THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Appellate Case No. 2018-000978
Case No. 2012-CP-32-0342

Kay F. Paschal, ... Respondent,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, ... Petitioner.

PETITION FOR REHEARING

The Petitioner Leon Lott petitions the South Carolina Supreme Court for a rehearing of the Court's recent decision in *Paschal v. Lott.*, Op. No. 2019-MO-45 (S.C. S.Ct. filed December 18, 2019).

The grounds for the Petitioner's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Petitioner's petition for rehearing is based on the Court's decision in *Paschal v. Lott.*, Op. No. 2019-MO-45 (S.C. S.Ct. filed December 18, 2019); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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January 2, 2020

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Petitioner Leon Lott has petitioned this Court for a rehearing of the recent decision in *Paschal v. Lott*, Op. No. 2019-MO-045 (S.C. S.Ct. filed December 28, 2019). Sheriff Lott respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

On the issue involving the interpretation of Section 22-5-110, the Court respectfully overlooked several key points. In particular, the Court construed Sheriff Lott's argument much too narrowly. In its memorandum opinion, the Court writes:

> Sheriff Lott argues the trial court improperly allowed the jury to interpret the section as it applied to a law enforcement officer's authority to seek a warrant outside of his or her jurisdiction. We agree. We find the trial court's failure to explain the meaning of section 22-5-110 to the jury permitted the jury to improperly interpret the statute and draw its own conclusions as to how the statute applied to Lieutenant Heidi Scott's actions in seeking the arrest warrant against Paschal in Lexington County.

Slip. Op. , at 2. While Sheriff Lott is in agreement that the trial judge should not have allowed the jury to interpret the statute itself without clear guidance from the court, the error is much more significant than an erroneous or inadequate jury instruction. The crux of Sheriff Lott's argument -- which this Court does not address -- is that Section 22-5-110 by its very language *has no applicability to this case*. That ruling should have been correctly made on the Sheriff's directed verdict motions. The substantial reliance on Section 22-5-110 by Paschal was in error, and the trial judge failed to recognize that and remedy it. As indicated, this fundamental error goes far beyond the jury instruction. Courts are only permitted to instruct the jury on applicable law. In this case, as Sheriff Lott has argued and shown, Section 22-5-110, which was at the heart of Paschal's case, quite simply has no applicability to this case.

Like the Court of Appeals, this Court has still not interpreted Section 22-5-110 and has never addressed the law governing the issuance of a courtesy summons rather than an arrest warrant. Frankly, it was anticipated that this Court granted Sheriff Lott's writ of certiorari to provide much needed guidance to the bar and bench as to the meaning and applicability of Section 22-5-110. The Court's memorandum opinion, however, is silent as to the statute's proper meaning and applicability. On rehearing, the Court is respectfully asked to address the statute and to actually look at whether Section 22-5-110 has any applicability to this case.[1]

By finding that the trial judge should have instructed the jury on the meaning of the statute, it can be assumed that the Court found the statute has some applicability to the facts of this case. If that assumption is correct, that in itself constitutes reversible error that should be reassessed on rehearing. As Sheriff Lott has argued, consistent with Section 22-5-110 and Section 22-3-330, both the South Carolina Bench Book for Summary Court Judges and the South Carolina Attorney General have stated that a courtesy summons is to be used only where (1) the affiant is not a law enforcement personnel, and (2) where the individual is charged with a misdemeanor offense. *See*, Op. Atty. Gen., September 25, 2012, 2012 WL 4711427. Importantly, neither of those elements is present here, and this Court has

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[1] The same is true with respect to the companion statute, Section 22-3-330, which states: "Notwithstanding another provision of law, a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons." S.C. Code Ann. § 22-3-330.

not ruled otherwise in its memorandum opinion. The affiant was Lt. Heidi Scott who was the investigating officer. In addition, both warrants were for felonies. The first warrant was for a forgery of $10,000 or more, which pursuant to Section 16-13-10(B)(1), is a felony. The second warrant was for breach of trust of over $2,000 and under $10,000, which pursuant to Section 16-13-260, is a felony. These were not magistrate-level offenses,[2] and as a result, Magistrate Whittle acted consistently with South Carolina law, including Section 22-3-330, in issuing arrest warrants rather than courtesy summonses.

As Sheriff Lott has further argued, Paschal's position regarding the applicability of Section 22-5-110 in this case was legally incorrect, and if correct, would have required the dismissal of her claims under the Tort Claims Act. This Court, like the Court of Appeals, has not even considered those arguments. In arguing that Section 22-5-110 is applicable, Paschal claims that Lt. Scott was acting as a private citizen, and therefore, a law enforcement officer was not the affiant and a courtesy summons should have been issued instead of the arrest warrants. However, even if Lt. Scott sought the warrant as a non-law enforcement officer, a courtesy

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[2] As Sheriff Lott has previously pointed out, had the charges been magistrate-level charges that would have allowed for the use of a courtesy summons, then the magistrate's court would have been precluded as a matter of law from even holding a preliminary hearing. *See, State v. Ramsey*, 381 S.C. 375, 673 S.E.2d 428, 428 (2009) ("[f]or crimes outside magistrates' jurisdiction, magistrates are authorized to conduct a preliminary examination"). *See also*, Rule 2(a), SCRCrimP ("Any defendant charged with a *crime not triable by a magistrate* shall be brought before a magistrate and shall be given notice of his right to preliminary hearing"). (Emphasis added).

summons could not have been used by Magistrate Whittle because both offenses are felonies and non-magistrate-level offenses. Thus, the capacity of the affiant is immaterial to the discussion. A warrant, rather than a courtesy summons, had to be used. Additionally, if Lt. Scott was acting as a private citizen in seeking the arrest warrants and was not acting in her official capacity, then Sheriff Lott cannot be held liable under the Tort Claims Act.[3] Therefore, Paschal's position is inconsistent with her claim that Sheriff Lott is liable under the Tort Claims Act for the conduct of Lt. Scott in seeking her arrest. And finally, South Carolina law recognizes that a law enforcement officer may be the affiant on a warrant to be executed in another jurisdiction. In *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411 (1978), this Court addressed the validity of a search warrant that was sought by a municipal law enforcement officer for the search of premises that were located outside of his jurisdiction. This Court ruled "that the fact the place to be searched was outside of Officer Parsons' jurisdiction did not, in and of itself, render the search warrant invalid." 242 S.E.2d at 413. This principle of law from *Hammond* was later applied by the federal district court in the case of *United States v. Hardy*, 2006 WL 208865 (D.S.C. 2006), wherein Judge Henry Herlong upheld the validity of a search warrant alleged to have been obtained by officers from the Cherokee County Sheriff's Office for execution on premises located in Spartanburg County. Judge Herlong wrote:

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[3] In *Flateau v. Harrison*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003), the Court of Appeals ruled that the Tort Claims Act "is intended to cover those actions committed by an employee within the scope of the employee's official duty." 584 S.E.2d at 416.

> [U]nder South Carolina law "the fact that the place to be searched" is outside of the warrant applicant's jurisdiction does not "in and of itself, render the search warrant invalid." *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411, 413 (S.C. 1978). As such, even if an officer from Cherokee County signed the search warrant, the warrant is not invalid.

2006 WL 208865, *2. Although *Hammond* and *Hardy* both involve search warrants, there is no reason that an arrest warrant should be treated any differently. In other words, if a law enforcement officer may be the affiant on a search warrant to be executed in another jurisdiction, the same should be true for an arrest warrant as well. It is noted that neither *Hammond* nor *Hardy* was even cited, let alone refuted, in the this Court's memorandum opinion.[4]

In short, Lt. Scott was acting in her official capacity as a law enforcement officer when she signed the arrest warrants as the affiant. Importantly, the arrest warrants were not served by Lt. Scott or any Richland County deputy. Instead, they were served by a Lexington County deputy after Paschal turned herself in at the Lexington County Detention Center. The arrest itself therefore was effected by a law enforcement officer from Lexington County, which renders the arrest valid and consistent with applicable South Carolina law. But most importantly, this analysis demonstrates that, from a purely legal standpoint, Section 22-5-110 has no

[4] This Court also gave no consideration to the decision of the United States District Court, as affirmed by the Fourth Circuit, in Paschal's companion federal case. In *Paschal v. Lott*, 2016 WL 11409585 (D.S.C. 2016), as adopted in 2016 WL 5402861 (D.S.C. 2016), and affirmed by 2017 WL 1828995 (4th Cir. 2017), the federal court also cited favorably to the *Hammond* and *Hardy* decisions. 2016 WL 11409585, *5, n.7.

applicability to this case.

In sum, Section 22-5-110 should not have been charged to the jury -- correctly or otherwise. By finding that the trial judge should have explained the meaning of Section 22-5-110 to the jury and committed error in failing to do so, the Court has overlooked the crux of Sheriff Lott's position. For, it is reversible error for the trial court to find any applicability of Section 22-5-110 to the facts of this case. Respectfully, it is error for this Court to find -- even impliedly -- that Section 22-5-110 has any applicability. That alone is deserving of a rehearing, and as argued in Sheriff Lott's petition for writ of certiorari, this case gives this Court the ability to provide guidance to the bench and bar as to the meaning and applicability of Sections 22-5-110 and 22-3-330. That was, in all candor, an opportunity missed because the Court did not address or decide the actual issues with Section 22-5-110 that were raised.

II.

As a further point, even if the Court's intent was to conclude that Section 22-5-110 is applicable and thus should have been properly charged to the jury, the Court still erred in concluding that "the trial court's erroneous charge had little impact on the jury's verdict." Slip Op., p. 2. That is clearly not the case. It is unclear what the Court means by "little impact." That standard has never been used before by this Court or the Court of Appeals. The Court did not cite to any precedent for that standard, nor did the Court set forth a test for determining how

"little impact" was assessed or determined. The Court deliberately did not apply the "harmless error" rule or any test consistent with Rule 61, SCRCP. So, it is unclear what that standard means.

Moreover, the statement that the erroneous charge had "little impact" on the jury's verdict overlooks the substantial verdict that was returned. That statement overlooks the central focus of Section 22-5-110 to Paschal's theory of the case. The record clearly reflects – as confirmed by the trial judge's order on post-trial motions – that the application of Section 22-5-110 was a central issue in this case. The record, in fact, shows that Paschal's counsel made a copy of Section 22-5-110 itself a trial exhibit so that the jury had a copy of that law -- and no other part of the charge -- in the jury room during deliberations. (R. 1012). The jury heard repeatedly that Lt. Scott failed to comply with the statute, and more so than that, failed to advise a judicial officer about Section 22-5-100 -- when in reality Section 22-5-110 had absolutely no bearing on Lt. Scott's actions, Magistrate Whittle's actions, the arrest and prosecution of Kay Paschal, or any civil liability in this case. Nonetheless, it is clear that Paschal's counsel kept raising the statute not only in testimony but also in closing arguments and even directed the jury to the fact that the statute was in evidence. (R. 900).

Frankly, a finding by this Court of "little impact" is speculative in nature. There is no credible way to judge the impact of this error of law on the jury. The error of law committed was substantial, and it tainted the entire verdict to the

extent that Sheriff Lott, as he has argued repeatedly, was denied due process and a fair trial. Therefore, on rehearing, the Court is respectfully asked to reconsider its decision that the error of law, as found by this Court, was not substantial enough to merit a new trial.

III.

With respect to the malicious prosecution claim, Sheriff Lott submits that the Court has overlooked that Kay Paschal failed to present proof of a lack of probable cause. In its memorandum opinion, the Court focused not on evidence of probable cause but on issues related to the adequacy or completeness of Lt. Scott's investigation. Those analyses are not the same. Importantly, Kay Paschal withdrew her negligence claim. (R. 870). Thus, the malicious prosecution claim cannot be supported by evidence of alleged negligence or inadequacies in the investigation. The dispositive question is a simply one -- "[p]robable cause is determined as of the time of the arrest, based on facts and circumstances -- objectively measured -- *known to the arresting officer*." *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 659 (Ct. App. 2005). (Emphasis added). *See also, Mack v. Lott*, 415 S.C. 22, 780 S.E.2d 761, 761 (2015) ("the proper standard for determining probable cause is an objective standard; that is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause").

Therefore, a proper analysis should focus on what was known to Lt. Scott when the arrest warrant was obtained. That information is not addressed at all by this Court in its memorandum opinion. The Court makes no mention of the conclusions reached by the two forensic document examiners who examined the two versions of the Power of Attorney. The Court makes no mention of the information known to Lt. Scott about Kay Paschal's involvement in drafting the Power of Attorney or what Lt. Scott knew about the transaction where the Power of Attorney was used by Paschal to purchase the Toyota Sienna van which was then titled in both the names of David Wallace and Kay Paschal. However, as Sheriff Lott has shown, the information known to Lt. Scott demonstrated that Kay Paschal used the forged Power of Attorney to acquire the Toyota Sienna van and to gain an interest in that van. An objectively reasonable law enforcement officer knowing that information would believe that probable cause existed for one or both charged crimes under South Carolina law. Hence, Sheriff Lott was entitled to a directed verdict and JNOV on the probable cause issue. The Court is respectfully requested to rehear this case and to apply the probable cause standard -- and not a negligence standard -- in evaluating whether probable cause existed for Lt. Scott to seek the arrest warrant.

IV.

In addition, the Court is respectfully requested to reconsider its ruling that the holding from *McKenney v. Jack Eckerd Company,* 304 S.C. 21, 402 S.E.2d 887

(1991), has no applicability where the dismissal of a criminal charge occurs as a result of a preliminary hearing rather than a nolle prosequi. Although *McKenney* involved a nolle prosequi, the rule adopted in that case applies or should apply to any preliminary dismissal of a criminal charge without prejudice, including the discharge of the defendant at a preliminary hearing. Just as a charge that is nolle prossed may be reinstated through an indictment by a grand jury, a charge dismissed at a preliminary hearing is also still subject to later indictment and prosecution. *See, State v. Sanders*, 251 S.C. 431, 163 S.E.2d 220, 226 (1968) ("If a defendant is discharged by a magistrate at a preliminary hearing, such is not a final determination of the charge and does not bar subsequent prosecution by the State"). *See also*, Rule 2(c), SCRCrimP ("If probable cause be found by the magistrate, the defendant shall be bound over to the Court of General Sessions. If there be a lack of probable cause, the defendant shall be discharged; but his discharge shall not prevent the State from instituting another prosecution for the same offense"). Thus, whether by nolle prosequi or by a preliminary hearing, a criminal charge should be dismissed for reasons which imply or are consistent with innocence in order to proceed with and prove a malicious prosecution claim. That should be the law if it is not already. Notably, this Court, like the Court of Appeals, cited only to pre-*McKenney* cases that have been overruled. Frankly, there is no rational basis for applying the *McKenney* test to one type of criminal dismissal and not another.

V.

As to the abuse of process claim, Sheriff Lott argued that there is no evidence in the record that would support a finding that Sheriff Lott or his deputies had an ulterior purpose by seeking the issuance of the two arrest warrants. In its memorandum opinion, the Court found sufficient evidence from "Paschal's testimony that interactions between Scott and the Wallace children were unprofessional" and "other circumstantial evidence surrounding the timing of Scott's searches and Paschal's arrest." Slip Op., at 3. The Court, however, disregarded the law of the case. The trial judge expressly rejected those arguments. In his post-trial order, the trial judge writes as follows:

> The court does have serious concerns with the repeated focus by the Plaintiff on aspects that dealt with missing Probate Court hearings and her loss of a claim related to the estate. In the court's view, these claims were largely unproven to the extent that there was not sufficient competent evidence on that subject for the jury to consider them as being proximately caused by any wrongdoing on the part of the Defendant.

(R. 5). That ruling was unappealed by Paschal, and thus constitutes the law of the case. *See, ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997) (a lower court's unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct). The Court, therefore, cannot affirm on

that basis.

CONCLUSION

Based on the foregoing discussion, the Petitioner Leon Lott respectfully requests that the Court rehear its decision in this case. Sheriff Lott renews his request that this Court reverse the jury's verdict and the order of Judge William P. Keesley filed December 11, 2014, and remand for entry of judgment in Sheriff Lott's favor. In the alternative, Sheriff Lott requests that the Court remand for a new trial absolute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Petitioner, does hereby certify that service of the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 2nd day of January 2020:

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