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Apr 25 2022

SC Court of Appeals

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,..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Certificate of Counsel 1

Questions Presented 1

Statement of the Case..... 2

Statement of Facts 5

Arguments 8

 I. The Court of Appeals erred in failing to require the trial court to consider the evidence supporting probable cause from the perspective of an objectively reasonable officer on the scene as required by the *Ornelas* test. 8

 II. The Court of Appeals erred in failing to rule as a matter of law that an objectively reasonable police officer in Deputy James Gore's position could have perceived and concluded that the Respondent committed an unwanted touching resulting in injuries sustained in the public roadway. 13

Conclusion 20

CERTIFICATE OF COUNSEL

Counsel for the Petitioner Leon Lott, in his official capacity as Sheriff of Richland County, certifies that his Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on March 25, 2022.

QUESTIONS PRESENTED

- I. Did the Court of Appeals erred in failing to require the trial court to consider the evidence supporting probable cause from the perspective of an objectively reasonable officer on the scene as required by the *Ornelas* test?

- II. Did the Court of Appeals err in failing to rule as a matter of law that an objectively reasonable police officer in Deputy James Gore's position could have perceived and concluded that the Respondent committed an unwanted touching resulting in injuries sustained in the public roadway?

STATEMENT OF THE CASE

This is an action for false arrest/imprisonment brought by the Respondent Demetrius Mack against the Petitioner Leon Lott, in his official capacity as Sheriff of Richland County. This action arises out of the arrest of Mack on December 6, 2008, in the vicinity of Club Essence, a nightclub located on Two Notch Road in Richland County, South Carolina. Mack was working at the time as a private security officer at Club Essence. Mack was arrested by Richland County sheriff's deputies on the charge of simple assault following his pursuit, apprehension, and handcuffing of the victim, McKenzie Williamson.

Demetrius Mack initiated this action by the filing of a complaint on August 4, 2010, wherein he alleged causes of action for false arrest/imprisonment, negligence, gross negligence, negligent training, assault and battery. (R. 21-28). All of the causes of action except for the false arrest/imprisonment claim were voluntarily dismissed prior to trial. (R. 3-4).

The case was scheduled for a jury trial to begin on April 4, 2012. The parties thereafter waived their right to a jury trial and consented to a bench trial before Circuit Court Judge DeAndrea G. Benjamin. The case was tried on April 4-5, 2012. On April 5, 2012, Judge Benjamin issued a judgment in favor of the

Respondent Mack and awarded \$7,500.00 in actual damages. That judgment was memorialized in an order filed April 6, 2012. (R. 5-7).

Sheriff Lott subsequently filed a motion to alter or amend judgment pursuant to Rule 52(b) and/or Rule 59(e), SCRCP. (R. 35-43). That motion was summarily denied in a form order filed May 11, 2012. (R. 8).

Sheriff Lott thereafter filed a timely appeal to the Court of Appeals which remanded the case by a published opinion issued on July 23, 2014. The Court of Appeals concluded that the "trial court's findings of fact are insufficient under Rule 52(a)," and as a result, the Court remanded "for more detailed findings as to whether Mack met his burden of proving Gore did not have probable cause to arrest him." (R. 395). Sheriff Lott petitioned for rehearing, and that petition was summarily denied.

Thereafter, Sheriff Lott filed a petition for writ of certiorari which was granted in part. After full briefing and oral argument, the Supreme Court dismissed the writ as improvidently granted "since both parties and the trial court agree that 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." (R. 397). The Supreme Court also ordered that the

Court of Appeals' opinion be depublished "[b]ecause the Court of Appeals' language on this issue is arguably unclear." (R. 397).

On remand, Judge Benjamin held a hearing on May 4, 2017, at which she heard additional oral argument from the parties. She thereafter issued a written order filed July 19, 2017, wherein she set forth findings of fact and conclusions of law and ultimately confirmed her earlier judgment in favor of Mack in the amount of \$7,500.00. (R. 9-19).

Leon Lott, in his official capacity as Sheriff of Richland County, filed an appeal to the Court of Appeals. On January 19, 2022, the Court of Appeals issued an unpublished opinion affirming the orders of Circuit Court Judge DeAndrea G. Benjamin. The Petitioner Lott filed a petition for rehearing which was summarily denied by order filed March 25, 2022.

STATEMENT OF FACTS

On December 6, 2008, the Respondent Demetrius Mack was employed with DTH Protective Services and working at Club Essence, a nightclub on Two Notch Road in Richland County. On that date, a Club Essence patron named McKenzie Williamson had been creating some trouble at the nightclub. According to Mack, Williamson had been escorted off the property several times by members of DTH Protective Services. (R. 151-154).

At some point during the early morning hours, Williamson returned to the nightclub and was spotted by Mack. When Mack approached Williamson to arrest him, Williamson immediately began to flee on foot. (R. 154-155). Mack pursued Williamson and during the course of the pursuit in the direction of Weir Avenue,¹ Mack claims that Williamson tripped and fell under a white vehicle parked on the public roadway. (R. 154-155, 198). Mack testified that he then "grabbed" Williamson, "pulled" him from under the parked vehicle, and placed him in handcuffs. (R. 199, 202-203).

Richland County Sheriff's Deputies James Gore and Kenneth Proffitt were on duty in their assignment in Region Two at or near the 100 block of Weir

¹ The adjoining property to the Club Essence location is 109 Weir Avenue which is owned by the owner of Club Essence. That property was used as a parking lot for the nightclub and was within the scope of DTH Protective Services' contract. (R. 345-348).

Avenue. Specifically, they were in the process of placing some subjects in custody for narcotics violations. (R. 111). At that time, these deputies observed some type of commotion taking place at Club Essence, which was approximately forty yards from their location. (R. 111-112). In particular, they observed a subject running from the nightclub's parking lot out into the road with another subject chasing him. (R. 112). Deputy Gore observed the second subject tackle the first subject in the roadway. It then appeared that the second subject placed handcuffs on the first subject. (R. 113). Deputy Proffitt witnessed the same events. (R. 272-273).

Deputy Proffitt called for back-up units, and Deputy Stacy Parish, who was in the vicinity, responded. The location of Williamson and the parked vehicle are depicted on Deputy Parish's dashcam video. (R. 358).

Deputy Gore proceeded to the location and spoke with Demetrius Mack to ascertain the nature of the commotion. Mack identified himself as a security guard for Club Essence. Mack explained that the subject running off the property was asked several times to leave and would not do so. Mack then chased the subject off the property and into the roadway. (R. 116).

Deputy Gore asked Mack that, at the point the subject was off the property then why did he continue to chase him into the street. Mack replied that he was detaining him so that law enforcement could place him on trespass notice. Deputy Gore then asked Mack whether he intended to press charges against the subject,

and Mack stated that he did not. Deputy Gore then advised Mack as to Section 40-18-110, which provides that a person who is appropriately certified as a private security officer has the authority and arrest powers given to sheriff's deputies. However, such powers are specifically confined to the property on which he is employed. (R. 117-119).

Deputy Gore turned his questioning to the McKenzie Williamson who had been handcuffed by Mack. Williamson informed him that he wished to press charges against Mack. (R. 121). Deputy Gore observed Williamson and noted that he sustained injuries to his hands and face and that he had blood "all over his shirt." (R. 120). Those injuries required ambulatory treatment, and Williamson was subsequently transported to the hospital via Richland County EMS. (R. 121). Deputy Gore (who was a Corporal at the time of these events) instructed Master Deputy Stacy Parish to effectuate an arrest of Mack for simple assault. Mack was arrested and transported to the Alvin S. Glenn Detention Center.

ARGUMENTS

- I. The Court of Appeals erred in failing to require the trial court to consider the evidence supporting probable cause from the perspective of an objectively reasonable officer on the scene as required by the *Ornelas* test.**

In its opinion, the Court of Appeals failed to recognize that the trial court did not consider the evidence supporting probable cause from the perspective of an objectively reasonable officer on the scene. The trial court on remand from this Court 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. The trial court did not follow this Court's implicit remand directions in its *per curiam* opinion filed December 9, 2015, and a writ of certiorari is therefore warranted.

In *State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661 (2000), this Court adopted the "two-step process" for determining probable cause as articulated in *Ornelas v. United States*, 517 U.S. 690 (1996). This 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 United States 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*, our Court of Appeals 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, which 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. The Court of Appeals erred in overlooking 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.² 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 trial court was required to still determine what facts

² As this Court previously wrote in this very case, "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." (R. 397). *See, United States v. Porter*, 71 Fed.Appx. 277, 278 (4th Cir. 2003) ("the Supreme Court has emphasized that the analysis of whether probable cause exists is an objective one, that is unaffected by the officer's subjective beliefs or state of mind"). *See also, State v. Banda*, 371 S.C. 245, 639 S.E.2d 36, 40, n.3 (2006) *citing Whren v. United States*, 517 U.S. 806, 814 (1996) ("subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

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.

This Court is requested to issue a writ of certiorari 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, the Court of Appeals wrote: "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 of Appeals made 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 disregarded or excused. This Court is respectfully requested to issue a writ of certiorari to ensure that the *Ornelas* test is properly applied and that probable cause be treated, as it is supposed to be, as an objective and not subjective standard.

II. The Court of Appeals erred in failing to rule as a matter of law that an objectively reasonable police officer in Deputy James Gore's position could have perceived and concluded that the Respondent committed an unwanted touching resulting in injuries sustained in the public roadway.

Sheriff Lott made a motion for an involuntary nonsuit 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, the Court of Appeals 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 case 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, the Court of Appeals 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, the Court of Appeals failed to recognize 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 clearly 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 the Court of Appeals.

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. The Court of Appeals similarly recognized 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.³ 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

³ 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).

sufficient to establish probable cause by an objectively reasonable officer on the scene.

The Court of Appeals' 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," the Court of Appeals concluded that "no court has found the video supports the argued position." Slip. Op. at 8. The Court of Appeals made the same error as the trial court, which had similarly concluded that "[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. Moreover, this Court actually ordered the Court of Appeals' first decision to be "depublished." (R. 396-397). 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 the Court of Appeals' prior decision

or this Court's earlier 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 the Court of Appeals 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, this Court is respectfully requested to issue a writ of certiorari so as to rule as a matter of law that Mack failed to prove his cause of action for false arrest/imprisonment.

CONCLUSION

For these reasons, the Petitioner Leon Lott, in his official capacity as Sheriff of Richland County, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

LINDEMANN & DAVIS P.A.

BY: s/ Andrew F. Lindemann

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April 25, 2022

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

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Case No. 2010-CP-40-5214

Demetrius Mack, Respondent,

v.

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

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 (dated August 25, 2021), the undersigned employee of Lindemann & Davis, P.A., attorneys for the Petitioner Leon Lott, in his Official Capacity as Sheriff of Richland County, does hereby certify that service of the **Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals and upon all counsel of record by email only this the 25th day of April 22, as follows:

Via Email Only

The Honorable Jenny Abbott Kitchings
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April 25, 2022

Via Email Only

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Apr 25 2022

SC Court of Appeals

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:

Pursuant to Section (b)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), please find enclosed for filing the **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has also been filed with the South Carolina Supreme Court.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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