THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2017-001734
Case No. 2010-CP-40-5214

Demetrius Mack,..... Respondent,

v.

Leon Lott, in his Official Capacity as
Sheriff of Richland County,..... Appellant.

PETITION FOR REHEARING

The Appellant Leon Lott, in his Official Capacity as Sheriff of Richland County, petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Mack v. Lott*, Op. No. 2022-UP-028 (S.C. Ct. App. filed January 19, 2022).

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

The Appellant Leon Lott's petition for rehearing is based on the Court's decision in *Mack v. Lott*, Op. No. 2022-UP-028 (S.C. Ct. App. filed January 19, 2022); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

LINDEMANN & DAVIS P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8921

ROBERT D. GARFIELD #6557
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5728

Counsel for Appellant Leon Lott

February 3, 2022

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant Leon Lott, in his official capacity as Sheriff of Richland County, has petitioned this Court for a rehearing of the recent decision in *Mack v. Lott*, Op. No. 2022-UP-028 (S.C. Ct. App. filed January 19, 2022). Sheriff Lott respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

In its unpublished opinion, this Court overlooked that the trial court failed to consider the evidence supporting probable cause from the perspective of an objectively reasonable officer on the scene. The trial court on remand was required to determine whether an *objectively reasonable police officer* in Deputy James Gore's position would believe that the Respondent

Demetrius Mack was off the Club Essence property at the time he arrested McKenzie Williamson.

In *State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661 (2000), the South Carolina Supreme Court adopted the "two-step process" for determining probable cause as articulated in *Ornelas v. United States*, 517 U.S. 690 (1996). The Supreme Court explained the "two-step process" as follows: "First, a court must determine the events which occurred leading up to the stop or search. Second, the court must decide whether these historical facts, *viewed from the standpoint of an objectively reasonable police officer*, amount to reasonable suspicion or to probable cause." *Brockman*, 528 S.E.2d at 664. (Emphasis added).

Therefore, the first step of the objective test requires the trial court to determine the "historical facts." As the Supreme Court explained in the landmark case of *Beck v. Ohio*, 379 U.S. 89 (1964), "[w]hen the constitutional validity of an arrest is challenged, it is the function of a court to determine whether *the facts available to the officers at the moment of arrest* would warrant a man of reasonable caution in the belief that an offense has been committed." 379 U.S. at 96. (Emphasis added) That test was reiterated in another landmark case: "[I]t is imperative that the facts be judged against an objective standard: would *the facts available to the officer at the moment of the seizure* or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). (Emphasis added) The United States Supreme Court has described this as a "flexible, common sense standard" which "does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983). The appellate courts of this State are in accord: Citing *Texas v. Brown*, this Court has explained that "[i]n regard to the lawfulness of an arrest, probable cause merely requires that the facts available to the officer would warrant a man of

reasonable caution in the belief that an offense has been committed and the accused committed it." *In the Matter of the Care and Treatment of Brown*, 372 S.C. 611, 643 S.E.2d 118 (Ct. App. 2007). *See also, State v. Geer*, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2010).

Therefore, in determining the "historical facts" as part of the "two-step process" established in *Ornelas*, a court must look at the "facts available to the officer" or, put another way, the facts within the officer's knowledge. It is immaterial whether the arresting officer perceived those facts or not; that is why they are deemed "historical facts." Once those "historical facts" are determined by the factfinder, the court must then proceed to the second prong of the analysis and decide "whether [those] historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *State v. Morris*, 411 S.C. 571, 769 S.E.2d 854, 859 (2015), *citing Ornelas*, 517 U.S. at 696. Again, it is immaterial whether the arresting officer's subjective beliefs were correct or not. Probable cause is an objective standard, and thus, it does not turn on whether the arresting officer's account of what happened was correct or not.

A review of the order filed July 19, 2017, shows that the trial court, who was sitting without a jury, never engaged in the proper analysis. The order does describe the "two-step process" established in *Ornelas* in the portion of the order captioned "Applicable Standard"; however, the trial court never engages in the second prong of the analysis. This Court respectfully overlooks this deficiency in the trial court's analysis. The trial court never made a determination whether an objectively reasonable police officer in Deputy Gore's position could have reasonably perceived that Mack was off the Club Essence property at the time he arrested Williamson. Indeed, in the "Findings of Fact' and "Conclusions of Law" sections of the order, the trial court never makes that determination *nor even addresses* what an "objectively

reasonable police officer" would have reasonably perceived or believed with respect to the arrest of Williamson. The trial court did make a determination that Deputy Gore's "testimony is not believable" and hence was "not credible." (R. 18). However, as indicated, the subjective beliefs of the officer are not relevant. Even where the court does not believe the arresting officer's version of the facts, in whole or in part, that does not automatically mean that there was no probable cause for the arrest. In other words, in cases where the arresting officer's testimony is disbelieved in whole or in part, that does not relieve the court of determining the "historical facts" and applying both prongs of the *Ornelas* test, which is well established as being an objective rather than a subjective test. Thus, the court was required to still determine what facts were reasonably available to the officer at the time of arrest, those being the "historical facts," and it is those facts that must then be viewed from the perspective of an objectively reasonable police officer to determine whether those facts give rise to probable cause.

On rehearing, this Court is respectfully requested to require the trial court to actually apply the second prong of the *Ornelas* test, which it clearly did not. The trial court failed to make findings and conclusions on that prong. Likewise, the trial court failed to give any consideration to what an "objectively reasonable police officer" could have perceived about the arrest and whether those perceptions were sufficient to establish probable cause. In its opinion, this Court writes: "Evidence supports the circuit court's determination that the facts available to Deputy Gore, viewed 'from the standpoint of an objectively reasonable police officer," did not provide probable cause for Gore to arrest Mack for simple assault." Slip. Op. at 7. By placing "from the standpoint of an objectively reasonable police officer" in quotation marks, the Court makes it appear that is a quote from the trial court's order. It is not. The trial court never considered the historical facts from the standpoint of an objectively reasonable police officer as

required by the second prong of the *Ornelas* test. Instead, the trial court makes some reference to "objective information the officer possessed," but it is unclear what is even meant by that. (R. 18). Clearly, the trial court's analysis focused only on what Deputy Gore knew and whether his account of the incident was credible. That is not a proper application of the *Ornelas* test, and the failure of the trial court to apply the proper test for probable cause (including *both* prongs of the test) to find for the Respondent should not be overlooked or excused.

II.

This Court also overlooked or misapprehended Sheriff Lott's position on the motion for an involuntary nonsuit made at the close of Mack's case-in-chief and again at the close of the evidence as well as after remand. In its opinion, this Court refers to the motions as "directed verdict" motions, which admittedly is how Sheriff Lott's counsel described the motions at trial. (R. 246, 319). However, the motions should be properly deemed to be motions for involuntary nonsuit because this action was tried non-jury. *See*, *Gordon v. Lancaster*, 419 S.C. 48, 795 S.E.2d 857, 861, n.3 (Ct. App. 2016). In *Gordon*, this Court determined under the same circumstances as present in the care at bar that "[appellant's] incorrect terminology does not warrant a refusal on the part of this court to address the merits of his motion." *Id*. Accordingly, the proper standard of review would be for a nonsuit motion rather than a directed verdict motion.

At any rate, Sheriff Lott believes that the Court erred in failing to recognize that the existence of probable cause may be determined as a matter of law based on the undisputed evidence contained in the record including the concessions Mack made in his trial testimony, the positions Mack took at trial, and what is reflected on the dashcam video. In particular, this Court overlooked or disregarded that Mack conceded in sworn testimony that he was actively pursuing

McKenzie Williamson on foot, that Williamson fell under a parked vehicle, that the vehicle was partially situated in the public roadway, that Mack then proceeded to physically "grab" and "pull" Williamson out from under the vehicle, and that Mack then restrained Williamson by handcuffing him. (R. 154-155, 198-203). Moreover, by Mack's own admission, Williamson was placed under arrest while lying in the street. There is, in fact, no evidence to suggest that Williamson was arrested on the grass and then moved into the street. Instead, by Mack's own account, he pulled Williamson from under the white car that was positioned halfway in the street, and Williamson was then placed under arrest and handcuffed *while at least partially in the street*. Mack himself confirmed on direct examination that Williamson was not moved after his arrest:

> Q. ... And that is when you handcuffed him?
>
> A. That is when the bouncers who came behind me to assist me said, go ahead and put the cuffs on him. And I cuffed him and pulled him out -- *after they pulled him out from under the car, I put the cuffs on him and we held him right there until one of deputies came down Weir Avenue, which was Deputy Parish.* And one of the guys flagged her down where I held him right here.
>
> Q. Okay.
>
> A. Uh-huh.
>
> Q. *You didn't move him after he came out from under the car, did you?*
>
> A. *No.*
>
> Q. *After you put handcuffs on him?*
>
> A. *No.*

(R. 156). (Emphasis added).

This is important and demonstrates why Sheriff Lott is entitled to judgment as a matter of law. Even assuming the historical facts are as described by Mack and as confirmed on the

dashcam video, an objectively reasonable officer in Deputy Gore's position, which was forty yards down the street (R. 113), would reasonably perceive that the arrest of Williamson occurred in the public street. Williamson could be seen handcuffed and laying at least partially in the roadway. *That has been conceded.* Williamson was arrested and handcuffed where he lay. *That has been conceded.* Could an objectively reasonable officer viewing this from forty yards away conclude that the arrest occurred in the street? Of course.

Mack's testimony to that effect is corroborated by the dashcam video from Deputy Stacy Parish's vehicle. When the video is shot, Williamson had already been pulled from underneath the vehicle and was handcuffed. (R. 239, 358). Thus, while the video does not show Williamson being dragged from beneath the white car by Mack, it does show the position of the car in question, which is at least partially in the street, and it shows Williamson at least partially in the street after his arrest. That cannot be disputed. In fact, Mack's counsel conceded as much with his questioning of Deputy Parish at trial, as the following examples show:

> Q. And that white vehicle was half on the side of the road and a half on the property of 109 Weir Avenue?
>
> (R. 217).
>
> Q. And when you arrived on the scene, Mr. Williamson was half on the grass of 109 Weir Avenue and half on the roadway, is that correct?
>
> (R. 220).
>
> Q. Officer Parish, I believe in your testimony with me you said that the white vehicle was all the way in the road. Would you agree with me that that video depicts it half on the grass and a half on the side of the road?
>
> (R. 244).

Thus, *Mack took the position at trial that the white vehicle was halfway in the road and that Williamson was also positioned at least halfway in the road*. Those concessions are also supported by the dashcam video, yet those concessions were not addressed and, in fact, were entirely disregarded in error by the trial court and by this Court on appeal.

Even the trial court found as fact that "the car appears to be *primarily* parked in the grass." (R. 16). (Emphasis added). The use of the word "primarily" indicates that the vehicle was not completely in the grass. This Court also recognizes that "the video appears to show the white vehicle described in the testimony is *primarily* parked in the grass at 109 Weir Avenue." Slip Op. at 8. (Emphasis added). Again, the use of the word "primarily" indicates, as the dashcam shows, and Mack conceded at trial, the vehicle was *at least partially in the roadway* – perhaps as much as "half and half" as Mack argued at trial.[1] That is critical because an objectively reasonable police officer in Deputy Gore's position could have perceived from his vantage point that the arrest occurred in the public roadway. That is all it takes to establish probable cause. That may not be sufficient evidence to convict, but that is not the issue. Clearly, that evidence is sufficient to establish probable cause by an objectively reasonable officer on the scene.

This Court's consideration of the dashcam video is also flawed. After stating that Sheriff Lott "presented [the dashcam video] to every court considering the question of probable cause," this Court concludes that "no court has found the video supports the argued position." Slip. Op. at 8. This Court makes the same error as the trial court, which had similarly concluded that

[1] The record shows that Weir Avenue is a two-lane road; yet the parked vehicles lining the street reduced the street to one lane – as evidenced by the limited space that Deputy Stacy Parish had to maneuver her vehicle. The dashcam shows that clearly. That alone demonstrates that the vehicles, including the white vehicle, were parked at least partially in the roadway. (R. 358, 359).

"[t]he dashcam video of the incident is not determinative of whether the incident took place on private property or in the road" and "[t]his is consistent with the opinions from the Court of Appeals and the Supreme Court." (R. 18). The trial court maintained that both appellate courts declined to find the video to be "indisputable." (R. 18). That is absolutely incorrect. There is no mention whatsoever of the dashcam video in either of the appellate courts' opinions issued prior to remand. Both appellate courts chose to remand for further fact-finding rather than addressing the merits of Mack's claim. Thus, there was never a determination of the merits on appeal and no discussion of the dashcam video and what it shows or whether it is or is not "indisputable." The only court to offer an opinion on the value of the dashcam video was the trial court, and it is unfair and incorrect to read more into this Court's prior decision or the Supreme Court's opinion, neither of which addressed the merits of the probable cause determination.

In sum, as Sheriff Lott argued at trial, even if the historical facts were drawn entirely from Mack's account and the dashcam video, the trial court should have still found that an objectively reasonable police officer observing the events would conclude that Mack's arrest of Williamson occurred at least partially in the roadway and, as a result, outside of Mack's jurisdiction. Stated differently, an objectively reasonable police officer in Deputy Gore's position could have perceived and concluded that Mack committed an unwanted touching resulting in injuries sustained in the public roadway. However, in this instance, the trial court, and this Court erred, in not considering what an objectively reasonable officer would have perceived based upon the historical facts. Based on the undisputed evidence contained in the record and the concessions Mack made in his sworn testimony and the position taken at trial, there should be no question that probable cause existed for Mack's arrest. For that reason, the

Court is respectfully requested on rehearing to rule as a matter of law that Mack failed to prove his cause of action for false arrest/imprisonment.

CONCLUSION

Based on the foregoing discussion, the Appellant Leon Lott respectfully requests that the Court rehear its decision in this case and reverse the decision of the trial court and remand either for proper consideration of the second prong of the *Ornelas* test or for entry of a nonsuit in Sheriff Lott's favor.

Respectfully submitted,

LINDEMANN & DAVIS P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8921

ROBERT D. GARFIELD #6557
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5728

Counsel for Appellant Leon Lott

February 3, 2022

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant Leon Lott, does hereby certify that service of the **Petition for Rehearing and Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 3rd day of February 2022:

Neal M. Lourie, Esquire
Lourie Law Firm, LLC
Email: nlourie@lourielawfirm.com

Joshua S. Kendrick, Esquire
Christopher S. Leonard, Esquire
Kendrick & Leonard, P.C.
Email: josh@kendrickleonard.com
Email: chris@kendrickleonard.com

Robert D. Garfield, Esquire
Crowe LaFave, LLC
Email: robert@crowelafave.com

s/ Andrew F. Lindemann

LINDEMANN & DAVIS

Telephone (803) 881-8920
Facsimile (803) 862-1181

5 Calendar Court, Suite 202 (29206)
Post Office Box 6923
Columbia, South Carolina 29260

ANDREW F. LINDEMANN*
Direct Dial: (803) 881-8921
Email: andrew@ldlawsc.com

JAMES M. DAVIS, JR.†
Direct Dial: (803) 881-8922
Email: jim@ldlawsc.com

**Also Admitted in North Carolina*
†*Certified Mediator*

February 3, 2022

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Demetrius Mack v. Leon Lott, in his Official Capacity as Sheriff of Richland County
Appellate Case Number: 2017-001734
Civil Action Number: 2010-CP-40-5214
Our File Number: 314.8515

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on all counsel of record to this appeal by email only. The $50.00 check for the filing fee is being sent to the Court via U.S. Mail today.

If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Neal M. Lourie, Esquire *(w/ Enclosures, Via Email Only)*
Joshua S. Kendrick, Esquire *(w/ Enclosures, Via Email Only)*
Christopher S. Leonard, Esquire *(w/ Enclosures, Via Email Only)*
Robert D. Garfield, Esquire *(w/ Enclosures, Via Email Only)*