. The trial judge even goes as far as to describe Robinson as a "transmitter of someone else's written form." Tr. 518, ln 16 – Tr. 519, ln 7. As it is clear from the record that Robinson had no personal knowledge of this case at this point, and only obtained his probable cause from an out of state agency, he could not have provided Croxton with a substantial basis to obtain the search warrant on his behalf.

Here, it is evident that Croxton has no personal knowledge and a level of hearsay exists, as he is signing on behalf of Robinson. Consequently, the affiant is tasked with the responsibility of establishing a substantial basis for crediting the hearsay. At no point in the affidavit, however, does Croxton explain the circumstances on how the information was provided to him by Robinson. The affiant failed to establish a substantial basis for crediting the hearsay received by Robinson.

Moreover, the affidavit, which appears to contain double and even triple hearsay, fails to establish a substantial basis for crediting the hearsay at each level as is required by Dunbar. At no point in the affidavit signed by Croxton, does the affiant indicate who Robinson is and where he stands in the chain of custody of hearsay information that was ultimately relayed before the magistrate judge on May 22, 2009. The affidavit mentions an "Officer Pickler" and generically refers to "Detectives,"

but the affidavit does not indicate who the detectives were, nor does it even attempt to provide a substantial basis for the multiple levels of hearsay statements by crediting the appropriate declarant at each step of the chain of custody.

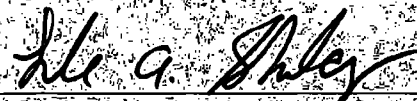
The Court does cite State v. Tench, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003) for the principle that the magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in the particular place to be searched. The Court further cites Tench for the proposition that the appellate court should give great deference to the magistrate's determination of probable cause. The search warrant at issue is plainly insufficient. It sets forth no facts to establish probable cause that (1) McPhatter is dead, (2) that Manning killed McPhatter, or (3) that a crime occurred in Manning's residence or car, which the police searched pursuant to the warrant. Indeed, there is not even a single allegation that a crime occurred in the body of the affidavit. Thus the magistrate had insufficient information upon which to make a determination of probable cause and this Court should reconsider its affirmance of this issue.

An examination of the Search Warrant provides no basis to believe that a crime has been committed or that such items would constitute evidence of a crime or would be found at the residence of Manning, his car, or that the seizing of DNA material could prove evidence of an enumerated crime from. From CMPD's first arrival in Columbia, SC on May 21st, 2009 to May 22nd, 2009 when they searched the house, they learned nothing in their investigation that would have risen to the level of probable case. "Mere suspicion, rumor, or strong reason to suspect [wrongdoing] are not sufficient." United States v. Han, 74 F.3d 537, 541 (4th Cir.1996)

Defense counsel argued extensively during the pretrial suppression motion that RCSD and CMPD only had probable cause to believe this was a missing person case at the time they obtained the murder search warrant. Tr. 498, ln 16 – Tr. 501, ln 11. This argument was supported by the May 22, 2009 search warrant return stating case type as “Missing Person,” and more telling was that RCSD Captain Stan Smith’s report described how only on May 28th, 2010 had the investigation turned into a homicide investigation. It took six days of additional investigation into the information that was obtained from the search of Manning’s residence for the investigation to transform from a Missing Persons case into a homicide investigation. Furthermore, when Manning’s uncle arrived on scene during the execution of search warrant he was informed this was a missing person’s investigation per police reports. Defense counsel’s complaint that this search warrant lacked probable cause is confirmed by the testimony of Investigator Robinson when he admits that at the time he prepared the affidavit for the warrant law enforcement did not have evidence that McPhatter was even deceased. Tr. 528, ll 11-14. Upon inquiry by the trial Court as to how probable cause can exist for a murder search warrant when a crime is not even alleged to have been committed, the prosecution responded that “the fact that there is no evidence leads to a conclusion of murder.” Tr. 532, ln 15 – Tr. 533, ln, 13. This assertion by the state is not supported by the caselaw supra and underscores the fact that at the time of the search probable cause did not exist for a murder search warrant. Accordingly the search warrant and all of its fruits should have been suppressed by the Court.

The affidavit provided on May 22, 2009 ultimately fails to meet the probable cause requirement of the Fourth Amendment to the U.S. Constitution. Accordingly, the trial Court erred by not suppressing this search warrant and all the fruits of the search.

Respectfully submitted,



Luke Shealey, The Shealey Law Firm  
E. Fielding Pringle, Chief Public Defender  
for Richland County

Date: 11/25/14

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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NOV 25 2014  
**SC Court of Appeals**

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Appeal from Richland County  
G. Thomas Cooper, Jr., Circuit Court Judge  
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THE STATE,

RESPONDENT,


V.

THEODORE MANNING,

APPELLANT

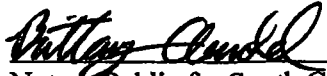
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Blich, Esquire, this 25th day of November, 2014.

  
\_\_\_\_\_  
Luke Shealey, The Shealey Law Firm  
E. Fielding Pringle, Chief Public Defender  
for Richland County

ATTORNEYS FOR APPELLANT

SWORN TO BEFORE ME this 25<sup>th</sup> day  
of November, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: April 4, 2024

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

DEC 04 2014

**SC Court of Appeals**

Appeal from Richland County  
Honorable G. Thomas Cooper, Jr., Circuit Court Judge  
Appellate Case Tracking No. 2010-176707

The State,

Respondent,

vs.

Theodore Manning,

Appellant.

PETITION FOR REHEARING

On November 19, 2014, this Court affirmed in part and remanded this case for the trial court to hold an evidentiary hearing regarding Appellant's claim for immunity under the Protection of Persons and Property Act. The Court found a full evidentiary hearing was required pre-trial, and also found it could not review the trial court's determination the Act did not apply, even though a complete and total evidentiary hearing was held the trial. This Court misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find an evidentiary hearing is not required, affirm the trial court's ruling, and affirm Appellant's conviction and sentence.

This Court found the trial court erred in failing to provide Appellant with a full evidentiary hearing pre-trial in order to determine whether he is entitled to immunity under the Protection of Persons and Property Act, Sections 16-11-410 through 450 of the South Carolina Code (the Act). The trial court allowed argument by both counsel

including allowing Appellant's counsel to argue what evidence indicated Appellant was entitled to immunity under the Act. As a result, Appellant received all the consideration pre-trial that is required under State v. Duncan, 392 S.C. 404, 709 S.E.2d 402 (2011). Finally, Appellant received a ruling from the trial court that he was not entitled to immunity, which he was able to appeal.

Similar to the ruling in Duncan and the Protection of Persons and Property Act, the Sexually Violent Predator Act allows a judge to make a determination under the Act. Under section 44-48-30(2) of the South Carolina Code, the trial judge is entitled to make a determination of whether the crime for which a person is charged qualifies as sexually violent even when it is not specifically listed under the Act. In State v. Wessinger, 408 S.C. 416, 759 S.E.2d 405 (2014), the South Carolina Supreme Court considered whether an individual is entitled to a full evidentiary hearing prior to the judge making a determination under the SVP Act. The Court specifically held: "We hold that the scope and necessity of a separate evidentiary hearing is to be determined on a case-by-case basis." Id. at 420. This holding demonstrates the desire to allow a trial judge to determine the extent of a hearing necessary to make a discretionary ruling, such as the ruling under the SVP Act or a ruling regarding immunity under the Protection of Persons and Property Act.

As in Wessinger, the trial court in this case was presented with evidence by Appellant which was uncontradicted by the State. Appellant acknowledged his statement contained the facts surrounding his shooting of the victim. The trial court considered those facts, the arguments of Appellant's counsel regarding any theories under which he believed his client would be entitled to immunity under the Act, and all

statements by the State prior to making a clear ruling that Appellant was not entitled to immunity. The trial court in this case heard all that was necessary to know the facts as presented by Appellant's counsel did not and would never rise to the standard necessary to provide for immunity under the Act. The court did not need to hold an evidentiary hearing with testimony from witnesses in order to reach the conclusion it reached and requiring such a hearing places an unnecessary burden on the trial court when the issue is straightforward as this Court even found in its opinion.

Appellant never asked to call any witnesses in support of his position, and never objected to the trial court's hearing the motion without witnesses being called. (T.462-471; R. 462-471). He never asked to proffer additional testimony or indicate to the trial court the additional testimony he would have presented had he been entitled to a full testimonial evidentiary hearing. As a result, Appellant received a determination prior to trial as he was entitled to under Duncan.

Additionally, this case is similar to the case of Peterson v. State, 983 So.2d 27 (Fla. App. 1 Dist. 2008). In that case, the Florida Court approved a trial court's procedure in which the "trial court conducted a hearing at which the parties did not present live evidence but, instead, presented the deposition of an eyewitness-petitioner's and the victim's sister-as well as the deposition of the alleged victim." Id. at 28.

Further, this Court erred in requiring a remand for a determination to be made by the trial court.<sup>1</sup> First, no more extensive evidentiary hearing can be held than the trial in which Appellant testified and presented all evidence he desired to present. As a result,

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<sup>1</sup> Again, the State does not believe any further hearing beyond that conducted by the trial court is necessary, but in the event the Court disagrees and finds further evidentiary hearing is warranted, the State submits any error is harmless because Appellant presented all evidence including his own testimony at trial and none of the evidence supports a claim for immunity.

there can be no different evidence presented at the hearing from that presented under oath at the trial. At a minimum, this Court can review the conclusion by the trial court that the Protection of Persons and Property Act does not apply based on the fullest evidentiary hearing presented, the trial.

This is exactly what took place in Dennis v. State, 51 So.3d 456 (Fla. 2010), when the trial court held no hearing at all. The Court considered the evidence presented at trial because it found that all evidence to be presented related to the claim of immunity was presented at trial. The Court then found based on the evidence presented at trial that the defendant was not entitled to immunity. The same determination should be made in this case if this Court concludes a hearing beyond that conducted by the trial court is required.

Additionally, it makes no sense in remanding for a determination by the trial court when his ruling can be reviewed based on the same evidence considered by the jury. The jury specifically rejected any defense raised by Appellant and found beyond a reasonable doubt the State disproved any defense and proved Appellant guilty of the charges. Further, the trial court already made the legal determination no provisions under section 16-11-440 applied to Appellant's case so the only remaining considerations would be the common law provisions considered and rejected by the jury.

As a result, there is no need to remand and instead the Court should consider the facts presented at trial and whether there is any evidence to support a conclusion that Appellant is not entitled to immunity. If this analysis is undertaken, it is clear there is evidence to support the trial court's finding Appellant is not entitled to immunity and, therefore, Appellant's conviction and sentence should be affirmed without resort to remand for an unnecessary second determination by the trial court.

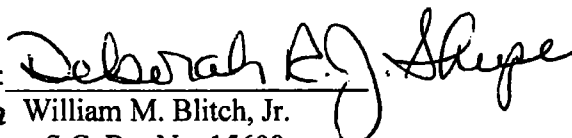
**CONCLUSION**

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court properly considered Appellant's request for immunity, and affirm Appellant's conviction and sentence.

Respectfully submitted,

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Attorney General

WILLIAM M. BLITCH, JR.  
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

December 4, 2014

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**SC Court of Appeals**

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**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County  
Honorable G. Thomas Cooper, Jr., Circuit Court Judge  
Appellate Case Tracking No. 2010-176707

The State,

Respondent,

vs.

Theodore Manning,

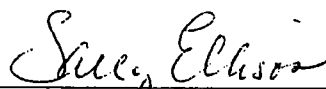
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Luke A. Shealey, Esquire  
The Shealey Law Firm, LLC  
2008 Lincoln Street  
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.  
This 4<sup>th</sup> day of December, 2014.



SALLY ELLISON  
Legal Assistant  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

**RECEIVED**

DEC 04 2014

**SC Court of Appeals**

December 4, 2014

**VIA HAND DELIVERY**

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

Re: State v. Theodore Manning,  
Appellate Case No. 2010-176707

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

for William M. Blich, Jr.  
Assistant Attorney General  
S.C. Bar No. 15608

**Enclosures**

cc: Luke A. Shealey, Esquire (2 copies enclosed)  
Victim's Services (enclosure)

# The South Carolina Court of Appeals

The State, Respondent,

v.

Theodore Manning, Appellant.

Appellate Case No. 2010-176707

\_\_\_\_\_  
ORDER  
\_\_\_\_\_

Appellant and Respondent filed petitions for rehearing. After careful consideration of both petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions for rehearing are denied.

\_\_\_\_\_  
*John Cannon, Jr.* C.J.  
*A. Ke* J.

\_\_\_\_\_  
*Stephen H. McDonald* J.

Columbia, South Carolina

cc: Elizabeth Fielding Pringle, Esquire  
Luke Adcock Shealey, Esquire  
William M. Blich, Jr., Esquire  
Alan McCrory Wilson, Esquire

**FILED**  
12-31-14  
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