

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals  
Appeal from Richland County  
Honorable Alison Renee Lee, Circuit Court Judge  
Appellate Case No. 2013-000086

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AUG 12 2015

S.C. Supreme Court

THE STATE,

Respondent,

vs.

RUSHAN COUNTS,

Petitioner.

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**REPLY TO RETURN TO  
RESPONDENT'S PETITION FOR REHEARING**

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In the case sub judice, this Court issued a published opinion in which it affirmed Petitioner Rushan Counts's conviction and sentence for third-offense possession of marijuana with intent to distribute after determining the "knock-and-talk" conducted by the law enforcement officers involved in Counts's case did not constitute an unreasonable search, seizure, or invasion of privacy. State v. Counts, Op. No. 27546 (S.C. Sup. Ct. filed July 8, 2015). However, based on the belief "knock-and-talks" could potentially be abused if not curtailed, a majority of this Court announced a new per se rule that, if allowed to stand, would radically alter, restrict, and, in some situations, eliminate the ability of law enforcement officers in South Carolina to approach a citizen's home, knock on the door, and speak with an occupant about a criminal matter despite the fact officers have historically been permitted to do just that by virtue of the implicit license extended to and by our citizens. See Florida v. Jardines, \_\_\_ U.S. \_\_\_,

133 S. Ct. 1409, 1415 (2013) (recognizing the existence of an implicit license extended by the citizenry of the United States that permits anyone, including law enforcement personnel, “to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave”).

Significantly, in the State’s view, the majority’s new per se rule is incompatible with existing state and federal precedent and with the long-standing customs and practices of our citizenry. Furthermore, as articulated in its petition for rehearing, the State believes the majority’s new per se has the potential to have a profound, detrimental impact on the ability of our law enforcement officers to effectively carry out their duties to the citizens of South Carolina and could undermine the safety of our citizenry. For those reasons coupled with all of the other reasons outlined in its petition for rehearing, the State petitioned this Court pursuant to Rule 221 of the South Carolina Appellate Court Rules to rehear the matter and reconsider its decision in Counts’s case, and the State’s petition fully complied with both the requirements of our appellate court rules and the underlying purpose of petitions for rehearing. See Arnold v. Carolina Power & Light Co., 168 S.C. 163, 172, 167 S.E. 234, 238 (1933) (“The purpose of such a petition is to aid the Court in deciding correctly a case heard by it.”).

Subsequent to the State’s filing of its petition for rehearing, Counts filed a return asking this Court to deny the State’s petition. In his return, Counts contends in part the arguments from the State’s petition are “unavailing” and should be rejected on their merits. To the extent Counts is challenging the merits of the State’s petition, the State does not believe an additional response is necessary and reasserts the positions raised in its petition coupled with those raised in the Brief of Respondent and during oral argument before this Court. However, in his return, Counts also boldly – and erroneously – maintains the State is entirely barred from filing a petition for

rehearing because it is allegedly “not an aggrieved party.”<sup>1</sup> Counts’s contentions in that regard are entirely incorrect and appear to be based on a misunderstanding of the purpose served by petitions for rehearing.

Specifically, Counts’s contentions are patently without merit because our appellate court rules do **not** restrict the availability of petitions for rehearing to any particular party. Instead, pursuant to Rule 221 of the South Carolina Appellate Court Rules, **any** party to an appeal may petition for rehearing following the issuance of an appellate court decision in order to call the appellate court’s attention to points the party believes the court may have misapprehended or overlooked in issuing its decision. See Rule 221(a), SCACR (“A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court.”). Notably absent from Rule 221 is a provision restricting the availability of petitions for rehearing solely to a party who did not ultimately prevail in the appeal. Similarly, no other appellate court rules, case law, or statutory authority in South Carolina restrict the availability of petitions for rehearing solely to a non-prevailing party. The likely reason for the absence of any such restrictions is petitions for rehearing exist for the simple purpose of aiding an appellate court in correctly deciding the cases before it. See Arnold, 168 S.C. at 172, 167 S.E. at 238 (explaining petitions for rehearing exist simply to aid appellate courts in correctly deciding the cases before them). Significantly, that purpose is best achieved by granting each party to an appeal an equal opportunity to call the appellate court’s attention to perceived issues, errors, or points supposedly misapprehended or overlooked in the appellate court’s decision if a party believes it is necessary to do so, and our appellate courts have historically entertained such petitions so long as they comply with the requirements of our appellate court rules. See, e.g., N.

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<sup>1</sup> Notably, in making such an argument, Appellant admittedly and troublingly relies upon a withdrawn and superseded opinion filed by this Court in a case involving a petition for a writ of certiorari submitted by the State. For reasons that should be obvious, reliance upon an opinion that has been withdrawn and superseded is improper.

Am. Rescue Prods., Inc. v. Richardson, 411 S.C. 371, 377, 769 S.E.2d 237, 240 (2015) (noting **both** parties petitioned for rehearing following a decision issued by this Court and indicating **both** petitions were granted). Accordingly, as a party to the appeal currently before this Court, the State was fully entitled to file a petition for rehearing following this Court's issuance of its decision in Counts's case, and this Court should consider – and, respectfully, grant – the State's properly-filed petition for rehearing despite Counts's contentions to the contrary.

However, even if Counts's contentions are somehow correct and a non-aggrieved party is not entitled to file a petition for rehearing despite the total absence of such a restriction in our appellate court rules, case law, and statutes, Counts's arguments in his return are nonetheless wholly incorrect because the State is, in fact, an aggrieved party in Counts's case. Critically, as this Court acknowledged in its opinion, law enforcement officers in South Carolina traditionally have been fully permitted to avail themselves of the implicit license granted by our citizens and approach a home to conduct a “knock-and-talk” in an effort to speak with an occupant about a law enforcement matter or criminal investigation. See State v. Wright, 391 S.C. 436, 328, 706 S.E.2d 324, 444 (2011) (instructing a law enforcement officer may lawfully go to a person's home and door to interview that person); see also Jardines, 133 S. Ct. at 1415 (“[A] police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen might do.’ ” (citation omitted)). However, subsequent to this Court's opinion in Counts's case, law enforcement officers in South Carolina will **not** be permitted to approach a home and knock on a door in an effort to speak to an occupant without possessing reasonable suspicion of criminal activity. Thus, the new per se rule articulated by the majority places a new, previously non-existent burden and obligation on law enforcement officers in our state, which is a matter of substantial and significant public interest. See Bivens v. Knight, 254

S.C. 10, 173 S.E.2d 150 (1970) (recognizing a party is “aggrieved” where a decision injures the party in a legal sense, such as **by imposing a new burden or obligation**); see also State ex rel. Condon v. Hodges, 349 S.C. 232, 240, 562 S.E.2d 623, 627 (2002) (recognizing one of the roles of the Attorney General is to represent the interests of the “collective citizens” of South Carolina); Porcher v. Cappelmann, 187 S.C. 491, 500, 198 S.E. 8, 12 (1938) (indicating the Attorney General represents the sovereign power and the general public); see generally United States v. Hensley, 469 U.S. 221, 229 (1985) (instructing the government has a strong interest in solving crimes and bringing offenders to justice and the public has a strong interest in crimes being solved and criminals being apprehended). As a result, the State **is** an aggrieved party in Counts’s case by virtue of this Court’s majority opinion, which is decidedly not in the State’s favor in regard to a matter of significant public interest, and the State was fully entitled to file its petition for rehearing, which, respectfully, should be granted for all of the reasons laid out in that petition.<sup>2</sup>

### **Conclusion**

For all the foregoing reasons, this Court should decline Counts’s invitation to deny the State the ability to petition this Court for rehearing when it believes this Court has misapprehended or overlooked particular points in one of its decision, which is the precise reason petitions for rehearing exist. Likewise, for all the reasons articulated in the State’s petition for rehearing coupled with the arguments raised in the Brief of Respondent and during oral argument before this Court, the State respectfully asks this Court to rehear this matter pursuant to Rule 221 of the South Carolina Appellate Court Rules, reconsider its decision, vacate its previous opinion, and affirm Counts’s conviction and sentence without adopting a new per se

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<sup>2</sup> Tellingly, the fact Counts chose to defend on the merits a decision that **affirmed** his own conviction and sentence is perhaps the best and clearest evidence this Court’s opinion aggrieved the State.

rule that would fundamentally change the implicit license granted by our citizenry, unnecessarily burden law enforcement officers attempting to carry out their duties to the citizens of our state, and reduce the personal safety and security of the citizens of South Carolina.

Respectfully submitted,

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August 12, 2015

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**PROOF OF SERVICE**

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I, Anne A. Mueller, certify that I have served the within Reply to Return to Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire  
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I further certify that all parties required by Rule to be served have been served.  
This 12th day of August, 2015.



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