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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable George M. McFaddin, Circuit Court Judge

JOSHUA WILLIAM PORCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000058

APPENDIX

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to be seized. Ybarra v. Illinois, 444 U.S. 85 (1979). Stated another, more familiar way, probable cause exists when the totality of the circumstances within the officer's knowledge "are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Stated another way, in determining the constitutional validity of an arrest, a court must consider whether at the moment the arrest was made, the officer had probable cause to make it, i.e., whether at that moment the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, was sufficient to warrant a prudent man in believing the suspect had committed a criminal offense. Maryland v. Pringle, 540 U.S. 366 (2003); Beck v. Ohio, 379 U.S. 89 (1964); State v. Pruitt, 260 S.C. 396, 196 S.E.2d 107 (1073); State v. Singleton, 258 S.C. 125, 187 S.E.2d 518 (1972); State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971).

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984); State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978); State v. Williams, 262 S.C. 186, 203 S.E.2d 436 (1974). Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983). Probable cause is a fluid concept-turning on the assessment of probabilities in a particular factual context–nor readily, or even usefully, reduced to a neat set of legal rules. Maryland v. Pringle, 540 U.S. 366 (2003); Illinois v. Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Pringle, *supra*; Gates, *supra*. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169, 69 S.Ct. 1302, (1949); State v. Dupree, 319 S.C.

454, 462 S.E.2d 279 (1995). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742, 103 S.Ct. at 1535. South Carolina has adopted the "totality of the circumstances" test of Illinois v. Gates, *supra*, in determining whether sufficient probable cause exists to issue a warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); Martin, *supra*.

As the United States Supreme Court recognized in Gates, *supra*, affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, in light of which technical requirements of elaborate specificity once exacted under common law pleading have no proper place. *See* United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965). "Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion." State v. Bowie, *supra*, *citing* Sullivan, *supra*; Dupree, 354 S.C. at 683, 583 S.E.2d at 441. Affidavits must be judged on the facts presented, not on the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

The Franks hearing

Below, Judge Lee, out of an abundance of caution, conducted a Franks hearing regarding the circumstances surrounding the issuance of the arrest warrant for Porch. At the hearing, Chief Deputy Sheriff David Wilson of the Richland County Sheriff's Office (hereinafter "Chief Wilson") testified regarding his investigation of the murder of Nakia Mallory and how he ultimately came to seek a warrant for Porch's arrest for murder. (Tr. pp. 25-69).

Chief Wilson testified he was asked to re-open or look at the previous investigation of the victim's murder by Sheriff Leon Lott after the victim's husband, Justin, was acquitted. Chief

Wilson testified that in doing so he discovered there were several inconsistencies in **Porch's** statements to police. Obviously, Porch had given at least three (3) inconsistent statements to police including first stating he was not at the scene on the night of the crime, second stating he was there earlier with his child and cut his hand cutting an apple, and finally third admitting he was present at the scene but claiming he was stabbed by victim's husband during a domestic altercation. Importantly, to Chief Wilson, Porch admitted in this final statement that he attempted to clean up blood he had dripped on the kitchen floor before the leaving the apartment. Chief Wilson noted that it made no sense to him that Porch would intervene in a domestic altercation between the husband and the victim and suffer a stab wound, and then clean up the kitchen while the husband was still attacking the wife in the den or living room of the apartment. It also seemed strange that Porch would not call police or EMS after walking out of the kitchen and discovering the victim's body near the couch. Chief Wilson was also aware of the husband's statement to police the night of the crime where he stated he came home and found his wife lying at the foot of the couch and blood was everywhere. Further, Chief Wilson was aware a neighbor had informed police that when the husband came to his apartment asking for assistance, there was no blood on the husband's clothing. Chief Wilson decided to have the victim's shirt re-examined for DNA, which had never been done in the investigation. The original DNA testing in the case showed Porch's blood was found in the kitchen of the victim's apartment, where someone had attempted to wipe up the blood, and Porch's DNA was found under the victim's fingernails. The subsequent DNA testing, after the husband's acquittal, requested by Chief Wilson, revealed a drop of Porch's blood was found at the bottom right of the victim's blouse. This was significant to Chief Wilson. Porch had also told police on one (1) occasion that it was

his left hand that was cut and testified at husband's trials that it was his left hand that was cut.[7] In his statement to police placing himself at the scene at the time the husband supposedly attacked the wife, Porch claimed he was facing the husband when he [Porch] was stabbed or cut, and the victim, Nakia Mallory, was standing behind him. Chief Wilson believed it was highly unlikely that if Porch's left hand had been cut, that he would have dripped or gotten blood on the bottom right of the victim's shirt when she was standing behind him. Chief Wilson also noted in reviewing the file that the victim was stabbed in what would be her right shoulder or neck area. Porch was left-handed. The victim's husband was right handed. It was more consistent with the assault on the victim that she was stabbed by a perpetrator who was left handed. This would also be consistent with the drop of Porch's blood found on the bottom right of the victim's blouse. As a result of all of the evidence in the case, Chief Wilson believed there was probable cause to arrest Porch for the victim's murder, and Chief Wilson believed Porch actually committed the murder. (Tr. 11/12/2013 pp. 25-69).

Chief Wilson sought and obtained an arrest warrant for murder from Magistrate Phil Newsome. Judge Newsome issued the arrest warrant for the murder of Nakia Mallory against Porch. (Tr. 11/12/2013 pp. 25-69, 69-75).

The Arrest Warrant Affidavit

The Affidavit presented to the magistrate who issued the arrest warrant in this case stated as follows:

> That on 5/14/2006 while at 1103 Pinelane Road Apt. 311 in the Dentsville Magisterial District of Richland County, one Joshua Porch did commit the crime of

7 Chief Wilson testified Porch had told police inconsistent stories about which hand was cut. First, he stated his right hand was cut and on another occasion he stated his left hand was cut. Chief Wilson stated he found it unusual that someone could be involved in such a significant event as a murder, and could not remember which hand was cut.

> Murder in that he did with malice aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene and implicates the defendant in the assault at the time of the murder. Affiant and others are witness to prove same.

(Arrest Warrant, Defendant's Ex. 1).8 The arrest warrant for murder was subsequently served on Porch in California, and he thereafter confessed that the husband [Justin] was not present during the crime, and it was he who killed the victim.

The Lack of Merit of Porch's Argument

Porch relies on Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). In Franks, the Supreme Court delineated the limited circumstances in which a defendant can attack a facially sufficient warrant affidavit. 438 U.S. at 155-56. The Court set forth a two-step process for defendants seeking to challenge such affidavits. Id. First, a defendant must make a rigorous showing necessary to obtain a hearing:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. This showing "must be more than conclusory" and should include affidavits or other evidence to overcome the "presumption of [the warrant's] validity." Id. at 171. Second a defendant faces additional burdens at the hearing stage:

> In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the

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8 Both Chief Wilson and Magistrate Newsome testified Wilson told Newsome other information than what was in the arrest warrant affidavit, such as background information on the case; however, due to the passage of time between the issuance of the arrest warrant and the Franks hearing, neither Chief Wilson nor Magistrate Newsome could remember what they discussed. (See Tr. 11/12/13, pp. 25-75).

> affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 156.

Franks addressed an act of commission in which false information had been included in the warrant affidavit. That did not occur here. There is no false information in the affidavit. Porch had admitted under oath at two (2) different trials and in a prior statement to police that he was present at the scene of the crime at the time of the assault and stabbing of Nakia Mallory. Further, Porch had been further implicated in the crime by DNA testing which found Porch's blood on the kitchen floor and someone had attempted to wipe up that blood before leaving the crime scene, under the victim's fingernails, and on the bottom of the victim's shirt indicating Porch was present at the scene *and* indicated Porch was involved in the assault of the victim at the time of the murder. Judge Lee correctly found there were no false statements in the affidavit. Porch concedes this issue and argues the omission of exculpatory evidence. (BOA, pp. 5-13).

The Franks test also applies to acts of omission in which exculpatory material is left out of an affidavit. State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999); State v. Lynch, 412 S.C. 156, 179-84, 771 S.E.2d 346 (Ct. App. 2015). The Franks' threshold is even higher for defendants making claims of omissions rather than affirmative false statement. United States v. Clenney, 631 F.3d 658 (4th Cir. 2011); United States v. Tate, 524 F.3d 449, 454-55 (4th Cir. 2008). Merely identifying factual omissions is insufficient. Tate, 454-55. To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. Missouri; United States v. Blauvelt, 638

F.3d 281, 289 (4th Cir. 2011). The defendant must also show that the omissions were material, meaning that their "inclusion in the affidavit would defeat probable cause." Clenney, 631 F.3d at 664; United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990).

To prevail at the hearing, the defendant must then prove these points by a preponderance of the evidence. Franks, 438 U.S. at 155-56; Clenney, 631 F.3d at 664. There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause. Id. Entitlement to a Franks hearing is a matter of law subject to *de novo* review. United States v. Tate, 524 F.3d 449, 455 (4th Cir. 2008).

There is a presumption of validity with respect to the affidavit in support of the warrant. Franks, 438 U.S. at 171. "To begin with, warrant affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, (1965). As the Fourth Circuit stated in Clenny:

> If we 'desire to encourage use of the warrant process by police officers,' Illinois v. Gates, 462 U.S. 213, 237, n. 10, 103 S.Ct. 2317 (1983), the worst course of action would be to pick apart warrant affidavits from the pristine perch of hindsight or to penalize officers for securing what the law requires. Obtaining a warrant is a process overseen by a neutral magistrate. Magistrates make an independent judgment about the sufficiency of the warrant affidavit. They are free to reject warrant applications that provide scant or insufficient evidence. Indeed, an important rationale for the Franks ruling was respect for the warrant process and the capabilities of magistrates. Franks, 438 U.S. at 166-67.

Clenny, 631 F.3d at 665 (4th Cir. 2011).

The protections of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) do not apply to warrant application proceedings. Clenny, 631 F.3d at 665; Colkley, 899 F.2d at 302-03. "The Supreme Court has shown no inclination to impart the panoply of trial protections into the warrant application process with all the attendant burdens and delays such a step would entail." Id. at 665; *See* Franks, 438 U.S. at 166-72.

The process of preparing a warrant affidavit requires affiants to exercise discretion by selecting certain facts for inclusion and others for omission. Tate, 524 F.2d at 454-55. "An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation." Colkley, 899 F.2d at 300.

> "[A] requirement that all potentially exculpatory evidence be included in an affidavit would severely disrupt the warrant process. The rule would place an extraordinary burden on law enforcement officers, who might have to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded."

Id. at 303. "In short, a rule requiring affiants to disclose all potentially exculpatory information has nothing to recommend it. Unless a defendant makes a strong preliminary showing that the affiant excluded critical information from the affidavit with the intent to mislead the magistrate, the Fourth Amendment provides no basis for a subsequent attack on the affidavit's integrity." Id. at 303.

> While omission may not be *per se* immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included have redounded to defendant's benefit. The potential of endless rounds of Franks hearings to contest facially sufficient warrants is readily apparent.

United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990); State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015)(*quoting* Colkley). "Inferring bad motives from an officer's omission of information inappropriately "collapses into a single inquiry the two elements –'intentionality' and 'materiality'—which Franks states are independently necessary." Id.

A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. Tate, 524 F3d at 454. "'[M]ere [] negligen[ce]

in ...recording the facts relevant to a probable-cause determination' is not enough." Colkey, 899 F.2d 301 (*quoting* Franks, 438 U.S. at 170). "[T]he omission must be 'designed to mislead' or must be made 'in reckless disregard of whether [it] would mislead'" United States v. Tate, 524 F.3d 449, 455 (4th Cir. 2008). "The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that its inclusion in the affidavit would defeat probable cause." United States v. Shorter, 328 F.3d 167, 170 (4th Cir. 2003)(citations and internal quotation marks omitted). In this case, Porch offered no evidence the officer omitted information with the intent to mislead the magistrate whether intentionally or recklessly. In fact, Judge Lee specifically found there was nothing false in the affidavit. And, even including the exculpatory material Porch alleged was omitted, there was still sufficient probable cause to support the issuance of the arrest warrant. (Tr. 11/12/2013, pp. 85-90; Tr. 11/18/2013, pp. 1-13). The facts elicited during the *in camera* hearing show Chief Deputy Wilson did not intend to mislead the magistrate.

Colkey makes clear the Fourth Circuit's disdain for the notion bad motive can be inferred from the materiality of the omitted information. That Court has clearly set a very high standard for establishing entitlement to a Franks hearing. Id. Porch was not even entitled to a Franks hearing, and has not made a sufficient showing to include his alleged exculpatory evidence. United States v. Shorter, 328 F.2d 167, 170 (4th Cir. 2003)(defendant must also show the omitted material was necessary to the probable cause finding, i.e., the omitted material was such its inclusion would have defeated probable cause).

Judge Lee conducted a Franks hearing out of an abundance of caution. Further, the affidavit supplied ample probable cause for the issuance of the warrant. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such

grounds as would induce an ordinarily prudent and cautious person under the circumstances to believe likewise." City of Spartanburg v. Wortman, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and the belief of guilt must be particularized with respect to the person to be seized. Ybarra v. Illinois, 444 U.S. 85 (1979).[9] Probable cause exists when the totality of the circumstances within the officer's knowledge "are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006)

As Gates recognized, and as here, affidavits are normally drafted by officers in a criminal investigation; therefore, technical requirements of elaborate specificity once exacted under common law pleading have no proper place, and they should be viewed in a common sense and realistic fashion.[10] Affidavits must be judged on the facts presented not the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). The Affidavit here supplies sufficient probable cause to issue the arrest warrant charging Porch with murder. State v. Lynch, 412 S.C. 156, 179-84, 771 S.E.2d 346 (Ct. App. 2015).

The facts of this case are similar to those in United States v. Moody, 762 F.Supp. 1491 (N.D. Ga. 1991), where the Court found no Franks hearing was due to a murder defendant

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9 Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984); State v. Peters, 271 SC. 498, 248 S.E.2d 475 (1978): State v. Williams, 262 S.C. 186, 203 S.E.2d 436 (1974). Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742.

10 *See* United States v. Ventresca, 380 U.S. 102 (1965); Bowie, *supra* ("Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion."), *citing* Sullivan; Dupree, 354 S.C. at 683, 583 S.E.2d at 441.

despite his claim that a search warrant affidavit omitted facts suggesting another suspect in the crime. A judge and lawyer were assassinated by mail bombs. The investigation first focused on one individual, but a search of his property proved fruitless. The investigation then shifted to the defendant for whom the police obtained search warrants. The defendant thereafter moved to suppress evidence seized pursuant to those warrants and contended that the warrant affidavits failed to disclose evidence implicating the first suspect. The Court, however, found that the defendant failed to demonstrate that the omitted information concerning the government's investigation of the other suspect, if included in the affidavit, would have defeated probable cause. In addition, the Court emphasized that to satisfy the Fourth Amendment's probable-cause requirement, the government need not demonstrate that a person is the chief suspect in a criminal investigation. Rather, implicit within the concept of probable cause is the notion that the government may pursue multiple, perhaps even divergent, lines of investigation so long as the government establishes probable cause as to each prior to the issuance of any warrant. In Moody, the evidence marshaled by the government against the first suspect did not exonerate the defendant. At most, the evidence indicated that the defendant and the first suspect may have conspired to commit the crimes charged. Accordingly, the Court found that the defendant's allegations were insufficient to raise issues worthy of an evidentiary hearing under Franks. Moody, *supra.*

Similarly, in State v. St. Louis, 128 Conn. App. 703, 18 A.3d 648 (2011), *certification denied*, 302 Conn. 945, 1011 WL 5581322 (2011), the Court held that the warrant to search the defendant's property for the murder victim's body was supported by probable cause notwithstanding the supporting *affidavit's allegedly improper omission of the defendant's statements inculpating another person* as the defendant's statements suggested that the victim

was dead and buried; the defendant's neighbor recalled seeing a "big hole" dug in the backyard of the defendant's property; the defendant, on the last day when the victim was seen alive, stole a checkbook and drove the victim's vehicle to a credit union, where he attempted to use the victim's license to cash a check made payable to the victim; and a jail house informant stated that the defendant admitted murdering and burying the victim. Id.

Here, Porch had testified under oath at two (2) different trials of the husband that he was present at the scene of the crime when the victim was stabbed. He had also previously given police a written statement that he was present at the scene of the crime at the time the victim was stabbed. Although, he attempted to place the blame for the murder on husband, neither a jury or circuit judge accepted his testimony. Porch unequivocally placed himself at the scene of the crime at the time of the victim's murder. Additionally, DNA testing before and after the husband's acquittal showed Porch's blood [D.N.A.] was on the kitchen floor where someone had tried to clean up the blood before leaving the apartment, on the bottom of the victim's shirt placing Porch in close proximity to the victim and facing the victim when she was stabbed and Porch cut his finger during the stabbing, and Porch's DNA was found under the victim's fingernails. This DNA testing, including the additional DNA evidence, indicated Porch was the person who stabbed the victim. There was sufficient probable cause to issue to arrest warrant for murder against Porch for the murder of the victim.

Further, even including the allegedly omitted exculpatory material, there was still sufficient probable cause to issue the warrant for Porch's arrest so there was no Franks violation. State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999); State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015).

At the Franks hearing, Porch submitted the following affidavit alleging this is what should have been submitted to the magistrate when the arrest warrant was requested:

> On 5/14/2006 at 1103 Pineland Rd Apt 331C in the Dentsville Magisterial District of Richland County one Nekia Mallory died as a result of a stab wound to her neck. Her husband, Justin Mallory, was originally arrested and charged with the crime of murder. This arrest was based on an eye witness and neighbor placing Mallory on the scene at the exact time she heard a domestic fight occurring in the victim's apartment. She was awakened to the argument hearing a woman's voice scream, "how could you" and later observed a black male running out to a white van, later identified as Mallory's, saying "look what you made me do." This witness observed this male at his van with another individual and speed off. Later this van was witnessed arriving at a local hospital with Mallory bringing in the body of Nekia Mallory. Hospital security guard witness observed the demeanor and behavior of Mallory as being inconsistent with genuine grief over the death of his wife, saying things like "bitch bled all over my walls, couch, and PlayStation!" The same witness also observed him enlisting the aid of another man in removing what looked to be a gun from the van. Mallory was arrested and provided a statement placing himself at the crime scene, although denying the murder. Mallory failed a polygraph test regarding killing his wife. Further investigation using Mallory's statement and cell phone records showed that Mallory had ample time to commit the crime after coming home from a date he was on that night. The Defendant, Joshua Porch, was interviewed and ultimately ended up testifying twice as an eye [witness] during prosecutions of Mallory. His testimony was that he was a friend of the Mallory's and came over late the night of the incident to visit. Mallory was not home and he and Nekia began kissing and fondling. At some point they stop, and shortly thereafter Mallory arrives home and he and Nekia began a violent confrontation regarding cheating. Porch observes Mallory striking at Nekia with an object in his hand. Porch attempts to intervene and while standing between the two gets cut on his hand. He testified that he went to the kitchen to find a paper towel for his wound, and in the process bled in the kitchen and attempted to wipe up blood as he bled. When Porch came back out of the kitchen the fight was over, Nekia was sitting against the couch and Mallory was on the phone somewhere in the back of the apartment. Porch left, not notifying law enforcement of what he witnessed and denied being at the scene when questioned the following day. Over a year later when law enforcement finalized preparations for trial Porch was re-interviewed about his DNA possibly being at the crime scene. He gave several inconsistent statements to law enforcement in the weeks before trial before finally admitting to being injured while witnessing the stabbing of the victim by Mallory. He was polygraphed twice regarding whether he stabbed the victim, denying involvement, but failing both polygraphs. Per Major Smith's report he was advised by the polygraph examiner that Porch may not be a good candidate for polygraphs. Lead investigators and the Deputy Solicitor were satisfied with the veracity of his account and called him as a witness during both trials. He explained at trial that

> fear of being implicated in the crime and also his wife discovering his infidelity was why he did not come forward and was not initially truthful about the event. After the acquittal of Mallory following the second bench trial, this affiant was asked by the Sheriff to investigate this case further. Upon reviewing the written statement given by Porch on 6/27/07 stating he cut his right index finger, and then reviewing his statement on 7/2/07 stating he cut his left hand, this affiant decided testing of the victim's shirt was necessary, as it was not deemed relevant for testing by the initial investigators. This showed that a small amount of Porch's blood was located on the bottom right part of the victim's shirt. Although Porch has provided different accounts regarding whether his right or left had [sic] was cut, his trial testimony was that his left hand was cut while intervening in the fight between Mallory and the victim. In this affiant's opinion the left hand being cut is inconsistent with his blood being on the right bottom portion of the victim's shirt. Further, Porch is noted to be left handed by the polygraph examiner, while Mallory is right handed. Although Porch denies the killing, it is the affiant's opinion that the right sided wound to the victim's neck is more consistent with a left handed assailant; however, a right handed assailant cannot be ruled out as well.

(Porch's Proposed Affidavit). Judge Lee found even including the alleged exculpatory material Porch alleged should have been included, there was still probable cause to issue the arrest warrant charging Porch with the victim's murder. (Tr. 11/12/2013, pp. 85-90; Tr. 11/18/2013, pp. 1-13). Judge Lee's findings of fact and conclusions of law are supported by the evidence. Considering the affidavit *as submitted by Porch* there is/was probable cause to issue the warrant for Porch's arrest for murder. State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (2015).

Furthermore, Porch omits incriminating evidence against Porch developed during the investigation that would have come with the exculpatory evidence had Chief Collins drafted the affidavit the way Porch argues it should have been drafted. The victim's husband informed police on the night of his wife's murder that he came home from a date with another woman, and found his wife collapsed on the floor. Blood was everywhere. No one was in the apartment but his children who were sleeping in a bedroom. He immediately ran next door, began banging on the door, and sought assistance. The neighbor, who answered the cry for help, informed police the victim's husband had no blood on him. The police investigation revealed the husband had

been exactly where he claimed to have been on the night of the murder, including corroboration by the girlfriend, restaurant records, hotel records, and phone records. Phone records and cell phone tower records showed the husband would have arrived home at approximately 3:30 a.m., leaving little time for murder to have been committed by him, and the husband called 911 at approximately 3:35 a.m. The eyewitness neighbor described in the affidavit above testified at the husband's trials that the altercation she overheard in the apartment complex took place over a longer period of time than as set forth in her statement to police, over approximately 30 to 45 minutes. Her timeline of the altercation she overheard that night expanded under oath making it impossible for the victim's husband to be the assailant given his location approaching the apartment complex as confirmed by cell-phone towers and his cell phone records. Husband's phone calls during this time period approaching the apartment were also confirmed by his friends who spoke with him. The victim's husband was right-handed. **Porch** first denied he was present at the scene the night of the crime. Over a year later, **Porch** stated he cut his hand in the victim's apartment cutting an apple earlier in the evening, but was not present at the time of the murder, which was a lie to explain his blood [DNA] in the kitchen. Porch also lied on another occasion telling another officer that he told the first (1st) officer who questioned him that he cut his hand in the apartment. Finally, he admitted he was present in the victim's apartment when the victim was killed; he did cut his hand; he bled in the kitchen, and attempted to clean up his blood in the kitchen before leaving the crime scene. Porch stated he was facing the husband, and away from the victim when his hand was cut. Porch's DNA was found on the kitchen floor of the victim's apartment. DNA consistent with Porch's DNA was found *under the victim's fingernails.* Neither a jury nor a circuit judge believed Porch's final statement or testimony in two (2) different trials of the husband.

As a result, there is no merit to this argument. Even had Chief Collins prepared the affidavit differently including all of the details of the investigation, there was probable cause to arrest Porch for the murder of Nakia Mallory when the affidavit and arrest warrant was presented to the magistrate *in 2009*. As a result, Porch's admissions to police in California that the victim's husband [Justin] was not present during the murder, that he [Porch] lied in the husband's two (2) trials, and that he [Porch] was in fact the person who killed the victim, should not have been suppressed. Judge Lee did not abuse her discretion in denying the motion to suppress. Her decision is supported by evidence in the record.

ARGUMENT II.

There was no Confrontation Clause violation.

What Occurred Below

At trial, the State only introduced the last portion of *the videotaped confession* of Porch [the 3rd interview, State's Ex. 50], which was the last statement, taken on July 10th, 2009.[11] In the defense' case, *in camera*, Porch indicated he was going to testify, and he inquired whether he could testify about what occurred earlier in this same videotaped interview, i.e. whether he was threatened or promised anything. In the earlier portion of the videotape, Porch was being polygraphed/questioned by a Los Angeles, California detective, who was present for the Denno hearing in this case, but was not present for the trial. In addition to this portion of the interview being videotaped, it was monitored by Richland County Detectives from an adjoining room in the Los Angeles County Sheriff's Office. The State responded that it had limited what it introduced and thought there was an understanding of how both sides were going to proceed regarding this final statement. The State argued if Porch testified about specific occurrences within that portion of the interview [the portion with the Los Angeles detective], it would open the door for the possibility of the State playing portions of that video in reply or rebuttal to Porch's testimony. Porch argued he had a right to testify; it was not his fault the witness who

11 Prior to and during the trial, the State also intended to play before the jury the very first portion of this video, where the Los Angeles detective read Porch his Miranda rights, since the Los Angeles detective who polygraphed Porch was not present for trial. Porch objected on the grounds of hearsay and the Confrontation clause. The State provided the court with legal authority that the reading of Miranda rights is not hearsay. The State also argued showing this portion of the video did not violate the Confrontation clause because the State was simply showing the jury that Porch was advised of his rights before the 3rd interview. Porch continued to object. After much argument and discussion with the Court, the State agreed to play only the last portion of the tape when Porch was questioned by Richland County detectives and rely before the jury on the previous Miranda warnings to Porch. Porch agreed this was acceptable.

interrogated him was not there at trial; and he would not be able to present his complete and full story to the jury. Judge Lee informed Porch he could testify to what occurred earlier in this questioning session [with the Los Angeles detective] if he wished, but if he did and he went too far, it would probably open the door to the State being allowed to introduce portions of the videotape in reply or rebuttal. Porch indicated he did not want the State to rebut using the videotape when the witness was not there. He also stated he had not seen the redacted video yet. Judge Lee indicated Porch would be allowed to review the redacted videotape (Tr. pp. 1497-1503).

Porch then testified in his own defense, and was not limited in any way in his testimony, and did testify to threats and promises he alleged were made by the Richland County detectives and also testified that the same type of threats or behavior occurred during his interrogation by the Los Angeles detective. After Porch testified, the State did not play the earlier portion of the videotape in reply or rebuttal of Porch's testimony. (Tr. pp. 1503-1627). Porch did not proffer any other testimony he would have testified to had the Judge Lee not informed him of the possibility of reply or rebuttal with the videotape. (Tr. pp. 1497-1627).

Porch now claims this advising him of the possibility of reply or rebuttal with the videotape somehow limited his testimony and as a result violated his rights under the Confrontation Clause. Porch is wrong, and there is no merit to this argument.

Lack of Preservation of the Issue

First, this issue is not preserved for appellate review. Porch *inquired* of the court whether he could testify about matter which occurred earlier in the 3rd interview tape. He stated that if he could not it would infringe on his right to testify. The court informed him he could testify to anything he wished including what occurred during the earlier interview. However, the court

informed him it would probably open the door to reply or rebuttal evidence from the videotape itself. Porch argued this impinged on his right to testify. He alleged he was not able testify fully and therefore to present a complete defense. The court made clear he could testify to anything he wanted to, including what occurred in the earlier interview, but the State had the opportunity to rebut it through the video. Porch stated he did not want State to rebut his testimony using the video when the detective on the video was not there, thus conceding the issue. (Tr. pp. 1497-1503).

Porch raised no objection below. Further, Porch did not object at any point under the Confrontation Clause. Porch argued his right to testify was being impinged. Further, Porch conceded the issue in the trial court. And, Porch did not proffer any testimony what he would have testified to had the court not informed him of the possibility he could open the door to reply or rebuttal evidence. As a result, this issue is not preserved for appellate review. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(*Owens III.*)(Confrontation Clause challenge not preserved for appellate review when it was not properly raised below); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)(constitutional arguments are not exception to issue preservation rule); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000)(same); Glover v. County of Charleston, 361 S.C. 634, 606 S.E.2d 773 (2004)(issue preservation rule applies to constitutional arguments); Durlach v. Durlach, 359 S.C. 64, 596 S.E.2d 908 (2004)(same); State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993)(requiring proffer when evidence is excluded); State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991)(purpose of a proffer is to adequately develop the record in order to allow the appellate court a chance to determine whether the appellant was prejudiced by the trial court's refusal to admit the evidence); Designer Showrooms, Inc. v. Kelley, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991)(a proffer that is confusing or incomplete will not provide

grounds for the appellate court to find prejudice); State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998)(party may not raise one issue below and a different issue on appeal); State v. Myers, 344 S.C. 344 S.C. 532, 544 S.E.2d 851 (Ct. App. 2001)(same); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(issue is not preserved for appellate consideration if it has been conceded in the trial court); TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(same). This issue must be dismissed.

The Confrontation Clause

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" Richardson v. March, 481 U.S. 200, 206, 107 S.Ct. 1702 (1987)(*quoting* U.S. Const. amend. VI.); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015), (*quoting* Richardson v. March). This constitutional right "include[s] the right to cross-examine those witnesses." Pointer v. Texas, 380 U.S. 400, 401, 85 S.Ct. 1065 (1965); McDonald, *supra.*

The Lack of Merit of Porch's Argument

Porch was not prevented or prohibited from cross-examining any witness against him during his trial. (See Trial Transcript). In fact, he cross-examined the Los Angeles detective at the Denno hearing, and she did not testify against him at trial. The portion of the videotape where she was interviewing him was not played to the jury by the State in its case in chief. Porch was simply informed, when he inquired whether he could testify about matters that occurred in this earlier portion of this interview, that he could, but if he went into matters in his direct testimony regarding what occurred earlier on the videotape, not shown to the jury, and he went too far, the State would be allowed to play the earlier portions of the videotape to the jury

in reply or rebuttal to Porch's claims on direct because Porch would have opened the door to that reply or rebuttal testimony. (Tr. pp. 1497-1503). There was no Confrontation Clause violation.

Porch cites several cases dealing with the admissibility of statements *of witnesses* who are not present to testify at trial. (See BOA). The cases Porch cites are simply not apposite and have no application here.

First, the earlier portions of the videotape were never introduced in evidence; there was only the potential the earlier portions of the tape would be introduced in reply or rebuttal depending on what Porch testified to on direct examination or cross-examination. As a result, there was no Confrontation Clause violation. Additionally, the trial court merely explained to Porch what could occur if he went into matter not already in evidence, so Porch could make an informed decision, which he made. Porch was not prohibited from testifying. He was not prohibited from testifying about any matter that he wished to testify about. As a result, there is no Confrontation Clause violation.

Second, the videotape was not the statement of *a witness*, it contained **Porch's statements** in response to questioning by an investigator. As a general rule, it is an exception to the hearsay rule that **a defendant's out-of-court statement** may be testified to by the witness who heard an oral statement or received a written statement. State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980); State v. Shorter, 85 S.C. 170, 67 S.E. 131 (1910); State v. Hambright, 310 S.C. 382, 426 S.E.2d 806 (Ct. App. 1992); State v. Good, 308 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992). Anything a defendant has stated, which is relevant to any question involved in the trial, is admissible in evidence against him. State v. Pittman, 137 S.C. 75, 134 S.E.515 (1926); State v. Turner, 117 S.C. 470, 109 S.E. 119 (1921). A statement, confession, or admission of a defendant may take many different forms, and is admissible, provided, it came direct from the

one charged with the commission of the crime. State v. Smith, 227 S.C. 400, 88 S.E.2d 345 (1955). It is a common occurrence that a defendant will communicate to other persons; and, if authenticated, the communication can be used and is admissible in evidence against a defendant. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Mathews, 296 S.C. 379, 373 S.E.2d 587 (1988); State v. Mercado, 263 S.C. 304, 210 S.E.2d 459 (1974); State v. Miller, 260 S.C. 1, 193 S.E.2d 802 (1973); State v. Hightower, 221 S.C. 91, 69 S.E.2d 363 (1952); State v. Dixon, 284 S.C. 526, 328 S.E.2d 89 (Ct. App. 1985). *See also* State v. Miller, 262 S.C. 369, 204 S.E.2d 738 (1974).

The Confrontation Clause simply does not apply here. Porch was not prevented from testifying; however, if he did testify, Porch could not be allowed to testify falsely about what occurred earlier in the interview, when the videotape would show the jury exactly what had occurred. The admission of reply testimony is within the sound discretion of the trial judge. State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). Any testimony which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply as long as it is not on a collateral matter. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. South, 285 S.C. 529, 311 S.E.2d 775 (1985); State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Bell, 263 S.C. 239, 209 S.E.2d 890 (1974); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); State v. Beckham, 334 S.C. 302, 321, 513 S.E.2d 606, 615 (1999); State v. DuBose, 288 S.C. 226, 231, 341 S.E.2d 785, 788 (1986); State v. Williams, 409 S.C. 455, 469, 761 S.E.2d 770, 778 (Ct. App. 2014). *See* State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904)(in murder prosecution, where defendant testified that the deceased victim grabbed the barrel of the pistol, as it was fired, it was proper to present reply testimony that there were not powder burns on the deceased's hand, which tended

to show that the deceased did not have hold of the barrel of the pistol at the time it was fired). Similarly, when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been initially offered by the opposing party under the "opening the door" rule. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); State v. Taylor, 33 S.C. 159, 508 S.E.2d 870 (1998); State v. Stroman, 281 S.C. 508, 513, 316 S.E.2 395, 398 (1984); State v. Johnson, 196 S.C. 497, 14 S.E.2d 24 (1941); State v. Browder, 183 S.C. 447, 191 S.E.2d 302 (1937); State v. Moody, 94 S.C. 26, 78 S.E. 737 (1913); State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012); State v. Culbreath, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007); State v. Bryant, 356 S.C. 485, 589 S.E.2d 775 (Ct. App. 2003), *reversed on other grounds*, 369 S.C. 511, 633 S.E.2d 152 (2006); State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999). Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of the trial is addressed to the sound discretion of the trial court. State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008), *citing* State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2005). The Richland County detectives observed this portion of the interview from an adjoining room and could authenticate the authenticity of the videotape. Rule 1001(1) & (2), SCRE (photographs include videotapes); State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972)(it is sufficient to justify the admission of photographs in evidence if a person familiar with the scene can say that the pictures truly and accurately represent the scene involved). As a result, there is no Confrontation Clause violation. The court was merely answering Porch's inquiry in light of the State's response to Porch's inquiry and correctly stated the law. Depending on what Porch

testified to on direct, the videotape could become admissible as reply or rebuttal evidence or because Porch opened the door to its admission.

Third, Porch testified about what occurred in each interview, including this earlier interview on the videotape, and the State did not play the videotape in reply or rebuttal. This portion of the tape was never introduced. (See Tr. pp. 1503-1627). There was no Confrontation Clause violation.

Fourth, Porch had the opportunity to cross-examine the Los Angeles detective and did at the Denno hearing. (Tr. Denno hearing). Even if the videotape had been admitted, which it was not, Porch had the opportunity to cross-examine the other person in the video beside himself. If the tape had been introduced, which it was not, Porch could have introduced the Denno testimony of the Los Angeles detective in surreply. *See* State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1924); State v. Burton, 111 S.C. 526, 98 S.E. 856 (1919); State v. Harmon, 79 S.C. 80, 60 S.E. 230 (1908); State v. Summer, 55 S.C. 32, 32 S.E. 771 (1899); State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003). *See also* State v. Wooten, 92 S.C. 61, 75 S.E. 212 (1912).

Finally, even if this somehow constituted a Confrontation Clause violation, it was harmless. Schneble v. Florida, 405 U.S. 427, 430, 92 S.Ct. 1056, (1972)("The mere finding of a violation of [the Confrontation Clause] in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction."); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015), *quoting* Schneble, *supra*. The violation of a defendant's right of confrontation, if proven, is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431 (1986). It is not *per se* reversible error. State v. Dinkins, 345 S.C. 412,

548 S.E.2d 217 (2001). *See* State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996); State v. Bell, 302 S.C. 18, 393 S.E.2d 362, 372 (1990).

The victim was murdered in her own apartment. Porch gave several inconsistent statements, first denying he was present at the scene, then admitting he was at the scene but cut his hand cutting some object earlier before the murder. Porch then admitted he was at the scene but the husband killed the victim. The victim was stabbed on her right neck and over her right eye. Porch was left handed. The victim's husband was right handed. Porch confessed to the crime after being arrested in California. Porch admitted in his *statements* in California that the husband was not present when the victim was killed, and two (2) of these statements were made before he was questioned by the Los Angeles detective. Porch eventually admitted it was he who "came on" to the victim, she resisted, and he eventually killed the victim. Porch's blood [D.N.A.] was found on the right bottom of the victim's shirt. DNA consistent with Porch's DNA was found under the victim's fingernails. This DNA was not consistent with the husband's DNA. Porch's DNA was found in the victim's kitchen and under her sink. Porch admitted he attempted to clean up the blood before leaving the scene. Porch admitted he got rid of the knife used to stab the victim. Porch was not limited in his testimony. Porch did not proffer what he would have testified to had the Court not informed him of the possible repercussions of him going into the earlier portion of the interview. State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991)(purpose of a proffer is to adequately develop the record in order to allow the appellate court a chance to determine whether the appellant was prejudiced by the trial court's refusal to admit the evidence); Designer Showrooms, Inc. v. Kelley, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991)(a proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice). Even if there was some Confrontation Clause violation, it was harmless.

Delaware v. Van Arsdall; Dinkins, *supra*; McDonald. This appellate ground has no merit and must be dismissed with prejudice.

CONCLUSION

For the above stated reasons, Porch's conviction and sentence for the murder of Nakia Mallory must be affirmed and this appeal dismissed.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

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The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-40-03359

Appellate Case No. 2013-002531

State of South Carolina, ... Respondent,

v.

Joshua William Porch, ... Appellant.

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SUMMARY OF ARGUMENT/RELEVANT FACTS

The trial court committed reversible error in two regards in this matter. First, the trial court failed to void the State's arrest warrant under *Franks v. Delaware*. Second, the trial court improperly limited Porch's testimony and, in so doing, violated his rights under the Confrontation Clause. The trial court's errors constitute reversible error. This Court should vacate Porch's conviction.

On July 7, 2009, the Richland County Sheriff's Department ("RCSD") obtained a warrant for Porch's arrest for the murder of Nakia Mallory. (Trans Dated 11/21/13 at 1057–59; R. ___). The RCSD did not inform the magistrate that Porch previously testified for the State as an eyewitness to the crime. (Trans. Dated 11/25/13 at 1521–23; R.___). Instead, the RCSD explained only that Porch's statements placed him at the scene of the crime and that newly tested blood evidence matched blood left at the scene by Porch. (Trans. Dated 11/12/13 at 7–10, 54–56; R.___).

Notably, the RCSD did not inform the magistrate that, in the two prior trials for Mallory's murder, the State presented testimony *from Porch* (1) that he witnessed an altercation between Nakia and her husband, Justin Mallory, (2) that Porch intervened in the dispute, and (3) that Porch suffered an injury himself during the altercation that caused his blood to be left at the scene. (Trans. Dated 11/25/13 at 1521–23; R.___). The RCSD omitted this exculpatory information that directly touched on the warrant's essential purposes. The omission of this exculpatory information led to the issuance of the warrant and to Porch's arrest. Thus, the trial court erred in failing to void that arrest warrant and any resulting evidence under *Franks v. Delaware*, 438 U.S. 154 (1978).

Moreover, the trial court violated Porch's rights under the Confrontation Clause. Members of the RCSD and the Los Angeles County Sheriff's Office ("LASD" or "the LASD") interrogated Porch following his arrest. (Trans. Dated 11/18/13 at 171; Trans. Dated 11/21/2013 at 1065–69). Some of these interrogations were video recorded, including portions involving RCSD and a separate six-hour interrogation and polygraph examination conducted by Roberta Cohen, an investigator with the LASD. However, Cohen refused to testify at Porch's trial despite a *subpoena from the State*. (Trans. Dated 11/18/13 at 171–73; R. ___). Consequently, the State entered into evidence only the portion of the video showing the interrogation by members of the RCSD. (Trans. Dated 11/18/13 at 173–74, 191, 199–200; Trans. Dated 11/21/13 at 1106–07; R.___).

The trial court ruled, over an objection from Porch's trial counsel, that Porch could not discuss Cohen's interrogation as part of his own defense or the court would permit the State to introduce those portions of the interrogation video even in Cohen's absence. (Trans. dated 11/25/13 at 1498–1500; R.___). This ruling violated Porch's rights under the Confrontation Clause.

ARGUMENT

I. The State's argument misapprehends *Franks v. Delaware*.

The State's arguments on this point simply restate black letter law without specifically addressing the flaws in the RCSD affidavit used to obtain the warrant. The fact of this matter is that the trial court erred in failing to void the State's arrest warrant under *Franks v. Delaware*. This Court should reverse.

Franks protects against omissions "designed to mislead" or that were made in "reckless disregard" of whether such omissions would mislead the magistrate in the issuance of the warrant. *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). The State's reliance on *Colkley* is misplaced. *Colkley* is factually distinct and actually supports reversal of the trial court.

In *Colkley*, the Fourth Circuit found that a *Franks* hearing was not required where the omitted information was not material to the probable cause determination. *Colkley*, 899 F.2d at 301. There, the defendant challenged the affidavit used to support his arrest for armed robbery. Defendant claimed the affidavit failed to note that numerous witnesses did not identify him in a photographic spread and because police based the composite height description on the testimony of a single witness and disregarded testimony from other witnesses who claimed the robber was shorter. *Id.* at 299. Defendant received a *Franks* hearing and the trial court held that, even with including the omitted information, probable cause existed for issuing the warrant. *Id.* The court also found that the police did not intentionally misrepresent defendant's height and that discrepancies in height descriptions were common and immaterial. *Id.*

The Fourth Circuit based its ruling, in part, on the amount of other incriminating information contained in the affidavit. *Id.* at 302. For instance, a car that a co-defendant purchased with cash after the robbery was located outside of defendant's home. *Id.* Defendant participated in cash purchases of two cars within a month of the robbery. *Id.* The affidavit also recited an informant's tip to the police that defendant admitted committing a robbery that bore a "remarkable resemblance" to the one under investigation. *Id.*

The facts in *Colkley* are markedly different from the affidavit in the instant case. The facts here demonstrate that the trial court erred in failing to void the warrant. The *Colkley* court would have done so under these facts. Here, the affidavit contained this uncontested language: "The defendant has admitted to being at the scene of the crime during the assault and stabbing." (Trans. Dated 11/12/13 at 5; R.___). The affidavit did not inform the Court that Porch admitted to being at the scene of the crime as part of his service as the State's eyewitness in two trials for this same crime. *Id.* The affidavit also stated that Porch had been further implicated "by DNA testing of blood found at the scene." *Id.* The affidavit did not explain that Porch previously explained that he left blood at the scene of the crime because he intervened in a violent altercation between the victim and her husband – the man the State prosecuted twice for the crime.

The "very heart of the affidavit's purpose" was to establish probable cause for Porch's arrest in connection with Nakia Mallory's murder, yet the affidavit did not include key context regarding how the RCSD collected the supporting information. That was improper. *See State v. Missouri*, 337 S.C. 548, 556, 524 S.E.2d 394, 398 (1999) (finding that a substantial basis for probable cause did not exist where omitted information was directly related to the affidavit's purpose).

Moreover, the RCSD's intentional omission is not a case of requiring law enforcement to disclose "all" potentially exculpatory information or placing an onerous burden of "elaborate specificity" on the drafters of warrant affidavits, as argued by the State. Resp. Br. at 18–19 (citations omitted). Instead, this is a case where the RCSD deliberately withheld exculpatory information and information critical to the magistrate's probable cause determination. Disclosure of such information is already

required by well-settled law. Porch does not seek to alter or expand the settled requirements. Application of those settled principles leads to the inescapable conclusion that the trial court erred.

To support its erroneous view of *Franks*, the State relies on *United States v. Moody*, 762 F. Supp. 1491 (N.D. Ga. 1991). There, a federal judge and a lawyer were assassinated by mail bombs. *Id.* at 1493–94. The defendant claimed that in failing to disclose evidence implicating another individual, the government recklessly omitted material information. *Id.* at 1500. The court explained that whatever evidence the government marshaled regarding another individual did not "begin to exonerate" the defendant, but "at most" indicated that the defendant and another individual may have conspired to commit the crimes charged. *Id.*

Moody is not a helpful lens for analyzing the instant case. For one, the RCSD affidavit did not include facts related to an "investigation" but instead only contained selected facts related to *two* prior trials for the same exact crime. Second, the information RCSD omitted *does* begin to exonerate Porch as it is information which the State relied on to prosecute another individual for the same crime. As the *Moody* court acknowledged, the government may pursue multiple lines of investigation "so long as the government establishes probable cause as to each prior to the issuance of any warrant." *Id.* In this appeal, the RCSD "established" probable cause by hiding information critical to the magistrate's probable cause analysis.

Given the lack of authority supporting its view of *Franks*, the State then turns to the curious tactic of undercutting Porch's service as a State witness. The State speciously claims that, "[a]lthough, [Porch] attempted to place the blame for the

murder on husband, neither a jury or circuit judge accepted his testimony." Resp. Br. at 21 (alteration added). This is a misleading depiction of Porch's testimony. Porch testified in two trials in which he was not the defendant and where he had no motivation to try and "place the blame" on anyone. Instead, Porch agreed to testify as to what he observed on the night of Nakia Mallory's death. Whether a judge or jury believed Porch's testimony in his trial is irrelevant to what the State had to disclose in obtaining the affidavit. The State's argument misapprehends this distinction. In fact, the State's argument on this point actually affirms how critical Porch's testimony was to the State's case and strengthens the argument that this crucial information should not have been excluded from the warrant affidavit.

The State also claims that if the RCSD included exculpatory information in the affidavit then the RCSD would have included other incriminating information in the affidavit. This argument makes the same mistake as the trial court in analyzing the RCSD's description of what it would have or could have included in the affidavit. That is not the focus. Instead, the focus of the magistrate's analysis of the information was what was actually included in the affidavit. *See Missouri*, 337 S.C. at 555, 524 S.E.2d at 397 ("Thus, the primary issue before this Court is whether excluding the false information and inserting the exculpatory statement, there remains a substantial basis upon which the magistrate could have found probable cause to issue the warrant.").

As the State notes, probable-cause is a flexible, common-sense standard. Resp. Br. at 10 (citing *Texas v. Brown*, 460 U.S. 730 (1983)). It is common-sense that an affidavit that states that a suspect admits to being at the scene of a crime should also

state that the suspect admitted to being at the scene of that crime through his participation as an eye-witness for the state in two prior trials for the same crime.

In *State v. Lynch*, this Court found the defendant failed to show a *Franks'* violation where the information the defendant claimed police failed to relay to the magistrate was not actually known to police at the time of the warrant. 412 S.C. 156, 182–83, 771 S.E.2d 346, 360 (Ct. App. 2015). This is not the case here. Unfortunately for the State, the RCSD did not draft this affidavit in the haste of a criminal investigation. Instead, the RCSD produced this affidavit after an investigation spanning several years and significant litigation. The critical information the RCSD chose not to include in its affidavit was safely within their grasp and was neither technical nor elaborate. Testimony from the magistrate demonstrates that the RCSD did not take the opportunity to properly supplement the affidavit with sworn oral testimony explaining the facts contained in the affidavit. *Id.* at 184, 771 S.E.2d at 361.

The RCSD intentionally and recklessly omitted exculpatory information necessary for a sufficient probable cause determination. The trial court erred in its analysis. This Court should reverse.

II. The Trial Court's Limitation of Porch's Testimony Violated The Confrontation Clause.

The State incorrectly claims that the issue is not preserved for appellate review. According to the State, "Porch raised no objection below. Further, Porch did not object at any point under the Confrontation Clause." Resp. Br. at 28. This is erroneous.

As explained in Porch's Initial Brief, counsel preserved this issue for appeal. Over an objection from Porch's trial counsel, the trial court ruled that Porch could not

discuss Cohen's interrogation during his testimony or the court would allow the State to introduce those portions of the interrogation even in Cohen's absence. (Trans. Dated 11/25/2013 at 1498–1500; R.___). The conversation that takes place during this portion of the proceedings was an extension of an earlier discussion regarding Cohen's absence and Confrontation Clause concerns. (Trans. Dated 11/18/13 at 182–85; R.___). In that earlier discussion, Porch's trial counsel explained that Cohen's absence negatively impacted Porch's rights under the Confrontation Clause. (*Id.* at 184.) ("I can't stress how limited this confrontation was compared to what it would be in front of a jury. I guarantee Mr. Goings is [sic] cross-examining Mr. Porch isn't going to be the same as it will be when Mr. Porch testifies."). As part of that discussion, the State acknowledged that it was not "seeking to introduce the full interview of Ms. Cohen," and only wanted to introduce the statements the RCSD investigators received from Porch. (*Id.* at 189–90.)

This tactic by the State naturally required the later colloquy regarding what portions of the video recordings Porch could testify about and which he could not. (Trans. Dated 11/25/13 at 1498). During this discussion, the State explained that if Porch testified about specific occurrences within the over six hour interview with Cohen, "it opens the door for the possibility of playing portions of that video as well." *Id.* The court agreed, and Porch's trial counsel objected, stating "I disagree with that ruling completely. I disagree with that position, because he has right the [sic] testify." *Id.* at 1499.

It is well-settled that error preservation rules do not require a party to use the exact name of a legal doctrine to preserve an issue for appellate review. *State v.*

Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); *State v. Douglas*, 411 S.C. 307, 323, 768 S.E.2d 232, 241 (Ct. App. 2014). Instead, a litigant is required only to fairly raise the issue to the trial court, giving it an opportunity to rule on the issue. *Brandon*, 388 S.C. at 502, 697 S.E.2d at 595.

Porch properly preserved the Confrontation Clause issue as shown above. It was raised, perhaps inartfully, but nonetheless ruled upon by the trial court. Thus, Porch's Confrontation Clause argument is preserved for this Court's review. *See State v. Gamble*, 405 S.C. 409, 416 n.3, 747 S.E.2d 784, 787 n.3 (2013) ("While defense counsel could have articulated his objection more clearly, his objection adequately preserved the issue for this Court's review.").

Contrary to the State's assertions, the Confrontation Clause applies. Statements taken by police officers in interrogations are testimonial. *State v. Stokes*, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009). This clear authority renders the State's gymnastics regarding whether the video recording is the statement of a witness or Porch's response to an investigator's questioning a nullity. It is undisputed that the video recording depicts an interrogation of Porch, conducted by Cohen, and that Cohen was unavailable to testify.[1]

The State then asserts that Porch was not prevented from testifying, but instead, "if he did testify, Porch could not be allowed to testify falsely about what occurred earlier in the interview, when the videotape would show the jury exactly what had occurred." Resp. Br. at 31. This argument lacks merit. Perjury was not the concern.

[1] At no time during the trial did the State assert that the Confrontation Clause simply did not apply and that is because it does.

The State did not seek to admit the video tape only if Porch perjured himself. Rather, the State sought and obtained a ruling that if Porch testified *in any manner* regarding the interview then the State would be allowed to admit the entire video interview. Thus, the State's perjury argument is irrelevant and incorrect.

Next, the State urges this Court to collapse the *Denno* and Confrontation Clause guarantees into one analysis. Resp. Br. at 33. This argument simply invites the Court to replicate the trial court's error. The central concern in a *Denno* proceeding is the voluntariness of a defendant's confession. This is separate and distinct from the Confrontation Clause inquiry which commands, "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

Finally, the Confrontation Clause error was not harmless. It simply cannot be said that Porch's inability to discuss the events which gave rise to his false confession were so insignificant that it did not affect the verdict or that the record contains overwhelming evidence of Porch's guilt. This position is only strengthened by the State trying another defendant, twice, using similar evidence. The trial court's Confrontation Clause error prejudiced Porch in frustrating his ability to present a full and complete defense. *See State v. Turner*, 373 S.C. 121, 131, 644 S.E.2d 693, 698 (2007) (noting it is reversible error if the defendant establishes that he was unfairly prejudiced).

CONCLUSION

For the foregoing reasons, Porch's conviction and sentence must be reversed and vacated.

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September 18, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011GS4003359

Appellate Case No. 2013-002531

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SC Court of Appeals

The State, ... Respondent,

v.

Joshua William Porch, ... Appellant.

Proof of Service

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Joshua William Porch, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document Served: **Initial Reply Brief of Appellant**

Counsel Served: Alan McCrory Wilson
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Lisa P. Whitehurst
Lisa P. Whitehurst
Administrative Assistant

September 18, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joshua William Porch, Appellant.

Appellate Case No. 2013-002531

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5435
Heard May 3, 2016 – Filed August 3, 2016

AFFIRMED

Michael J. Anzelmo and Matthew A. Abee, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

HUFF, J.: Joshua William Porch appeals his conviction for murder, arguing the trial court erred in failing to void the State's arrest warrant pursuant to *Franks v.*

Delaware.[1] Porch also argues the trial court erred by limiting Porch's testimony in violation of the Confrontation Clause. We affirm.

FACTUAL/PROCEDURAL HISTORY

In the early morning hours of May 13, 2006, Justin Mallory (Mallory) found his wife, Nikea Mallory (Victim), dead in the family's apartment in Richland County. Victim suffered blunt force trauma to the head, a bruise on her neck, a stab wound on the right side of her neck, and a stab wound on her right eyebrow. The stab wound to Victim's neck was the fatal injury. Hours after discovering Victim's body, Mallory was charged with Victim's murder.

During the murder investigation, Mallory told officers they should talk to Joshua Porch, who lived near Mallory. Investigator Randy Strange interviewed Porch and his wife. Porch told Investigator Strange he was not in the Victim's apartment the night of the murder.

Police interviewed Porch again on June 27, 2007, after they discovered unidentified male DNA at the crime scene. Porch agreed to provide officers with a DNA sample and told them that he was in the Victim's apartment the day before the murder. Porch stated he cut himself while he was peeling or cutting an apple for his child and he attempted to clean up the blood with paper towels in the kitchen. Porch then signed a written statement of his version of events. In that statement, Porch also indicated he told this version of events to the investigators that interviewed him after the murder.

Following the second interview, Major James Smith contacted Investigator Strange to confirm Porch's story. Investigator Strange told Major Smith he could not recall Porch telling him he cut himself in the Victim's apartment the day before the murder. Major Smith returned to Porch's home that same day and asked Porch about his story. Porch told Major Smith he could not recall whether he told Investigator Strange about the cut. Porch stated he was scared to tell the police about the cut because he did not want to be considered a suspect.

On July 2, 2007, Captain James White and Major Smith interviewed Porch again. Porch told the officers he was present at Victim's apartment during the early morning hours of May 13, 2006. Porch stated he and Victim were drinking

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[1] 438 U.S. 154 (1978) (allowing defendants to challenge a probable cause determination after the issuance of a search warrant in limited circumstances).

together that night and started kissing and fondling one another. According to Porch, Mallory arrived at the apartment and became angry. Mallory and Victim started arguing in front of Porch but later went to the kitchen to continue arguing. Porch stated he saw Victim push Mallory and Mallory "swung at her" with an unidentified item in his hand. Porch told the officers he stepped in between Mallory and the Victim to stop them from fighting and Mallory cut him. Porch then went to the kitchen to wrap his hand with paper towels and clean up the blood. According to Porch, Victim was "slouched" on the couch when he left, but he did not think she was badly injured. Porch explained he made inconsistent statements to police because he "was afraid [he] would be charged as an accomplice, or accused of actually doing it. [He] was also afraid [his] wife would find out about [him] and [Victim] getting involved that morning." During the interview, Captain White noticed Porch was left handed.

Mallory was tried twice for Victim's murder. Porch testified consistent with his July 2, 2007 statement in each of those proceedings. The first trial ended in a hung jury. Mallory then elected to proceed to a bench trial and was acquitted. Following his acquittal, Mallory contacted the Richland County Sheriff's Department (RCSD) and requested they reopen the investigation into his wife's murder. Deputy Chief David Wilson was assigned to investigate the case. Chief Wilson reviewed the investigation file and noticed several inconsistencies. Chief Wilson was bothered by Porch's shifting statements to police. Chief Wilson noted the stab wounds were to the Victim's right side, which led him to suspect the assailant was left-handed. Chief Wilson learned Porch was left-handed. Finally, Chief Wilson reviewed DNA evidence from the crime scene, which revealed further inconsistencies relating to Porch's version of events. Specifically, investigators found Porch's blood not only in the kitchen, but also on Victim's shirt.

Chief Wilson interviewed several other witnesses and secured a warrant for Porch's arrest. Officers learned Porch had moved from South Carolina back to his home town in California. On July 8, 2009, RCSD officers arrested Porch in a store in California and transported him to the Long Beach Police Department for questioning. Investigators Shawn McDaniel and Brian Godfrey notified Porch of his Miranda rights around 1:00 a.m. on July 9, 2009. That morning, Porch admitted he stabbed Victim but claimed it was an accident.

Investigators McDaniel and Godfrey reviewed the case file to determine if the evidence supported Porch's accident claim. The investigators then interviewed Porch again on July 10, 2009. At that time, Porch told the investigators he initiated intimate contact with Victim and she attacked him with the knife. Porch told

officers he hit Victim in the head with his palms and once on the right side of her head with his left elbow.

Investigators McDaniel and Godfrey then took Porch to the Los Angeles County Sheriff's Department for a third interview, which was recorded. Initially, Investigator Cohen from the Los Angeles County Sheriff's Office interviewed Porch for six and a half hours. Investigators McDaniel and Godfrey then interviewed Porch. Subsequently, investigators brought Porch back to South Carolina for trial.

Prior to trial, Porch challenged the sufficiency of the evidence to support probable cause for his arrest warrant. Porch argued Chief Wilson intentionally or recklessly omitted information from his arrest warrant affidavit and any evidence gathered as a result of his arrest should be suppressed. The trial court granted Porch a pretrial hearing to determine if the arrest warrant was valid but declined to suppress the evidence gathered as a result of Porch's arrest.

Porch also made a motion in limine to exclude the entire recorded interrogation from California because Investigator Cohen was unavailable to testify. Porch argued he would not be able to cross-examine her because the California state court declined to enforce the South Carolina subpoena sent by the State. The trial court found Porch had an opportunity to cross-examine Investigator Cohen regarding the video at a pretrial *Jackson v. Denno*[2] hearing. The trial court believed that opportunity to cross-examine was all that is necessary under *Crawford v. Washington*[3] but took the matter under advisement. The next morning, prior to trial, the court ruled the portion of the interview conducted by Investigator Cohen was inadmissible but the portion of the interview conducted by Investigators McDaniel and Godfrey was admissible.

During the trial, Porch testified on his own behalf. Prior to his testimony, Porch inquired whether he would be allowed to discuss what he was told in the six-and-a-half-hour interview the court determined was not admissible because of Investigator Cohen's absence. The State argued, "[I]f Mr. Porch testifies about specific occurrences within that six and a half hour interview with Investigator Cohen, . . . it opens the door for the possibility of us playing portions of that video as well." The trial court indicated it was troubled by Investigator Cohen's absence but agreed that Porch's testifying about Investigator Cohen's interview could

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[2] 378 U.S. 368 (1964).
[3] 541 U.S. 36 (2004).

potentially open the door for the video of the interview to be admitted into evidence. Porch decided not to testify about any statements from the recorded interview in order to ensure the State would not have an opportunity to rebut his testimony with the video.

The jury found Porch guilty of Victim's murder. The trial court sentenced Porch to fifty years' imprisonment. This appeal followed.

LAW/ANALYSIS

I. *Franks v. Delaware*

Porch argues the RCSD omitted critical exculpatory information from the arrest warrant. Porch asserts in light of the omitted information, no probable cause existed to support his arrest warrant. Therefore, Porch requests this court void the arrest warrant and suppress any evidence resulting from Porch's arrest.

"In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). Entitlement to a *Franks* hearing is a matter of law subject to de novo review. *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008). The *Franks* test applies in cases when officers include false information in a warrant affidavit and cases when officers omit potentially exculpatory information. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. While we commend the trial court in this case for holding a *Franks* hearing out of an abundance of caution, we find Porch failed to overcome his heavy burden to establish he was entitled to such a hearing. Furthermore, we take this opportunity to clarify the proper standard trial courts should apply in cases in which the defendant challenges the *omission* of evidence from the arrest affidavit.

"To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." *Id.* "There will be no *Franks* violation if the affidavit, *including the omitted data*, still contains sufficient information to establish probable cause." *Id.* (emphasis added).

The defendant has the burden of proving the officer acted with the requisite intent. *State v. Gore*, 408 S.C. 237, 244, 758 S.E.2d 717, 721 (Ct. App. 2014). "A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof." *State v. Lynch*, 412 S.C. 156, 179, 771 S.E.2d 346, 358 (Ct. App. 2015). "The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that *its inclusion* in the affidavit would defeat probable cause." *Id.* at 180, 771 S.E.2d at 358-59 (emphasis added) (quoting *United States v. Shorter*, 328 F.3d 167, 170 (4th Cir. 2003)). "Upon making this two-part preliminary showing, a defendant is entitled to a hearing, at which he bears the burden of proving the allegations by a preponderance of the evidence." *Id.* at 180, 771 S.E.2d at 359 (quoting *Shorter*, 328 F.3d at 170). "If a *Franks* hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant 'must be voided' and evidence or testimony gathered pursuant to it must be excluded." *Id.* (quoting *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990)).

"The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." *Colkley*, 899 F.2d at 301 (quoting *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987)). "'[M]ere[] neligen[ce] in . . . recording the facts relevant to a probable cause determination' is not enough." *Id.* (alterations in original) (quoting *Franks*, 438 U.S. at 170). An omission does not per se invalidate the arrest warrant. *Gore*, 408 S.C. at 245, 758 S.E.2d at 721. The Fourth Circuit has expressed "doubts about the validity of inferring bad motive under *Franks* from the fact of omission alone, for such an inference collapses into a single inquiry the two elements–'intentionality' and 'materiality'–which *Franks* states are independently necessary." *Colkley*, 899 F.2d at 301.

"Probable cause is a 'commonsense, nontechnical conception [ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *State v. Morris*, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

Porch asserted *Franks* requires the trial court excise any offending information from an arrest warrant affidavit, then analyze the affidavit to determine if probable cause still exists to support the warrant. However, Porch conflates the test for the inclusion of false information in a warrant affidavit with the test for omission of potentially exculpatory information. If a defendant carries his heavy burden of demonstrating information was intentionally or recklessly omitted from the

affidavit, the trial court must then include the potentially exculpatory information and determine if probable cause exists.

We find Porch failed to overcome his burden to show Chief Wilson intentionally or recklessly omitted potentially exculpatory information from his warrant affidavit. In the affidavit, Chief Wilson stated:

> That on 05/14/2006 while at [redacted] Pinelane Rd. Apt. [redacted] in the Dentsville Magisterial District of Richland County, one Joshua Porch did commit the crime of Murder in that he did with malice and aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene and implicates the defendant in the assault at the time of the murder.

Chief Wilson stated he faxed the warrant to Judge Phil Newsom and personally appeared before the magistrate to discuss the case. Neither Chief Wilson nor Judge Newsom remembered the specific details they discussed prior to Judge Newsom signing the warrant. Judge Newsom agreed with Chief Wilson probable cause existed to believe Porch committed the murder and authorized the arrest warrant.

Judge Newsom also testified he never signs a warrant before the officer requesting the warrant physically appears before him. Judge Newsom was "sure" Chief Wilson told him some background on this case, but he could not recall anything in particular and he stated warrant proceedings are not recorded. Finally, Judge Newsom stated he did not remember Chief Wilson telling him Porch admitted being at the crime scene because Porch witnessed the Victim's husband stab her.

During the pretrial hearing, Chief Wilson testified he did not include some information in the affidavit. Specifically, Wilson admitted he did not include (1) information from an eye witness from the first two trials who testified she heard a "domestic argument" coming from the apartment and saw a black male running toward a white van; (2) information from a security guard at the hospital Mallory took Victim to who testified he heard Mallory say, "Bitch bled all over my van, my walls, my Playstation" and saw Mallory remove something from his van while it

was at the hospital; (3) Mallory had "plenty of time" to commit this murder; (4) Porch's statements regarding how his blood came to be at the scene of the crime; (5) information that Mallory had been tried twice for this crime and Porch testified for the State in both instances; and (6) information that the situation during the argument was "fluid" and the blood could have gotten on Victim's shirt during her fight with Mallory. However, Chief Wilson testified none of the information he included in the affidavit was false, and he believed the totality of the circumstances established probable cause to arrest Porch for Victim's murder.

Chief Wilson admitted he omitted some information from the warrant affidavit, but we find the content of the omissions alone is insufficient evidence to demonstrate Chief Wilson acted intentionally or with reckless disregard of whether the omissions would make the affidavit misleading. There is no evidence Chief Wilson intentionally omitted the statements regarding Mallory's involvement in his wife's death. Furthermore, including the statements from all four versions of Porch's story was unnecessary because those statements were not credible. Accordingly, we find Porch failed to make a sufficient showing to entitle him to a *Franks* hearing.

While we find Porch failed to demonstrate Chief Wilson intentionally or recklessly omitted potentially exculpatory information, we also find, even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause to secure an arrest warrant for Porch. Porch admitted he was present at the murder scene and his blood was found in the same area where Victim's body was found.

Although Porch testified for the State in Mallory's murder trial, his story continued to change throughout the investigation. If all of this information were included in the affidavit presented to the magistrate, we find probable cause would have supported an arrest warrant for Porch. Accordingly, we affirm the trial court's decision not to suppress the evidence discovered as a result of Porch's arrest.

II. Confrontation Clause

Porch argues the trial court erred by "threatening Porch with the introduction of a videotape displaying [Porch's] interrogation" in violation of the Confrontation Clause. Porch also asserts the trial court's decision to allow the State to rebut his

testimony using the video limited his ability to present a full and complete defense.[4]

"As a general rule, if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal." *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 28 (Ct. App. 2006). "[A] proffer of testimony is required to preserve the issue of whether the testimony was properly excluded by the trial [court], and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been." *Id.* at 163, 634 S.E.2d at 29.

We find this issue is not preserved for this court's review. The trial court indicated the State may have been able to rebut Porch's testimony by introducing the video if Porch opened the door by testifying about the California interrogation. However, Porch failed to proffer what his testimony would have been if he were allowed to testify about the interrogation without opening the door. Therefore, we decline to address Porch's Confrontation Clause argument.

CONCLUSION

Based on the foregoing, Porch's conviction is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

---

[4] Porch also argues the trial court erred in finding he had an opportunity to cross-examine Investigator Cohen during the *Jackson v. Denno* hearing. However, Porch admits the State only submitted that portion of the interview conducted by Investigators McDaniels and Godfrey. Because the State did not seek to admit any portion of the interview conducted by Investigator Cohen, we find this argument is without merit.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011-GS-4003359

Appellate Case No. 2013-002531

The State, ... Respondent,

v.

Joshua William Porch, ... Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Joshua William Porch petitions the Panel to grant rehearing in *State v. Porch*, Op. No. 5435 (S.C. Ct. App. filed August 3, 2016) (Shearouse Adv. Sh. No. 31 at 58), and reverse the trial court. This matter necessitates rehearing for three reasons. First, the Panel overlooked the trial court's erroneous reliance on evidence that was not in front of the magistrate at the time the warrant was issued when the trial court concluded that Porch's rights were not violated under *Franks v. Delaware*. Second, the Panel misapprehends the proper analysis where facts have been omitted from a search warrant by failing to determine whether the omitted information strikes at the heart of the affidavit's purpose. Third, the Panel misapprehends South Carolina's error preservation rules by relying on Porch's decision not to proffer his relevant testimony as a grounds for

avoiding the merits of his Confrontation Clause challenge. The Panel should grant rehearing to correct these errors and reverse.

I. The Panel overlooked the trial court's error in relying on information not before the magistrate at the time the warrant was issued.

Rehearing is required because the Panel overlooked the trial court's error in expanding the scope of review under *Franks v. Delaware* by considering evidence not presented to the magistrate at the time the warrant was issued. This oversight merits rehearing and the trial court's error merits reversal.

United States Supreme Court precedent is clear that the proper scope of inquiry once an error of omission has been committed is for the trial court to determine whether there "[r]emains sufficient content in the warrant affidavit to support a finding of probable cause . . ." *Franks v. Delaware*, 438 U.S. 154, 172 (1978). While the probable cause determination is reviewed based on the totality of the circumstances, *State v. Missouri*, 337 S.C. 548, 555, 524 S.E.2d 394, 397 (1999), "[i]f no supplemental testimony is taken, a magistrate's probable cause determination is limited to the four corners of the search warrant affidavit." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) (citing *State v. Herring*, 387 S.C. 201, 214, 692 S.E.2d 490, 497 (2009)); *cf. State v. Lynch*, 412 S.C. 156, 184, 771 S.E.2d 346, 361 (Ct. App. 2015) (concluding that, despite omitted evidence, sufficient probable cause existed by relying on supplementary affidavit properly before magistrate at the time the warrant was issued), *reh'g denied* (May 6, 2015), *cert. denied* (Feb. 16, 2016). This inquiry is "based on all of the information available to the magistrate *at the time the warrant was issued.*" *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996) (emphasis added) (citing *State v. Bultron*, 318 S.C. 323, 457

S.E.2d 616 (Ct. App. 1995)). The inquiry does not include evidence made available at a later time or evidence that has had the benefit of being polished by the State's prosecutors.

Here, the magistrate only had a Warrant Worksheet in front of him at the time the warrant was issued. (R. at 127.) Richland County detectives did not supplement this Warrant Worksheet with a supplemental affidavit, and there is no evidence in the record to confirm whether the magistrate had additional sworn testimony to inform his probable cause determination. (R. at 68-69, 71.) Nevertheless, the trial court concluded that the totality of the evidence presented at the *Franks* hearing—including evidence not disclosed to the magistrate—was sufficient to support probable cause. (R. 103-108; 119-127.) In doing so, the trial court expanded the scope of the inquiry. The trial court improperly determined whether probable cause existed with the benefit of hindsight rather than relying only on the evidence in the record that was presented to the magistrate.

The Panel's opinion initially supports this understanding of the proper scope of review. *See Porch* (Shearouse Adv. Sh. No. 31 at 63) ("There will be no *Franks* violation *if the affidavit*, including the omitted data, still contains sufficient information to establish probable cause." (emphasis added and omitted)). However, the Panel ultimately concluded that "even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause . . ." *Id.* (Shearouse Adv. Sh. No. 31 at 65). This overlooks the fact that the trial court's scope of review was not so narrow. It overlooks the fact that the trial court specifically relied on evidence not presented to the magistrate to conclude that probable cause existed. Thus, rehearing is necessary to properly reverse the trial court's error of law.

II. The Panel's rejection of Porch's claim that the omitted information goes to the very heart of the affidavit's purpose misapprehends established case law.

The Panel asserted that Porch conflated the analysis under *Franks* for a commission and for an omission. Its opinion then ends the analysis by concluding that the affidavit establishes sufficient probable cause without determining whether the omitted evidence strikes to the heart of the affidavit's purpose. This truncated analysis illustrates that the Panel misapprehended the proper inquiry under *State v. Missouri*.

In *State v. Missouri*, our Supreme Court affirmed the decision to suppress evidence collected following a detective's omission of exculpatory information from, and inclusion of false information in, a search warrant affidavit. 337 S.C. 548, 556, 524 S.E.2d 394, 398 (1999). While the Court explained that simply excising the false information from the affidavit did not defeat probable cause, it explained that the *Franks* inquiry did not end there. *Id.* The Court next sought to determine whether the inclusion of the omitted evidence affected the probable cause determination. In doing so, it found that where the omitted evidence strikes to the very heart of the affidavit's purpose, "the inclusion of the omitted information creates an affirmative hurdle which the remaining portions of the affidavit must overcome," ultimately concluding that the omitted evidence "erodes the basis upon which a magistrate could find probable cause." *Id.*

The same is true in the present case. The omitted information undermines the remaining portions of the affidavit such that probable cause is defeated because the omitted information strikes to the heart of the affidavit's purpose—arresting Porch for murder. The Panel did not analyze the omitted information in such a manner, however. Instead, the Panel explained the difference between errors of commission and omission, which, in turn, omitted the next key step

in the inquiry. Therefore, the Panel should grant rehearing to correct this misapprehension of established case precedent.

III. The Panel misapprehended South Carolina's error preservation rules by relying on the decision not the proffer testimony as a grounds for avoiding the merits of Porch's Confrontation Clause challenge.

Lastly, by refusing to address the merits of Porch's Confrontation Clause challenge, the Panel misapprehended established case law requiring a proffer only where evidence or testimony is being excluded, not where the trial court has placed a defendant in the impossible position of deciding how to present his case.

The Panel is correct that a failure to proffer *excluded* testimony precludes appellate review. *See Porch* (Shearouse Adv. Sh. No. 31 at 63) (citing *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006)). This rule of error preservation simply does not apply where a defendant, through no fault of his own, is forced to choose between two equally difficult and unacceptable choices—present relevant testimony (that was not excluded by the trial court) or have his Constitutional right to confront witnesses against him violated. The requirement that a defendant proffer evidence or testimony for the purpose of appellate review only applies where a trial court actually excludes the evidence or testimony. *See Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) (failing to proffer excluded medical records); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (failing to proffer excluded testimony). This did not occur here. The Panel misapprehended the error preservation rules and overlooked this distinction.

As explained in Porch's briefing, the State cannot be permitted to gain from its own failure to make Investigator Cohen available for cross-examination at trial. Doing so handcuffs

Porch's ability to present a defense with his Constitutional rights intact. The Panel should grant rehearing on this basis and reverse.

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August 17, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011GS4003359
Appellate Case No. 2013-002531

The State, ... Respondent,

v.

Joshua William Porch, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Joshua William Porch, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified at the following address(es):

Document Served: **PETITION FOR REHEARING**

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August 17, 2016

The South Carolina Court of Appeals

The State, Respondent,

v.

Joshua William Porch, Appellant.

Appellate Case No. 2013-002531

ORDER

After careful consideration of the petition 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, the petition for rehearing is denied.

Thomas C. Young J.

J.

J.

Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2013-002531

The State, ... Respondent,

v.

Joshua William Porch, ... PETITIONER

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Joshua William Porch petitions this Court to grant a writ of certiorari for the opinion in *State v. Porch*, Op. No. 5435 (S.C. Ct. App. filed Aug. 3, 2016) (Shearouse Adv. Sh. No. 31 at 58). As set forth below, the Court should grant the petition and reverse the Court of Appeals.

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QUESTIONS PRESENTED

After twice failing to convict another person for the murder of Nakia Mallory, the State turned on its lead eyewitness from those two trials and sought an arrest warrant for Petitioner Joshua William Porch. When applying for the warrant, the officer failed to advise the magistrate of exculpatory evidence. The warrant was issued. Porch was then arrested in California and interrogated by South Carolina investigators and a Los Angeles County police officer.

In reviewing the validity of the warrant prior to trial, the trial court found under *Franks v. Delaware*, 438 U.S. 154 (1978), that the warrant affidavit improperly omitted exculpatory evidence. However, the trial court ultimately concluded that no *Franks* violation occurred because sufficient probable cause existed to arrest Porch. It reached this conclusion by considering evidence not presented to the magistrate. During trial, Porch also contested the State's use of a videotape of his interrogation in California in light of the Los Angeles County police officer's failure to appear as a witness. A portion of the video was admitted over Porch's Confrontation Clause objection and he was instructed that his testimony regarding what occurred during the omitted portions would open the door for the remaining video to be admitted.

The Court of Appeals affirmed the trial court in a published opinion. The Court of Appeals concluded that no *Franks* violation occurred, ignoring Porch's argument that the trial court improperly considered evidence not presented to the magistrate. The Court of Appeals also improperly rejected Porch's Confrontation Clause argument on error preservation grounds.

Thus, the questions presented are:

I. Whether the Court of Appeals erred in affirming the trial court's improper consideration of facts not presented to the magistrate to uphold the arrest warrant?

II. Whether the Court of Appeals erred in affirming on error preservation grounds the trial court's decision to effectively limit Porch's testimony by threatening him with a violation of his Confrontation Clause rights?

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CERTIFICATION REGARDING REHEARING

The undersigned certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on September 20, 2016. (App. 1378-83, 1385.)

STATEMENT OF THE CASE

Early on May 14, 2006, Nakia Mallory was murdered. The State conducted an investigation and charged Justin Mallory with the crime. (App. at 201.) Mallory's first trial ended with a hung jury. (*Id.*) When he was tried a second time, Mallory opted for a bench trial. (App. at 1116-18.) The court found Mallory not guilty. (*Id.*) Porch testified as the State's lead eyewitness at each trial. (App. at 1116-18.) Porch testified that he witnessed an altercation between Mallory and the victim, which resulted in her death. (*Id.*) Porch intervened in the dispute and suffered an injury himself, which caused his own blood to be left at the scene. (*Id.*)

A. Application for an Arrest Warrant

After the State failed to convict Mallory twice, the State focused its attention on Porch. (App. at 859-61.) On July 7, 2009, the State applied to the magistrate for an arrest warrant. (App. at 852.) The warrant application included an affidavit stating:

> That on or about 05/14/2006 . . . one Joshua Porch did commit the crime of Murder . . . . It is believed the defendant committed the crime because [t]he defendant did with malice and aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene and implicates the defendant in the assault at the time of the murder. Affiant and others are witness to prove same.

(App. at 1259). The warrant failed to include that Porch had previously served as the State's lead eyewitness and that he testified that his blood was at the scene because he intervened in the altercation between Mallory and the victim. (App. at 80-82, 100-101.) The record is silent as to

other sworn testimony that was presented to the magistrate. (App. at 72-73.) The magistrate later recounted that the "gist" of what was presented to him was contained in the warrant affidavit. (App. at 95.) The record is clear, however, that the deputy did not inform the magistrate that Porch had previously testified—twice—as the State's lead witness. (App. at 80-82, 100-01.) Based on the affidavit, the magistrate issued the warrant for Porch's arrest. (App. at 1260.)

B. Porch's Arrest and Interrogation

After issuance of the warrant, investigators travelled to California and arrested Porch. (App. at 852-53.) They interrogated Porch for approximately 4.5 hours. (App. at 877-78, 891.) During that interrogation, Porch provided statements implicating himself in the victim's death. (R. 880.) Investigators then interrogated Porch for several hours later that same day. (App. at 889-91.) This second interrogation concluded approximately three hours later. (App. at 887.) During the second interrogation, Porch added details to this statement allegedly consistent with evidence law enforcement had collected. (App. at 904.)

Investigators interrogated Porch for a third time the next day. Unlike the two previous interrogations, the third interrogation was videotaped. (App. at 975.) Although the video begins at 11:00 am, the investigators' portion of the interrogation occurs approximately six hours later. (*Id.*) During the six-hour gap, a Los Angeles County police officer interrogated Porch and administered a polygraph examination. (App. at 209.)

After investigators returned to South Carolina with Porch, a Richland County Grand Jury indicted him for the murder of Nakia Mallory. (App. at 127.)

C. *Franks v. Delaware* Hearing

Prior to trial, the trial court granted Porch an evidentiary hearing under *Franks v. Delaware*, finding:

> [a]fter—after reviewing all of the information, I—I think that there were—that—that the affidavit contained in—in—in the arrest warrant lacks information which would have been relevant to making a decision as to probable cause. And it—it—lacks both exculpatory and [exclupatory] information.

(App. at 49-50.) The trial court stated that it was a close call but required the hearing because of the failure to include the potential exculpatory evidence. (*Id.*)

During the *Franks* hearing, Porch presented testimony from the deputy who applied for the warrant and the magistrate who issued the warrant. The deputy confirmed that the State had relied on Porch as an eyewitness in two previous trials for Nakia Mallory's murder. (App. at 67-68). The magistrate testified that the deputy did not inform him of that fact. (App. at 100-01). Indeed, the magistrate testified that he did not remember the deputy presenting any other information to him—the "gist of what would have been related to" him was in the one paragraph of the warrant affidavit. (App. at 95.)

According to the deputy, the information in the affidavit was sufficient for a finding of probable cause because of prior inconsistent statements attributed to Porch and the newly discovered blood evidence on the victim's clothing that matched to Porch. (App. at 79, 90-91). Critically, ***the warrant affidavit did not contain this information***. (App. at 1259.) Likewise, the deputy could not confirm that he had discussed this information with the magistrate. (App. at 76-77, 79).

At the conclusion of the hearing, the trial court rejected Porch's argument regarding the validity of the arrest warrant:

> But after hearing all of the information, both information that would have been exculpatory as well as information that the—the—the police officers had available to them, I find that there was sufficient probable cause.

(App. at 107). The trial court specifically relied on at least three pieces of evidence not presented to the magistrate to conclude that probable cause existed: (1) the fact that the suspect and Porch both happen to be left-handed, (App. at 107), (2) the newly discovered DNA evidence on the victim's shirt, (App. at 107-08), and (3) Porch's prior inconsistent statements regarding the incident, (App. at 107). Porch objected to the trial court's improper consideration of the evidence that was not presented to the magistrate:

> Mr. Shealy: I guess I just – just for the record purposes, I – I would slightly disagree with you . . .
> The Court So what you're saying then is – that I can't consider the new information that was presented in making a determination as to probable cause.
> Mr. Shealy: I just – the way I viewed the case law was just that . . . you're the fact – fact finder of this hearing to see what the judge heard . . .

(App. at 110-11.) Nevertheless, the trial court doubled-down on its expanded inquiry at the next hearing, again relying on the evidence not presented to the magistrate to determine that probable cause existed. (App. at 127.) To preserve the record, Porch then explained that

> The crux of our objection to your prior ruling at that hearing went to, respectfully, that we felt that the analysis was not correct, that in our opinion as Joshua Porch's defense counsel, the evidentiary hearing was held to determine if [the] magistrate, was given the opportunity, based on what was presented to him or not presented to him by [the deputy], for him to make a determination at the time whether there was probable cause, and you, your Honor, as the fact finder of that question – we wouldn't disagree it is your job to determine and assess probable cause in this case after possibly hearing and going through Jackson v. Denno, it was our opinion for you to decide whether [the magistrate] had that opportunity.

(App. at 130-31.)

D. Porch's Trial and Conviction

In November 2013, the State tried its case for the murder of Nakia Mallory for the third time in seven years. The State presented evidence collected at the scene as well as Porch's

statements to investigators. While the investigators who interrogated Porch testified at trial, the State did not call the Los Angeles County police officer who interrogated Porch for six hours to testify. The State had subpoenaed the police officer to testify at trial; however, despite that subpoena, the officer did not appear and was not available for cross-examination before the jury.[1]

Over Porch's objection, the State also entered into evidence the one-hour portion of the videotaped interrogation that involved the investigators. (App. at 207-08, 225, 233-34; App. at 900-01.) The State did not introduce the remaining six hours of the video involving the Los Angeles County police officer's interrogation of Porch. (App. at 205-206.) Porch objected to the introduction of the portion of the video because it would take the entire interrogation out of context. (App. at 206.) As Porch explained, the only way for him to put the one-hour portion of the video in context would have been to introduce the entire video or to testify as to the details of the full interrogation. (App. at 206.) The State argued, "if Mr. Porch testifies about specific occurrences within that six and a half hour interview with [the Los Angeles County police officer], . . . it opens the door for the possibility of us playing portions of that video as well." (App. at 1081.) In response, Porch explained to the trial court that his constitutional rights should not be violated because the State was unable to make the witness available for cross-examination. (App. at 1082-83.)

The trial court ruled that Porch could not discuss the remaining portions of the interrogation during his testimony without allowing the State to introduce the remaining portions of the interrogation video, despite the absence of the subpoenaed Los Angeles County police

[1] As the Court of Appeals correctly points out, the Los Angeles County police officer did appear for the *Jackson v. Denno* hearing eight months earlier; however, her testimony was limited to the voluntariness of Porch's statements. Porch did not have a chance to cross-examine the officer regarding other matters relevant to his defense.

officer. (App. at 1081-83.) Likewise, the trial court ruled that his right to confront the absent police officer was satisfied because he had previously cross-examined the officer when she was present for the *Jackson v. Denno* hearing held eight months earlier in March. (App. at 222.) In light of the trial court's ruling, Porch did not discuss his interrogation with the absent officer except to say that it took six and a half hours. (App. at 1125-26.) Porch did not proffer any other testimony or evidence.

The jury found Porch guilty of murder. (App. at 1211-14.) The trial court then sentenced him to fifty years' imprisonment. (App. at 1225.)

E. Porch's Appeal and the Opinion of the Court of Appeals

Porch timely filed his notice of appeal. (App. at 1268.) After hearing argument, the Court of Appeals issued its published opinion. (App. at 1369). With respect to his *Franks v. Delaware* argument, the Court of Appeals concluded that Porch failed to overcome his burden to show that the State intentionally or recklessly omitted potential exculpatory evidence. (App. at 1375.) It also found that "even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause to secure an arrest warrant for Porch." (App. at 1376.) The Court of Appeals did not reach Porch's Confrontation Clause challenge, instead ruling that Porch did not preserve the issue because he failed to proffer the testimony he would have given had he been allowed to testify as to the remaining portions of his videotaped interrogation. (App. at 1377.)

Porch petitioned for rehearing, specifically arguing that the Court of Appeals (1) overlooked the trial court's error in relying on information that was not presented to the magistrate at the time the warrant was issued; and (2) misapprehended South Carolina's error

preservation rules by rejecting his Confrontation Clause argument due to his failure to proffer testimony. (App. at 1378-83.) His petition was denied on September 20, 2016. (App. at 1385.)

ARGUMENT

The Court should issue a writ of certiorari to review and reverse the Court of Appeals for two reasons. First, a substantial constitutional issue is directly involved—whether the trial court applied the wrong standard of review under *Franks v. Delaware* by relying on evidence that was not presented to the magistrate to support the conclusion that probable cause existed to issue the arrest warrant for Porch. *See* Rule 242(b)(4), SCACR. The Court of Appeals' decision ignores its own precedent and impermissibly expands the scope of reviewing a magistrate's decision to issue a warrant. While Porch agrees that a magistrate must apply the totality of the circumstances test to determine whether to issue a warrant, a trial or appellate court reviewing that decision must base its determination of probable cause on the sworn testimony actually presented to the magistrate—not what *could* have been presented to the magistrate.

This case presents an important matter for criminal practice. The Court of Appeals' opinion will leave future litigants confused as to the proper evidence a trial court may consider when determining whether a *Franks* violation has occurred. While the Court of Appeals has previously stated that a trial court's review is "based on all of the information available to the magistrate *at the time the warrant was issued*," *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996), its opinion in this case sanctions an inconsistent position, namely that a trial court can review *any* evidence to determine whether probable cause exists, not just that evidence presented to a magistrate when the warrant application is made.

Second, the Court of Appeals' opinion ignores a novel issue of law by improperly rejecting Porch's Confrontation Clause argument on error preservation grounds. *See* Rule 242(b)(1), SCACR.

I. The Court of Appeals misconstrues the standard under *Franks v. Delaware.*

The Court of Appeals wrongly affirmed the trial court's error in expanding the scope of review under *Franks v. Delaware* by considering evidence not presented to the magistrate at the time the warrant was issued. This error necessitates that certiorari be granted.

A. The trial court properly concluded that potential exculpatory information was recklessly omitted from the warrant affidavit.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held the Fourth and Fourteenth Amendments to the United States Constitution afforded criminal defendants the right to challenge the veracity of a warrant affidavit. In *Franks*, the Supreme Court provided a two-part test:

> 1) To mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth and those allegations must be accompanied by an offer of proof; and
>
> 2) If these requirements are met, and if, when material that is subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999) (citing *Franks*, 438 U.S. at 171-72). This test applies when false information is included in the warrant affidavit and where exculpatory material is omitted from the affidavit. *Id.*

In *Missouri*, police obtained a warrant to search the defendant's home for cocaine. *Id.* at 550, 524 S.E.2d at 395. On appeal, this Court held that the lead detective "at least acted

recklessly in making the false statement and in omitting the exculpatory information." *Id.* at 555, 524 S.E.2d at 397. When the omitted information was included, it created an "affirmative hurdle" which the remaining portions of the affidavit could not overcome. *Id.* ("This, in turn, erodes the basis upon which a magistrate could find probable cause to search [the defendant's] apartment."). Following this conclusion, this Court then looked to whether excluding the false information and inserting the exculpatory statement, there remained "a substantial basis upon which the magistrate could have found probable cause to issue the warrant." *Id.* This Court held that a substantial basis did not exist because the omitted information struck at the "very heart of the affidavit's purpose . . ." *Id.* at 556, 524 S.E.2d at 398.

After hearing arguments in this matter, the trial court properly found that an evidentiary hearing was warranted. Specifically, the Court ruled that the affidavit "lack[ed] information which would have been relevant to making a decision as to probable cause. (App. at 45-46). Thus, the trial court concluded that Porch had met his burden to warrant an evidentiary hearing. (App. at 46.) The trial court further explained that "while there may be other . . . evidence that . . . if stated in the affidavit, would more clearly establish probable cause, because the affidavit does not necessarily contain that information and other information that was exculpatory was omitted, is . . . the reason why I've come to the conclusion." (App. at 47.)

This conclusion was proper. The affidavit did exclude potential exculpatory information, including the fact that Porch had served as the State's lead witness in two separate trials for the same murder. Nevertheless, the Court of Appeals found that the simple fact that the deputy applying for the warrant omitted this information was insufficient to establish that the deputy "acted intentionally or with reckless disregard of whether the omissions would make the affidavit

misleading." (App. at 1375.)[2] This conclusion ignores the fact that the State has taken irreconcilable positions throughout the course of three trials for the murder of Nakia Mallory. More specifically, it ignores the fact that the State had been sufficiently confident in Porch's testimony to put him on the stand as its lead witness twice, yet did not find that information important enough to include in the warrant affidavit.

Thus, the Court of Appeals erred when it found that Porch had made an insufficient showing to require a hearing under *Franks v. Delaware*.

B. The Court of Appeals improperly sanctioned the trial court's reliance on information that was not presented to the magistrate at the time of the warrant application.

United States Supreme Court precedent establishes that the proper scope of inquiry once an error of omission has been committed is for the trial court to determine whether there "[r]emains sufficient content in the warrant affidavit to support a finding of probable cause . . ." *Franks v. Delaware*, 438 U.S. 154, 172 (1978). While the probable cause determination is reviewed based on the totality of the circumstances, *State v. Missouri*, 337 S.C. 548, 555, 524 S.E.2d 394, 397 (1999), "[i]f no supplemental testimony is taken, a magistrate's probable cause determination is limited to the four corners of the search warrant affidavit." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014) (citing *State v. Herring*, 387 S.C. 201, 214, 692 S.E.2d 490, 497 (2009)); *cf. State v. Lynch*, 412 S.C. 156, 184, 771 S.E.2d 346, 361 (Ct. App. 2015) (concluding that, despite omitted evidence, sufficient probable cause existed by relying on

[2] Instead of applying a deferential standard of review, the Court of Appeals reviewed the trial court's finding that Porch was entitled to a *Franks* hearing *de novo*, relying only on Fourth Circuit precedent. (App. at 1373 (citing *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008)).) This Court has not yet determined the proper standard of review of a trial court's finding that a defendant is entitled to a *Franks* hearing. Under either standard, the Court of Appeals erred.

supplementary affidavit properly before magistrate at the time the warrant was issued). This inquiry is "based on all of the information available to the magistrate *at the time the warrant was issued.*" *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996) (emphasis added). Thus, the proper inquiry does not include evidence made available at a later time or evidence that has had the benefit of being polished by the State's prosecutors. The proper inquiry is limited to only what was presented to the magistrate after the addition of the omitted exculpatory information.

Here, the magistrate only had an affidavit at the time the warrant was issued. (App. at 127.) There is no evidence in the record to confirm whether the magistrate had additional sworn testimony to support his probable cause determination. (App. at 72-73, 73.) Nevertheless, the trial court concluded that the totality of the evidence presented at the *Franks* hearing—including evidence that was not disclosed to the magistrate—was sufficient to support probable cause. (App. at 107-112; 123-131.)[3] Indeed, the trial court specifically relied on at least three pieces of evidence that were not presented to the magistrate to conclude that probable cause existed: (1) the fact that the suspect and Porch are both left-handed, (App. at 107, 128), (2) the newly discovered DNA evidence on the victim's shirt, (App. at 107-08, 128), and (3) Porch's prior inconsistent statements, (App. at 107, 128). In doing so, the trial court expanded the scope of the inquiry. It improperly determined whether probable cause existed with the benefit of hindsight rather than relying only on the evidence in the record that was presented to the magistrate.

The State explicitly conceded that the proper inquiry is limited to the evidence presented to the magistrate. In its Final Response Brief to the Court of Appeals, the State explains that

[3] Porch specifically argued that the trial court improperly considered evidence that had not been presented to the magistrate. (App. at 111, 130-31.)

when reviewing the validity of a warrant "a reviewing court may consider only information brought to the magistrate's attention. '[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for . . . conclude[ing] that probable cause existed.'" (App. at 1321 (alterations in original).) Likewise, the Court of Appeals initially explains that the inquiry is limited to the affidavit, not the totality of the evidence available to the circuit court at the *Franks* hearing: "There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." (App. at 1373-74 (emphasis omitted).) However, its opinion ultimately fails to correct the trial court's error in considering evidence that was not presented to the magistrate. (App. at 1376.) Therefore, the Court should grant certiorari to limit the trial court's scope of review to evidence actually presented to the magistrate.

II. The Court of Appeals improperly applied South Carolina's error preservation rules to avoid the merits of Porch's Confrontation Clause challenge.

This Court should grant certiorari because the Court of Appeals has misapplied South Carolina's error preservation rules. By doing so, it failed to entertain the merits of Porch's argument that the State violated an important constitutional right through no fault of his own.

A. The Court of Appeals' error preservation ruling is incorrect.

The Court of Appeals correctly concludes that a failure to proffer *excluded* testimony prevents appellate review. (App. at 1377.) But the trial court did not *exclude* evidence or testimony here. Instead, it gave Porch two equally difficult and unacceptable choices—limit his testimony and allow the State to play one hour of a six-hour videotaped interrogation or explain the context of the interrogation and have his Constitutional right to confront witnesses against him violated. The requirement that Porch proffer his testimony does not apply in this situation. *See Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) (failing to proffer excluded

medical records); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (failing to proffer excluded testimony). This is because no evidence was excluded by the trial court. Thus, the Court of Appeals erred by failing to address this issue on the merits.

B. The record supports reversal for the violation of Porch's right to confrontation.

The State cannot be permitted to gain from its own failure to make the Los Angeles County police officer available for cross-examination at trial. Doing so allows the State to make an end-run around the Confrontation Clause.

The Sixth Amendment's Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause bars the admission of testimonial statements of a witness who does not testify at trial. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). As our Supreme Court has explained, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment . . . about how reliability can best be determined." *Id.* at 61. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62.

In this case, Porch was interrogated on video for over seven hours in two shifts. (App. at 898.) The Los Angeles County police officer conducted the first six hours, and the two South Carolina investigators conducted the remaining hour. (App. at 967.) However, the jury only viewed the one-hour portion of the videotape featuring investigators who were available to testify. (App. at 205.) The State did not enter the vast majority of the video because the Los Angeles County police officer did not appear at trial. (App. at 1083.) Porch objected to the admission of only one hour of the testimony because it would place his interrogation out of

context. (App. at 205-07.) Porch explained that the trial court's decision to allow the one-hour portion to be admitted in a vacuum would present him with a catch-22: either have the full video entered into evidence or testify regarding the missing six hours. (*Id.*) The trial court warned Porch that his testimony would open the door for the State to admit the video, notwithstanding his inability to cross-examine the missing Los Angeles County police officer regarding the interrogation in front of the jury. (App. at 1082-84.)

The trial court concluded that placing Porch in this impossible position did not violate his right to confrontation for two main reasons: (1) Porch had already cross-examined the officer at the *Jackson v. Denno* hearing held eight months earlier, (App. at 219, 222), and (2) the officer was not present at the trial, (App. at 221). These conclusions were in error and should be reversed.

This Court has not yet decided whether a cross-examination at a pretrial hearing is sufficient to meet the dictates of the Confrontation Clause. The Court should conclude that cross-examination at a pretrial hearing is insufficient cross-examination for Confrontation Clause purposes because a pretrial hearing has a limited scope with a different burden or proof that from the burden of proof at trial. For example, in a pretrial *Jackson v. Denno* hearing, the focus is the voluntariness or involuntariness of a defendant's confession. *See State v. Silver*, 307 S.C. 326, 331, 414 S.E.2d 813, 815 (Ct. App. 1992) ("The test of admissibility of a statement is voluntariness."). Even the trial court recognized that *Jackson v. Denno* hearings generally do not have the same broad scope as a cross-examination in front of a jury. (App. at 219.)

Second, the fact that the State unsuccessfully tried through proper channels to subpoena the Los Angeles County police officer, does not allow for a violation of Porch's Confrontation Clause rights. The Confrontation Clause has no "best-efforts" exception. Instead, it imposes a

procedural protection that requires the State to produce witnesses against a defendant for cross-examination as a prerequisite for introducing that witness's statements. *Crawford v. Washington*, 541 U.S. 36, 62 (2004). That did not occur here. Thus, Porch was left with no opportunity to cross-examine the Los Angeles County police officer regarding the most critical aspects of this case—statements made to Porch during the six-hour portion of his interrogation in California.

The trial court erred in these conclusions, and the Court of Appeals should have reached this issue and reversed. This Court should grant certiorari to correct this error of law that resulted in a deprivation of Porch's right to confront witnesses against him.

CONCLUSION

The courts below have erred in concluding that the warrant affiant's failure to disclose exculpatory evidence to the magistrate did not invalidate the warrant under *Franks v. Delaware*. The Court of Appeals compounded this error by failing to correct the trial court's improper expansion of the scope of review. The Court of Appeals should have instead held that the failure to disclose the State's reliance on Porch as their lead witness in the first two trials was a reckless disregard for the truth. It also should have corrected the trial court's improper consideration of evidence that was not presented to the magistrate. The Constitution—as interpreted by *Franks v. Delaware*—requires nothing less. Likewise, the Court of Appeals should not have avoided Porch's Confrontation Clause argument based on its misinterpretation of our State's issue preservation rules.

Thus, this Court should grant certiorari and reverse on both issues.

[Signature on following page.]

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011GS4003359
Appellate Case No. 2013-002531

The State, ... Respondent,

v.

Joshua William Porch, ... PETITIONER

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Joshua William Porch, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified at the following address(es):

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APPENDIX (three volumes)

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October 20, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
The Honorable Alison R. Lee, Circuit Court Judge
Appellate Case No. 2016-002146

RECEIVED
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S.C. SUPREME COURT

THE STATE

Respondent,

V.

JOSHUA WILLIAM PORCH,

Petitioner

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CERTIFICATE OF SERVICE

PETITIONER'S STATEMENT OF ISSUES

I. Whether the Court of Appeals erred in affirming the trial court's improper consideration of facts not presented to the magistrate to uphold the arrest warrant?

II. Whether the Court of Appeals erred in affirming on error preservation grounds the trial court's decision to effectively limit Porch's testimony by threatening him with a violation of his Confrontation Clause rights?

STATEMENT OF THE CASE

On May 14, 2006, Petitioner murdered Nakia Mallory in Richland County. Petitioner was arrested on July 8, 2009 in Los Angeles, CA, and Petitioner confessed. Petitioner was returned to S.C. and indicted for murder (*Ind. # 2011-GS-40-03359*). Ernest "Chip" Finney prosecuted the case. Petitioner was tried by a jury before Judge Alison Rene Lee from November 18-25, 2013 and found guilty and sentenced to 50 years. Petitioner appealed raising 2 issues. The Court of Appeals affirmed. State v. Porch, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016).[1] A Petition for Rehearing was denied. This is Respondent's Return to Petitioner's Petition for Writ of Certiorari.

RESPONDENT'S STATEMENT OF FACTS

Nakia Mallory ("victim"), the mother of 2 small children, was murdered in the early morning hours of May 14, 2006 in her apartment in Richland County. Victim was stabbed to death. She had 1 stab wound to *her right* neck and 1 stab wound over *her right* eye.[2] She had also been beaten about the head. The knife wound to the neck was fatal. A large amount of blood was found in the den of her home *and* a small amount in the kitchen. Someone had attempted to clean up the blood in the kitchen by wiping it with a cloth. There was also a spot of blood on a bottle of cleaner under the kitchen counter. The murder weapon, a knife, was never found, nor was the cloth used to wipe up the blood. (R. 155-196, 260-478, 480-557, 730-52).

Victim's husband, Justin Mallory ("Justin"), came home at approximately 3:30 a.m. on May 14th and found victim in the above described condition on their den floor. Blood was everywhere in the den. Justin flew into a panic, checked on the couples' 2 children who were

1 Judge Huff authored the Opinion which was concurred in by Judges Geathers and Konduros.
2 Petitioner Porch is left handed.

asleep, and immediately sought assistance from neighbors by banging on their doors.[3] Justin also called 911 and reported what he had found. After waiting for some time for EMS to arrive, Justin could wait no longer and picked his wife up, placed her in his van and drove her to the hospital. Victim was pronounced dead there. Justin got his wife's blood on him when he carried her to the van and into the hospital. (R. 155-196, 260-338, 339-351, 431-78, 546-57).

Justin cooperated fully with police including informing them of his whereabouts on the night of the murder, signing consents to search all of his property, and submitting a DNA sample. Justin admitted he had been with another woman romantically prior to finding his wife, had been at a motel with the woman, stopped at a convenience store, took the woman home, and then drove home talking to friends on his cell phone. When he arrived home, he discovered his wife's body, sought assistance from neighbors, called 911, heard gurgling sounds coming from his wife, picked her up and placed her in his van, and drove her immediately to the hospital. (R. 155-96, 260-338, 351-94, 431-78, 753-87).

Justin was initially charged with the murder by the Richland County Sheriff's Office and indicted. The 5th Circuit Solicitor's Office prosecuted the case. Justin was tried twice resulting in a hung jury and then an acquittal. (R. 155-96, 260-338). Justin then contacted the Richland County Sheriff's Office and the Sheriff and informed them he was not involved in his wife's murder and asked that they re-open the investigation. As a result, the Sheriff's Office assigned Chief Deputy David Wilson to review the case to determine if the wrong person was charged. The investigation focused on petitioner, Joshua Porch ("**Porch**"), who had testified in Justin's trials claiming he, Porch, was an eyewitness to the murder. (R. 155-96, 260-338, 787-840).

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3 The neighbor, Shareed Hargraves, testified when victim's husband came banging on his door for assistance, the husband did not have any blood on his person. (R. 546-557).

Police first approached Porch the day after victim's murder as a result of Justin's statement given the night of victim's murder. Justin told police the only persons who could possibly have killed his wife were the maintenance man *or* Porch, who was a neighbor, because they each had been in his apartment recently. In his 1st statement to police, **Porch** denied being present at the scene at the time of the crime and claimed he knew nothing about the murder. Porch's wife also told police at that time that Porch was with her the night of the murder.[4]

Over a year later and shortly before Justin's first trial, prosecutors discovered there was unidentified blood [male DNA] in the kitchen of victim's home. Porch was contacted again by police in an attempt to identify this unknown male DNA. At that time, Porch admitted being present at the scene [victim's home] earlier in the evening of the murder and cutting his hand while slicing an apple. Porch was polygraphed on this statement and failed the polygraph.

Upon further questioning, Porch gave a 3rd version where he stated that on the night of the murder he was at the crime scene "fooling around" with victim, but victim's husband came home and attacked victim with an object, and he [**Porch**] was cut on his hand while intervening. Porch claimed he was facing Justin when this occurred. Porch admitted he bled in the kitchen of the home, and before leaving the apartment attempted to clean up the blood. This was the version Porch testified to at Justin's 2 trials. As previously stated, Justin was ultimately acquitted. (R. 575-96,603-11, 558-74, 612-57, 666-729, 787-96).

After re-opening the case, Chief Deputy Wilson realized Porch had given inconsistent versions of the event, including stating on 1 occasion he cut his right hand and on another he cut his left hand. Porch also admitted he had attempted to clean up the crime scene [the kitchen]

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4 **Porch's** wife changed her statement at **Porch's** trial testifying he left their apartment during the night of the victim's murder and returned some time later in the night or morning (R. 558-74).

where he had bled. Wilson requested additional D.N.A. testing. It revealed **Porch's** blood [DNA] was on victim's shirt, not just in the kitchen. Porch's blood was found on the bottom right of victim's shirt. D.N.A. consistent with Porch's DNA had previously been found under victim's fingernails. Justin's DNA was not found on victim or under her fingernails. It was also determined **Porch** was left-handed, and both stab wounds to victim were on *her* right side. Justin was right-handed. The re-investigation of the case determined Porch murdered victim, and an arrest warrant for murder was obtained on July 7, 2009. (R. 431-79, 800-40).

Richland County Investigators traveled to California on July 8, 2009, and **Porch** was arrested that night for victim's murder. Porch was questioned shortly after midnight on July 9th, resulting in **Porch** providing a statement implicating himself in victim's death, alleging it was an accident. **Porch admitted Justin was not present when victim was killed, i.e. Porch had perjured himself in Justin's 2 trials.** (R. 796-98, 841-93, 907-64, 975-1067, 1225-35, State's 47). Later that day, the investigators questioned Porch again. In this statement, Porch claimed victim "came on to him;" he rejected her; she got a knife; there was a struggle over the knife, and he [Porch] ended up hitting her several times in the forehead. This was partially consistent with the autopsy results. (R. 841-93, 907-64, 975-1067, 1236-39, State's 49). Investigators questioned Porch again on July 10th, and this interview was videotaped.[5] Porch made further incriminating statements implicating himself in victim's murder. Porch admitted it was he who "came on" to victim; she rejected him, and he ended up killing her [stabbing her].[6] Porch admitted he

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5 Prior to this 3rd statement, Porch was polygraphed/interviewed by a Los Angeles County detective. This detective appeared and testified at the Jackson v. Denno, 378 U.S. (1964), hearing; however, a California court ruled she did not have to return to South Carolina for the actual trial, and she did not.

6 Justin testified at **Porch's trial** helping establish it was in fact Porch who murdered victim. Justin accounted for his whereabouts up until just moments before he discovered the body, began

attempted to clean up the crime-scene and carried the murder weapon with him and disposed of it. After hearing all of the evidence, including Porch's confessions, the jury found Porch guilty of murder. (R. 841-93, 907-64, 975-1067, 1199-1202, State's Ex. 50).

ARGUMENT I.

The Court of Appeals correctly affirmed Judge Lee's ruling.

Pre-trial, Porch moved to suppress all evidence flowing from his arrest. Porch alleged the arrest warrant contained false information and omitted exculpatory material; therefore, his confessions should be suppressed pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Judge Lee conducted a Franks hearing regarding the circumstances of the issuance of the arrest warrant and whether the warrant was supported by probable cause. (R. 19-114, 1243). At the hearing's conclusion, Judge Lee found the arrest warrant did not contain any false statement and was supported by probable cause, and even including the exculpatory material Porch alleged should have been included, there was still probable cause to support the arrest warrant for murder; therefore, Porch's motion to suppress was denied. (R. 103-08, 116-28). Porch alleged on appeal Judge Lee erred. The Court of Appeals unanimously affirmed Judge Lee. Porch. Porch now alleges the Court of Appeals erred. Porch is wrong, and this Court should deny certiorari

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banging on neighbors doors, and called 911. This included phone records and cell tower information showing Justin coming from dropping off the paramour and headed toward the home where he and his wife lived while talking to friends on his phone. (R. 155-96, 799).

Standard of Review
(Circuit Court's Affirmation of Probable Cause)

The 4th Amendment applies to all seizures of the person. United States. v. Brignoni-Ponce, 422 U.S. 873 (1975); State v. Khingratsaipon, 352 S.C. 62, 572 S.E.2d 456 (2002). An arrest of a person is a "seizure" within the meaning of the 4th Amendment. United States v. Mendenhall, 446 U.S. 544 (1980). The standard of review of 4th Amendment search *or* seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the ruling of a trial judge where there is clear error. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015).

(Magistrate's Issuance of a Warrant)

Warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. *See* State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, this Court gives great deference to a magistrate's determination of probable cause. *See* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997). When determining the propriety of the issuance of a warrant, the duty of this Court is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. *See* State v. Kinloch, 410 S.C. 612, 767 S.E.2d 253 (2014). In making such a decision, this Court must consider the totality of the circumstances. Jones, (under the totality of the circumstances test, this Court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed).

The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d

57 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001). However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

Probable Cause to Arrest

"Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person under the circumstances to believe likewise." City of Spartanburg v. Wortman, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and the belief of guilt must be particularized with respect to the person to be seized. Ybarra v. Illinois, 444 U.S. 85 (1979).[7]

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984); State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742, 103 S.Ct. at 1535.[8] South Carolina has adopted the Gates "totality of the circumstances" test in determining

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7 Stated another way, probable cause exists when the totality of the circumstances within the officer's knowledge "are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Or, whether at that moment the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, was sufficient to warrant a prudent man in believing the suspect had committed a criminal offense. Maryland v. Pringle, 540 U.S. 366 (2003); Beck v. Ohio, 379 U.S. 89 (1964); State v. Pruitt, 260 S.C. 396, 196 S.E.2d 107 (1973).

8 Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). Probable cause is a fluid concept-turning on the assessment of probabilities in a particular factual context–not readily, or even usefully, reduced to a neat set of legal rules. Pringle; Illinois v. Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of

whether sufficient probable cause exists to issue a warrant. State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999).

As the Supreme Court recognized in Gates, affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, in light of which technical requirements of elaborate specificity once exacted under common law pleading have no proper place, and should therefore be viewed in a common sense and realistic fashion. United States v. Ventresca, 380 U.S. 102 (1965); Bowie, *citing* Sullivan. Affidavits must be judged on the facts presented, not on the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

The Franks hearing

Judge Lee, out of an abundance of caution, conducted a Franks hearing regarding the circumstances surrounding the issuance of the arrest warrant for Porch. Chief Deputy Wilson (hereinafter "Wilson") testified regarding his investigation of the murder and how he ultimately came to seek a warrant for Porch's arrest. (R. 43-87). Wilson testified he was asked to re-open the previous investigation by Sheriff Lott after Justin was acquitted. Wilson discovered there were several inconsistencies in **Porch's** statements to police. Obviously, Porch had given at least 3 inconsistent statements claiming; (1) he was not at the scene on the night of the crime, (2) he was there earlier with his child and cut his hand cutting an apple, and (3) he was present at the scene but alleging he was stabbed by Justin during a domestic altercation. Importantly, to Wilson, Porch admitted in this final statement he attempted to clean up blood he had dripped on the kitchen floor before the leaving the scene. Wilson noted it made no sense to him Porch

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the circumstances. Pringle; Gates. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169 (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995).

would intervene in a domestic altercation between Justin and victim and suffer a stab wound, and then clean up the kitchen while Justin was still attacking the wife in the den of the apartment. It also seemed strange Porch did not call police or EMS after leaving the kitchen and discovering victim's body near the couch. Wilson was also aware of Justin's statement to police the night of the crime where he stated he came home and found his wife lying at the foot of the couch and blood was everywhere. And, Wilson was aware a neighbor had informed police that when Justin came to his apartment asking for assistance, there was no blood on Justin. (R. 43-87).

Wilson decided to have victim's shirt re-examined for DNA, which had never been done in the investigation. The original DNA testing in the case showed Porch's blood was found in the kitchen of the crime scene, where someone had attempted to wipe up the blood, and Porch's DNA was found under victim's fingernails. The subsequent testing requested by Wilson revealed a drop of Porch's blood at the bottom right of victim's blouse. This was significant to Wilson. Porch had also told police on 1 occasion it was his left hand that was cut and testified at Justin's trials his left hand was cut.[9] In his statement to police placing himself at the scene at the time Justin supposedly attacked the wife, Porch claimed he was facing Justin when he [Porch] was stabbed or cut, and victim was standing behind Porch. Wilson believed it was highly unlikely if Porch's left hand had been cut, he would have dripped or gotten blood on the bottom right of victim's shirt when she was standing behind him. Wilson also noted in reviewing the file victim was stabbed in what would be her right neck area. Porch was left-handed. Justin was right handed. It was more consistent with the assault on victim that she was stabbed by a left handed perpetrator. This would also be consistent with the drop of Porch's blood found on the

9 Wilson testified Porch told police inconsistent stories about which hand was cut. First, he stated his right hand was cut and on another occasion stated his left hand was cut. Wilson found it unusual someone could be involved in such a significant event as a murder, and could not remember which hand was cut.

bottom right of victim's blouse. As a result of all of the evidence in the case, Wilson believed there was probable cause to arrest Porch for the murder, believed Porch actually committed the murder, and sought and obtained an arrest warrant from Magistrate Phil Newsome charging Porch with murder (R. 43-87, 87-93).

The Affidavit presented to the magistrate who issued the arrest warrant stated as follows:

> That on 5/14/2006 while at 1103 Pinelane Road Apt. 311 in the Dentsville Magisterial District of Richland County, one Joshua Porch did commit the crime of Murder in that he did with malice aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene and implicates the defendant in the assault at the time of the murder. Affiant and others are witness to prove same.

(R. 1243, Def.'s Ex. 6).[10] The warrant was subsequently served on Porch in California, and he confessed Justin was not present during the crime, and it was he [Porch] who killed the victim.

The Lack of Merit of Porch's Argument

In Franks, the Supreme Court delineated the limited circumstances in which a defendant can attack a facially sufficient warrant affidavit. 438 U.S. at 155-56. The Court set forth a two-step process for defendants seeking to challenge such affidavits. Id. First, a defendant must make a rigorous showing necessary to obtain a hearing:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

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10 Both Wilson and Magistrate Newsome testified Wilson told Newsome other information than what was in the arrest warrant affidavit, such as background information on the case; however, due to the passage of time between the issuance of the arrest warrant and the Franks hearing, neither Wilson nor the Magistrate could remember what they discussed. (R. 43-93).

Id. This showing "must be more than conclusory" and should include affidavits or other evidence to overcome the "presumption of [the warrant's] validity." Id. at 171. Second a defendant faces additional burdens at the hearing stage:

> In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 156.

Franks addressed an act of commission in which false information had been included in the warrant affidavit. That did not occur here. There is no false information in the affidavit.[11] Judge Lee correctly found there were no false statements in the affidavit. Porch conceded this issue below and argued the omission of exculpatory evidence. (BOA, 5-13).

The Franks test also applies to acts of omission in which exculpatory material is left out of an affidavit. State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999); State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015), *cert. denied.* The Franks' threshold is even higher for defendants making claims of omissions rather than affirmative false statements. United States v. Clenney, 631 F.3d 658 (4th Cir. 2011). Merely identifying factual omissions is insufficient. United States v. Tate, 524 F.3d 449, 454-55 (4th Cir. 2008). To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the

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11 Porch admitted under oath at 2 different trials and in a prior statement to police he was present at the crime scene at the time of the assault and stabbing of Nakia Mallory. Further, Porch had been further implicated in the crime by DNA testing which found Porch's blood on the kitchen floor and someone had attempted to wipe up that blood before leaving the crime scene, under the victim's fingernails, and on the bottom of the victim's shirt indicating Porch was present at the scene *and* indicated Porch was involved in the assault of the victim at the time of the murder.

affidavit misleading to the issuing judge. Missouri; United States v. Blauvelt, 638 F.3d 281, 289 (4th Cir. 2011). The defendant must also show that the omissions were material, meaning that their "inclusion in the affidavit would defeat probable cause." Clenney, 631 F.3d at 664; United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990). To prevail at the hearing, the defendant must then prove these points by a preponderance of the evidence. Franks, 438 U.S. at 155-56; Clenney, 631 F.3d at 664. There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause. Id. Entitlement to a Franks hearing is a matter of law subject to *de novo* review. Tate, 524 F.3d at 455.

There is a presumption of validity with respect to the affidavit in support of the warrant. Franks, 438 U.S. at 171. "To begin with, warrant affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." Ventresca, 380 U.S. at 108. As the 4th Circuit stated in Clenny:

> If we 'desire to encourage use of the warrant process by police officers,' Illinois v. Gates, 462 U.S. 213, 237, n. 10, 103 S.Ct. 2317 (1983), the worst course of action would be to pick apart warrant affidavits from the pristine perch of hindsight or to penalize officers for securing what the law requires. Obtaining a warrant is a process overseen by a neutral magistrate. Magistrates make an independent judgment about the sufficiency of the warrant affidavit. They are free to reject warrant applications that provide scant or insufficient evidence. Indeed, an important rationale for the Franks ruling was respect for the warrant process and the capabilities of magistrates. Franks, 438 U.S. at 166-67.

Clenny, 631 F.3d at 665.

The protections of Brady v. Maryland, 373 U.S. 83 (1963) do not apply to warrant application proceedings. Clenny, 631 F.3d at 665; Colkley, 899 F.2d at 302-03. "The Supreme Court has shown no inclination to impart the panoply of trial protections into the warrant application process with all the attendant burdens and delays such a step would entail." Id. at 665; *See* Franks, 438 U.S. at 166-72. The process of preparing a warrant affidavit requires

affiants to exercise discretion by selecting certain facts for inclusion and others for omission. Tate, 524 F.2d at 454-55. "An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation." Colkley, 899 F.2d at 300.

> [A] requirement that all potentially exculpatory evidence be included in an affidavit would severely disrupt the warrant process. The rule would place an extraordinary burden on law enforcement officers, who might have to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded.

Id. at 303. "In short, a rule requiring affiants to disclose all potentially exculpatory information has nothing to recommend it. Unless a defendant makes a strong preliminary showing that the affiant excluded critical information from the affidavit with the intent to mislead the magistrate, the Fourth Amendment provides no basis for a subsequent attack on the affidavit's integrity." Id.

> While omission may not be *per se* immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included have redounded to defendant's benefit. The potential of endless rounds of Franks hearings to contest facially sufficient warrants is readily apparent.

Colkley, 899 F.2d at 301; Lynch, (*quoting* Colkley). "Inferring bad motives from an officer's omission of information inappropriately "collapses into a single inquiry the two elements – 'intentionality' and 'materiality'—which Franks states are independently necessary." Id.

A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. Tate, 524 F3d at 454. "'[M]ere [] negligen[ce] in ...recording the facts relevant to a probable-cause determination' is not enough." Colkey, 899 F.2d 301 (*quoting* Franks, 438 U.S. at 170). "[T]he omission must be 'designed to mislead' or must be made 'in reckless disregard of whether [it] would mislead'" Tate, 524 F.3d at 455. "The

defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that its inclusion in the affidavit would defeat probable cause." United States v. Shorter, 328 F.3d 167, 170 (4th Cir. 2003). In this case, Porch offered no evidence Wilson omitted information with the intent to mislead the magistrate whether intentionally or recklessly. Judge Lee found everthing in the affidavit was true. And, even including the exculpatory material Porch alleged was omitted, there is still sufficient probable cause to support the issuance of the arrest warrant. (R. 103-08; 116-28). The facts elicited during the Franks hearing show Wilson did not intend to mislead the magistrate.

Colkey makes clear the 4th Circuit's disdain for the notion bad motive can be inferred from the materiality of the omitted information. That Court has clearly set a very high standard for establishing entitlement to a Franks hearing. Id. Porch was not entitled to a Franks hearing, and has not made a sufficient showing to include his alleged exculpatory evidence. Shorter, 328 F.2d at 170 (defendant must also show the omitted material was necessary to the probable cause finding, i.e., the omitted material was such its inclusion would have defeated probable cause).

Judge Lee conducted a Franks hearing out of an abundance of caution. Further, the affidavit supplied ample probable cause for the issuance of the warrant. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person under the circumstances to believe likewise." Wortman, 310 S.C. at 4, 425 S.E.2d at 20. The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and the belief of guilt must be particularized with respect to the person to be seized. Ybarra, *supra*.[12] Probable cause exists

12 Probable cause does not mean absolute certainty. Dean; Peters; Williams. Probable cause is a flexible, common-sense standard. Brown. Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Bowie, *quoting* Brown, 460 U.S. at 742.

when the totality of the circumstances within the officer's knowledge "are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." Baccus, 367 S.C. at 49, 625 S.E.2d at 220.

As Gates recognized, and as here, affidavits are normally drafted by an officer in a criminal investigation; therefore, technical requirements of elaborate specificity once exacted under common law pleading have no proper place, and they should be viewed in a common sense and realistic fashion. Ventresca; Bowie. Affidavits must be judged on the facts presented not the precise wording used. Viard. The Affidavit here supplies sufficient probable cause to issue the arrest warrant charging Porch with murder. Lynch, 412 S.C. at 179-84, 771 S.E.2d 346.

The facts of this case are similar to those in United States v. Moody, 762 F.Supp. 1491 (N.D. Ga. 1991), where the Court found no Franks hearing was due to a defendant despite his claim a search warrant affidavit omitted facts suggesting another suspect in the crime. A judge and lawyer were assassinated by mail bombs. The investigation first focused on 1 person, but a search of his property proved fruitless. The investigation then shifted to the defendant for whom police obtained search warrants. The defendant thereafter moved to suppress evidence seized pursuant to those warrants and contended the warrant affidavits failed to disclose evidence implicating the 1st suspect. The Court, however, found the defendant failed to demonstrate the omitted information concerning the investigation of the other suspect, if included in the affidavit, would have defeated probable cause. In addition, the Court emphasized to satisfy the 4th Amendment's probable-cause requirement, the government need not demonstrate a person is the chief suspect in a criminal investigation. Rather, implicit within the concept of probable cause is the notion police may pursue multiple, perhaps even divergent, lines of investigation so long as police establishe probable cause as to each prior to the issuance of any warrant. In Moody, the

evidence marshaled by police against the 1st suspect did not exonerate the defendant. At most, the evidence indicated the defendant and the 1st suspect may have conspired to commit the crimes charged. Accordingly, the Court found the defendant's allegations were insufficient to raise issues worthy of an evidentiary hearing under Franks. Moody.

Similarly, in State v. St. Louis, 128 Conn. App. 703, 18 A.3d 648 (2011), *certification denied*, 302 Conn. 945 (2011), the Court held the warrant to search the defendant's property for the victim's body was supported by probable cause notwithstanding the supporting *affidavit's allegedly improper omission of the defendant's statements inculpating another person* as the statements suggested the victim was dead and buried; the defendant's neighbor recalled seeing a "big hole" dug in the backyard of the defendant's property; the defendant, on the last day when the victim was seen alive, stole a checkbook and drove the victim's vehicle to a credit union, where he attempted to use the victim's license to cash a check made payable to the victim; and a jail house informant stated the defendant admitted murdering and burying the victim. Id.

Here, Porch had testified at 2 different trials of Justin and given a written statement that he was present at the scene of the crime when the victim was stabbed. Although, he attempted to place the blame for the murder on Justin, neither a jury or circuit judge accepted his testimony. Porch unequivocally placed himself at the scene of the crime at the time of the victim's murder. Additionally, DNA testing before and after Justin's acquittal showed Porch's blood [D.N.A.] was on the kitchen floor where someone had tried to clean up the blood before leaving the scene, on the bottom of the victim's shirt placing Porch in close proximity to the victim and facing the victim when she was stabbed and Porch cut his finger during the stabbing, and under the victim's fingernails. This DNA testing, including the additional DNA evidence, indicated Porch was the person who stabbed the victim. There was sufficient probable cause to issue the arrest warrant.

Further, even including the allegedly omitted exculpatory material, there was still sufficient probable cause to issue the warrant for Porch's arrest so there was no Franks violation. Missouri, 337 S.C. at 554, 524 S.E.2d at 397; Lynch, 412 S.C. 156, 771 S.E.2d 346. At the Franks hearing before Judge Lee, Porch submitted the following affidavit arguing this is what should have been submitted to the magistrate when the arrest warrant was requested:

> On 5/14/2006 at 1103 Pineland Rd Apt 331C in the Dentsville Magisterial District of Richland County one Nekia Mallory died as a result of a stab wound to her neck. Her husband, Justin Mallory, was originally arrested and charged with the crime of murder. This arrest was based on an eye witness and neighbor placing Mallory on the scene at the exact time she heard a domestic fight occurring in the victim's apartment. She was awakened to the argument hearing a woman's voice scream, "how could you" and later observed a black male running out to a white van, later identified as Mallory's, saying "look what you made me do." This witness observed this male at his van with another individual and speed off. Later this van was witnessed arriving at a local hospital with Mallory bringing in the body of Nekia Mallory. Hospital security guard witness observed the demeanor and behavior of Mallory as being inconsistent with genuine grief over the death of his wife, saying things like "bitch bled all over my walls, couch, and PlayStation!" The same witness also observed him enlisting the aid of another man in removing what looked to be a gun from the van. Mallory was arrested and provided a statement placing himself at the crime scene, although denying the murder. Mallory failed a polygraph test regarding killing his wife. Further investigation using Mallory's statement and cell phone records showed that Mallory had ample time to commit the crime after coming home from a date he was on that night. The Defendant, Joshua Porch, was interviewed and ultimately ended up testifying twice as an eye [witness] during prosecutions of Mallory. His testimony was that he was a friend of the Mallory's and came over late the night of the incident to visit. Mallory was not home and he and Nekia began kissing and fondling. At some point they stop, and shortly thereafter Mallory arrives home and he and Nekia began a violent confrontation regarding cheating. Porch observes Mallory striking at Nekia with an object in his hand. Porch attempts to intervene and while standing between the two gets cut on his hand. He testified that he went to the kitchen to find a paper towel for his wound, and in the process bled in the kitchen and attempted to wipe up blood as he bled. When Porch came back out of the kitchen the fight was over, Nekia was sitting against the couch and Mallory was on the phone somewhere in the back of the apartment. Porch left, not notifying law enforcement of what he witnessed and denied being at the scene when questioned the following day. Over a year later when law enforcement finalized preparations for trial Porch was re-interviewed about his DNA possibly being at the crime scene. He gave several inconsistent statements to law enforcement in the weeks before trial before finally admitting to being injured while witnessing the stabbing of the victim by Mallory.

> He was polygraphed twice regarding whether he stabbed the victim, denying involvement, but failing both polygraphs. Per Major Smith's report he was advised by the polygraph examiner that Porch may not be a good candidate for polygraphs. Lead investigators and the Deputy Solicitor were satisfied with the veracity of his account and called him as a witness during both trials. He explained at trial that fear of being implicated in the crime and also his wife discovering his infidelity was why he did not come forward and was not initially truthful about the event. After the acquittal of Mallory following the second bench trial, this affiant was asked by the Sheriff to investigate this case further. Upon reviewing the written statement given by Porch on 6/27/07 stating he cut his right index finger, and then reviewing his statement on 7/2/07 stating he cut his left hand, this affiant decided testing of the victim's shirt was necessary, as it was not deemed relevant for testing by the initial investigators. This showed that a small amount of Porch's blood was located on the bottom right part of the victim's shirt. Although Porch has provided different accounts regarding whether his right or left had [sic] was cut, his trial testimony was that his left hand was cut while intervening in the fight between Mallory and the victim. In this affiant's opinion the left hand being cut is inconsistent with his blood being on the right bottom portion of the victim's shirt. Further, Porch is noted to be left handed by the polygraph examiner, while Mallory is right handed. Although Porch denies the killing, it is the affiant's opinion that the right sided wound to the victim's neck is more consistent with a left handed assailant; however, a right handed assailant cannot be ruled out as well.

(Porch's Proposed Affidavit). Judge Lee found even including the alleged exculpatory material Porch alleged should have been included, there was still probable cause to issue the arrest warrant charging Porch with the victim's murder. (R. 103-08, 116-28). Judge Lee's finding is supported by the evidence. Even considering the affidavit **as submitted by Porch** there was probable cause to issue the warrant for Porch's arrest. Lynch, 412 S.C. 156, 771 S.E.2d 346.

Further, Porch omits incriminating evidence against him developed during the investigation that would have come with the exculpatory evidence had Wilson drafted the affidavit the way Porch argues it should have been drafted.[13] As a result, there is no merit to his

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13 Justin informed police on the night of his wife's murder that he came home from a date with another woman and found his wife collapsed on the floor. Blood was everywhere. No one was in the apartment but his children who were asleep in a bedroom. He immediately ran next door, began banging on the door, and sought assistance. The neighbor, who answered the cry for help, informed police Justin had no blood on him. The police investigation revealed Justin had been exactly where he claimed to have been on the night of the murder, including corroboration by the

argument. Even had Wilson prepared the affidavit differently including all of the details of the investigation, there was probable cause to arrest Porch for the murder of the victim when the affidavit and arrest warrant was presented to the magistrate *in 2009*. As a result, Porch's admissions to police in California that; victim's husband was not present during the murder, he [Porch] lied in the husband's 2 trials, and he [Porch] was in fact the person who killed the victim, should not have been suppressed. Judge Lee did not abuse her discretion in denying the motion to suppress. Her decision is supported by evidence in the record. Morris, *supra*. The Court of Appeals correctly affirmed. Id. Certiorari must be denied.

ARGUMENT II.

This issue is not preserved, and there was no Confrontation Clause violation.

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girlfriend, restaurant records, hotel records, and phone records. Phone records and cell tower records showed Justin would have arrived home at approximately 3:30 a.m., leaving little time for the murder to have been committed by him, and Justin called 911 at approximately 3:35 a.m. The eyewitness neighbor ***described in the affidavit above*** testified at Justin's trials that the altercation she overheard in the apartment complex took place over a longer period of time than as set forth in her statement to police, over approximately 30 to 45 minutes. Her timeline of the altercation she overheard that night expanded under oath making it impossible for Justin to be the assailant given his location approaching the apartment complex as confirmed by cell-phone towers and his phone records. Justin's phone calls during this time period approaching the apartment were also confirmed by his friends who spoke with him. Justin was right-handed. **Porch** first denied he was present at the scene the night of the crime. Over a year later, **Porch** stated he cut his hand in victim's apartment cutting an apple earlier in the evening, but was not present at the time of the murder, which was a lie to explain his blood [DNA] in the kitchen. Porch also lied on another occasion telling another officer that he told the first officer who questioned him that he cut his hand in the apartment. Finally, he admitted he was present in victim's home when she was killed; he did cut his hand; he bled in the kitchen, and attempted to clean up his blood in the kitchen before leaving the crime scene. Porch stated he was facing Justin, and away from victim when his hand was cut. Porch's DNA was found on the kitchen floor of victim's apartment. DNA consistent with Porch's DNA was found *under victim's fingernails*. Neither a jury nor a circuit judge believed Porch's final statement or testimony in 2 different trials of Justin.

At trial, the State introduced only the last portion of *the videotaped confession* of Porch [the 3rd interview, State's Ex. 50] taken on July 10th, 2009.[14] In the defense' case, *in camera*, Porch indicated he was going to testify and inquired whether he could testify about what occurred earlier in this same video interview, i.e. whether he was threatened or promised anything.[15] The State responded it had limited what it introduced and thought there was an understanding of how both sides were going to proceed regarding this final statement. The State argued if Porch testified about specific occurrences within this portion of the interview with the Los Angeles' detective, it would open the door for the possibility of the State playing portions of that video in reply or rebuttal to Porch's testimony. Porch argued he had a right to testify; it was not his fault the witness who interrogated him was not there at trial; and he would not be able to present his complete and full story to the jury. Judge Lee informed Porch he could testify to what occurred earlier in this questioning session with the Los Angeles' detective if he wished, but if he did and went too far, it would probably open the door to the State being allowed to introduce portions of the video in reply or rebuttal. Porch indicated he did not want the State to rebut using the video when the witness was not there. He also stated he had not seen the redacted video yet. Judge Lee indicated Porch would be allowed to review the redacted video.

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14 Prior to and during the trial, the State intended to play before the jury the very first portion of this video, where the Los Angeles' detective read Porch his Miranda rights, since the Los Angeles' detective who polygraphed Porch was not present for trial. Porch objected on the grounds of hearsay and the Confrontation clause. The State provided the court with legal authority that the reading of Miranda rights is not hearsay. The State also argued showing this portion of the video did not violate the Confrontation Clause because the State was simply showing the jury that Porch was advised of his rights before the 3rd interview. Porch continued to object. After much argument and discussion with the Court, the State agreed to play only the last portion of the tape when Porch was questioned by Richland County' detectives and rely before the jury on the previous Miranda warnings to Porch. Porch agreed this was acceptable.

15 In this portion of the video, Porch was being polygraphed/questioned by the Los Angeles'detective, who was present for the Denno hearing, but not for the trial. In addition to being taped, this portion was monitored by Richland County detectives from an adjoining room.

(R. 1068-74). Porch then testified in his own defense, was not limited in any way in his testimony, and testified to threats and promises he alleged were made by Richland County detectives and that similar threats or behavior occurred during his interrogation by the Los Angeles' detective. After Porch testified, the State **did not play the earlier portion of the video** in reply or rebuttal. Porch did not proffer any other testimony he would have testified to had Judge Lee not informed him of the possibility of reply or rebuttal with the video. (R. 1068-1198). Porch argued on appeal this advising him of the possibility of reply or rebuttal with the video limited his testimony and as a result violated his Confrontation Clause rights. As the Court of Appeals found, this issue was not preserved for appellate review. Certiorari must be denied.

Porch *inquired* of the court whether he could testify about matter which occurred earlier in the 3rd interview tape. He stated if he could not it would infringe on his right to testify. Judge Lee informed Porch he could testify to anything he wished including what occurred during the earlier interview. However, the court informed him it would probably open the door to reply or rebuttal evidence from the video itself. Porch argued this impinged on his right to testify. He alleged he was not able to testify fully and therefore to present a complete defense. The court made clear he could testify to anything he wanted to, including what occurred in the earlier interview, but the State had the opportunity to rebut it through the video. Porch stated he did not want the State to rebut his testimony using the video when the detective on the video was not there, thus conceding the issue. (R. 1068-74).

Porch raised no objection below. Further, Porch did not object at any point under the Confrontation Clause. He argued his right to testify was being impinged. Further, Porch conceded the issue at trial. And, Porch did not proffer any testimony what he would have testified to had the court not informed him of the possibility he could open the door to reply or

rebuttal evidence. The Court of Appeals correctly found this issue was not preserved for appeal. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(Confrontation Clause challenge not preserved for appellate review when it was not properly raised below);[16] State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993)(requiring proffer when evidence is excluded);[17] State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998)(party may not raise 1 issue below and a different one on appeal); State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct. App. 2001)(same); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(issue is not preserved for appellate consideration if it has been conceded in the trial court). TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(same). Certiorari must be denied.

Regardless, there is no merit to this issue. "The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" Richardson v. March, 481 U.S. 200, 206 (1987)(*quoting* U.S. Const. amend. VI.); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015), (*quoting* Richardson). This constitutional right "include[s] the right to cross-examine those witnesses." Pointer v. Texas, 380 U.S. 400, 401 (1965); McDonald, *supra*.

Porch was not prevented or prohibited from cross-examining any witness against him during his trial. **(ROA).** In fact, he cross-examined the Los Angeles' detective at the Denno

16 State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)(constitutional arguments are no exception to issue preservation rule)

17 State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991)(purpose of a proffer is to adequately develop the record to allow the appellate court a chance to determine whether the appellant was prejudiced by the trial court's refusal to admit the evidence); Designer Showrooms, Inc. v. Kelley, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991)(a proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice)

hearing, and she did not testify against him at trial. The portion of the video where she was interviewing him was not played to the jury by the State in its case in chief or on reply.[18]

Porch cited several cases dealing with the admissibility of statements *of witnesses* who are not present to testify at trial. (See BOA). Those cases simply have no application here.[19]

Porch was not prevented from testifying; however, if he did testify, Porch could not be allowed to testify falsely about what occurred earlier in the interview, when the video would show the jury exactly what had occurred.[20] And, such testimony would have "opened the door" to admission of the video.[21] Whether a person "opens the door" to the admission of evidence is

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18 Porch was simply informed, when he inquired whether he could testify about matters that occurred in this earlier portion of this interview, that he could, but if he went into matters in his direct testimony regarding what occurred earlier on the video, not shown to the jury, and he went too far, the State would be allowed to play the earlier portions of the video to the jury in reply or rebuttal to Porch's claims on direct because Porch would have opened the door to that reply or rebuttal evidence. (R. 1068-74).

19 The earlier portions of the video were never introduced in evidence; there was only the potential those portions of the tape would be introduced in reply or rebuttal depending on what Porch testified to on direct or cross-examination. Additionally, Judge Lee merely explained to Porch what could occur if he went into matter not already in evidence, so Porch could make an informed decision, which he made. Porch was not prohibited from testifying or prohibited from testifying about any matter he wished to testify about. Finally, the videotape was not the statement of *a witness*, it was **Porch's statements** in response to questioning by the Los Angeles' investigator and therefore admissible. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Mathews, 296 S.C. 379, 373 S.E.2d 587 (1988); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980); State v. Hambright, 310 S.C. 382, 426 S.E.2d 806 (Ct. App. 1992); State v. Good, 308 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992); .

20 The admission of reply testimony is within the sound discretion of the trial judge. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). Any testimony which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply as long as it is not on a collateral matter. Id.; State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. South, 285 S.C. 529, 311 S.E.2d 775 (1985); State v. Williams, 409 S.C. 455, 761 S.E.2d 770 (Ct. App. 2014); State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904)(in murder prosecution, where defendant testified the deceased victim grabbed the barrel of the pistol as it was fired, it was proper to present reply there were no powder burns on the deceased's hand, which tended to show he did not have hold of the barrel when it was fired).

21 When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it

addressed to the sound discretion of the trial court. State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008).[22] Judge Lee was merely answering Porch's inquiry in light of the State's response to Porch's inquiry and correctly stated the law. Depending on what Porch testified to, the video could become admissible as reply, rebuttal or because he opened the door to admission. Third, Porch testified about what occurred in each interview, including this earlier interview on the video, and the State did not play the video in reply or rebuttal. This portion of the tape was never introduced. (R. 1074-1198).

Fourth, Porch had the opportunity to cross-examine the Los Angeles' detective and did at the Denno hearing. Even if the video had been admitted, Porch had the opportunity to cross-examine the other person in the video beside himself. If the tape had been introduced, Porch could have introduced the detective's Denno testimony in surreply.[23] As a result of all of the above, there was no Confrontation Clause violation.

Finally, even if this somehow constituted a Confrontation Clause violation, it was harmless.[24] The victim was murdered in her own apartment. Porch gave several inconsistent statements, first denying he was present at the scene, then admitting he was at the scene but cut his hand cutting some object earlier before the murder. Porch then admitted he was at the scene

---

been initially offered by the opposing party under the "opening the door" rule. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); State v. Taylor, 33 S.C. 159, 508 S.E.2d 870 (1998); State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App.).

22 Richland County detectives observed this portion of the interview from an adjoining room and could authenticate the authenticity of the videotape. Rule 1001(1) & (2), SCRE (photos include videos); State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972)(it is sufficient to justify their admission if a person familiar with the scene can say the photos accurately represent the scene).

23 *See* State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. Brock, 130 S.C. 252, 126 S.E.2d 28 (1924); State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003).

24 Schneble v. Florida, 405 U.S. 427 (1972)(mere finding of Confrontation Clause violation does not automatically require reversal.); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015). It is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673 (1986); State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001); State v. Bell, 302 S.C. 18, 393 S.E.2d 362 (1990).

but the husband killed the victim. The victim was stabbed on her right neck and over her right eye. Porch was left handed. Justin was right handed. Porch confessed to the crime after being arrested and admitted in his *statements* in California that Justin was not present when the victim was killed, and 2 of these statements were before questioning by the Los Angeles' detective. Justin testified he did not kill his wife and Porch testified falsely in Justin's trials. Porch eventually admitted it was he who "came on" to the victim, she resisted, and he eventually killed her. Porch's blood was found on the right bottom of the victim's shirt. DNA consistent with Porch's DNA, and inconsistent with Justin's, was found under the victim's fingernails. Porch's blood was found in the victim's kitchen and under her sink. Porch admitted he attempted to clean up the blood before leaving the scene and he got rid of the murder weapon. Porch's wife testified Porch was not with her during the victim's murder.[25] Even if a Confrontation Clause violation, it was harmless. Van Arsdall; Dinkins; McDonald. Certiorari must be denied.

CONCLUSION

For the above stated reasons, certiorari must be denied.

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By: _____
Anthony Mabry

November, 21, 2016

25 Porch was not limited in his testimony. Porch did not proffer what he would have testified to had the Court not informed him of the possible repercussions of going into earlier portions of the video. Anderson (proffer is to adequately allow the appellate court a chance to determine whether there was prejudice from trial court's ruling); Kelley (similar).

CERTIFICATE OF SERVICE

I Anthony Mabry, hereby certify that I have served the Return to Petition for Writ of Certiorari in the foregoing action by depositing two copies of same in the United States Mail to:

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S.C. SUPREME COURT

and by InterAgency Mail to:

Robert M. Dudek
Chief Appellate Defender
SCCID/Division of Appellate Defense
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This 21st day of November, 2016.

ANTHONY MABRY
Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC -1 2016
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011-GS-40-03359
Appellate Case No. 2016-002146

The State, ... Respondent,

v.

Joshua William Porch, ... Petitioner.

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ARGUMENT

I. The Court of Appeals, the trial court, and the State misconstrued the proper standard under *Franks v. Delaware.*

In its Return, the State acknowledged that probable cause must be "based on all of the information available *to the magistrate* at the time the warrant was issued." (Return at 6–7.) Nevertheless, the State's brief failed to address the trial court's explicit consideration of evidence that was not presented to the magistrate when it determined at the *Franks v. Delaware* hearing that probable cause existed to support the issuance of the arrest warrant for Porch. This oversight—just like the oversight of the trial court and the Court of Appeals—must be corrected by this Court. Failing to do so would amount to sanctioning an inconsistent position, namely that a trial court can review *any* evidence to determine whether probable cause exists under *Franks*, not just that evidence presented to a magistrate when the warrant application is made.

A. To make its probable cause determination, the trial court improperly considered evidence not presented to the magistrate.

The State conceded that a trial court's review under *Franks v. Delaware*, 438 U.S. 154 (1978) and *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999), is limited. Specifically, the State noted that "[w]hen determining the propriety of the issuance of a warrant, the duty of this Court is simply to determine whether *the magistrate* had a substantial basis for concluding probable cause existed." (Return at 6 (emphasis added).) The State also explained that "[i]n determining the validity of the warrant, a reviewing court may consider *only* information brought to the magistrate's attention." (Return at 7 (emphasis added).) But the State's brief did not address the evidence considered by the trial court despite that evidence not being presented to the magistrate. The State placed great weight on (1) the different statements Porch gave to police, (Return at 3, 8–9, 24–25); (2) the fact that the suspect and Porch are both left-handed, (Return at

9, 25); and (3) the newly discovered DNA evidence on the victim's shirt, (Return at 9, 25). The State emphasized this evidence in its Return even though this information was not presented to the magistrate. The State erred in doing so, especially because the trial court improperly based its finding of probable cause on these three pieces of evidence. (App. at 107–08, 128, 1259.)

Instead of focusing on what the affiant actually presented to the magistrate, the State sought to parade what it believes to be a mountain of evidence before this Court as a basis for denying the present Petition. (Return at 9–10.) In passing, the State attempted to justify its parade of evidence—and the trial court's improper consideration of it—by relying on testimony regarding other "background information" presented to the magistrate. However, as conceded by the State, the warrant affiant and the magistrate could not remember any "background information" that was presented. (Return at 10 n.10.) In essence, the State urged this Court to append material to the record *post hoc* based on the time that passed between issuing the warrant and the *Franks* hearing. The lapse of time serves as no excuse. The State is bound by the record on appeal, which is silent as to any evidence presented to the magistrate other than what was contained within the warrant affidavit. The State cannot assume that the evidence relied upon by the trial court was presented to the magistrate as a part of the "background information." The Court should not make that assumption either. It should instead rely on the record, which confirms that the trial court improperly considered more than what was presented to the magistrate when the trial court made its probable cause determination at the *Franks* hearing.

B. The Court of Appeals erred when it failed to reach the issue by conducting a *de novo* review of the trial court's decision to hold a *Franks* hearing.

Instead of correcting the trial court's improper consideration of evidence not presented to the magistrate, the Court of Appeals concluded that the trial court was incorrect to even grant the *Franks* hearing in the first place. (App. at 1373 ("While we commend the trial court in this case

for holding a Franks hearing out of an abundance of caution, we find Porch failed to overcome his heavy burden to establish he was entitled to such a hearing").) To arrive at this conclusion, the Court of Appeals reviewed the trial court's finding that Porch was entitled to a *Franks* hearing *de novo*, relying only on Fourth Circuit precedent. (App. at 1373 (citing *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008)).) This Court has not yet determined the proper standard for reviewing a trial court's finding that a defendant is entitled to a *Franks* hearing.

In its Return, the State appeared to disagree with the Court of Appeals in this regard, suggesting that the proper standard of review should be an abuse of discretion. (Return at 19.) However, the Court need not determine this open question to grant certiorari because the record supports the trial court's determination that a *Franks* hearing was warranted. For instance, it is indisputable that the State relied on Porch's testimony at two trials, though it did not present this information to the magistrate. The State attempted to side-step this problem by twice stating that neither a judge nor jury believed Porch's testimony that Justin Mallory killed the victim. (Return at 16, 19 n13.) The State was quick to forget, however, that the Solicitor, acting as an arm of the State, *did* believe Porch's testimony—twice. It is immaterial whether Justin Mallory was convicted (or whether some other aspect of the two trials led to him being found not guilty). What is material is that the magistrate was not provided this information when he made the initial probable cause determination. Failing to do present this information to the Magistrate violated *Franks* and *Missouri*.

Applying either standard of review, this Court can properly reach the question of whether the trial court erred in considering evidence not presented to the magistrate when the trial court made its probable cause determination under *Franks*. This Court should reach the question by granting certiorari and reversing.

II. Porch properly objected to the limitations placed on his testimony to preserve his objection under the Confrontation Clause and *Crawford.*

The State boldly claimed that Porch raised no objection to the trial court's violation of his Confrontation Clause right under *Crawford v. Washington*, 541 U.S. 36, 62 (2004). This argument ignored three specific points in the trial where Porch objected to the introduction of the video or the limitations placed on his testimony. (App. at 144–154, 205–08, 225, 221–22, 227–28, 233–34, 900–01, 1082–83.) Porch specifically referenced the Confrontation Clause, *Crawford*, or his right to confront witnesses against him in those objections. (App. at 147, 150–152, 206, 212, 221–22, 227–28, 1082–83.) Indeed, the State even cited *Crawford* in its response to Porch's argument. (App. at 156, 207–08.) Likewise, the Court referenced *Crawford* in its discussion of the objection and its ruling. (App. at 150, 216, 219.) Thus, the State was wrong to argue that "Porch did not object at any point under the Confrontation Clause." (Return at 21.)

The State also tried to have this Court believe that Porch conceded the issue. (*Id.*) On the contrary, Porch's decision to press forward with trial by limiting his testimony was his only option, lest his right to confront the Los Angeles County police officer at trial be violated. (App. at 205–07; 1082–83.) This can hardly be construed as a concession of the issue where the State—not Porch—failed to make the officer available for cross-examination before the jury.[1] In its Return, the State argued that Porch's right to confront the officer was satisfied by his cross-examination of the officer at the limited *Jackson v. Denno* hearing held eight months earlier. (Return at 22–23, 24.) However, the State did not cite to any South Carolina precedent

[1] As Porch has consistently argued, the Confrontation Clause does not have a "best efforts" exception, *i.e.* just because the State used its best efforts to subpoena the officer does not give it license to violate Porch's Confrontation Clause right when she did not appear at trial. (Pet. at 16–17.) Moreover, nothing in the record suggests that the State exhausted all available resources to make the officer present for trial. For example, the record is silent as to any appeal of the California court's order permitting the officer to avoid appearing in South Carolina.

confirming that a limited cross-examination satisfies the mandates of the Confrontation Clause and *Crawford*. This is because, as Porch argued to the trial court and the Court of Appeals, cross-examination at a limited hearing will not satisfy the Constitutional directive. (App. at 219.)

Nor did Porch fail to preserve the issue. Contrary to the State's argument, (Return at 21–22), Porch did not have to proffer any testimony to preserve his Confrontation Clause objection because the trial court did not exclude any evidence or testimony. *See Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) (failing to proffer excluded medical records); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (failing to proffer excluded testimony). The State implicitly conceded this point by citing numerous cases in which evidence and testimony were excluded. (Return at 22.) These cases are inapposite because, as the State argued, the trial court did not exclude any evidence or testimony here. (Return at 24.) Instead, the trial court improperly instructed Porch that his Confrontation Clause right would be violated were he to testify fully to place the six-hour gap during his interrogation in context. This was in error. Because the Court of Appeals improperly failed to reach this issue, the Court should grant certiorari to entertain the merits of Porch's Confrontation Clause argument. Doing so will allow the Court to correct the trial court and Court of Appeal's errors.

CONCLUSION

On the *Franks* issue, both sides agree with the law that should be applied. They agree that *State v. Missouri* makes *Franks v. Delaware* applicable to an error of omission, that the trial court at a *Franks* hearing must determine whether sufficient evidence was presented to the magistrate to support probable cause, and that probable cause is determined under the *Gates* totality of the circumstances test. Porch does not disagree with the law in this regard; however, he disputes that the trial court improperly considered evidence not presented **to the magistrate**.

Apparently, the State does not disagree, because not a single page of its brief is devoted to this finer point. The State choose instead to paint with a broad brush in an attempt to have this Court also overlook the trial court's error. The Court should not be fooled. It should instead grant certiorari and reverse.

The Court should also grant certiorari and reverse the trial court's directive leading to the violation of Porch's Confrontation Clause rights. The Court should reach the merits of Porch's argument on this issue by granting certiorari to properly apply South Carolina's error preservation rules.

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Columbia, South Carolina
December 1, 2016

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011-GS-40-03359
Appellate Case No. 2016-002146

The State, ... Respondent,

v.

Joshua William Porch, ... Petitioner.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Joshua William Porch, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified at the following address(es):

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December 1, 2016

The Supreme Court of South Carolina

The State, Respondent,

v.

Joshua William Porch, Petitioner.

Appellate Case No. 2016-002146
Lower Court Case No. 2011-GS-40-03359

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

FOR THE COURT

BY _____

CLERK

Columbia, South Carolina

August 22, 2017

cc:
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The Honorable Jeanette W. McBride
The Honorable Jenny Abbott Kitchings

State of South Carolina

In the Supreme Court

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S.C. SUPREME COURT

Appeal from Richland County
Court of General Sessions
The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2016-002146

THE STATE,

Respondent,

v.

JOSHUA WILLIAM PORCH,

Petitioner.

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STATEMENT OF THE ISSUES

I. A criminal defendant may attack the veracity of factual statements in a warrant affidavit under *Franks v. Delaware* after making a preliminary showing of recklessness in omitting material evidence. If that threshold is met, the trial court must then determine whether probable cause existed to issue the warrant. The first issue presented is whether a trial court may uphold an arrest warrant by considering evidence not presented to the magistrate who determined that probable cause existed?

II. The United States Constitution requires that criminal defendants have a meaningful opportunity to cross examine a witness. The second question presented is whether a trial court may limit a defendant's testimony by threatening him with admission of an absent witness's statements where the defendant has only cross-examined the witness in a limited pretrial hearing and whether South Carolina's error preservation rules require the defendant to proffer testimony that was limited, but not excluded?

SUMMARY OF THE CASE

After twice failing to convict Justin Mallory for the murder of Nakia Mallory, the State turned on its lead eyewitness, Petitioner Joshua William Porch, and sought an arrest warrant for him. When applying for the warrant, the officer failed to advise the magistrate of Porch's prior testimony for the State and other exculpatory evidence. As a result, the warrant was issued, and Porch was arrested in California where he was interrogated on video by a California detective and then South Carolina investigators.

The trial court found under *Franks v. Delaware*, 438 U.S. 154 (1978), that the warrant affidavit improperly omitted exculpatory evidence and granted an evidentiary hearing. After considering evidence not presented to the magistrate, the trial court concluded sufficient probable cause for Porch's arrest existed. The Court of Appeals affirmed in a published opinion, concluding that an evidentiary hearing was not even warranted and then ignoring Porch's argument that the trial court improperly considered evidence not presented to the magistrate.

During trial, Porch objected to the introduction of his videotaped interrogation by the California detective who was not available for trial. The trial court only admitted the portion of the video not involving the California detective and instructed Porch that testifying about what occurred during the omitted portion of the video would open the door for admission of the remaining video. The Court of Appeals rejected Porch's argument that doing so violated his right to confrontation on error preservation grounds.

Porch now seeks reversal on both issues.

STATEMENT OF THE CASE

Early on May 14, 2006, Nakia Mallory was murdered. The State investigated and charged Justin Mallory with the crime. (App. at 199). Mallory's first trial ended with a hung jury. (*Id*). When the State tried him a second time, Mallory opted for a bench trial. (App. at 197–98). The court found Mallory not guilty. (*Id*). Porch testified as the State's lead eyewitness at each trial. (App. at 1104–07). Porch testified that he witnessed an altercation between Mallory and the victim, which resulted in her death. (App. 1134–36). Porch intervened in the dispute and suffered an injury himself, which caused his own blood to be left at the scene. (*Id*).

A. Application for an Arrest Warrant

After failing to convict Justin Mallory twice, the State turned its attention to Porch. (App. at 810–14). The impetus for turning their attention to Porch was allegedly his inconsistent statements—statements which were made during the initial investigation and prior to the State trying Justin Mallory for the murder—and newly discovered blood of the victim's shirt that belonged to Porch. (App. at 71). On July 7, 2009, Chief David Wilson, applied to the magistrate for an arrest warrant for Porch. (App. at 840–42). The warrant included an affidavit stating:

> That on or about 05/14/2006 . . . one Joshua Porch did commit the crime of Murder . . . . It is believed the defendant committed the crime because [t]he defendant did with malice and aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts

> the defendant at the scene and implicates the defendant in the assault at the time of the murder. Affiant and others are witness to prove same.

(App. at 1259). The warrant failed to include that Porch had twice served as the State's lead eyewitness and that he previously testified that his blood was at the scene because he intervened in the altercation between Justin Mallory and the victim. (App. at 80–82, 96–97, 1134–36). The record is silent whether other testimony was presented to the magistrate. (App. at 72–73). The magistrate recounted that the "gist" of what was presented to him was contained in the affidavit. (App. at 95). The record is clear, however, that the officer did not inform the magistrate that Porch had testified—twice—as the State's lead eyewitness. (App. at 80–82, 96–97). Based on the affidavit, the magistrate issued the warrant for Porch's arrest. (App. at 1260).

B. Porch's Arrest and Interrogation in California

After issuance of the warrant, investigators travelled to California and arrested Porch. (App. at 852–53). They interrogated him for approximately 4.5 hours. (App. at 936). During that interrogation, Porch provided statements implicating himself in the victim's death. (App. at 874–76). After a short break, investigators then interrogated Porch for approximately three more hours. (App. at 886–87). During the second interrogation, Porch added details to his statement consistent with evidence law enforcement had collected. (App. at 896). Investigators interrogated Porch for a third time the next day. (App. at 897). Unlike the two previous interrogations, the third interrogation was videotaped. (App. at 898). Although the video begins at 11:00 a.m., the investigators' portion of the interrogation occurs approximately six hours later. (App. at 967). During

the six-hour gap, a California detective interrogated Porch and administered a polygraph examination. (App. at 209).

After investigators returned to South Carolina with Porch, a Richland County Grand Jury indicted him for the murder of Nakia Mallory. (App. at 1258).

C. *Franks v. Delaware* Hearing

Porch moved under *Franks v. Delaware* to void the arrest warrant and suppress his statements to the investigators. Prior to trial, the trial court granted Porch an evidentiary hearing, finding:

> [a]fter—after reviewing all of the information, I—I think that there were—that—that the affidavit contained in—in—in the arrest warrant lacks information which would have been relevant to making a decision as to probable cause. And it—it—it lacks both exculpatory as well as inculpatory information.

(App. at 45-46). The trial court stated that it was a close call but required the hearing because the officer failed to include the potential exculpatory evidence. (*Id).* The trial court recognized that "the case law talks about information that's relevant but not dispositive information is not enough . . . to warrant the *Franks* hearing," but concluded that the defense met its burden to require an evidentiary hearing. (App. at 46).

During the *Franks* hearing, Porch presented testimony from the officer who applied for the warrant and the magistrate who issued the warrant. (App. at 47-91, 91-97). The officer confirmed that the State had relied on Porch as an eyewitness in two previous trials for the victim's murder. (App. at 55, 79). The magistrate testified that the

officer did not inform him of that fact, (App. at 96–97), though at that time the officer knew Porch had testified at the two prior trials, (App. at 51–52, 79).

According to the officer at the hearing, the affidavit was sufficient for a finding of probable cause because of Porch's prior inconsistent statements and newly discovered blood on the victim's clothing that matched Porch. (App. at 90–91). Critically, the warrant affidavit did not contain this information, (App. at 1259), and the officer could not confirm that he had discussed this information with the magistrate. (App. at 76–77, 79).

At the conclusion of the hearing, the trial court rejected Porch's argument regarding the validity of the arrest warrant:

> But after hearing all of the information, both information that would have been exculpatory as well as information that the—the—the police officers had available to them, I find that there was sufficient probable cause.

(App. at 107). The trial court specifically relied on at least three pieces of evidence not presented to the magistrate to conclude that probable cause existed: (1) the fact that the suspect and Porch are both left-handed, (2) the newly discovered DNA evidence on the victim's shirt, and (3) Porch's inconsistent statements during the initial investigation regarding the incident. (App. at 107–08). Porch objected to the trial court's improper consideration of the evidence not presented to the magistrate:

> Mr. Shealy: I guess I just – just for the record purposes, I—I would slightly disagree with you . . .
>
> The Court So what you're saying then is—that I can't consider the new information that was presented in making a determination as to probable cause.

> Mr. Shealy: I just—the way I viewed the case law was just that . . . you're the fact—fact finder of this hearing to see what the judge heard . . .

(App. at 110–11). The trial court doubled-down on its expanded inquiry on the first day of trial, again relying on the evidence not presented to the magistrate to determine that probable cause existed. (App. at 127–30). Porch then argued that:

> [T]he crux of our objection to your prior ruling at that hearing went to, respectfully, that we felt that the analysis was not correct, that in our opinion as Joshua Porch's defense counsel, the evidentiary hearing was held to determine if [the magistrate] was given the opportunity, based on what was presented to him or not presented to him by [the officer], for him to make a determination at the time whether there was probable cause, and you, your Honor, as the fact finder of that question . . . it was our opinion for you to decide whether [the magistrate] had that opportunity.

(App. at 130–31). The trial court did not change its ruling, refusing to suppress the evidence and testimony obtained pursuant to the arrest warrant.

D. Porch's Trial and Conviction

From November 18–25, 2013, the State tried its case for the murder of Nakia Mallory for the third time in seven years. While the investigators who interrogated Porch testified, the State did not secure the appearance at trial of the California detective who interrogated Porch for six hours. The State had subpoenaed the detective to testify; however, the detective did not appear and was not available for cross-examination before the jury.[1] (App. at 144)..

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[1] The California detective appeared for the *Jackson v. Denno* hearing eight months earlier, but her testimony was limited to the voluntariness of Porch's statements. Porch did not have a chance to cross-examine the detective on other matters relevant to his defense.

Over Porch's objection, the State also entered into evidence the one-hour portion of the videotaped interrogation that involved the South Carolina investigators. (App. at 207-08, 225, 233-34; App. at 900-01). The State did not introduce the remaining six hours of the video involving the California detective's interrogation of Porch. (App. at 205-06). Porch objected to introducing only a portion of the video because it would take the entire interrogation out of context. (App. at 206). As Porch explained, the only way for him to put the one-hour portion of the video in context would have been to introduce the entire video or to testify on the details of the full interrogation. (App. at 206). The State argued, "if Mr. Porch testifies about specific occurrences within that six and a half hour interview with [the California detective], . . . it opens the door for the possibility of us playing portions of that video as well." (App. at 1081). In response, Porch argued to the trial court that limiting his testimony by conditioning it on the admission of the remaining video would violate his rights under *Crawford v. Washington*, 541 U.S. 36, 62 (2004) because the State could not provide the witness at trial. (App. at 1082-83).

The trial court ruled that Porch could not discuss the remaining portions of the interrogation during his testimony without allowing the State to introduce the remaining portions of the interrogation video, despite the absence of the California detective for cross-examination. (App. at 1081-83). Likewise, the trial court ruled that his right to confront the detective was satisfied because he had previously cross-examined the officer on an unrelated issue when she was present for the preliminary hearing held eight months earlier under *Jackson v. Denno*, 378 U.S. 368 (1964). (App. at 222). Because of the trial court's ruling, Porch did not discuss his interrogation with the absent detective

except to say that it took six and a half hours. (App. at 1125-26). Porch did not proffer any other testimony or evidence.

The jury found Porch guilty of murder. (App. at 1211-14). The trial court then sentenced him to fifty years' imprisonment. (App. at 1225).

E. Porch's Appeal and the Opinion of the Court of Appeals

Porch timely filed his notice of appeal on December 2, 2013. (App. at 1268). After hearing argument, the Court of Appeals issued its published opinion. (App. at 1369-1377). Regarding his *Franks v. Delaware* argument, the Court of Appeals concluded that the trial court had not needed to hold an evidentiary hearing because Porch failed to overcome his burden to show that the State intentionally or recklessly omitted exculpatory evidence. (App. at 1375). The Court of Appeals also found that "even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause to secure an arrest warrant for Porch." (App. at 1376). The Court of Appeals did not reach Porch's Confrontation Clause challenge, instead ruling that Porch did not preserve the issue because he failed to proffer the testimony he would have given had he been allowed to testify regarding the remaining portions of his videotaped interrogation. (App. at 1377).

Porch petitioned for rehearing, specifically arguing that the Court of Appeals (1) overlooked the trial court's improper reliance on information not presented to the magistrate when the warrant was issued, and (2) misapprehended South Carolina's error preservation rules by rejecting his Confrontation Clause argument. (App. at 1378-83). The Court of Appeals denied his petition on September 20, 2016. (App. at 1385).

Porch timely petitioned this Court for a Writ of Certiorari on October 20, 2016. After return and reply briefs were filed, the Court granted certiorari by order dated August 22, 2017.

STANDARD OF REVIEW

The Court of Appeals, relying on *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008), reviewed *de novo* the trial court's decision to grant an evidentiary hearing under *Franks v. Delaware*. (App. at 1373). However, this Court has not yet established the proper standard of review for that inherently discretionary decision. Consistent with the majority of courts that have entertained the question, the Court should review the trial court's decision to hold an evidentiary hearing for clear error. *See United States v. Brown*, 631 F.3d 638, 642 (3d Cir. 2011) (collecting cases); *cf. State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law.").

Trial and appellate courts review a magistrate's probable cause determination under the substantial basis standard of review. *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). However, the Court reviews *de novo* the legal question of the proper scope of a trial court's *post hoc* probable cause determination under the second prong of *Franks v. Delaware*. *See State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (reviewing *de novo* questions of law in criminal cases). Likewise, whether the trial court

has violated the defendant's right to confront witnesses against him is a question of law for the court to review *de novo*. *Id.*

ARGUMENT

The Court should reverse because (1) the courts below wrongly considered evidence not presented to the magistrate to determine that probable cause existed to arrest Porch after a properly granted evidentiary hearing under *Franks v. Delaware*; and (2) the trial court violated the Confrontation Clause by threatening Porch with admission of his videotaped interrogation in full despite the absence of the State's witness, an error the Court of Appeals ignored by improperly applying our State's error preservation rules. Reversal is necessary to correct these substantive errors.

I. Though it properly granted Porch a *Franks* hearing, the trial court erred in considering evidence not presented to the magistrate to confirm that probable cause existed.

The trial court properly granted Porch a *Franks* hearing because the officer applying for the warrant omitted exculpatory evidence from the warrant affidavit that strikes at the heart of the warrant affidavit's purpose. The Court of Appeals improperly concluded that a *Franks* evidentiary hearing was unnecessary. It also incorrectly concluded, along with the trial court, that probable cause existed to arrest Porch. These errors necessitate reversal.

A. The trial court was correct that potential exculpatory information was recklessly omitted from the warrant affidavit.

Where exculpatory evidence is omitted from a warrant affidavit, a defendant may challenge the warrant under *Franks v. Delaware* if he can make a preliminary showing of

intentionality and materiality. *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). This Court has explained that intentionality is shown by an offer of proof establishing that the evidence "was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). While *Franks* has been said to be concerned with the intentional, rather than the mere negligent, omission of potentially exculpatory information, an omission that amounts to a "reckless disregard for the truth" can still warrant an evidentiary hearing. *Franks*, 438 U.S. at 171. The omitted evidence must also be "such that its inclusion in the affidavit would defeat probable cause." *State v. Lynch*, 412 S.C. 156, 180, 771 S.E.2d 346, 358–59 (Ct. App. 2015). This is because "*Franks* protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." *Colkley*, 899 F.2d at 301.

The trial court correctly explained that "case law talks about information that's relevant but not dispositive information is not enough . . . to warrant the *Franks* hearing," but found that Porch had met his burden to require the evidentiary hearing. (App. at 46). The trial court made a specific finding that the affidavit "lack[ed] information which would have been relevant to making a decision as to probable cause." (App. at 45). The trial court was right.

The warrant affidavit excluded the fact that Porch had served as the State's lead eyewitness in two separate trials where he testified that his DNA was at the scene because he intervened in the fatal altercation between Justin Mallory and the victim. (App. at

1259).[2] The State was sufficiently confident in Porch's testimony to put him on the stand as its lead eyewitness—not once, but twice—yet did not find that information important enough to include in the warrant affidavit.

The Court of Appeals disagreed that an evidentiary hearing was necessary because Porch could not prove the officer acted with the requisite intent. The Court of Appeals relied on the officer's testimony that he "believed the totality of the circumstances established probable cause to arrest Porch" to conclude that the officer did not act with the requisite intent to necessitate a *Franks* hearing. (App. at 1376). It is immaterial whether the officer believed that probable cause existed to arrest Porch for the purpose of the threshold question under *Franks*. An officer who believes that probable cause exists can still mislead a magistrate by omitting exculpatory evidence to ensure he obtains the warrant. Simply relying on the officer's testimony ignores the material nature of the omitted information, especially where that omitted information was available to the officer before he applied for the warrant. (App. at 51-52, 79). Unlike in *State v. Lynch*, where the officer who obtained the warrant was not aware of the omitted evidence when he signed the warrant affidavit, the officer here knew of the State's reliance on Porch in the two separate trials and had read his previous testimony. 412 S.C. 156, 183, 771 S.E.2d 346, 360 (Ct. App. 2015). Instead of focusing on the officer's belief that probable cause for

[2] The warrant affidavit also omitted other potentially exculpatory evidence, such as the possibility of a domestic argument at the apartment not involving Porch and Justin Mallory's callous statements about the victim at the hospital. (App. at 53-55). The Court of Appeals recognized that the officer also omitted this evidence from the affidavit. (App. at 1376).

arrest existed, the Court of Appeals should have focused on whether Porch sufficiently alleged that evidence was omitted "in reckless disregard of whether it made, the affidavit misleading to the issuing judge." *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. The evidence presented to the trial court shows that omitting this material evidence was done in reckless disregard of whether the omission would mislead the magistrate. *See Lynch*, 412 S.C. at 180, 771 S.E.2d at 358–59; *Colkley*, 899 F.2d at 301.

The information the officer omitted bears resemblance to the omitted confidential informant tip omitted from the warrant affidavit in *Missouri*. There, police obtained a warrant to search the defendant's home for drugs. *Missouri*, 337 S.C. at 550, 524 S.E.2d at 395. The warrant affidavit included the statement that a confidential informant had been told that the defendant had the drugs, but was not yet ready to sell them to the confidential informant. *Id.* at 553, 524 S.E.2d at 396. The affidavit failed to explain that the confidential informant had clarified to the officer that, while the defendant had drugs, it was not yet present in his apartment. *Id.* This Court determined that the police "at least acted recklessly in making the false statement and in omitting the exculpatory information." *Id.* at 555, 524 S.E.2d at 397. When the omitted information was included, it created an "affirmative hurdle" which the remaining portions of the affidavit could not overcome, "erod[ing] the basis upon which a magistrate could find probable cause . . ." *Id.* The omitted information struck at the "very heart of the affidavit's purpose," and what remained did not establish "a substantial basis upon which the magistrate could have found probable cause to issue the warrant." *Id.* at 555–56, 524 S.E.2d at 397–98. Like in *Missouri*, the officer's omission of Porch's prior involvement in the case and Porch's

testimony explaining his intervention in the fatal altercation create an affirmative hurdle that the State cannot overcome.

Accordingly, the trial court was correct in granting Porch an evidentiary hearing under *Franks*. The Court of Appeals erred in merely "commend[ing] the trial court in this case for holding a *Franks* hearing out of an abundance of caution," but concluding that such a hearing was unnecessary. (App. at 1373). The Court of Appeals should have deferred to the trial court because, under the proper standard of review, the trial court did not clearly err by conducting an evidentiary hearing. As the trial court properly found, Porch established a sufficient threshold showing to entitle him to a *Franks* hearing, and this Court should reverse the Court of Appeals to the extent that it concludes otherwise.

B. The trial court erred by considering more evidence than was before the magistrate for his initial probable cause determination.

The second prong of *Franks* focuses on whether the omitted evidence will defeat probable cause. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. In *Missouri*, this Court focused on whether, after inserting the exculpatory evidence, there remained "a substantial basis upon which the magistrate could have found probable cause to issue the warrant." *Id.*

Here, the trial court concluded that probable cause still existed to arrest Porch, even when the omitted evidence was considered. (App. 107-09). However, the trial did not limit its review to evidence actually presented to the magistrate. As a result, the trial court improperly employed an overbroad review not sanctioned by *Franks* or this Court's precedent. (App. at 110). By relying on evidence not presented to the magistrate to

support the conclusion that probable cause existed to issue the arrest warrant for Porch, the trial court committed reversible error that the Court of Appeals failed to correct.

The proper scope of inquiry in the *post hoc* probable cause analysis is for the trial court to determine whether there "[r]emains sufficient content in the warrant affidavit to support a finding of probable cause . . ." *Franks*, 438 U.S. at 172. While the probable cause determination is reviewed based on the totality of the circumstances, "[i]f no supplemental testimony is taken, a magistrate's probable cause determination is limited to the four corners of the search warrant affidavit." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014); *cf. State v. Lynch*, 412 S.C. 156, 184, 771 S.E.2d 346, 361 (Ct. App. 2015) (concluding that, despite omitted evidence, sufficient probable cause existed by relying on supplementary affidavit properly before magistrate when the warrant was issued).[3] This inquiry is "based on all of the information available to the magistrate *at the time the warrant was issued.*" *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996) (emphasis added). The inquiry does not include later-discovered evidence or information that has had the benefit of being polished by the State's prosecutors.

Courts from other jurisdictions are in accord that the probable cause review by the trial court is limited to the evidence actually presented to the magistrate. *See, e.g., United States v. Abernathy*, 843 F.3d 243, 249 (6th Cir. 2016) ("When determining whether an

[3] Even the Court of Appeals explained the proper, narrow review under *Franks*: "There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." (App. at 1373–74 (emphasis omitted)). The Court of Appeals ultimately ignored the trial court's failure to stay true to this standard, though.

affidavit establishes probable cause, we look only to the four corners of the affidavit; information known to the officer but not conveyed to the magistrate is irrelevant."); *United States v. Gladney*, 48 F.3d 309, 312 (8th Cir. 1995) ("'And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed.' [*Illinois v. Gates*, 462 U.S. 213, 238 (1983)]. When the magistrate relied solely on the affidavit presented to him, 'only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause.'" (quoting *United States v. Leichtling*, 684 F.2d 553, 555 (8th Cir. 1982)); *State v. Lilly*, 194 W. Va. 595, 601, 461 S.E.2d 101, 107 (1995) (requiring the reviewing court to "determine whether, either absent the false material or supplemented with the omitted material, the remaining content of the affidavit is sufficient to establish probable cause."); *State v. Witwer*, 642 P.2d 828, 831-32 (Alaska Ct. App. 1982) ("Finally, the review to determine whether probable cause exists must be limited to the record made before the magistrate including the affidavit(s) submitted and any oral testimony presented under oath to the magistrate prior to issuance of the warrant.").

Here, the magistrate had only the warrant affidavit when the warrant was issued. (App. at 95). The main factual information presented to the Magistrate in the warrant affidavit was that (1) Porch had admitted to being at the scene of the crime, and (2) DNA testing of blood found at the scene confirmed Porch was there. (App. at 1259). There is no evidence in the record that the officer told the magistrate that Porch is left-handed, that Porch admitted to intervening in the altercation between the victim and Justin Mallory, or that blood had recently been found on the victim's shirt. (App. at 79, 95-96). It is

uncontroverted that the officer did not tell the magistrate that Porch was the State's lead eyewitness in the two previous trials. (App. at 100–01).

At the conclusion of the *Franks* hearing, the trial court determined that the totality of the evidence presented—including evidence not disclosed to the magistrate—would support probable cause. (App. 107–12; 123–30). Specifically, the trial court stated:

> I think that's what the case law requires, that if in—in considering the omitted information or information that might have been misleading, that if I make the determination that *with the new information* there is probable cause, that would be sufficient.

(App. at 110 (emphasis added)). After Porch argued that the probable cause analysis is not so broad, the Court then agreed to review the applicable case law. (App. at 110–11).

When the trial court revisited the issue on the first day of trial, it still improperly expanded the scope of its review by reaffirming that evidence not presented to the magistrate formed the basis for the trial court's *post hoc* probable cause determination. (App. at 123–30). The trial court specifically referenced three pieces of evidence that the officer did not present to the magistrate in both the *Franks* hearing and in its clarification on the first day of trial: (1) the fact that the suspect and Porch are both left-handed, (2) the newly discovered DNA evidence on the victim's shirt, and (3) Porch's prior inconsistent statements. (App. at 107–08, 128–29).

In doing so, the trial court expanded the scope of the probable cause determination beyond that which is authorized by *Franks* and this Court's guidance. The trial court improperly determined whether probable cause existed with the benefit of hindsight rather than relying only on what was actually presented to the magistrate. The Court of

Appeals ignored this error altogether despite it being briefed, argued, and included in the petition for rehearing. The Court should correct this error by reversing and suppressing the evidence collected after the invalid arrest warrant.

II. Porch preserved his Confrontation Clause argument and the trial court violated his right to confrontation.

The United States Supreme Court has explained that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). Porch objected to the Court's violation of his right to confront the California detective regarding his videotaped interrogation throughout the case. (App. at 144–154, 205–08, 221–22, 227–28, 233–34, 900–01, 1082–83). He specifically referenced *Crawford* and the Confrontation Clause several times. (App. at 147, 150–152, 210, 216, 221–22, 227–28). Yet, the Court of Appeals concluded that he failed to preserve his objection by applying a hyper-technical reading of this Court's issue preservation rules. (App. 1377). The Court of Appeals, like the trial court, erred. Because the error is not harmless, this Court should reverse.

A. The Court of Appeals applied the improper error preservation standard to avoid the merits of Porch's argument.

The Court of Appeals declined to address Porch's Confrontation Clause challenge because he did not proffer any testimony. (App. 1377). This conclusion is incorrect. Because the trial court did not actually exclude Porch's testimony, he was not required to proffer any testimony under South Carolina's error preservation rules. Thus, the Court of Appeals erred by failing to address this issue on the merits.

As this Court has explained, the requirement to proffer testimony or evidence applies to excluded testimony and evidence. *See Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) (failing to proffer excluded medical records); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (failing to proffer excluded testimony). Porch does not dispute that a failure to proffer *excluded* testimony prevents appellate review. The Court of Appeals was correct in citing this standard. (App. at 1377). The Court of Appeals erred, however, in applying this error preservation rule here.

Porch was interrogated on video for over seven hours in two shifts. (App. at 898). The California detective conducted the first six hours, and the two South Carolina investigators conducted the remaining hour. (App. at 967). However, the jury only viewed the one-hour portion of the videotape featuring the investigators who were available to testify. (App. at 205). The State did not enter the vast majority of the video because the California detective did not appear at trial. (App. at 1083). Porch objected to the admission of only one hour of the video because it would place his interrogation out of context. (App. at 205-07). When the trial court admitted the one hour portion, Porch sought to testify to explain the other six hours. The trial court warned Porch that testifying about the remaining six hours of his interrogation would open the door for the State to admit the video, notwithstanding his inability to cross-examine the missing California detective in front of the jury. (App. at 1082-84). The trial court's warning presented Porch with a catch-22—either have the full video entered into evidence over his Confrontation Clause objection and testify regarding the missing six hours, or limit his testimony in order to avoid the admission of the full video. By doing so, the Court did not have to

actually exclude any testimony—it was enough to just threaten Porch with the constitutional violation.

By not excluding any of Porch's testimony, Porch did not have to proffer any testimony to preserve the issue for appellate review. The error is in the trial court's decision giving Porch two equally difficult and unacceptable choices. If he picked the first option of explaining the context of the interrogation, he would lose his right to cross-examine the California detective. If he picked the second, the jury would be left with no context for the one hour portion of the interrogation. By giving him this false dilemma, trial court ensured that it did not have to actually exclude Porch's testimony. Thus, Porch never proceeded to the point of proffering testimony because his testimony was never excluded. Accordingly, the error is preserved and the Court of Appeals should have reached the merits of the issue.

B. The trial court's catch-22 violated Porch's right of confrontation.

The State cannot be permitted to gain from its own failure to provide the California detective for cross-examination at trial. Doing so allows the State to make an end-run around the Confrontation Clause.

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." *State v. Thompson*, 420 S.C. 386, 803 S.E.2d 44, 51 (Ct. App. 2017) (quoting U.S. Const. amend. VI). The Confrontation Clause bars the admission of testimonial statements of a witness who is not available for cross-examination. *Bullcoming v. New Mexico*, 564 U.S. 647, 658–59 (2011). The crux of a defendant's confrontation clause right is the ability to have a meaningful opportunity to cross-

examine the witnesses against him. This procedural protection applies in both federal and state prosecutions under the Fourteenth Amendment. *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

By placing Porch in the dilemma of testifying and losing his right of confrontation, the trial court essentially grafted onto the Confrontation Clause an exception for defendants who wish to present a defense when the State fails to procure the availability of a witness to rebut that defense. The problem with such an exception is that, as the United States Supreme Court "stressed in *Crawford*, the text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Nor is it the role of courts to extrapolate from the words of the Confrontation Clause to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Bullcoming*, 564 U.S. at 662 (cleaned up). "If a 'particular guarantee' of the Sixth Amendment is violated," such as Porch's right to confront the California detective in this case, "no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation' complete." *Bullcoming*, 564 U.S. at 663 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006)).

This attempt to manufacture an exception to the Confrontation Clause falls short, as do the reasons the trial court gave on the record for violating Porch's right of confrontation: (1) Porch had already cross-examined the detective at the *Jackson v. Denno* hearing held eight months earlier, and (2) the detective was not present at trial despite

the State's attempt to subpoena her. (App. at 219-22). These reasons do not pass constitutional muster.

While this Court has not yet decided whether a cross-examination at a *Franks* hearing will meet the dictates of the Confrontation Clause, other courts have concluded that cross-examination at a pretrial hearing cannot satisfy a defendant's right of cross-examination. *See, e.g., People v. Fry*, 92 P.3d 970, 978 (Colo. 2004) (en banc) (holding that cross-examination at a preliminary hearing does not satisfy Confrontation Clause requirements); *State v. Stuart*, 279 Wis. 2d 659, 673, 695 N.W.2d 259, 266 (2005) (same); *Sanchez v. State*, 354 S.W.3d 476, 489 (Tex. Crim. App. 2011) (holding that admission of testimony from limited pretrial hearing violated defendant's right of confrontation); *cf. Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."); *State v. Contreras*, 979 So. 2d 896, 911 (Fla. 2008) (concluding that limited criminal deposition could not meet the dictates of the Confrontation Clause).

Like many of the other courts to address the issue, the Court should conclude that cross-examination at a pretrial hearing is insufficient cross-examination for Confrontation Clause purposes because a pretrial hearing has a limited scope with a different burden of proof from the burden of proof at trial. Additionally, testimony at a pretrial hearing does not afford the jury the ability to judge the demeanor of the witness, which is essential to its credibility determination. For example, in a pretrial *Jackson v. Denno* hearing, the focus is the voluntariness or involuntariness of a defendant's

confession. *See State v. Silver*, 307 S.C. 326, 331, 414 S.E.2d 813, 815 (Ct. App. 1992). Even the trial court recognized that *Jackson v. Denno* hearings rarely have the same broad scope as cross-examination in front of a jury. (App. at 219). This is especially true here because, at the time of the *Jackson v. Denno* hearing, Porch did not have the California detective's file, despite a later order that it be produced to the defense. (App. at 9–10). This easily could have led to additional questioning on issues not relevant (or even known to the defense) at the time of the limited hearing.

Second, that the State unsuccessfully tried through proper channels to subpoena the California detective does not immunize the State from violating Porch's right to cross-examine her at trial. The Confrontation Clause has no "best-efforts" exception. Instead, it imposes a procedural protection that requires the State to produce witnesses against a defendant for cross-examination as a prerequisite for introducing that witness's statements. *Crawford*, 541 U.S. at 62. That did not occur here, leaving Porch with no opportunity to cross-examine the California detective about the most critical aspects of this case—statements made during the six-hour portion of his interrogation in California.

The Court should reverse to correct the error leading to the admission of only a portion of the videotaped interrogation out of context due to the State's failure to secure the California detective's attendance at trial.

CONCLUSION

The State has taken irreconcilable positions throughout three trials for the victim's murder. Not once, but twice did the State rely on Porch's testimony to secure a conviction.

When they failed, they turned on Porch. Desperate for an arrest and conviction, the officer seeking to arrest Porch failed to disclose exculpatory evidence to the magistrate. This should have invalidated the warrant—and the evidence obtained following the execution of the warrant—under *Franks v. Delaware*. In refusing to void the arrest warrant, the trial court relied on information not initially presented to the magistrate to do so, improperly expanding the *post hoc* probable cause analysis. The Court of Appeals failed to correct this error. It should have instead reversed the trial court for the officer's reckless disregard for the truth in the warrant affidavit.

The Court of Appeals also should not have avoided Porch's Confrontation Clause argument based on its misinterpretation of our State's issue preservation rules. By not addressing the issue, the Court of Appeals failed to correct the trial court's erroneous conclusion that Porch's limited cross-examination of the absent detective was sufficient under *Crawford v. Washington* in light of the State's half-hearted attempt to secure the detective's attendance at trial.

This Court should reverse on both issues.

[Signature on following page.]

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State of South Carolina
In the Supreme Court

Appeal from Richland County
Court of General Sessions
The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2016-002146

THE STATE,

Respondent,

v.

JOSHUA WILLIAM PORCH,

Petitioner.

PETITIONER'S BRIEF

Counsel certifies that this Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

Case No. 2011-GS-40-03359
Appellate Case No. 2016-002146

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The State, ... Respondent,

v.

Joshua William Porch, ... Petitioner.

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
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S.C. SUPREME COURT

THE STATE

Respondent,

V.

JOSHUA WILLIAM PORCH,

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.....30

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CERTIFICATE OF SERVICE

PETITIONER'S STATEMENT OF ISSUES

I. Whether the Court of Appeals erred in affirming the trial court's improper consideration of facts not presented to the magistrate to uphold the arrest warrant?

II. Whether the Court of Appeals erred in affirming on error preservation grounds the trial court's decision to effectively limit Porch's testimony by threatening him with a violation of his Confrontation Clause rights?

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STATEMENT OF THE CASE

On May 14, 2006, Appellant Joshua Porch murdered Nakia Mallory in Richland County. Appellant was arrested on July 8, 2009 in Long Beach, CA; and, Appellant subsequently confessed to the killing. Appellant was returned to South Carolina and indicted for the murder by the Richland County grand jury. (*Ind. # 2011-GS-40-03359*). The case was prosecuted by the Attorney General's Office.[1] Appellant was tried by a jury before Circuit Court Judge Alison Rene Lee from November 18-25, 2013 and found guilty of Nakia Mallory's murder and sentenced to fifty (50) years. Appellant appealed raising 2 issues. The Court of Appeals unanimously affirmed. State v. Porch, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016).[2] A Petition for Rehearing was denied. A Petition for Writ of Certioari was then filed by Appellant. Respondent filed a Return to the Petition for Writ of Certiorari. This Court granted certiorari and ordered briefing. Appellant filed his Brief of Appellant. This is the Brief of Respondent.

1 As will become apparent, the 5th Circuit Solicitor's Office had a conflict and as a result this case was prosecuted by the Attorney General's Office.

2 Judge Huff authored the Opinion which was concurred in by Judges Geathers and Konduros.

RESPONDENT'S STATEMENT OF FACTS

Nakia Mallory ("the victim"), the mother of 2 small children, was murdered in the early morning hours of May 14, 2006 in her apartment in Richland County. The victim was stabbed to death. She had 1 stab wound to *her right* neck and 1 stab wound over *her right* eye.[3] She had also been beaten about the head, struck 6 times total to the back, sides, and front of the head, and had a bruise to her neck. The knife wound to the neck was fatal. A large amount of blood was found in the den of her home *and* a small amount in the kitchen. Someone had attempted to clean up the blood in the kitchen by wiping it with a cloth. There was also a spot of blood on a bottle of cleaner under the kitchen counter. The murder weapon, a knife, was never found, nor was the cloth used to wipe up the blood. (R. 155-96, 260-464, 480-557, 730-52; App. 159-200, 264-468, 488-565, 738-60).

The victim's husband, Justin Mallory ("Justin" or "husband"), came home to the couple's apartment at approximately 3:30 a.m. on May 14th and found the victim in the above described condition on their den floor. Blood was everywhere in the den. Justin flew into a panic, checked on the couples' 2 small children asleep in a bedroom, and immediately sought assistance from neighbors by banging on their doors.[4] Justin also called 911 and reported what he had found. After waiting for some period of time for EMS to arrive, Justin could wait no longer and picked his wife up, placed her in his van and drove her to the hospital. The victim was pronounced dead there. Justin got his wife's blood on him when he carried her to the van and into the hospital. (R. 155-96, 260-338, 339-351, 431-64, 546-57; App. 159-200, 264-342, 343-55, 435-68, 554-65).

---

3 Appellant Porch is left handed.

4 The neighbor, Shareed Hargraves, testified when victim's husband came banging on his door for assistance, the husband did not have any blood on his person. (R. 546-57; App. 554-65).

Justin cooperated fully with police including informing them of his whereabouts on the night of the murder, giving a written statement to the same, signing consents to search all of his property, and submitting a DNA sample. Justin admitted he had been with another woman romantically prior to finding his wife, had taken the woman to dinner, had been at a motel with the woman, stopped at a convenience store, took the woman home, and then drove home talking to friends on his cell phone. When he arrived home, he discovered his wife's body, sought assistance from neighbors, called 911, heard gurgling sounds coming from his wife, picked her up and placed her in his van, and drove her immediately to the hospital. (R. 155-96, 260-338, 351-94, 431-64, 753-87; App. 159-200, 264-342, 355-98, 435-68, 761-95).

The husband was initially charged with the murder the morning following Nakia's death by the Richland County Sheriff's Office and indicted. The 5th Circuit Solicitor's Office prosecuted the case. The husband was tried twice resulting in a hung jury and then an acquittal. (R. 155-96, 260-338; App. 159-200, 264-342).

The week following his acquittal, Justin contacted the Sheriff's Office and Sheriff Leon Lott and informed them he was not involved in his wife's murder and asked that they re-open the investigation. As a result, the Sheriff's Office assigned Chief Deputy David Wilson to review the case to determine if the wrong person was charged. The investigation focused on Appellant, Joshua Porch ("**Porch**"), who had testified in Justin's trials claiming he, **Porch**, was an eyewitness to the murder. (R. 155-96, 260-338, 787-840; App. 159-200, 264-342, 795-848).

Police had originally first approached **Porch** the morning after the victim's murder, May 14, 2006, as a result of the husband's statement given the night of the victim's murder. Justin told police the only persons who could possibly have killed his wife were the maintenance man

at the apartment complex where he and his wife lived *or* **Porch**, who was a former neighbor, because each man had been in his apartment recently. (R. 575-86; App. 583-94).

Porch's 1st Statement

In his 1st statement to police, given at his residence on May 14, 2006 to Sgt. Randy Strange, **Porch** denied being present at the crime scene at the time of the crime and claimed he knew nothing about the murder. **Porch** stated he was at home with his wife all night. Porch's wife also told Sgt. Strange at that time that **Porch** was with her the entire night of the victim's murder.[5] (R. 575-88; App. 583-94).

After Sgt. Strange left Porch's apartment, Porch's wife noticed **Porch** had a cut on his hand. She also noticed blood on the driver's door handle of Porch's car. **Porch** told his wife he had cut his hand at a friend Marcus' residence the night before. Porch's wife did not question him further about the cut on his hand at that time. (R. 558-74; App. 566-82).

Porch's 2nd Statement

Over a year later and shortly before the husband's first trial, prosecutors discovered there was unidentified blood [male DNA] in the kitchen of the victim's home. This DNA did not match the victim's husband. There were drops of blood on the kitchen floor, blood in the sink, and a spot of blood under the kitchen counter on some cleaning fluid. Someone had also attempted to wipe or clean up this blood from the kitchen floor. (R. 619-26; App. 627-34).

Porch was contacted again at his apartment on June 17, 2007 by Major James Smith in an attempt to identify this unknown male DNA. At that time, **Porch** admitted being present at

5 Porch's wife changed her statement at Porch's trial testifying **Porch** left their apartment during the night of the victim's murder and returned some time later in the night or morning. At the time of Porch's trial, **Porch** and his wife were separated. She still lived here in Richland County. **Porch** had moved to California after the husband's acquittal. (R. 558-74; App. 566-82).

the crime scene [the victim's home] earlier in the evening of the murder and cutting his hand while slicing an apple for his child. **Porch** admitted he had bled in the kitchen and in the sink, and attempted to clean up the blood with a paper towel. **Porch** agreed to provide a DNA sample. At this time, **Porch** informed Smith he had told both the police officer who initially interviewed him [Sgt. Strange] and his wife and her family that he had cut his hand in the victim's home the afternoon or evening before the victim's murder. A written statement was taken from **Porch** detailing these facts. (R. 619-32; App. 627-40; State's Ex. 39, R. 1214-16; App. 1226-28).

Porch's wife testified at Porch's trial **Porch** had not told her this version of events before. He had told her he cut his hand on a bannister at his friend Marcus' residence. The first time she heard this version was when **Porch** told Major Smith at their home. (R. 558-74; App. 566-82).

Porch's 3rd Statement

After leaving Porch's residence on June 27, 2007, Major Smith contacted the officer who interviewed **Porch** the morning after the murder. Sgt. Strange informed Smith that **Porch** had not told him about cutting his hand at the victim's residence the afternoon or evening before the murder. Major Smith immediately returned to Porch's residence and questioned **Porch** again. At this time, **Porch** stated he thought he informed the officer who interviewed him the morning after the murder that he cut his hand at the victim's residence the evening before the murder but was now sure that he did not tell him that. **Porch** stated he was scared to tell the police about the cut because he did not want to be considered a suspect. Another written statement was taken from **Porch**. (R. 631-35; App. 639-44; State's Ex. 40, R. 1217-18; App. 1229-30).

Porch's 4th Statement

On June 28, 2007, **Porch** was interviewed at the Solicitor's Office regarding the story he had told June 27th at his residence. **Porch** gave virtually the same statement about cutting his hand while cutting an apple at the victim's home the evening before her murder. **Porch** was later polygraphed at the Richland County Sheriff's Office on his 2nd and 3rd statements and failed the polygraph. (R. 612-18, 636-52, 1249-50; App. 620-26, 644-60, 1261-62; State's Ex. 50).

Porch's 5th Statement

On July 2, 2007, upon further questioning at the Richland County Sheriff's Office, **Porch** gave a **3rd version** of what occurred the night of the victim's murder. This was actually **Porch's** fifth (5th) statement to police or prosecutors.

Porch stated that on the night of the murder he was at the crime scene "fooling around" with the victim, but the victim's husband came home and attacked the victim with an object, and he [**Porch**] was cut on his hand while intervening. **Porch** claimed he was facing the victim's husband [Justin] when this occurred. **Porch** admitted he bled in the kitchen of the home, and before leaving the apartment attempted to clean up the blood. **Porch** stated when he left the victim's apartment, the victim was curled up on the couch and still [motionless] and bleeding from her face and neck. **Porch** claimed he left the apartment but admitted he did not call 911 or report what he had seen. **Porch** admitted the "apple cutting" version he had told the police before was a lie. Another written statement, this time to this version, was taken from **Porch** at the Sheriff's Office. **Porch** was polygraphed on this statement and failed the polygraph. (R. 575-96, 603-11, 558-74, 612-57, 666-729, 787-96; App. 583-604, 611-19, 566-82, 620-65, 674-737, 795-804; State's Ex. 41; R. 1219-24; App. 1231-36; State's Ex. 50; R. 1249-50; App. 1261-62).

This was the version **Porch** testified to at the husband's 2 trials. As stated, the husband's 1st trial resulted in a hung jury and the 2nd trial in the husband's acquittal. (R. 575-96, 603-11, 558-74, 612-57, 666-729, 787-96; App. 583-604, 611-19, 566-82, 620-65, 674-737, 795-804).

After re-opening the case after the husband's acquittal and at the husband's request, Chief Deputy Wilson realized **Porch** had given inconsistent versions of the event, including stating on 1 occasion he cut his right hand and on another he cut his left hand. **Porch** had also admitted he had attempted to clean up the crime scene [the kitchen] where he had bled. Wilson requested additional D.N.A. testing. It revealed **Porch's** blood [DNA] was on the victim's shirt, not just in the kitchen. **Porch's** blood was found on the bottom right of the victim's shirt. D.N.A. consistent with **Porch's** DNA had previously been found under the victim's fingernails and **Porch's** blood [DNA] was found on the kitchen floor of the crime scene. The husband's DNA was not found on the victim or under her fingernails. It was also determined **Porch** was left-handed, and both stab wounds to the victim were on *her* right side. The husband was right-handed. The re-investigation of the case determined **Porch** murdered the victim, and an arrest warrant for murder was obtained on July 7, 2009 from a Richland County magistrate. (R. 431-64, 800-40; App. 435-68, 808-848).

Richland County investigators Shawn McDaniels and Brian Godfrey traveled to California on July 8, 2009 because **Porch** now resided in Long Beach, CA. **Porch** was arrested at a Walgreens late that night for the victim's murder and transported to the Long Beach Police Department. (R. 977-1012, 841-93; App. 989-1024, 849-901).

Porch's 1st Confession in California

Porch was read his Miranda rights and executed a Waiver of Rights form and questioned shortly after midnight on July 9, 2009 resulting in **Porch** providing a statement implicating himself in the victim's death, alleging it was an accident. Importantly, **Porch admitted the husband was not present when the victim was killed, i.e. Porch had perjured himself in the husband's 2 trials.** At the end of this statement, **Porch** was asked if there was anything else that he would like to add or subtract from his statement. **Porch** responded as follows:

> A: I would like to add something. I want to apologize to Nakia's family. I'm sorry that they lost their loved one and also that I never told the truth before . . . and that they had to wait all this time to find out what really happened. Also I need to apologize to Justin Mallory for lying on him, and taking away a chunk of his life from him. I also want to apologize to the officers involved in this case. They shouldn't have to suffer because of my cowardice. That's all.

(State's Ex. 47, R. 1233-34; App. 1245-46). This statement was reduced to writing which **Porch** signed on each page as voluntary and as true and correct. This statement was admitted in evidence before the jury in Porch's trial. (R. 796-98, 841-93, 907-64, 975-1067, 1225-35, State's 47; App. 804-06, 849-901, 915-72, 983-1079, 1237-47).

Porch's 2nd Confession in California

Investigators McDaniels and Godfrey reviewed the case file to determine if the evidence supported **Porch's** accident claim. Because it did not, later that day, July 9th, after being read his Miranda rights again and after again signing a Waiver of Rights form, **Porch** was questioned again by the investigators. In this statement, **Porch** claimed the victim "came on to him;" he responded; she changed her mind; he called her "a bitch;" she became angry and got a knife; there was a struggle over the knife; he [**Porch**] ended up hitting her several times in the forehead with the palm of his hand and in the head with his elbow; and, **Porch** and the victim eventually

fell onto the den couch and the victim was stabbed in the neck. This was partially consistent with the autopsy results. This statement was also reduced to writing and **Porch** signed the statement as voluntary and true and correct. (R. 841-93, 907-64, 975-1067, 1236-39, State's 49; App. 849-901, 915-72, 983-1079, 1248-51).

Porch's 3rd Confession in California

After conferring by phone with Chief Deputy Wilson, McDaniels and Godfrey decided to question **Porch** again this time on video and with the assistance of a polygraph operator, Investigator Roberta Cohen from the Los Angeles County Sheriff's Department ("LACSD").

The following day, July 10th, **Porch** was transported from the Long Beach P.D. to the LACSD for a third interview which was video-recorded in its entirety.[6] After again being read his Miranda rights and waiving them, **Porch** made further incriminating statements implicating himself in the victim's murder. Initially, Inv. Cohen conducted a pre-polygraph interview, a polygraph test, and a post-polygraph interview which all lasted a total of about 6 ½ hours. This portion of the 3rd interview in California was monitored by 2 Richland County detectives from an adjoining room. McDaniels and Godfrey then interviewed **Porch** for about 1 hour. In this final statement, **Porch** admitted **he** "came on" to the victim; she rejected **him**, and **he** [**Porch**] ended up killing her [stabbing her] while the 2 were standing. **Porch** still claimed the victim had the knife but he grasped her hand and turned the knife around and thrust it into her neck. He admitted he did not fall on her. **Porch** admitted **he** attempted to clean up the crime-scene; he

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6 Cohen appeared and testified at the Jackson v. Denno, 378 U.S. (1964), hearing before Judge Lee in March of 2013; however, a California Superior Court ruled she did not have to return to South Carolina for the actual trial in November of 2013 even though the State submitted a proper out-of-state witness subpoena request. Cohen refused to voluntarily return for the trial and was therefore unavailable. (R. 108, App. 112).

knew the victim was seriously injured but did not assist her, and carried the murder weapon with **him** and disposed of it by throwing it in a dumpster. **Porch** also admitted he got the victim's blood on his clothing, washed his clothes, and cleaned out his car with Clorox a few days later to remove blood stains.[7] After hearing all of the evidence, including **Porch's** confessions [the final 1 on video], the jury found **Porch** guilty of the victim's murder. (R. 841-93, 907-64, 975-1067, 1199-1202, 1240, State's Ex. 50; App. 849-901, 915-72, 983-1079, 1211-14, 1252).

ARGUMENT I.

The Court of Appeals correctly affirmed on the Franks issue.

Pre-trial, Porch moved to suppress all evidence flowing from his arrest. Porch alleged the arrest warrant contained false information and omitted exculpatory material; therefore, his confessions should be suppressed pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Judge Lee conducted a Franks hearing, out of an abundance of caution, regarding the circumstances of the issuance of the arrest warrant and whether the warrant was supported by probable cause. (R. 19-114, 1243; App. 23-118, 1255). At its conclusion, Judge Lee found the arrest warrant did not contain any false statement and was supported by probable cause, and even including the exculpatory material Porch alleged should have been included, there was still probable cause to support the arrest warrant for murder under the totality of the circumstances; therefore, Porch's motion to suppress was denied. (R. 103-08, 116-28; App. 107-112, 120-32).

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7 In a strange but appropriate twist of fate, the victim's husband also testified at **Porch's trial** helping establish it was in fact **Porch** who murdered the victim. Justin accounted for his whereabouts up until just moments before he discovered the body, began banging on neighbors doors, and called 911. This included phone records and cell tower information showing Justin coming from dropping off his paramour and headed toward the home where he and his wife lived while talking to friends on his cell phone. (R. 155-96, 759-73, 799; App. 159-200, 767-81, 807).

Porch conceded on appeal to the Court of Appeals that the affidavit for the arrest warrant contained no false information and argued instead only that it improperly excluded exculpatory material. **(FBOA, pp. 5-13)**. Porch alleged Judge Lee erred in upholding the arrest warrant when including his alleged exculpatory material. **(FBOA).**

The Court of Appeals unanimously affirmed. State v. Porch, 417 S.C. 619, 622-30, 790 S.E.2d 440, 441-46 (2016). It found Porch had failed to meet his burden to show Chief Wilson intentionally omitted potential exculpatory material from his warrant affidavit with the intent to mislead the magistrate or did so with reckless disregard of whether it made the affidavit misleading to the issuing judge. Id. at 626-30, 790 S.E.2d at 443-46. The Court of Appeals also found even including the potentially exculpatory information Porch contended should have been in the affidavit presented to the magistrate, the affidavit still contained probable cause to issue the arrest warrant for Porch so there was no Franks violation. Id. at 630, 790 S.E.2d at 445-46.

Porch now alleges the Court of Appeals erred. Porch is wrong, and this Court should affirm the Court of Appeals.

Standard of Review
(Circuit Court's Affirmation of Probable Cause)

The 4th Amendment applies to all seizures of the person. United States. v. Brignoni-Ponce, 422 U.S. 873 (1975); State v. Khingratsaipon, 352 S.C. 62, 572 S.E.2d 456 (2002). An arrest of a person is a "seizure" within the meaning of the 4th Amendment. United States v. Mendenhall, 446 U.S. 544 (1980). The standard of review of 4th Amendment search *or* seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the ruling of a trial judge where there is clear error. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015).

(Magistrate's Issuance of a Warrant)

Warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. *See* State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, this Court gives great deference to a magistrate's determination of probable cause. *See* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). When determining the propriety of the issuance of a warrant, the duty of this Court is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. *See* State v. Kinloch, 410 S.C. 612, 767 S.E.2d 253 (2014). In making such a decision, this Court considers the totality of the circumstances. Jones, (under the totality of the circumstances test, this Court considers all circumstances, including the status, basis of knowledge, and veracity of the informant, when determining whether or not probable cause existed).

The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001). However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

Probable Cause to Arrest

"Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person under the circumstances to believe likewise." City of Spartanburg v. Wortman, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). The substance of all definitions of probable cause is a reasonable

ground for belief of guilt, and the belief of guilt must be particularized with respect to the person to be seized. Ybarra v. Illinois, 444 U.S. 85 (1979).[8]

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 155, 317 S.E.2d 746 (1984); State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742.[9] South Carolina has adopted the Gates "totality of the circumstances" test in determining whether sufficient probable cause exists to issue a warrant. State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999).

As the Court recognized in Gates, affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation, in light of which technical requirements of elaborate specificity once exacted under common law pleading have no proper place, and should therefore be viewed in a common sense and realistic fashion. United States v. Ventresca, 380 U.S. 102 (1965); Bowie, *citing* Sullivan. Affidavits must be judged on the facts presented, not on the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

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8 Stated another way, probable cause exists when the totality of the circumstances within the officer's knowledge "are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Or, whether at that moment the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, was sufficient to warrant a prudent man in believing the suspect had committed a criminal offense. Maryland v. Pringle, 540 U.S. 366 (2003); Beck v. Ohio, 379 U.S. 89 (1964); State v. Pruitt, 260 S.C. 396, 196 S.E.2d 107 (1973).

9 Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). It is a fluid concept-turning on the assessment of probabilities in a particular factual context–not readily, or even usefully, reduced to a neat set of legal rules. Pringle; Illinois v. Gates, 462 U.S. 213 (1983). The probable cause standard is incapable of precise definition or quantification into percentages, because it deals with probabilities and depends on the totality of the circumstances. Id.; Gates. In dealing with determinations of probable cause, as the very term implies, a just determination must deal with **probabilities**, which are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 169 (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995).

The Franks hearing

Judge Lee, out of an abundance of caution, conducted a Franks hearing regarding the circumstances surrounding the issuance of the arrest warrant for Porch. In fact, Judge Lee stated several times that this was a "close case" whether a Franks hearing should be granted, but she would "rather err on the side of caution" and have the hearing than mistakenly not have a Franks hearing. (R. 42, 43, 122; App. 46, 47, 126).

At the hearing, Porch called 2 witnesses [Chief Deputy Wilson and the Magistrate] and introduced documentary exhibits including the arrest warrant, investigative reports, a witness statement, and a Proposed Affidavit Excluding Misrepresentations and Including Exculpatory Evidence in an attempt to meet his burden. (R. 43-93, 1247-55; App. 47-97, 1259-67).

Chief Deputy Wilson (hereinafter "Wilson") testified regarding his re-investigation of the murder of Nakia Mallory and how he ultimately came to seek a warrant for Porch's arrest. (R. 43-87; App. 47-91). Wilson was asked to re-open the previous investigation by Sheriff Lott after Justin Mallory was acquitted. Wilson discovered there were several inconsistencies in Porch's statements to police. Obviously, Porch had given at least 3 inconsistent versions claiming; (1) he was not at the scene on the night of the crime, (2) he was there earlier with his child and cut his hand cutting an apple, and (3) he was present at the scene but alleging he was stabbed by Justin during a domestic altercation. Importantly, to Wilson, Porch admitted in this final statement he attempted to clean up blood he had dripped on the kitchen floor before the leaving the scene. Wilson noted it made no sense to him Porch would intervene in a domestic altercation between Justin and victim and suffer a stab wound, and then clean up the kitchen while Justin was still attacking the wife in the den of the apartment. It also seemed strange that Porch did not call police or EMS after leaving the kitchen and discovering victim's body near the couch. Wilson

was also aware of the husband's [Justin's] statement to police the night of the crime where he stated he came home and found his wife lying at the foot of the couch and blood was everywhere. And, Wilson was aware a neighbor had informed police that when Justin came to his apartment asking for assistance, there was no blood on Justin. (R. 43-87; App. 47-91).

Wilson decided to have the victim's shirt re-examined for DNA, which had never been done in the investigation. The original DNA testing in the case showed Porch's blood was found in the kitchen of the crime scene, where someone had attempted to wipe up the blood, and DNA consistent with Porch's DNA and inconsistent with the husband's DNA was found under the victim's fingernails. The subsequent testing requested by Wilson revealed a drop of Porch's blood at the bottom right of the victim's blouse. This was significant to Wilson. Porch had also told police on 1 occasion it was his left hand that was cut and testified at Justin's trials his left hand was cut.[10] In his statement to police placing himself at the scene at the time Justin supposedly attacked the wife, Porch claimed he was facing Justin when he [Porch] was stabbed or cut, and victim was standing behind Porch. Wilson believed it was highly unlikely if Porch's left hand had been cut, he would have dripped or gotten blood on the bottom right of victim's shirt when she was standing behind him. Wilson also noted in reviewing the file the victim was stabbed in what would be her right neck area. Porch was left-handed. The husband was right handed. It was more consistent with the assault on the victim that she was stabbed by a left handed perpetrator. This would also be consistent with the drop of Porch's blood found on the bottom right of victim's blouse. As a result of all of the evidence in the case, Wilson believed there was probable cause to arrest Porch for the murder; he believed Porch actually committed

10 Wilson testified Porch told police inconsistent stories about which hand was cut. First, he stated his right hand was cut and on another occasion his left hand was cut. Wilson found it unusual someone could be involved in such a significant event as a murder, and could not remember which hand was cut.

the murder; and, he sought and obtained an arrest warrant from Magistrate Phil Newsome charging Porch with Nakia Mallory's murder (R. 43-87, 87-93; App. 47-91, 91-97).

The Affidavit presented to the magistrate who issued the arrest warrant stated as follows:

> That on 5/14/2006 while at 1103 Pinelane Road Apt. 311 in the Dentsville Magisterial District of Richland County, one Joshua Porch did commit the crime of Murder in that he did with malice aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene and implicates the defendant in the assault at the time of the murder. Affiant and others are witness to prove same.

(R. 1243; App. 1255, Def.'s Ex. 6).

Both Wilson and Magistrate Newsome testified at the Franks hearing that Wilson told Newsome other information than what was in the arrest warrant affidavit, such as background information on the case; however, due to the passage of time between the issuance of the arrest warrant and the Franks hearing, neither Wilson nor the Magistrate could remember what they discussed. (R. 43-93; App. 47-97).

At the Franks hearing before Judge Lee, Porch submitted the following affidavit arguing the following exculpatory information is what should have been submitted to the magistrate when the arrest warrant was requested (R. 40, ll. 14-22; App. 44, ll. 14-22):

> On 5/14/2006 at 1103 Pineland Rd Apt 331C in the Dentsville Magisterial District of Richland County one Nekia Mallory died as a result of a stab wound to her neck. Her husband, Justin Mallory, was originally arrested and charged with the crime of murder. This arrest was based on an eye witness and neighbor placing Mallory on the scene at the exact time she heard a domestic fight occurring in the victim's apartment. She was awakened to the argument hearing a woman's voice scream, "how could you" and later observed a black male running out to a white van, later identified as Mallory's, saying "look what you made me do." This witness observed this male at his van with another individual and speed off. Later this van was witnessed arriving at a local hospital with Mallory bringing in the body of Nekia Mallory. Hospital security guard witness observed the demeanor and behavior of Mallory as being inconsistent with genuine grief over the death of his wife, saying things like "bitch bled all over my walls, couch, and PlayStation!" The

same witness also observed him enlisting the aid of another man in removing what looked to be a gun from the van. Mallory was arrested and provided a statement placing himself at the crime scene, although denying the murder. Mallory failed a polygraph test regarding killing his wife. Further investigation using Mallory's statement and cell phone records showed that Mallory had ample time to commit the crime after coming home from a date he was on that night. The Defendant, Joshua Porch, was interviewed and ultimately ended up testifying twice as an eye [witness] during prosecutions of Mallory. His testimony was that he was a friend of the Mallory's and came over late the night of the incident to visit. Mallory was not home and he and Nekia began kissing and fondling. At some point they stop, and shortly thereafter Mallory arrives home and he and Nekia began a violent confrontation regarding cheating. Porch observes Mallory striking at Nekia with an object in his hand. Porch attempts to intervene and while standing between the two gets cut on his hand. He testified that he went to the kitchen to find a paper towel for his wound, and in the process bled in the kitchen and attempted to wipe up blood as he bled. When Porch came back out of the kitchen the fight was over, Nekia was sitting against the couch and Mallory was on the phone somewhere in the back of the apartment. Porch left, not notifying law enforcement of what he witnessed and denied being at the scene when questioned the following day. Over a year later when law enforcement finalized preparations for trial Porch was re-interviewed about his DNA possibly being at the crime scene. He gave several inconsistent statements to law enforcement in the weeks before trial before finally admitting to being injured while witnessing the stabbing of the victim by Mallory. He was polygraphed twice regarding whether he stabbed the victim, denying involvement, but failing both polygraphs. Per Major Smith's report he was advised by the polygraph examiner that Porch may not be a good candidate for polygraphs. Lead investigators and the Deputy Solicitor were satisfied with the veracity of his account and called him as a witness during both trials. He explained at trial that fear of being implicated in the crime and also his wife discovering his infidelity was why he did not come forward and was not initially truthful about the event. After the acquittal of Mallory following the second bench trial, this affiant was asked by the Sheriff to investigate this case further. Upon reviewing the written statement given by Porch on 6/27/07 stating he cut his right index finger, and then reviewing his statement on 7/2/07 stating he cut his left hand, this affiant decided testing of the victim's shirt was necessary, as it was not deemed relevant for testing by the initial investigators. This showed that a small amount of Porch's blood was located on the bottom right part of the victim's shirt. Although Porch has provided different accounts regarding whether his right or left had [sic] was cut, his trial testimony was that his left hand was cut while intervening in the fight between Mallory and the victim. In this affiant's opinion the left hand being cut is inconsistent with his blood being on the right bottom portion of the victim's shirt. Further, Porch is noted to be left handed by the polygraph examiner, while Mallory is right handed. Although Porch denies the killing, it is the affiant's opinion that the right sided wound to the victim's neck is more consistent with a left handed assailant; however, a right handed assailant cannot be ruled out as well.

(R. 1249-50; App. 1261-62). In fact, Judge Lee specifically asked Porch if this is what he contended should have been submitted to the magistrate for the probable cause determination:

> THE COURT: As well as a proposed affidavit, excluding misrepresentations and including exculpatory evidence. [Court listing documents submitted at Franks hearing].
>
> MR. L. SHEALEY: Yes, ma'am.
>
> THE COURT: Okay. And I assume it is - - it is this last document which the defense proposes should be the information that should have been contained within the warrant for consideration by the magistrate in determining whether or not probable cause existed.
>
> MR. L. SHEALEY: Yes, ma'am.
>
> (R. 40, ll. 14-22; App. 44, ll. 14-22).

The Lack of Merit of Porch's Argument

In Franks, the Supreme Court delineated the limited circumstances in which a defendant can attack a facially sufficient warrant affidavit. 438 U.S. at 155-56. The Court set forth a two-step process for defendants seeking to challenge such affidavits. Id. First, a defendant must make a rigorous showing necessary to obtain a hearing:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. This showing "must be more than conclusory" and should include affidavits or other evidence to overcome the "presumption of [the warrant's] validity." Id. at 171. Second a defendant faces additional burdens at the hearing stage:

> In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 156.

Franks addressed an act of commission in which false information had been included in the warrant affidavit. That did not occur here. There is no false information in the affidavit.

Porch admitted under oath at 2 different trials and in a prior statement to police he was present at the crime scene at the time of the assault and stabbing of Nakia Mallory. Further, Porch had been further implicated in the crime by DNA testing which found: (1) Porch's blood on the kitchen floor and someone had attempted to wipe up that blood before leaving the crime scene; (2) DNA consistent with Porch's DNA and inconsistent with the husband's DNA was found under the victim's fingernails; and (3) Porch's blood [DNA] was found on the bottom right of the victim's shirt indicating Porch was present at the scene *and* indicated Porch was involved in the assault of the victim at the time of the murder.

Judge Lee correctly found there were no false statements in the affidavit. (R. 123, ll. 1-9; App. 127, ll. 6-9). Porch conceded this issue in the Court of Appeals; there was nothing false in the affidavit; and, argued instead *the omission of exculpatory material.* **(FBOA, pp. 5-13)**.

The Franks test also applies to acts of omission in which exculpatory material is left out of an affidavit. State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999); State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015), *cert. denied.* The Franks' threshold is even higher for defendants making claims of omissions rather than affirmative false statements. United States v. Clenney, 631 F.3d 658 (4th Cir. 2011). "A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof." State v. Lynch, 412 S.C. 156, 179, 771 S.E.2d 346, 358 (Ct. App. 2015); Tate, 524 F.3d at 454.

Merely identifying factual omissions is insufficient. United States v. Tate, 524 F.3d 449, 454-55 (4th Cir. 2008). "The mere fact that the affiant did not list every conceivable conclusion

does not taint the validity of the affidavit." United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990)(*quoting* United States v. Barnes, 8816 F.2d 1354, 1358 (9th Cir. 1987)). "'[M]ere negligen[ce] in ...recording the facts relevant to a probable cause determination' is not enough." Id. (alterations in original)(*quoting* Franks, 438 U.S. at 170). An omission does not per se invalidate the arrest warrant. State v. Gore, 408 S.C. 237, 245, 758 S.E.2d 717 (Ct. App. 2014).

To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. Missouri; United States v. Blauvelt, 638 F.3d 281, 289 (4th Cir. 2011). The defendant has the burden of proving the officer acted with the requisite intent. Gore, 408 S.C. at 244, 758 S.E.2d 721. The defendant must also show the omissions were material, meaning their "inclusion in the affidavit would defeat probable cause." Clenney, 631 F.3d at 664; Colkley, 899 F.2d at 301. Entitlement to a Franks hearing is a matter of law subject to *de novo* review. Tate, 524 F.3d at 455.

To prevail at the Franks hearing, the defendant must then prove these points by a preponderance of the evidence. Franks, 438 U.S. at 155-56; Clenney, 631 F.3d at 664. There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause. Id.

There is a presumption of validity with respect to the affidavit in support of the warrant. Franks, 438 U.S. at 171. "To begin with, warrant affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation.'" Ventresca, 380 U.S. at 108. As the 4th Circuit stated in Clenny:

> If we 'desire to encourage use of the warrant process by police officers,' Illinois v. Gates, 462 U.S. 213, 237, n. 10, 103 S.Ct. 2317 (1983), the worst course of action would be to pick apart warrant affidavits from the pristine perch of hindsight or to penalize officers for securing what the law requires. Obtaining a warrant is a

> process overseen by a neutral magistrate. Magistrates make an independent judgment about the sufficiency of the warrant affidavit. They are free to reject warrant applications that provide scant or insufficient evidence. Indeed, an important rationale for the Franks ruling was respect for the warrant process and the capabilities of magistrates. Franks, 438 U.S. at 166-67.

Clenny, 631 F.3d at 665.

The protections of Brady v. Maryland, 373 U.S. 83 (1963) do not apply to warrant application proceedings. Clenny, 631 F.3d at 665; Colkley, 899 F.2d at 302-03. "The Supreme Court has shown no inclination to impart the panoply of trial protections into the warrant application process with all the attendant burdens and delays such a step would entail." Id. at 665; *See* Franks, 438 U.S. at 166-72. The process of preparing a warrant affidavit requires affiants to exercise discretion by selecting certain facts for inclusion and others for omission. Tate, 524 F.2d at 454-55. "An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation." Colkley, 899 F.2d at 300.

> [A] requirement that all potentially exculpatory evidence be included in an affidavit would severely disrupt the warrant process. The rule would place an extraordinary burden on law enforcement officers, who might have to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded.

Id. at 303. "In short, a rule requiring affiants to disclose all potentially exculpatory information has nothing to recommend it. Unless a defendant makes a strong preliminary showing that the affiant excluded critical information from the affidavit with the intent to mislead the magistrate, the Fourth Amendment provides no basis for a subsequent attack on the affidavit's integrity." Id.

> While omission may not be *per se* immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included have redounded to defendant's benefit. The

> potential of endless rounds of Franks hearings to contest facially sufficient warrants is readily apparent.

Colkley, 899 F.2d at 301; Lynch, (*quoting* Colkley). As this Court stated in Missouri:

> We begin with the presumption that the Fourth Amendment does not require an affiant to include all potentially exculpatory evidence in the affidavit. *See* Colkley, *supra*. A presumption to the contrary "would perforce result in perniciously prolix affidavits that would distract police officers from more important duties and render the magistrate's determination of probable cause unnecessarily burdensome." Colkley 899 F.2d at 303.

Missouri, 337 S.C. at 555-56, 524 S.E.2d at 397-98. "Inferring bad motives from an officer's omission of information inappropriately "collapses into a single inquiry the two elements – 'intentionality' and 'materiality'—which Franks states are independently necessary." Colkley.

"[T]he omission must be 'designed to mislead' or must be made 'in reckless disregard of whether [it] would mislead.'" Tate, 524 F.3d at 455. "The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that its inclusion in the affidavit would defeat probable cause." United States v. Shorter, 328 F.3d 167, 170 (4th Cir. 2003).

In this case, Porch offered no evidence Wilson omitted information with the intent to make, or in reckless disregard of whether it made, the affidavit misleading. Judge Lee found everthing in the affidavit was true. (R. 123, ll. 6-9; App. 127, 6-9). And, Porch conceded this issue on appeal. (BOA). Judge Lee did not find Wilson omitted exculpatory information with the intent to deceive the magistrate intentionally or did so recklessly. In fact, she found Wilson had omitted both **inculpatory** and exculpatory information from the affidavit. (R. 123-26; App. 127-30). And, **even including the exculpatory material Porch alleged was omitted**, there is still sufficient probable cause to support the issuance of the arrest warrant. (R. 103-08; 116-28).

The facts elicited during the Franks hearing show Wilson did not intend to mislead the magistrate. The victim's husband had been acquitted and cleared by Wilson's re-investigation.

Colkley makes clear the 4th Circuit's disdain for the notion bad motive can be inferred from the materiality of the omitted information. That Court has clearly set a very high standard for establishing entitlement to a Franks hearing. Id. As the Court of Appeals correctly found, Porch was not entitled to a Franks hearing, and has not made a sufficient showing to include his alleged exculpatory evidence. Shorter, 328 F.2d at 170 (defendant must show intentionality and the omitted material was necessary to the probable cause finding, i.e., the omitted material was such its inclusion would have defeated probable cause).

Judge Lee conducted a Franks hearing out of an abundance of caution. She stated several times this was a "close case" on whether a hearing should be granted, but granted the hearing out of "an abundance of caution." She pointed out the affidavit omitted **both** inculpatory and exculpatory information. As a result, she did not find Wilson omitted information with the intent to deceive the magistrate whether intentionally or recklessly. As the Court of Appeals correctly found, Porch failed meet his burden to show Wilson intentionally omitted potentially exculpatory material with the intent to deceive or mislead the magistrate or did so with reckless disregard of whether it made the affidavit misleading.

Further, the affidavit supplied ample probable cause for the issuance of the warrant. Porch has never claimed the affidavit "on its face" did not contain probable cause. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person under the circumstances to believe likewise." Wortman, 310 S.C. at 4, 425 S.E.2d at 20. The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and the belief of guilt must be

particularized with respect to the person to be seized. Ybarra, *supra*.[11] Probable cause exists when the totality of the circumstances within the officer's knowledge "are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." Baccus, 367 S.C. at 49, 625 S.E.2d at 220.

As Gates recognized, and as here, affidavits are normally drafted by an officer in a criminal investigation; therefore, technical requirements of elaborate specificity once exacted under common law pleading have no proper place, and they should be viewed in a common sense and realistic fashion. Ventresca; Bowie. Affidavits must be judged on the facts presented not the precise wording used. Viard. The Affidavit here supplies sufficient probable cause to issue the arrest warrant charging Porch with murder. Lynch, 412 S.C. at 179-84, 771 S.E.2d 346.

The facts of this case are similar to those in United States v. Moody, 762 F.Supp. 1491 (N.D. Ga. 1991), where the Court found no Franks hearing was due to a defendant despite his claim a search warrant affidavit omitted facts suggesting another suspect in the crime. In that case, a judge and lawyer were assassinated by mail bombs. The investigation first focused on 1 person, but a search of his property proved fruitless. The investigation then shifted to the defendant for whom police obtained search warrants. The defendant moved to suppress evidence seized pursuant to those warrants and contended the affidavits failed to disclose evidence implicating the 1st suspect. The Court, however, found the defendant failed to demonstrate the omitted information concerning the investigation of the other suspect, if included in the affidavit, would have defeated probable cause. In addition, the Court emphasized to satisfy the 4th Amendment's probable-cause requirement, the government need not demonstrate a person is the

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11 Probable cause does not mean absolute certainty. Dean; Peters; Williams. Probable cause is a flexible, common-sense standard. Brown. Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Bowie, *quoting* Brown, 460 U.S. at 742.

chief suspect in a criminal investigation. Rather, implicit within the concept of probable cause is the notion police may pursue multiple, perhaps even divergent, lines of investigation so long as police establish probable cause as to each prior to the issuance of any warrant. In Moody, the evidence marshaled by police against the 1st suspect did not exonerate the defendant. At most, the evidence indicated the defendant and the 1st suspect may have conspired to commit the crimes charged. Accordingly, the Court found the defendant's allegations were insufficient to raise issues worthy of a Franks hearing. Moody, *supra.*

Similarly, in State v. St. Louis, 18 A.3d 648 (Conn. App. 2011), *certification denied*, 302 Conn. 945 (2011), the Court held the warrant to search the defendant's property for the victim's body was supported by probable cause notwithstanding the supporting *affidavit's allegedly improper omission of the defendant's statements inculpating another person* as the statements suggested the victim was dead and buried; the defendant's neighbor recalled seeing a "big hole" dug in the backyard of the defendant's property; the defendant, on the last day when the victim was seen alive, stole a checkbook and drove the victim's vehicle to a credit union where he attempted to use the victim's license to cash a check made payable to the victim; and a jail house informant stated the defendant admitted murdering and burying the victim. Id.

Here, Porch had testified at 2 different trials of the husband and given a written statement that he was present at the scene of the crime when the victim was stabbed. Although, he attempted to place the blame for the murder on Justin, neither a jury or circuit judge accepted his testimony. The husband had been acquitted and the re-investigation determined the husband did not commit the crime. Porch unequivocally placed himself at the scene of the crime at the time of the victim's murder. Additionally, DNA testing before and after the husband's acquittal showed Porch's blood [D.N.A.] was on the kitchen floor where someone had tried to clean up

the blood before leaving the crime scene, on the bottom of the victim's shirt placing Porch in close proximity to the victim and facing the victim when she was stabbed and Porch cut his finger during the stabbing, and under the victim's fingernails. This DNA testing, including the additional DNA evidence, indicated Porch was the person who stabbed the victim. There was sufficient *probable cause* to issue the arrest warrant.

Further, and more importantly, even including the allegedly omitted exculpatory material, there was still sufficient probable cause to issue the warrant for Porch's arrest so there was no Franks violation. Missouri, 337 S.C. at 554, 524 S.E.2d at 397; Lynch, 412 S.C. 156, 771 S.E.2d 346. Porch submitted the following affidavit to Judge Lee arguing this is the exculpatory material that should have been submitted to the magistrate. (R. 40, ll. 14-22; App. 44, ll. 14-22):

> On 5/14/2006 at 1103 Pineland Rd Apt 331C in the Dentsville Magisterial District of Richland County one Nekia Mallory died as a result of a stab wound to her neck. Her husband, Justin Mallory, was originally arrested and charged with the crime of murder. This arrest was based on an eye witness and neighbor placing Mallory on the scene at the exact time she heard a domestic fight occurring in the victim's apartment. She was awakened to the argument hearing a woman's voice scream, "how could you" and later observed a black male running out to a white van, later identified as Mallory's, saying "look what you made me do." This witness observed this male at his van with another individual and speed off. Later this van was witnessed arriving at a local hospital with Mallory bringing in the body of Nekia Mallory. Hospital security guard witness observed the demeanor and behavior of Mallory as being inconsistent with genuine grief over the death of his wife, saying things like "bitch bled all over my walls, couch, and PlayStation!" The same witness also observed him enlisting the aid of another man in removing what looked to be a gun from the van. Mallory was arrested and provided a statement placing himself at the crime scene, although denying the murder. Mallory failed a polygraph test regarding killing his wife. Further investigation using Mallory's statement and cell phone records showed that Mallory had ample time to commit the crime after coming home from a date he was on that night. The Defendant, Joshua Porch, was interviewed and ultimately ended up testifying twice as an eye [witness] during prosecutions of Mallory. His testimony was that he was a friend of the Mallory's and came over late the night of the incident to visit. Mallory was not home and he and Nekia began kissing and fondling. At some point they stop, and shortly thereafter Mallory arrives home and he and Nekia began a violent confrontation regarding cheating. Porch observes Mallory striking at Nekia with an object in his hand. Porch attempts to intervene and while standing between the two

> gets cut on his hand. He testified that he went to the kitchen to find a paper towel for his wound, and in the process bled in the kitchen and attempted to wipe up blood as he bled. When Porch came back out of the kitchen the fight was over, Nekia was sitting against the couch and Mallory was on the phone somewhere in the back of the apartment. Porch left, not notifying law enforcement of what he witnessed and denied being at the scene when questioned the following day. Over a year later when law enforcement finalized preparations for trial Porch was re-interviewed about his DNA possibly being at the crime scene. He gave several inconsistent statements to law enforcement in the weeks before trial before finally admitting to being injured while witnessing the stabbing of the victim by Mallory. He was polygraphed twice regarding whether he stabbed the victim, denying involvement, but failing both polygraphs. Per Major Smith's report he was advised by the polygraph examiner that Porch may not be a good candidate for polygraphs. Lead investigators and the Deputy Solicitor were satisfied with the veracity of his account and called him as a witness during both trials. He explained at trial that fear of being implicated in the crime and also his wife discovering his infidelity was why he did not come forward and was not initially truthful about the event. After the acquittal of Mallory following the second bench trial, this affiant was asked by the Sheriff to investigate this case further. Upon reviewing the written statement given by Porch on 6/27/07 stating he cut his right index finger, and then reviewing his statement on 7/2/07 stating he cut his left hand, this affiant decided testing of the victim's shirt was necessary, as it was not deemed relevant for testing by the initial investigators. This showed that a small amount of Porch's blood was located on the bottom right part of the victim's shirt. Although Porch has provided different accounts regarding whether his right or left had [sic] was cut, his trial testimony was that his left hand was cut while intervening in the fight between Mallory and the victim. In this affiant's opinion the left hand being cut is inconsistent with his blood being on the right bottom portion of the victim's shirt. Further, Porch is noted to be left handed by the polygraph examiner, while Mallory is right handed. Although Porch denies the killing, it is the affiant's opinion that the right sided wound to the victim's neck is more consistent with a left handed assailant; however, a right handed assailant cannot be ruled out as well.

(R. 1249-50; App. 1261-62). In fact, Judge Lee specifically asked Porch if this is what he contended should have been submitted to the magistrate for the probable cause determination and Porch said: "Yes, Ma'am." (R. 40, ll. 14-22; App. 44, ll. 14-22). Porch failed to mention this fact to the Court of Appeals and to this Court. (BOA; Petitioner's Brief). However, Respondent informed the Court of Appeals of this fact and informs this Court. (FBOR).

Porch now argues and argued to the Court of Appeals that Judge Lee improperly considered information not presented to the Magistrate at the time the arrest warrant was sought.

However, that is exactly what Porch asked Judge Lee to consider at the Franks hearing. (R. 40, ll. 14-22, 1249-50; App. 44, ll. 14-22, 1261-62).[12] And, that is exactly what Judge Lee is required to do under the case law. Missouri, 337 S.C. at 554, 524 S.E.2d at 397 (if including the allegedly omitted exculpatory material, there is still sufficient probable cause to issue the warrant, there is no Franks violation); Lynch, 412 S.C. 156, 771 S.E.2d 346 (same); Clenney, 631 F.3d at 664. Even including the alleged exculpatory material Porch alleged should have been included, **exactly as submitted by Porch** before Judge Lee at the Franks hearing, there was still probable cause to issue the arrest warrant charging Porch with the victim's murder. (R. 40, App. 44, R. 1249-50, App. 1261-62). Missouri; Lynch; Clenney. Judge Lee's upholding the arrest warrant is supported by the evidence.

Regardless of what Judge Lee considered or found, the Court of Appeals correctly found: "even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause to secure an arrest warrant for Porch." Porch, 417 S.C. at 630, 790 S.E.2d at 445, 446. (App. at 1376). As a result, the Court of Appeals must be affirmed. Missouri, 337 S.C. at 554, 524 S.E.2d at 397 (if including the allegedly omitted exculpatory material, there is still sufficient probable cause to issue the warrant, there is no Franks violation); Lynch, 412 S.C. 156, 771 S.E.2d 346 (same); Clenney, 631 F.3d at 664.

Further, Porch omits incriminating or inculpatory information against him developed during the investigation that would have come with the exculpatory information had Wilson drafted the affidavit the way Porch argues it should have been drafted.

Justin informed police on the night of his wife's murder that he came home after a date

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12 Any alleged error by Judge Lee in considering any facts or information set forth in Porch's proposed affidavit would be invited error by Porch, and he would not be entitled to any relief. State v. Sawyer, 409 S.C. 475, n. 2, 763 S.E.2d 183 (2014); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

with another woman and found his wife collapsed on the apartment floor. Blood was everywhere. No one was in the apartment but his children who were asleep in a bedroom. After checking on his children, he immediately ran next door, began banging on the door, and sought assistance. The neighbor, who answered the cry for help, informed police Justin had no blood on him. The police investigation revealed Justin had been exactly where he claimed to have been on the night of the murder, including corroboration by the girlfriend, her sister, restaurant records, gas station surveillance video, hotel records, and phone records. Phone records and cell tower records showed Justin would have arrived home at approximately 3:30 a.m., leaving little time for the murder to have been committed by him, and Justin called 911 at approximately 3:35 a.m. The eyewitness neighbor ***described in Porch's affidavit above*** testified at Justin's trials that the altercation she overheard in the apartment complex took place over a longer period of time than as set forth in her statement to police, over approximately 30 to 45 minutes. Her timeline of the altercation she overheard that night was much longer under oath making it impossible for Justin to be the assailant given his location approaching the apartment complex as confirmed by **cell-phone towers** and his phone records. (R. 83-84, 480-528; App. 488-535, 87-88).[13] Justin's phone calls during this time period approaching the apartment were also confirmed by his friends who spoke with him. The husband [Justin] was right-handed. Porch first denied he was present at the scene the night of the crime. Over a year later, Porch stated he cut his hand in victim's apartment cutting an apple earlier in the evening, but was not present at the time of the murder, which was a lie to explain his blood [DNA] in the kitchen. Porch also lied on another occasion telling another officer that he told the 1st officer who questioned him that he cut his hand in the

13 This witness' husband, who was also present with this witness at the same time, described what he heard completely differently. He first heard someone banging on apartment doors and yelling for help, and then saw a vehicle drive by their window leaving the apartment complex. (R. 529-44; App. 537-52). Porch fails to mention this in his proposed affidavit.

apartment. Finally, he admitted he was present in victim's home when she was killed; he did cut his hand; he bled in the kitchen, and attempted to clean up his blood in the kitchen before leaving the crime scene. Porch stated he was facing Justin, and away from the victim when his left hand was cut. Porch's DNA was found on the kitchen floor of victim's apartment. DNA consistent with Porch's DNA, and inconsistent with the husbands' was found *under the victim's fingernails*. Neither a jury nor a circuit judge believed Porch's final statement or testimony in 2 different trials of Justin. Based on his investigation, Wilson was convinced Porch killed Nakia.

As a result, there is no merit to Porch's argument. Even had Wilson prepared the affidavit differently including all of the details of the investigation, there was probable cause to arrest Porch for the murder of the victim when the affidavit and arrest warrant was presented to the magistrate *in 2009*. As a result, Porch's admissions to police in California that; victim's husband was not present during the murder, he [Porch] lied in the husband's 2 trials, and he [Porch] was in fact the person who killed the victim, should not have been suppressed. Judge Lee did not abuse her discretion in denying the motion to suppress. Her decision is supported by evidence in the record. Morris, *supra*. Furthermore, based on this record, the Court of Appeals correctly affirmed. Id. Therefore, Porch's conviction and sentence must be affirmed.

ARGUMENT II.

The Court of Appeals correctly found the issue raised to it was not preserved for appellate review; and, the new issue now raised to this Court in Appellant's Brief, was not even raised to the Court of Appeals; and, even if the issue raised to the Court of Appeals was preserved, there was no Confrontation Clause violation; and even if there was, the violation was harmless beyond a reasonable doubt.

What Occurred Below

(Background)

Prior to trial, a Jackson v. Denno, 378 U.S. 368 (1964), hearing was held before Judge

Lee in March of 2013. Among other witnesses, the State called the 2 Richland County investigators who questioned Porch in Calfornia [McDaniels and Godfrey] and the Los Angeles County investigator who polygraphed/interviewed Porch [Cohen] prior to Porch's final statement [the 3rd confession in California]. The entire polygraph/interview of Porch by Cohen was video-recorded and also monitored from an adjoining room by McDaniels and Godfrey. The entire 3rd interview, including that porton conducted by McDaniels and Godfrey was video-recorded as well. At the Denno hearing, Porch had the opportunity to and did cross-examine each of the investigators on the voluntariness of Porch's statements, including Cohen. Cohen testified to the circumstances surrounding her interview of Porch; the making of the video of the entire 3rd interview; and how it was copied on CD/DVD by her and provided to McDaniels and Godfrey. At the hearing's conclusion, Porch moved to exclude all of the statements Porch made including those in California. Judge Lee found the statements were knowingly, voluntarily, and intelligently made by a preponderance of the evidence and would be admissible at trial. (R. 143-54; 92-93, 130-32, 138-39, 201-30, 254-59, 664-65, 889-93, 896-905, 911-12, 965-74; App. 147-58, 114-15, 134-36, 142-43, 205-34, 258-63, 672-73, 897-901, 904-13, 919-200, 974-82).

Subsequent to the Denno hearing, the case was scheduled for trial in July of 2013; however, the State had to move for a continuance due to Cohen's unwillingness to appear for the trial due to a previously scheduled vacation. Judge Lee granted the continuance and the case was scheduled for trial in November of 2013. (R. 7, 14, 116; App. 11, 18, 121).

Prior to trial, the State timely sought the issuance of an out-of-state witness subpoena from the State of California for Cohen. Cohen refused to voluntarily return to South Carolina for the trial and contested the issuance of the out-of-state subpoena. Through no fault of the State of South Carolina, the California Superior Court refused to require her to return to South Carolina

for Porch's trial and she would not voluntarily return. As a result, she was unavailable at trial. (R. 108, 112-13, 140, 1067; App. 112, 116-17, 144, 1079).

Judge Lee specifically found several times on the record at trial that the State was not at fault in the failure of Cohen to appear. (R. 213-15, 217-18, 969-70, 1067; App. 217-19, 221-22, 1079, 977-78). Judge Lee found the State had done everything it could to assure her appearance; however, the California court refused to require her to come to South Carolina for trial, and she refused to voluntarily appear. (R. 213-15, 217-19; 969-70, 1067; App. 217-19, 221-22, 977-78, 1079). Defense counsel also conceded this issue several times on the record. (R. 217-18, 969-70, 1067, 1068; App. 221-22, 977-78, 1079, 1080).

At trial, the State introduced Porch's statements made to police here in Richland County before Porch was a suspect. Porch again moved suppress or exclude all of his confessions in California. Judge Lee denied that motion. (R. 130-32, 138-39; App. 134-36, 142-43).

Porch also moved to exclude the Advice of Rights Form administered by Cohen on July 10th and the actual video of her questioning Porch on July 10th. (R. 140-41; App. 144-45). Upon inquiry by the Court, because Cohen was unavailable, the State agreed to only introduce testimony from McDaniels and Godfrey that they witnessed Cohen read Porch his Miranda rights[14] and Porch waived those rights and the last portion of the video-recorded statement [the

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14 The State informed Judge Lee it could play before the jury only the very first portion of the video, where Cohen read Porch his Miranda rights and Porch waived them, since she was unavailable *or* have Godfrey and McDaniels testify to their witnessing Cohen read Porch his Miranda rights and Porch waiving them to establish the Miranda waiver on the third day of questioning *or* read Cohen's Denno testimony regarding the same. Porch again objected on the grounds of hearsay and the Confrontation Clause. The State provided the court with legal authority that the reading of Miranda rights to a defendant is not hearsay or a violation of the Confrontation Clause because the State was merely showing the jury Porch was advised of his rights before the 3rd interview began. Bracket v. State, 142 Ga. App. 578, 236 S.E.2d 538 (Ga. App. 1977); State v. McClain, 220 Kan. 80, 81-82, 551 P.2d 806, 807-08 (Kan. 1976); State v. Badado, 257 P.3d 1219, 2011 WL 2611297 (Ct. App. Haw. 2011)(*Unpublished*). *See also*

3rd confession], the portion made to McDaniels and Godfrey. The State agreed to redact any references to a polygraph or administration of the polygraph test. (R.141-42; App. 145-46).[15]

Even though the entire 3rd interview was video-recorded on CD/DVD, and it contained **Porch's responses** to *questioning* by Cohen, McDaniels and Godfrey, Porch objected to admission of **any** of the 3rd interview on Confrontation Clause grounds because Cohen was not present for the trial because the California court declined to enforce the out-of-state subpoena. (R. 140-54, 201-30; App. 144-58, 205-34). As discussed, Judge Lee found Cohen was unavailable through no fault of the State. Judge Lee initially found Porch had the opportunity to cross-examine Cohen at the Denno hearing regarding the reading of Miranda rights, Porch's waiver of the same, and the video itself. Judge Lee believed the opportunity to cross-examine was all that is necessary under Crawford v. Washington, 541 U.S. 36 (2004), but took the matter under advisement. (R. 201-31; 254-59; App. 205-35; 258-63). The next morning Judge Lee ruled the portion of the interview conducted by Cohen [Miranda and waiver] was inadmissible but the portion of the interview conducted by McDaniel and Godfrey was admissible. (R. 254-59; App. 258-63). She reiterated this ruling later. (R. 665; App. 673).

In summary, because of Porch's objection, Judge Lee eventually ruled she would not allow admission of the portion of the video where Porch was Mirandized by Cohen and Porch waived of those rights, because Cohen was not present; however she would admit the video portion of the interview where Porch was questioned by McDaniels and Godfrey and they could testify to Porch's admissions in their portion of the 3rd interview. As a result of Judge Lee's

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Washington v. State, 568 P.2d 301, 308-09 (Okla. Crim. App. 1977)(same). Porch continued to object. After much argument and discussion with the Court, Judge Lee ruled the State could introduce only the last portion of the video where Porch was questioned by Godfrey and McDaniels and rely before the jury on 2 previous Miranda warnings given to Porch on July 9th.

15 Porch concedes in his brief the entire interview with Cohen and McDaniels and Godfrey [the 3rd interview in California] was recorded on video. **(Petitioner's Brief, pp. 2, 4-5, 8, 20, 24).**

ruling on Porch's objection, and the State's agreement because of Porch's objection, the State introduced only the last portion of *the video-recorded confession* of Porch [the 3rd confession, State's Ex. 50] taken on July 10th, where Porch is questioned by McDaniels and Godfrey.

What Occurred Below Relevant to the Issue Raised to the Court of Appeals

After the State rested its case, *in camera*, the following took place:

> MR. LUKE SHEALEY [Defense counsel]: Another issue I was hoping to get some clarification on, since Mr. Porch has decided to testify, you know, we've - - in this very unusual situation we have in this case where Investigator Cohen fought her out-of-state subpoena and chose not to come, through no fault of Mr. Goings, through no fault of this court, but also through no fault of Mr. Porch's, you know, we've kind of fashioned the way to go about it I think in Your Honor's opinion is fair to both sides, where we obviously needed to be able to tell that that was the longest interrogation. He was with her for six and a half hours. Some of that was polygraph, which we can't mention in this court before this jury, so what we have been doing is saying well, he - -after - - on that beginning of that day, on the 10th, he was left with a California detective. He was with her six and a half hours. I think they have been able to say including some breaks and things like that, and then turned over to Godfrey and McDaniels. So when Mr. Porch testifies, you know, is he limited strictly to that, or can he say nothing more about the process of that interrogation, what may have been said to him, what threats may have been made, because I think if he's stricklty limited just to that, that his right to testify is diminished greatly.
>
> So it is an unusual situation that we are placed in, but I just wanted to know the parameters from the court before he testifies so I don't want to defy any potential ruling, but I think that, you know, he should be allowed to discuss, if necessary, anything that happened in there, but for the polygraph. But - - so I - - I've never quite been put in this situation, so I think that any limitation on his testimony as to that situation, other than not being allowed infringes on his right to testify. So I don't know how we deal with it, but I'm bringing it up before we get started.
>
> THE COURT: Mr. Goings?
>
> (Off the record)
> (Back on the record)
>
> MR. GOINGS: Your Honor, we had - - we had limited it. I thought that was the understanding of how we were going to proceed.
>
> The only thing I can think of at this point in time is if Mr. Porch testifies

about specific occurences within that six and a half hour interview with Investigator Cohen, that it opens the door for the possibility of us playing portions of that video as well.

THE COURT: I think there is - - I think there is some problems with that, because certainly - - certainly she's not here to be able to state what went on.

If she had been here, certainly you would have been able to cross-examine her on those issues and she could have stated, you know, what her view was, and then Mr. Porch would be able to testify as to, you know, what he says occurred, but I think - - I think Mr. Goings is correct, that if you go too far into what occurred, what specifically was said to him and what she did is just going to open the door for them to put the video in.

MR. LUKE SHEALEY: Okay. Well, I just wanted to know. I disagree with that ruling completely. I disagree with that position because he has a right to testify.

THE COURT: Sure, he does.

MR. LUKE SHEALEY: It's not his fault that she was a Government witness who interrogated him for six and a half hours is not here.

I wasn't just to - - it's kind of like we have already said, that he was there for six and a half hours with this other detective, that it was more of the same, without going into specific threats or anything that was done, but I would just note my objection for the record and I just disagree with that. I think he has a right to testify, as I indicated through no fault of their own, and that he will not be able to present his complete and full story to the jury. And I just wanted to take it up and I will certainly follow the court's ruling.

THE COURT: You know, he can present it, but just understand that if he presents it, then they have got the opportunity to rebut it through the use of the video.

MR. LUKE SHEALEY: Well, certainly we don't want them to rebut that using this video when we don't' have her obviously here. Maybe I should kind of just hold oral argument in front of them, which I'm not going to do, but I understand your ruling and we won't go into it in any more detail.

(R. 1068, ln. 3-1071, ln. 8; App. 1080, ln. 3 – 1083, ln. 8).

As just shown, after the State rested, *in camera*, Porch indicated he was going to testify and inquired whether he could testify about what occurred earlier in this same video interview, i.e. whether he could testify to what occurred during the interview with Cohen including whether

he was threatened or promised anything. As previously noted, Porch had successfully kept from the jury this portion of the 3rd interview video by raising a Confrontation Clause challenge because Cohen was not at trial and the State's agreement to not enter the same. Again, in this portion of the video, Porch was being *questioned/polygraphed* by Cohen. In addition to being video-recorded, this interview was monitored by McDaniels and Godfrey from an adjoining room by closed circuit T.V.

The State responded to Porch's inquiry by stating it had limited what it introduced, based on the court's earlier ruling, and thought there was an understanding or agreement how both sides were going to proceed regarding the 3rd interview. However, if Porch testified about specific occurrences within this earlier portion of the video-recorded 3rd statement, i.e. with Cohen, it would open the door for the possibility of the State playing portions of that part of the video in reply or rebuttal to Porch's testimony. The State did not intend to allow any references to the polygraph test to be admitted in reply or rebuttal and would redact those.

Porch argued he had a right to testify; it was not his fault the witness who interrogated him during this portion of the video was not at trial; and he would not be able to present his complete and full story to the jury if he was not allowed to testify about the earlier interview with Cohen.

Judge Lee informed Porch he could testify to what occurred earlier in this questioning session, i.e. with Cohen, if he wished, but if he did and went too far, it would probably open the door to the State being allowed to introduce portions of the video in reply or rebuttal. Porch stated he did not want the State to rebut using the video when Cohen was not there. He asserted he would not go into any more detail about the Cohen interview. (R. 1068-71; App. 1080-83).

After a break, Porch then testified in his own defense. He was not limited in any way in his testimony by the Court or the State, and he testified to threats and promises he *alleged* were made by Godfrey and McDaniels **and** that similar threats or behavior occurred during his interrogation by Cohen. (R. 1102-16; App. 1114-28, Specifically R. 1113, ll. 14 – 1114, ln. 10 in conjunction with R. 1102-1116). Porch did not seek or ask to play portions of the video of the interview with Cohen to corroborate his claims. Nor did he seek to introduce Cohen's testimony from the Denno hearing to corroborate his claims. After Porch testified, the State **did not play the earlier portion of the video** [that portion with Cohen] in reply or rebuttal. Porch did not proffer any other testimony he would have testified to had Judge Lee not informed him of the possibility of reply or rebuttal with portions of the video. (R. 1068-1198; App. 1080-1210).

Lack of Preservation of the Issue Raised to this Court for the 1st time

Porch now argues for **the first time on appeal** this Court **should reverse because** Judge Lee erred in admitting the last portion of the 3rd interview of Porch in California [with McDaniels and Godfrey] because his Confrontation Clause rights were violated. (Pet.'s Brief, pp. 21-25). This **new issue** is not preserved for appellate review because it was not raised to the Court of Appeals. Rule 226(d)(2), SCACR; Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000). Porch argued **to the Court of Appeals** Judge Lee violated his Confrontation Clause rights by informing him that if he testified about matters occurring in the 1st portion of the video, it may open the door or result in reply from the video itself. (FBOA, p. i & pp. 13-20). Porch did not argue to the Court of Appeals that Judge Lee erred in admitting the last portion of the 3rd interview. This new ground is not preserved for appeal.

Lack of Preservation of the Issue raised on Appeal to the Court of Appeals

Porch argued on appeal to the Court of Appeals that Judge Lee's advising him of the possibility of reply or rebuttal with the video of his interview with Cohen violated his Confrontation Clause rights and as a result limited his testimony. As the Court of Appeals correctly found, this issue was not preserved for appellate review. Porch, *supra*. It was not preserved for appellate review **for several reasons**.

Porch *inquired* of the court whether he could testify about matter which occurred earlier in the 3rd interview video, i.e. with Cohen. He stated if he could not it would infringe on his right to testify. The court informed Porch he could testify to anything he wished including what occurred during the earlier interview with Cohen. However, the court informed him, if he went too far, it would probably open the door to reply or rebuttal evidence from the video itself. Porch argued this impinged on his **right to testify**. He alleged he was not able **to testify fully** and therefore **to present a complete defense**. The court made clear Porch could testify to anything he wanted to, including what occurred in the earlier interview with Cohen, but the State had the opportunity to rebut it through the video. Porch stated he did not want the State to rebut his testimony using the video when Cohen was not there, thus conceding the issue.

Porch actually raised **no objection below to his testimony being limited**. He inquired whether he could go into the earlier interview and *whether* there were specific alleged threats by Cohen and what else was said, and was told that he could. His objection was to Judge Lee's ruling that if Porch went too far into the Cohen interview, it might open the door to the State offering reply evidence from the video itself to rebut his claims. As a result, the issue he raised to the Court of Appeals is not preserved for appellate review.

Further, **Porch did not object at any point under the Confrontation Clause.** He

argued initially if he could not go into the earlier portion of the 3rd interview, his **right to testify** and **present a defense** was being impinged. Again, he was told that he could.

Furthermore, Porch conceded the issue at trial. Once, the Court notified Porch he could testify to what occurred in the interview with Cohen, including whether there were any *alleged* threats and what was said, and of the possiblility of reply or rebuttal with the video, Porch stated he did not want the State to impeach with the video conceding the issue. Porch was looking for guidance from Judge Lee, and once he received that guidance, he decided not to go into whether any *alleged* [possible] specific threats were made or what was said during the earlier interview with Cohen because it could open the door to portions of the video itself [which contained the entire interview with Cohen] coming in to disprove his testimony. This issue was conceded at the trial court level.

Finally, Porch *did not proffer any testimony what he would have testified to* had the court not informed him of the possibility he could open the door to reply or rebuttal evidence. Since Porch was not limited in his testimony or in presenting a defense by the Court; it was incumbent on Porch to establish prejudice by a proffer of what he would have testified to.

The Court of Appeals correctly found this issue was not preserved for appeal. It was not preserved for several reasons. *See* State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(Confrontation Clause challenge not preserved for appellate review when it was not properly raised below); State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)(constitutional arguments are no exception to issue preservation rule); State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993)(requiring proffer when evidence is excluded); State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991)(purpose of a proffer is to adequately develop the record to allow the appellate court a chance to determine whether the appellant was prejudiced by the trial court's refusal to

admit the evidence); Designer Showrooms, Inc. v. Kelley, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991)(a proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice); State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998)(party may not raise one issue below and a different one on appeal); State v. Myers, 344 S.C. 532, 544 S.E.2d 851 (Ct. App. 2001)(same); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(issue is not preserved for appellate consideration if it has been conceded in the trial court). TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(same). As a result, the Court of Appeals finding this issue was not preserved for appellate review must be affirmed.

The Lack of Merit of this Issue

Regardless of the lack of preservation of this issue, there is no merit to this ground. This appellate ground is disingenuous at best. Porch concedes in his brief, as he must, the entire 3rd interview in California, including the portion with Cohen, was video-recorded. **(Pet.'s Brief, pp. 2, 4-5, 8, 20, 24).** Prior to testifying, Porch inquired of Judge Lee whether he could go into this earlier portion of the video-recorded interview even though it had been excluded. Porch indicated he intended to testify whether Cohen threatened or coerced him during this portion of the video-recorded interview and what was said during the interview. Judge Lee informed Porch he could testify to any part of the video-recorded interview he wished, including with Cohen, including any alleged threats Cohen made, or what was said, but his testimony could open the door to the State offering portions of the video in reply or rebuttal. There is no merit to this ground because if the State had offered the video of this portion of the interview in reply it would not be hearsay because it would not be offered for the truth of the matter asserted **but to show these alleged threats Porch testified to did not occur**, i.e. something was **not said** that Porch claimed was said. As a result, there was no Confrontation Clause violation. Instead, Porch made

an informed decision not to go into whether there were any specific *alleged* threats or what was said to avoid damaging and proper reply which would show this trial testimony of his was false.

Analysis

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" Richardson v. Marsh, 481 U.S. 200, 206 (1987)(*quoting* U.S. Const. amend. VI.); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015), (*quoting* Richardson). This constitutional right "include[s] the right to cross-examine those witnesses." Pointer v. Texas, 380 U.S. 400, 401 (1965); McDonald, *supra*.

Porch was not prevented or prohibited from cross-examining any witness against him during his trial. Porch was allowed to cross-examine every witness called by the State. **(ROA).**

And, he cross-examined the Los Angeles' detective [Cohen] at the Denno hearing, and **she did not testify against him at trial**. Further, the portion of the video where she was interviewing him **was not played to the jury** by the State in its case in chief *or* on reply.[16]

Porch cited several cases to the Court of Appeals dealing with the admissibility of statements *of witnesses* who are not present to testify at trial. (See BOA). He continues to argue to this Court similarly. Those cases simply have **no application here**.

In the context raised here, the video was not the statement of *a witness,* **it was the entire interview of Porch with Cohen captured in real time.** It was Porch's statements [a party opponent] made in response to *questioning* or interrogation by Cohen and therefore admissible in

16 Porch was simply informed, when **he inquired** whether he could testify about matters that occurred in this earlier portion of the 3rd interview, that he could, but if he went into matters in his direct testimony regarding what occurred earlier on the video, not shown to the jury, and he went too far, the State could be allowed to play the earlier portions of the video to the jury in reply or rebuttal to Porch's claims on direct because Porch would have opened the door to that reply or rebuttal evidence. (R. 1068-74; App. 1080-86).

reply or rebuttal as long as any references to the polygraph test were redacted, which the State agreed to do. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Mathews, 296 S.C. 379, 373 S.E.2d 587 (1988).[17] Normally, *a question* is not hearsay because it is not assertive. State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996); *Collins, Danny R.*, South Carolina Evidence, 2nd Ed., p. 487 (2000).

Respondent recognizes, in State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) this Court held that in some instances, questions or statements of a police officer in an interrogation setting may be impermissible hearsay when they can have no other purpose but to be offered for the truth of the matter asserted. This case is not Brewer for several reasons. There is no contention Porch invoked his right to remain silent. There is no contention Porch did not answer the questions. Finally, and most importantly, the video was not going to be offered for a hearsay purpose.

In the context raised here, reply or rebuttal of Porch's claims on the stand, the questions asked by Cohen or even her statements are not hearsay and would not violate the Confrontation Clause and were admissible because they would not have been offered to prove the truth of the matter asserted, but to show what actually prompted the party opponent/criminal defendant's [**Porch's**] verbal responses and his eventual 3rd statement, i.e. his answers to Cohen and 3rd confession to McDaniels and Godfrey **were not the result of any threat or coercion**.[18] Porch

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17 *See also* State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980); State v. Hambright, 310 S.C. 382, 426 S.E.2d 806 (Ct. App. 1992); State v. Good, 308 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992).

18 In Brewer, this Court made clear: "We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial. As recognized by the North Carolina Court of Appeals, however, caution must be exercised in the admission of such evidence to ensure that all out-of-court statements are either 'admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end run around the evidentiary and constitutional proscriptions against the admission of hearsay.'

concedes in his brief the entirety of the interview with Cohen was video-recorded. **(Pet.'s Brief, pp. 2, 4-5, 8, 20, 24).** The video would have been admissible in reply because it would have shown what was **not said by Cohen**, i.e. no threats or coercion. Rule 801(c), SCRE (hearsay is an out of court statement which is offered to prove the truth of the matter asserted); State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). A statement introduced for any purpose other than to prove the truth of the matter asserted is not hearsay and does not violate the Confrontation Clause. United States v. Diaz, 670 F.3d 332, 346 (1st Cir. 2012)(Confrontation Clause not violated by admission of police officer's testimony because admitted for non-hearsay purpose); United States v. Cain, 671 F.3d 271, 300 (2nd Cir. 2012)(same); United States v. Jimenez, 513 F.3d 62, 80-81 (3d Cir. 2008); United States v. Williams, 445 F.3d 724, 736 (4th Cir. 2006).[19]

Further, the earlier portions of the video were never introduced in evidence; there was only the potential those portions would be introduced in reply or rebuttal, depending on what Porch testified to on direct or cross-examination. Additionally, Judge Lee merely explained to Porch what could occur if he went into matter not already in evidence, so Porch could make an informed decision, which he made.[20] Porch was not prohibited by the Court from testifying or prohibited from testifying about any matter he wished to testify about.

State v. Miller, 197 N.C.App. 78, 676 S.E.2d 546, 556 (2009)." Id. at 407-08, 768 S.E.2d at 659. Here, if Porch testified he was threatened or coerced by Cohen, the entire interview with Cohen [redacting any polygraph references] would be admissible to show *the threats or coercion* **did not actually occur.**

19 *See also* United States v. Armstrong, 619 F.3d 380, 385 (5th Cir. 2010); United States v. Boyd, 640 F.3d 657, 664-65 (6th Cir. 2011); United States v. Gaytan, 649 F.3d 573, 579-80 (7th Cir. 2011); United States v. Cook, 675 F.3d 1153, 1156-57 (8th Cir. 2012); United States v. Mitchell, 502 F.3d 931, 966 (9th Cir. 2007); United States v. Mendez, 514 F.3d 1035, 1045-46 (10th Cir. 2008); United States v. Woods, 684 F.3d 1045, 1061-63 (11th Cir. 2012); United States v. Coumaris, 399 F.3d 349 (D.C. Cir. 2005).

20 Porch had access to the CD/DVD and knew exactly what was on the video-recorded interview with Cohen. (R. 201-02, 1071; App. 205-06, 1083). If Cohen had threatened or coerced Porch during the interview, Porch could have introduced the video to corroborate his

However, if he did testify, Porch could not be allowed to testify falsely about what occurred earlier in the interview, when the video would show the jury exactly what had occurred, i.e. no threats or coercion. *See* Harris v. New York, 401 U.S. 222, 225 (1971)(prosecution is entitled to rebut false impression defendant created by his own testimony including using in reply defendant's statements taken in violation of Miranda as long as the statements were reliable and trustworthy, i.e. voluntary);[21] Walder v. United States, 347 U.S. 62, 65 (1954)(prosecution may use evidence inadmissible in its case in chief to impeach a defendant because the defendant will not be allowed to insulate his perjurous testimony by use of the exclusionary rule); United States v. Havens, 446 U.S. 620 (1980)(similar); Oregon v. Haas, 420 U.S. 714 (1975)(similar); United States v. Leavis, 853 F.2d 215 (4th Cir. 1988)(same).

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." Harris, 401 U.S. at 225, *referencing* United States v. Knox, 396 U.S. 77 (1969); *cf.* Dennis v. United States, 384 U.S. 855 (1966). *See also* State v. Brown, 296 S.C. 191, 371 S.E.2d 523 (1988)(recognizing holding in Harris v. New York and following the same).

The admission of reply testimony is within the sound discretion of the trial judge; and, any evidence which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999).[22] It cannot seriously be argued that if Porch had

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claims. He did not.

21 Prior to trial, Judge Lee had already conducted a Denno hearing, in which Cohen testified, and Judge Lee had determined Porch's statements, including those to Cohen were voluntarily, knowingly, and intelligently made. Therefore, the video of that interview with Cohen was admissible in reply if Porch testified regarding what he alleged occurred during that interview.

22 *See also* State v. South, 285 S.C. 529, 311 S.E.2d 775 (1985); State v. Williams, 409 S.C. 455, 761 S.E.2d 770 (Ct. App. 2014); State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904).

gone into detail about the interview with Cohen claiming threats or coercion that the State could not impeach or rebut his testimony with the video which contained the entirety of the interview between Cohen and Porch. The video is **the best evidence** of what occurred during Cohen's interview with Porch.

And, such testimony by Porch would have certainly "opened the door" to admission of the video of the interview with Cohen. When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been initially offered by the opposing party under the "opening the door" rule. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004); State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003); State v. Taylor, 33 S.C. 159, 508 S.E.2d 870 (1998); State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008). Whether a person "opens the door" to the admission of evidence is addressed to the sound discretion of the trial court. State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). Cohen had already testified at the Denno hearing to the making of the video-recording of the 3rd interview and providing it to McDaniels and Godfrey and was subject to cross-examination by Porch. (R. 210-20; App. 214-24). The 2 Richland County detectives observed this earlier portion of the 3rd interview from an adjoining room and could also authenticate the authenticity of the video. Rule 1001(1) & (2), SCRE (photos include videos); State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972)(it is sufficient to justify admission of a photo if a person familiar with the scene can say the photo accurately represents the scene). Further, as previously discussed, Porch concedes in his brief the entirety of the interview with Cohen was video-recorded. **(Pet.'s Brief, pp. 2, 4-5, 8, 20, 24)**. Again, the video

was **the best evidence** of what occurred during Cohen's interview with Porch and whether there were any threats or coercion.

Judge Lee was merely truthfully answering Porch's inquiry in light of the State's response to Porch's inquiry and correctly stated the law. Depending on what Porch testified to, the video could become admissible as reply, rebuttal, or because Porch "opened the door" to its admission. To the extent *he* [Porch] limited his testimony, it was to prevent proper reply or rebuttal evidence.

Additionally, Porch testified about what occurred in each interview, including this earlier interview on the video. During his trial, for several pages of the transcript, Porch testified to threats he alleged Godfrey and McDaniels made against his wife and his brother-in-law. He then stated that what occurred in the interview with Cohen prior to his final interview with Godfrey and McDaniels was: "more of the same." The State did not play the video in reply or rebuttal. This portion of the video was never introduced. **(R. 1074-1198; App. 1086-1198).**

Further, the witness [Cohen] was unavailable and Porch had the opportunity to cross-examine Cohen and did at the Denno hearing. Crawford v. Washington, 541 U.S. 36, 68 (2004) ("the Sixth Amendment demands what common law required: unavailability and a prior opportunity for cross-examination."). (See R. 215-19; App. 219-23).

There is no question the witness was unavailable at trial. Judge Lee found several times the witness was unavailable and unavailable through no fault of the State. Porch also conceded on several occasions the witness was unavailable and unavailable through no fault of the State. *See* Barber v. Page, 390 U.S. 719, 724-25 (1968)(a witness is considered "unavailable" if the government is unable, despite good-faith efforts, to procure witness's attendance at trial); Mancusi v. Stubbs, 408 U.S. 204, 212 (1972)(state must make good-faith effort to compel

presence of witness beyond merely showing witness was outside state); United States v. Johnson, 108 F.3d 919, 922 (8th Cir. 1997)(good-faith effort shown because government moved for continuance to allow time to procure vacationing police officer); Acosta-Huerta v. Estelle, 7 F.3d 139, 143 (9th Cir. 1993)(good-faith effort proven because prosecutor tracked witness to different state, attempted to convince witness to return, and initiated state law procurement proceedings); United States v. Eufracio-Torres, 890 F.2d 266, 270 (10th Cir. 1989)(good-faith effort shown where government served alien witnesses with subpoenas and provided instructions for obtaining travel reimbursement and witness fees, and witnesses stated they would return); United States v. Siddiqui, 235 F.3d 1318, 1324 (11th Cir. 2000)(good-faith effort proven because despite's government's offer to pay witness's expenses of attending trial, witness stated unequivocally he could not travel to U.S.).

And, Porch had the prior **opportunity** to cross-examine the witness and did cross examine her at the Denno hearing. (R. 212-20; App. 216-24). Crawford; State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011)("The Confrontation Clause 'guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.")(emphasis in original); Id. ("Therefore, if a defendant had the opportunity to cross-examine a witness, there is no violation of the Confrontation Clause"); Williams v. Bauman, 759 F.3d 630 (6th Cir. 2014)(defendant had opportunity to cross-examine witness at his own preliminary hearing and prior testimony's admission did not violate confronation clause); Delgadillo v. Woodford, 527 F.3d 919, 926-27 (9th Cir. 2008)(a witness' prior statements, which witness testified to during witness' preliminary examination, did not violate Confrontation Clause where witness was subject to cross-examination regarding the prior statements during the preliminary examination); United States v.

Avants, 367 F.3d 433, 445 (5th Cir. 2004)(Confrontation Clause not violated when deceased codefendant's statements admitted at trial because defendant cross-examined codefendant at preliminary hearing); State v. Crocker, 852 A.2d 762. 784-87 (Conn. App. 2004)(Confrontation Clause not violated by admission of witness' prior testimony at a probable cause hearing because attorney who represented defendant at hearing had opportunity to cross-examine witness under oath and did so); Timimi v. Jackson, 379 Fed. Appx 435 (6th Cir. 2011)(*Unpublished*)(Where petitioner was represented by counsel at preliminary hearing and had opportunity to cross-examine witness, admission of prior testimony from hearing did not violate Confrontation Clause); Strayhorn v. Booker, 718 F.Supp. 2d 846 (E.D. Mich. 2010)(introduction of witness' prior statement did not violate Confrontation Clause because witness was present at preliminary examination where his statement was read into the record, and counsel for petitioner was given opportunity to cross-examine witness at that time). The very purpose of the Denno hearing was to determine the voluntariness of Porch's statements including those to Cohen.[23]

Even if the video had been admitted, Porch had the opportunity to cross-examine the other person in the video beside himself. *If* portions of the tape had been introduced in reply or rebuttal, Porch could have introduced Cohen's Denno testimony in surreply. *See* State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003). And, he could have introduced the entire video, if it contained threats or coercion as he claims, under the rule of completeness. As a result of all of the above, there was no

23 The appellant has the burden of providing a sufficient record on appeal to support his position. Helms v. Gibson-Wall Company, 363 S.C. 334, 611 S.E.2d 485 (2005); *See* Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983)(the appealing party has the burden of providing a sufficient record to the appellate court). Porch did not request the transcript or designate or include in the Record on Appeal Cohen's Denno hearing testimony or the video of the Cohen/Porch interview (Court's Ex. 7, Denno hearing). However, this Court may pursuant to Rule 212(a), SCACR, call up the Denno hearing testimony or the Cohen/Porch interview (Court's Ex. 7, Denno hearing). Respondent invites this Court to do so.

Confrontation Clause violation. (R. 212-20; App. 216-24)[Specifically R. 218, ln. 6 – 219, ln. 2].

Harmless Error

Even if this somehow constituted a Confrontation Clause violation, it was harmless. Schneble v. Florida, 405 U.S. 427 (1972)(mere finding of Confrontation Clause violation does not automatically require reversal.); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015). It is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673 (1986); State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001); State v. Bell, 302 S.C. 18, 393 S.E.2d 362 (1990).

The victim was murdered in her own apartment. Porch gave several inconsistent statements, first denying he was present at the scene, then admitting he was at the scene but cut his hand cutting some object earlier before the murder, then admitting he was at the scene during the murder but alleged the husband killed the victim and cut his [Porch's] hand. The victim was stabbed on her right neck and over her right eye. Porch was left handed. The victim's husband was right handed. Porch confessed after being arrested and admitted in his ***multiple statements*** in California the victim's husband was not present when the victim was killed and it was he [Porch] who killed the victim, and **2 of these statements** were before questioning by Cohen. These written statements were admitted in evidence at Porch's trial. Porch signed each as true and correct. Justin testified at Porch's trial that he did not kill his wife and that Porch testified falsely in Justin's trials. Porch eventually admitted in his last statement it was he [Porch] who "came on" to the victim, she resisted, and he eventually killed her. This confession was on video and was admitted in evidence and played for the jury. Porch's blood was found on the right bottom of the victim's shirt. DNA consistent with Porch's DNA, and inconsistent with the husband's, was found under the victim's fingernails. Porch's blood was found in the victim's kitchen and under her sink. Porch admitted he attempted to clean up the blood before leaving the

crime scene and he got rid of the murder weapon. Porch's wife testified Porch was not with her during the time of the victim's murder; Porch lied to her about how he cut his hand; and, Porch then lied again to her and a police officer about how he cut his hand. Porch was not limited in his testimony. To the extent *he* [Porch] limited his testimony, it was to prevent proper reply or rebuttal evidence. And, Porch did not proffer what he would have testified to had the Court not informed him of the possible repercussions of going into earlier portions of the video. Anderson (proffer is to adequately allow the appellate court a chance to determine whether there was prejudice from trial court's ruling); Kelley (similar). Finally, since the entire 3rd interview was video-recorded, including the portion with Cohen, if Porch's claims of threats and coercion were true, Porch could have admitted the video to corroborate his claims; however, he did not. As stated, this claim is disingenuous, at best. Even if there was a Confrontation Clause violation, which there was not, it was harmless beyond any doubt. Van Arsdall; Dinkins; McDonald. Porch's conviction and sentence must be affirmed.

CONCLUSION

For the above stated reasons, Porch's conviction and sentence for the murder of Nakia Mallory must be affirmed.

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NOV 06 2017
S.C. SUPREME COURT

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This 6th day of November, 2017.

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Senior Assistant Attorney General

State of South Carolina

In the Supreme Court

RECEIVED
NOV 22 2017
S.C. SUPREME COURT

Appeal from Richland County
Court of General Sessions
The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2016-002146

THE STATE,

Respondent,

v.

JOSHUA WILLIAM PORCH,

Petitioner.

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ARGUMENT

Petitioner Joshua William Porch did not appeal his conviction as being contrary to the weight of the evidence. He instead appealed and sought certiorari on two legal issues. While the State's brief correctly identifies these two issues, (Resp. Br. at ii), the State sidesteps them, including unnecessary and repetitive references to facts and precedent that have no bearing on the outcome of this appeal. The State does so to divert this Court's attention from the errors of the courts below.

The State devotes much of its brief to a parade of horribles. It suggests that a mountain of inculpatory evidence serves as a basis for ignoring the legal errors committed by the courts below. (Resp. Br. at 22–23, 25–30). For example, the State notes six times, that Porch failed polygraph examinations regarding his statements to police and his testimony. The State knows that polygraph results are generally inadmissible. *See State v. McHoney*, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). So too is the State aware that these polygraph results were not admitted at trial. (App. at 42).

In a similarly misguided attempt to divert the Court's attention from the central issues, the State twice argues that neither a judge nor jury believed Porch's testimony that Justin Mallory killed the victim. (Resp. Br. at 25, 30). The State essentially asks the Court to discount Porch's legal arguments because it could not convict another individual. The State is quick to forget that its prosecutors *did* believe Porch's testimony—twice—though the State did not see this information as being important enough for the magistrate to consider when the officer sought Porch's arrest warrant.

The State's parade of horribles is an unnecessary distraction from the issues on appeal. The record establishes that (1) in its *Franks* determination, the trial court improperly concluded that probable cause existed by considering evidence not presented to the magistrate, and (2) the trial court improperly limited Porch's testimony by threatening him with a Confrontation Clause violation. These errors require reversal.

I. The State concedes the limited scope of review applicable under *Franks* but ignores the failure of the courts below to properly apply that narrow standard.

The State devotes roughly three paragraphs of its fifty-page brief to the central issue before the Court: whether during its *post hoc* probable cause review the trial court improperly considered evidence that the officer who applied for the arrest warrant did not present to the magistrate. The remaining portions of the State's brief that purport to address this issue confuse the proper scope and procedure under *Franks*. The State's argument fails in three respects: (1) the trial court did not clearly err by determining that a preliminary hearing was necessary, (2) the probable cause determination is limited to what was presented to the magistrate, not what the officer knew at the time of the warrant application, and (3) the invited error doctrine has no applicability to the trial court's probable cause determination.

A. The Court should review the trial court's grant of an evidentiary hearing for clear error, not *de novo* as the State suggests.

The State fails to address Porch's argument that this Court should review the trial court's decision to grant a *Franks* hearing for clear error. The State relies only on *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008), to argue that the review is *de novo*, (Resp. Br. at 20), but overlooks the fact that this Court has not yet established the proper

standard of review for this threshold determination. Despite the State's failure to address Porch's argument, the Court should take this opportunity to establish the proper standard of review of a trial court's determination of whether the facts proffered by a defendant necessitate a hearing under *Franks*.

Clear error is the appropriate standard of review for this inherently discretionary decision. A trial court's application of *Missouri*'s "reckless disregard" standard is a mixed question of law and fact. *See United States v. Brown*, 631 F.3d 638, 642 (3d Cir. 2011). Because determining whether to grant a *Franks* hearing involves a mixed question, "as a matter of the sound administration of justice," the trial court "is better positioned than [the appellate court] to decide" this threshold issue case by case. *Id.* at 642–43 (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Like the Third Circuit in *Brown*, this Court should follow the majority of circuits to have addressed this issue and conclude that clear error is the proper standard of review. Doing so would be consistent with this Court's precedent. *Cf. State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law.")

B. In arguing that probable cause existed, the State conflates what the officer knew with what he actually presented to the magistrate.

The State argues against itself on the question of whether the trial court improperly considered evidence not presented to the magistrate. Citing *State v. Driggers*, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996) and then *State v. Martin*, 347 S.C. 522, 556 S.E.2d 706 (Ct.

App. 2001), the State properly explains that "[t]he magistrate should determine probable cause based on all the information available to the magistrate at the time the warrant was issued. In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention." (Resp. Br. at 12). This standard is correct—the trial court's probable cause determination is limited only to the evidence that the officer actually presented to the magistrate. *Driggers*, 322 S.C. at 510, 473 S.E.2d at 59 (reviewing "information available to the magistrate at the time the warrant was issued.").

Later in its brief, though, the State attempts to expand the scope of review to include what the officer knew when the warrant was issued, despite not presenting that evidence to the magistrate. (Resp. Br. at 25-26, 28-30). This expansion of the probable cause review collapses the two phases of a *Franks* analysis into one. The first phase of that analysis requires a trial court to review evidence proffered by a defendant to determine whether a hearing is appropriate. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). With an omission, this necessarily requires the Court to review information known to the officer requesting the warrant, but which the officer did not present to the magistrate—that is the whole purpose of a *Franks* attack on a warrant that omits material information. *See State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). Once a hearing has been granted, though, the question before the trial court becomes whether probable cause existed based solely upon what the officer presented to the magistrate. *Driggers*, 322 S.C. at 510, 473 S.E.2d at 59. To determine whether probable cause existed in this second phase, the trial court includes the evidence recklessly omitted, but does not consider other inculpatory evidence if the officer did not present that evidence to the magistrate. *Id.*

The State justifies the trial court's expanded inquiry in two fleeting arguments. First, it argues that the officer and the magistrate both "testified at the *Franks* hearing that [the officer] told [the magistrate] other information than what was in the arrest warrant affidavit, such as background information on the case . . . ." (Resp. Br. at 16). The record does not support such a definitive reading. The record is instead silent on what information was presented outside of the affidavit. (App. at 72-73; 79-80; 95-97).

Second, the State again parades irrelevant evidence before the Court to try and establish that the officer believed he had probable cause. (Resp. Br. at 14-16, 25-26, 28-30). The State asserts that the trial court correctly determined probable cause existed because the officer who sought the warrant knew that Porch had made prior inconsistent statements, failed polygraph examinations, and was left-handed. (Resp. Br. at 30). The flaw in this argument is that it does not matter what the officer *knew*, but instead what he *presented* to the magistrate. *Driggers*, 322 S.C. at 510, 473 S.E.2d at 59. Nothing in the record confirms that the officer provided this information to the magistrate.

The State mistakenly relies on *State v. Baccus*, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006), to support this position, arguing that the affidavit contained sufficient probable cause because "[p]robable cause exists when the totality of the circumstances *within the officer's knowledge* 'are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested.'" (Resp. Br. at 24 (emphasis added)). *Baccus* is inapposite—it deals with the arrest of a suspect on-scene based on the officer's knowledge, not based on the officer first obtaining an arrest warrant. *Baccus*, 367 S.C. at 49, 625 S.E.2d at 220 ("We conclude [the arresting officer] had probable cause to make the

warrantless arrest based on the information he received from [the responding officer] and his own observations at [the susptect's] residence"). Such is not the case here. Instead, the focus is on what information the officer presented to the magistrate in the arrest warrant affidavit. The officer's knowledge is immaterial if he did not share it with the magistrate.

Because neither argument absolves the courts below from failing to limit the review to information actually presented to the magistrate, this Court should reverse.

C. The record does not support the State's invited error argument.

The State suggests that Porch invited the trial court's error by presenting a "Proposed Affidavit Excluding Misrepresentations and Including Exculpatory Evidence" to establish his entitlement to a *Franks* hearing. (Resp. Br. at 28 n.12; App. at 1261-62). The State misconstrues the record and again conflates the two phases of the *Franks* analysis.

The State notes twice that Porch mentioned his proposed affidavit to the trial court. (Resp. Br. at 18, 27). When adding the portion of the record not quoted by the State, it shows that the trial court was merely attempting to confirm the paper exhibits that Porch had presented prior to the *Franks* hearing. (App. at 43-45). After listing all the documents Porch presented, the Court asked, "Is there any—what about the remaining documents and all of the other information?" (App. at 45). Porch responded in part:

> We felt that if we'd met our burden for the hearing, once we got in the hearing, we think we could strongly contend that he left out a lot of stuff that he should have told Judge Newsom regarding the the affidavit; and then we'd make our argument that the whole thing should be suppressed.
>
> But - so we think a lot of that information would [come] out through Chief Wilson. But that -- that is all we had submitted at this time . . . which we felt was sufficient to get a hearing.

(App. at 43–45). Taking the excerpt quoted by the State in context, it is clear that the trial court was merely clarifying what documentation Porch had submitted to carry his burden of establishing entitlement to a *Franks* hearing. Porch was not hinging his entire argument on the proposed affidavit as the State would have the Court believe.

Regardless, introducing the proposed affidavit during the first phase of the *Franks* analysis does not affect the trial court's *post hoc* probable cause determination in phase two. Porch's introduction of the proposed affidavit was merely to satisfy his burden of showing that the officer recklessly omitted exculpatory facts from the warrant affidavit, making it materially misleading. This differs from Porch's argument that the trial court improperly considered testimony beyond what was presented to the magistrate when determining whether the affidavit established probable cause.

The State's argument is another distraction from the central issue in this case and should be rejected. This Court should reverse the courts below.

II. The Court should not be distracted by the State's attempts to overly complicate Porch's Confrontation Clause challenge.

A. Porch's argument has been consistent since first raised to the trial court.

The State argues that Porch did not object under the Confrontation Clause and that Porch has raised a new issue not presented to the Court of Appeals. (Resp. Br. 37–39). The State is wrong in both respects.

First, the State's assertion that "Porch did not object at any point under the Confrontation Clause" disregards the record before the Court. (Resp. Br. at 38 (emphasis omitted)). It even contradicts the State's own brief: "Even though the entire 3rd interview

was video-recorded on CD/DVD, and it contained Porch's responses to questioning . . . , Porch objected to admission of any of the 3rd interview on Confrontation Clause grounds . . . ." (Resp. Br. at 33 (emphasis omitted)). Even as the State concedes, Porch did object under the Confrontation Clause and *Crawford*. (App. at 147–48, 150–52, 210, 216, 221–22, 227–28, 975). Porch even explains that this Court has not yet resolved the issue of whether limited pretrial examination can satisfy the mandates of the Confrontation Clause:

> [The *Denno* hearing] was not a full cross-examination [of the California detective], your Honor. So I think that it is a *Crawford* violation. There aren't many cases on that whether you get a cross that is more limited and then you go in an actual trial—I can't find the information. Maybe this will be the case on that issue.

(App. at 151). The State cannot reasonably argue that Porch did not object under the Confrontation Clause given the State's own contradictory recitation of the record.

Porch also does not raise a new argument regarding the videotaped confession. (Resp. Br. at 37). As Porch explained to the trial court when raising his objection pretrial:

> Now because of [the California detective's absence], the defense is left in a position where we can't also present a complete and full defense because we cannot properly explain it. The only way for us to explain his position in that final hour is to introduce the six and a half hour interrogation or the polygraph, which we are not prepared to waive his right to [*Crawford*]."

(App. at 207).[1] This is consistent with Porch's explanation during trial, specifically referencing the final hour of the video: "[The State] sought to admit the final hour

[1] The Appendix actually reads "proffer," though this is likely a transcription mistake. Defense counsel previously argued that he was not ready to waive Porch's right of confrontation under *Crawford*. (App. at 206). Porch contends this is another such occasion.

interview with [the South Carolina investigators], and the whole discussion and the objection from the defense was, well, can you do this without [the California detective], number one? Is there a Crawford violation." (App. at 975). These objections are consistent with Porch's argument to the Court of Appeals. (App. at 1294–95, 1360–61).

The Court should reject the State's attempts to confuse the issue raised by Porch and instead address the merits of Porch's Confrontation Clause challenge.

B. The State improperly tries to justify the Court's violation of Porch's Confrontation Clause right by applying the hearsay rule.

The State attempts to negate Porch's confrontation clause challenge by asserting that compliance with the hearsay rule precludes a Confrontation Clause violation: "if the State had offered the video of this portion of the interview in reply it would not be hearsay . . . As a result, there was no Confrontation Clause violation." (Br. at 40; Br. at 42). Put another way, the State argues that a "statement introduced for any purpose other than to prove the truth of the matter asserted is not hearsay and does not violate the Confrontation Clause." (Resp. Br. at 43). By arguing that compliance with the hearsay rule insulates evidence from the Confrontation Clause, the State confirms that it misunderstands the precedent that has developed since *Crawford*. Courts have consistently rejected arguments similar to the State's contention that evidentiary rules can supplant a defendant's opportunity for adequate cross-examination. The State's argument must be rejected as inconsistent with the Confrontation Clause and precedent.

The State argues that "the questions asked by [the California detective] or even her statements are not hearsay and would not violate the Confrontation Clause," (Br. at 42).

To support this argument, the State claims that questions normally cannot be hearsay. (*Id*). But questions can be hearsay—the State recognizes this by citing this Court's recent opinion in *State v. Brewer*, 411 S.C. 401, 406-08, 768 S.E.2d 656, 658-60 (2015) (explaining police officers' interrogation questions may be hearsay). Failing that, the State also argues that the lack of a statement is not hearsay, citing to *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). (Resp. Br. at 43 ("The video would have been admissible in reply because it would have shown what was not said by [the California detective], i.e. no threats or coercion." (emphasis omitted))). First, *Price* does not stand for the proposition that the absence of a statement is not hearsay evidence; rather, the opinion simply restates the general definition of hearsay. *Price*, 368 S.C. at 499, 629 S.E.2d at 366. Second, the State's contention is wrong; the absence of a hearsay statement can still be hearsay. *See Smith v. Korn Indus., Inc.*, 274 S.C. 182, 183, 262 S.E.2d 27, 27-28 (1980).

Regardless of the State's misunderstanding of this evidentiary rule, whether a hearsay exclusion or exception applies is unimportant under the Confrontation Clause analysis. In *State v. Mitchell*, the trial court admitted the prior statement of a third-party under Rule 804(b)(3), SCRE, despite the witness refusing to testify, being held in contempt, and being removed from the courtroom prior to completing direct-examination. 378 S.C. 305, 312-13, 662 S.E.2d 493, 497-98 (Ct. App. 2008), *cert. dismissed*, 386 S.C. 597 (2010). Our Court of Appeals reversed, explaining that although the trial court found that the statement complied with the hearsay exception, the defendant "had no opportunity to cross-examine [the declarant] about the statement because [the

declarant] had already been removed from the courtroom when the State moved to admit it." *Id.* at 312, 662 S.E.2d at 497.

Like *Mitchell*, the State's citation of hearsay exemptions and exceptions does not insulate the evidence from the Confrontation Clause. Many of South Carolina's hearsay exceptions are rooted in perceived reliability. *Cf. State v. Hill*, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (explaining that basis of excited utterance hearsay exceptions is reliability—spontaneity has the effect of "reducing the likelihood of fabrication"). Whether testimony is sufficiently reliable to be admitted notwithstanding confrontation is the exact argument the United States Supreme Court rejected in *Crawford*: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" 541 U.S. 36, 61 (2004). Thus, the Court must look to whether Porch had an adequate opportunity for cross-examination, not whether the statements were being offered for the truth or whether the statements were reliable enough to fall under a hearsay exception. Accepting the State's invitation to leave "the regulation of out-of-court statements to the law of evidence" in criminal cases because doing so would "render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51.

The Court should reject the State's assertions that the trial court's improper limitation of Porch's testimony by threatening him with violating his Constitutional rights was permissible because the violation confirmed with the South Carolina hearsay rules. Because the admission of this evidence was not harmless, the Court should reverse.

CONCLUSION

The Court granted certiorari to review two legal issues wrongly decided by the courts below. Instead of addressing the merits of these issues, the State has put Porch on trial again, repeatedly referencing evidence and precedent that has no application to this appeal. The Court should look through the State's diversions to conclude that (1) under *Franks v. Delaware*, the trial court properly granted an evidentiary hearing but then improperly considered evidence not presented to the magistrate, and (2) under *Crawford v. Washington*, the trail court violated Porch's Confrontation Clause right—an error that he preserved and that was not harmless.

This Court should reverse on both issues.

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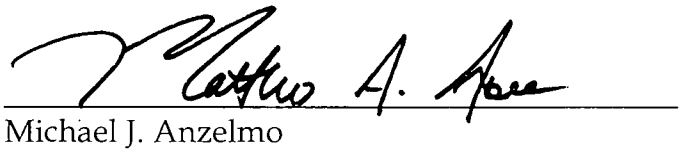
By: 

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November 22, 2017

State of South Carolina
In the Supreme Court

Appeal from Richland County
Court of General Sessions
The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2016-002146

THE STATE,

Respondent,

v.

JOSHUA WILLIAM PORCH,

Petitioner.

CERTIFICATE OF COUNSEL

Counsel certifies that Petitioner's Rely Brief complies with Rule 211(b), SCACR.

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November 22, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

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S.C. SUPREME COURT

Case No. 2011-GS-40-03359
Appellate Case No. 2016-002146

The State, ... Respondent,

v.

Joshua William Porch, ... Petitioner.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Joshua William Porch, Petitioner.

Appellate Case No. 2016-002146

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Alison Renee Lee, Trial Court Judge

Opinion No. 27809
Heard May 23, 2018 – Filed May 30, 2018

DISMISSED AS IMPROVIDENTLY GRANTED

Matthew A. Abee, William C. Wood Jr., Michael J. Anzelmo, and Caroline Delores Gimenez, all of Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert Michael Dudek, all of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Attorney General J. Anthony Mabry, Senior Assistant Attorney W. Edgar Salter III, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

PER CURIAM: We granted Joshua William Porch's petition for a writ of certiorari to review the court of appeals' decision to affirm his murder conviction. *See State v. Porch*, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

KITTREDGE, Acting Chief Justice, HEARN, FEW, JAMES, JJ., and Acting Justice James E. Lockemy, concur.

The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
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1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1080
FAX (803) 734-1499
www sccourts org

May 30, 2018

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Joshua W. Porch
Lower Court Case No. 2011GS4003359
Appellate Case No. 2016-002146

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Robert Michael Dudek, Esquire
Matthew A. Abee, Esquire
Daniel Edward Johnson, Esquire
Melody Jane Brown, Esquire
William C. Wood, Jr., Esquire
Caroline Dolores Gimenez, Esquire
W. Edgar Salter, III, Esquire

FORM 5

STATE OF SOUTH CAROLINA)
)
County of Richland)
)
Joshua William Porch 357979)
Full name and prison number (if any) of Applicant)
)
v.)
)
)
State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS

2018CP4004103

RICHLAND COUNTY FILED
2018 AUG -3 AM 11:56
JEANNETTE W. MCBRIDE C.C.P. G.S.

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution 990 McSacky Highway, Bishopville, S.C. 29010

2. Name and location of Court which imposed sentence Richland County Court of General Sessions 1701 Main St. Columbia, S.C. 29203

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2011-GS-40-03359 / Murder

   (b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) November 25, 2013 Sentenced to 50 years

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty N/A

(b) after a plea of not guilty I plead not guilty

(c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. The State of South Carolina in the Court of Appeals

ii. State of South Carolina in the Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed in the Court of Appeals

ii. Dismissed as Improvidently granted in the Supreme Court

iii. _____

(c) the date of each such result:

i. August 3, 2016 in the Court of Appeals

ii. May 30, 2018 in the Supreme Court

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Opinion NO: 5435 Court of Appeals

ii. Opinion No: 27809 Supreme Court

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Failure to Call Witnesses

(b) Due process (5th Amendment)

(c) Confrontation Clause (6th Amendment)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial Counsel failed to Call three witnesses that would have perjured investigato

(b) Trial counsel failed to ~~inform me of Indictment process and proceeding Indictme~~ properly move to quash the indictment in accordance

(c) Unreasonably failing to preserve the issue for direct review

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

~~Confrontation Clause~~ Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. Confrontation Clause

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. Direct Appeal and writ of Certiorari

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) First Collateral Attack

(b) first Collateral Attack

(c) N/A

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Jay Cooper, Columbia, Luke and Brian Shealey 2008 Lincoln Street Columbia S.C. 29201

ii. Arther Aiken Columbia

Michael Anzelmo and Matthew Abee 1320 Main Street/17th

iii. floor P.O. Box 11070 (29211-1070) Columbia, S.C. 29201

Robert Dudek S.C Commission on Indigent Defense P.O. Box 11589 Columbia, S.C 29211

(b) the proceedings at which each such attorney represented you:

i. Jay Cooper, Luke and Brian Shealey and Arther Aiken represented me during my trial.

ii. Michael Anzelmo, Matthew Abee, and Robert Dudek represented me during my direct Appeal and Certiorari

iii.

19. State clearly the relief you seek in filing this application:

~~Sentence Reversed~~ My conviction and sentence reversed and Vacated and Remand

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Richland)

I, Joshua W. Porch, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Joshua W. Porch

SWORN to and subscribed before me this 11 day of July, 2018

Angela Greene (L.S.)
Notary Public

My Commission Expires: 9-29-2027

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Joshua W. Porch, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Joshua W Porch
Applicant

SWORN or affirmed to and subscribed before me this
11 day of July, 2018

Aniqua Greene
Notary Public

My Commission Expires: 9-29-2021

(b) with S.C. Code Ann. § 17-19-90 (2003).

(d) Jurisdiction

(d) Trial Counsel failed to establish subject matter jurisdiction.

- Jurisdiction was not established on the record or at all
- According to § 14.9.120 Richland County doesnt have jurisdictio to hear, or try, Convict and Sentence murder charges.
-

General Statement

I believe I have additional claims for post conviction relief, but I do not yet have collateral counsel, access to the discovery process, or funds for expert services to investigate these claims.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Joshua William Porch, #357979, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-40-4103 **RETURN**

RICHLAND COUNTY
FILED
2018 NOV -8 PM 1:58
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

The State (Respondent), making its Return to the application for post-conviction relief (PCR) filed on August 3, 2018, would respectfully show this Court:

I. Procedural History

Joshua William Porch (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In January 2011, the Richland County Grand Jury indicted Applicant for murder (2011-GS-40-3359). Luke and Brian Shealey, Esquires, represented Applicant. Assistant Solicitors Cary Goings, Esquire, and Curtis Pauling, Esquire, prosecuted the case. On November 12, 2013, Applicant proceeded to trial before the Honorable Alison R. Lee. The jury found Applicant guilty as indicted. On November 25, 2013, Judge Lee sentenced Applicant to imprisonment for fifty years.

Applicant filed a timely notice of appeal. Michael Anzelmo, Esquire, and Matthew A. Abee, Esquire, perfected the appeal, raising the issues of whether the trial court erred in failing to void Applicant's arrest warrant under Franks v. Delaware[1] and whether Applicant's rights under the Confrontation Clause were violated when the trial court admitted only a portion of the

[1] 438 U.S. 154 (1978).

videotape of Applicant's interrogation because one officer was unavailable to appear at trial. After briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction on August 3, 2016. State v. Porch, Op. No. 2016-UP-5435 (S.C. Ct. App. filed August 3, 2016). Applicant then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The petition was granted by Order dated August 22, 2017. After briefing and oral argument, the South Carolina Supreme Court dismissed the writ as improvidently granted on May 30, 2018. The remittitur was returned to the circuit court on the same day.

Attached to this Return and incorporated by reference are the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. Summary of Facts Adduced at Trial

Nakia Mallory (Victim) was murdered in the early morning hours of May 14, 2006 in her home in Richland County. Her husband, Justin Mallory (Mallory), was initially charged with the murder and was tried twice resulting in a hung jury and then an acquittal.[2]

Subsequently, the Attorney General's Office took over the prosecution, and the investigation focused on Applicant, who had testified in Mallory's two trials claiming he was an eyewitness to the murder. Applicant testified he witnessed an altercation between Mallory and Victim, attempted to intervene and was injured, resulting his blood being found at the crime scene. The Attorney General's investigation ultimately determined Porch murdered Victim, and an arrest warrant for murder was obtained on July 7, 2009.

[2] Victim's husband was prosecuted by the Fifth Circuit Solicitor's Office.

Investigators with the Richland County Sheriff's Office traveled to California on July 8, 2009 and arrested Porch that night. Porch was interrogated on July 9, 2009, resulting in Porch providing a statement implicating himself in Victim's death, alleging it was an accident. Porch admitted Mallory was never present when Victim was killed.

Later that same day, the investigators questioned Porch again. In this statement, Porch claimed Victim "came on to him," he rejected her, and she got a knife. According to Applicant's statement, there was a struggle over the knife, and he hit her several times in the forehead.

Investigators questioned Porch again on July 10, 2009, and this interview was videotaped. In this statement, Porch made further incriminating statements implicating himself in Victim's murder. Porch admitted it was he who "came on" to Victim; she rejected him, and he killed her.

III. Allegations

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel, in that:
   a. "Trial counsel failed to call three witnesses that would have perjured investigator"
   b. "Trial counsel failed to properly move to quash the indictment in accordance unreasonably failing to preserve the issue for direct review"

Applicant is seeking for "my conviction and sentence reversed and vacated and remand".

IV. Response to Allegations of Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just

result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel for failure to call allegedly helpful defense witnesses probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. Motion to Dismiss Allegation Regarding Indictment

Respondent moves to dismiss Applicant's allegation trial counsel was ineffective for failing to properly move to quash in the indictment, thus rendering the issue unpreserved for

appellate review. The indictment is a notice document, and any challenges to its sufficiency "shall be taken by demurrer or on motion to quash... before the jury shall be sworn and not afterwards." S.C. Code § 17-19-20 (2003); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Further, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

In this case, the attached indictment clearly states the name of the victim, the crime charged, the date of the crime, and the manner of death. The indictment is also signed and stamped as true-billed. On its face, the indictment is clearly sufficient to give Applicant and his attorney notice of the allegation Applicant was required to answer, and Applicant has not articulated any meritorious basis for challenging the indictment. Accordingly, this allegation should be dismissed as a matter of law.

V. Procedure for Amendment of Application

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized

to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VI. Response to All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII. Request for Evidentiary Hearing

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claim of ineffective assistance of trial counsel for failure to call allegedly helpful defense witnesses.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LINDSEY MCCALLISTER
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

_____, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2018-CP-40-4103
	)	
JOSHUA PORCH, #357979	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

RICHLAND COUNTY
FILED
2018 NOV -8 PM 1:58
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Lir Patrick Derieg
1924 Barnwell St
Columbia, South Carolina 29201

DATED this the 6th day of November, 2018.

Carmen A. Nord, Legal Assistant
For Respondent

The State Of South Carolina

Richland County Courthouse

Joshua Porch.

Applicant.

vs.

State Of South Carolina.

Respondent.

Court Of Common Pleas

Fifth Judicial Circuit

Motion To Amend Post Conviction Application

#

South Carolina Civil Procedure Rule 15(a)

RICHLAND COUNTY
FILED
2020 DEC 23 AM 10:24
JEANNETTE W. McBRIDE
C.C.P. & G.S.

Honorable Court:

Please Take Notice. that applicant by and through counsel files this motion to amend application as follows:

I. Ineffective Assistance Of Counsel

A) Failure To Object:

(1) Counsel failed to have Juror dismissed after she revealed family member was arrested and falsely accused. counsel did not object to trial court ruling which did not find if Juror failure to do so was intentional.

(2) Counsel failed to object when another doctor was allowed to testify, and he was not the one who conducted forensic test of victim. Counsel failure to do so violated applicant right to confrontation.

(3) Counsel failed to object to Prosecution, Putting my credibility on trial. When the Police on numerous occassions during direct/cross referred to me as a liar.

(4) Counsel failed to object to Prosecutions closing remarks, which attacked my credibility.

(5) Counsel failed to object to Judge charge to Jury

(6) Counsel failed to Present thied Party Built defense

2. Probable Cause Determination

A) Arrest Warrants

1) Counsel failed to challenge arrest warrants under Beck v. Ohio, when warrant do not establish Probable cause to arrest.

2) Counsel failed to challenge warrants that were not signed by magistrate until two days later. South Carolina Code Ann. Sec. 22-5-190 (Cum. Supp. 19)

3) Counsel failed to request charge of unlawful arrest. State v. Swilling 249 S.C. 541 (1967) since counsel alleged confession was inadmissible being obtained in violation of Miranda

4) Counsel did not object to court Jurisdiction. when arrest warrants violate Section 22-5-710; Section 22-3-540. Barly v. State. 397 S.C. 290 (2012) State v. Ballington, 346 S.C. 262 (2001)

3. Separation Of Powers

A) Appointment Of Counsel

Executive order Giving Attorney General Power to order appointment of counsel violates our Process, Separation of Powers.

B) Controlling Docket:

For the same reasons this court in Lunsford v. State, ruled Solicitors violate Separation of Powers by controlling General Sessions docket. The same can be said when Attorney General controls Pcr/dockets.

c) Waiting Final Orders:

The Attorney General must be Precluded from waiting my final order because this violates Separation of Powers, and this office has been involved in my case from trial, direct appeal, and now Post conviction.

D) Inadequate / Ineffective Collateral Proceedings:

A conflict has arisen when attorney who Prosecuted case was appointed as counsel in Pcr to represent me, and it took counsel two Years to make this determination and this delay taints entire adversarial Process

Wherefore, it is Prayed court Grant leave to amend.

Date: 16 day of December, 2020.

Respectfully Submitted:

s/ Joshua Porch

Joshua Porch / Pro Se

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
JOSHUA PORCH,	)	**CASE NO.: 2018-CP-40-4103**
	)	
Applicant,	)	
	)	
v.	)	**AMENDMENT TO APPLICATION**
	)	**FOR POST CONVICTION RELIEF**
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

2021 JAN 21 PM 3:0
CLERK OF COURT
RICHLAND COUNTY
FILED

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief. This amended complaint adopts and includes all grounds in the original application filed August 3, 2018, by Applicant. Applicant further alleges as additional grounds regarding his claim of ineffective assistance of counsel as to Arthur Aiken, Luke Shealey and Brian Shealey, Michael Anzelmo and Matthew A.Abee as follows:

1. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to properly review the evidence with applicant and prepare him for trial.

2. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to speculation, opinion testimony and evidence of other crimes from Justin Mallory, "It looked like someone raped and killed her" (p. 148, Lines 19-20).

3. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to call Officer Cohen as a witness to question regarding applicants interrogation and failed to present the full interrogation to the jury to argue that applicants statements were involuntary.

4. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to conduct a complete cross examination of Officer Cohen at a previous hearing. (p188, Lines 7-13).

5. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to States Ex 6 and 7 (report and 911 calls), (p326, 327).

6. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to leading question "is that the safeguard to show that the evidence isn't tampered with?" (p342, Lines 2-3).

7. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to photos of victims injuries as prejudicial, States Ex. 18,19,22,23.(p 365).

8. Appellate counsel Michael Anzelmo and Matthew A.Abee failed to Appeal courts ruling regarding applicants consent form regarding DNA Buccal Swab collection Ex 28. (P. 377).

9. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to Buccal Swab States Ex 29 (p380) and photos of blood States Ex12,13 (p. 401) and States Ex 10,17,20 (p. 405) as prejudicial and cumulative.

10. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to leading questions regarding crime scene photos States EX 24,25 (P.396, lines 15-20).

11. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to object to a leading question "and so from time to time you can in a kitchen have a false positive on a LCD, can't you?" (p. 416, Lines. 5-6).

12. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to leading questions regarding applicants Buccal swab States Ex 59, "obviously this case was opened prior to that ? Correct? " (p 452 lines18-19), "when you receive a new item of evidence its just assigned the next number in line ?" (Lines. 21-22).

13. Appellate counsel Michael Anzelmo and Matthew A.Abee failed to appeal ruling regarding admission of photo of bloody shirt (states EX 36) court said it may be cumulative. (p502, Line 9).

14. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to testimony regarding DNA of applicant as "included" in comparison to DNA taken from victims fingernails. (P 527, Lines 16-25).

15. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to leading question from the state regarding DNA, "so that means that that DNA could have been Joshua Porch's DNA ?" (P.528, lines 10-11).

16. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to testimony regarding DNA evidence from the crime scene matching applicant (p531) and from victims clothing (p541, Lines 16-24).

17. Appellate Michael Anzelmo and Matthew A.Abee failed to appeal court allowing leading questions regarding DNA evidence from Inv. Barron (p. 544).

18. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to leading question and hearsay testimony by the witness Hargraves, "it was a cry for help? Yes, he was saying help, help" (p631, lines 19-20).

19. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to leading questions to Persia Porch "so the first time law enforcement approached Mr. porch, he didn't volunteer any information ?" (p655 lines 18-21).

20. Appellate counsel Michael Anzelmo and Matthew A.Abee to appeal courts decision to allow in portion of applicants interrogation by law enforcement regarding allegation that applicant was gay or abused as a child despite defense objection under Rule 404 (p.814 line 17).

21. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to expert opinion testimony from Inv. Holdorff regarding cellular phone information and tracking for Mr. Mallorys phone records even though he was not qualified as a digital forensic examiner and cellular analyst (P 927 lines 1-7, p 932, Lines 13-17, p 934, lines 5-8).

22. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to leading question from solicitor to Inv. Holdorf regarding Justin Mallory's cell phone information and tracking "he could have arrived a couple minutes after 3:30, the time you put him at and testified to ?" (P 934 lines 5-7).

23. Appellate counsel Michael Anzelmo and Matthew A.Abee failed to appeal courts ruling on video of applicants interrogation as admissible despite visible polygraph machine in video. (P.1054).

24. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to applicants statement to Inv. McDaniels during interrogation in California in answer to the question "did you lie about Justin Mallory being there when Nakia was stabbed ?" stating "he looked up, and he said he was not there" (p 1072 lines 4-9) and to evidence of other crimes regarding perjury when Inv. McDaniels asked applicant "why did you stand up in court and lie?" (p1074, Lines 3-4).

25. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to States Ex 50 regarding a portion of a video recorded statement by applicant discussing

use of illegal drugs that was then published to the jury. (P. 1107, lines 10-12) and counsel Luke Shealey stated that this evidence was "clearly prejudicial" (p.1130).

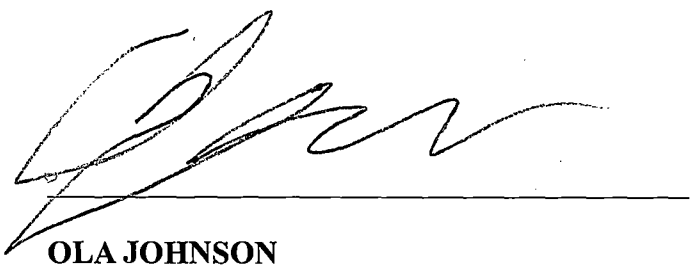
26. Appellate counsel Michael Anzelmo and Matthew A.Abee failed to appeal the courts denial of a motion for mistrial (p1130) following defense motion based on the introduction of States Ex 50.

27. Applicants counsel Arthur Aiken, Luke Shealey and Brian Shealey failed to object to testimony from Sgt. Godfrey regarding applicants statements about fighting with victim. (p1360, lines 3-9).

28. Appellate counsel Michael Anzelmo and Matthew A.Abee failed to appeal the courts ruling to prohibit the testimony of Andelyn Rodriguez as 3rd party guilt involving witnessing previous assaults by Mr. Mallory choking the victim. (P.1497, lines 1-2).

29. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See* Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



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This 18 day of March, 2022

State of South Carolina) Court of Common Pleas
County of Richland) Fifth Judicial Circuit

Joshua Porch,) Transcript of Record
)
Plaintiff/Applicant,) 2018-CP-40-4103
)
vs.)
)
State of South Carolina,)
)
Defendant.)

May 27, 2022
Columbia, South Carolina

B E F O R E:

The Honorable George M. McFaddin, Jr., Judge

A P P E A R A N C E S:

Ola A. Johnson, Esquire
On behalf of the Plaintiff/Applicant

David A. Spencer, Assistant Attorney General
Russ Barlow, II, Assistant Attorney General
On behalf of the State

Stacy S. Johnson, RPR
Circuit Court Reporter

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NO.	DESCRIPTION	ID.	EVD.

NO EXHIBITS WERE INTRODUCED

(The following proceedings were held May 27, 2022, beginning at 9:33 AM.)

BAILIFF: Remain seated and come to order.

THE COURT: Thank you very much.

MR. JOHNSON: I think we're ready to go, Judge.

THE COURT: All right, sir. One of you read it in and we'll go.

MR. SPENCER: Thank you, Your Honor.

This is 2018-CP-40-4103. This is a Joshua Porch versus South Carolina. Mr. Porch is represented today by Mr. Ola Johnson. My name is Dave Spencer with the South Carolina Attorney General's Office.

Your Honor, just to give you a little procedural background on this, Mr. Porch is currently confined serving a 50-year sentence for murder. He was indicted in January of 2011 for murder. He was represented by Luke and Brian Shealey and also Mr. Arthur Aiken.

This is actually a prosecution that was -- our office prosecuted this case. It was Mr. Goings, Mr. Pauling and -- I'm drawing a blank -- Mr. Underwood, excuse me, that prosecuted the case.

November 12, 2013, Applicant was tried before Judge Lee. He was found guilty as charged obviously. He appealed his conviction and sentence and he was represented on appeal by several attorneys, including

Michael Anzelmo, Matthew Abee. There's one other who I can't recollect right now. That didn't seem to make our return. And it was a part of the pool project, so Mr. Dudek was also listed as counsel.

The Court of Appeals after oral argument issued a published opinion affirming the conviction and sentence. They then petitioned the Supreme Court, who granted cert, and following briefing and oral argument they dismissed the writ as improperly granted on May 30th of 2018, and that's the same day the remittitur was issued.

Mr. Johnson has completed -- has an amended application that he provided me. I understand he's going to add a single issue to that, which I would anticipate not objecting to, and with that I would just want to make sure there's no further allegations beyond that.

THE COURT: Mr. Johnson.

MR. JOHNSON: Thank you, Your Honor.

I put in my application that I was about to include all of the allegations in the original PCR application as well, but I will put on the record in the back there it seems to list an issue about subject matter jurisdiction. We're not proceeding on that one, so I wanted to make that clear.

THE COURT: Okay.

MR. JOHNSON: And the issue that -- my client, he

had added this and filed something December 23, 2020, and I believe that was after I had been appointed, but he had filed this so it included an allegation that trial counsel failed to object when another doctor was allowed to testify and he was not the one who conducted the forensic test of the victim. Counsel's failure to do so violated Applicant's right to confrontation, and I believe that's referring to Dr. Bradley Marcus, so I'm adding that issue and going forward in addition to the other issues on the application. I'm adding that one in and publishing it at this time.

THE COURT: All right, sir.

MR. SPENCER: And I don't have any objection to that amendment.

THE COURT: Okay.

MR. JOHNSON: All right. We're ready to go forward.

THE COURT: All right, Mr. Johnson.

MR. JOHNSON: I call Mr. Porch to testify.

(Whereupon, Joshua W. Porch was duly sworn by the Court.)

THE COURT: All right.

JOSHUA W. PORCH,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Mr. Porch, during the trial of the case with the attorneys, were you represented by Mr. Arthur Aiken, Luke Shealey and Brian Shealey at trial?
A. Yes, sir.
Q. And your appellate attorneys were Michael Anzelmo and Matthew Abee?
A. Yes, sir.
Q. Okay. And could you explain to me whether or not they properly reviewed the evidence with you and prepared you for trial?
A. You're asking me if they did?
Q. Did they?
A. No.
Q. Tell me about that.
A. I spent about four and a half years, four years and four months in the county jail. Not once was I allowed to go to the law library. We had a couple of discussions, but as far as being properly prepared for trial, I really don't know what the hell was going on at the time.
Q. Okay. In addition to not having access to the law library, did these attorneys come talk to you and prepare you for this trial?
A. A saw some of them a couple of times during that period of time, but there wasn't much information being exchanged. Most of the time I'm actually rushing to try

and figure out if there was something I'd be able to do if they'd just tell me, if there's any case law that I wanted to look up, I could tell them, but I don't -- I was never allowed to go anywhere.

Q. Did they ever send a private investigator to come talk to you to work on your case?

A. Not in person, no.

Q. Did they ever sit down and review audio and video recordings from your evidence with you?

A. Not that I recall, no.

Q. Okay. Did they ever provide you with copies of discovery?

A. No. I've yet to get discovery.

Q. Okay. And is there anything else that you feel like they should have done in trial preparation?

A. There's quite a few things in hindsight that I would have done differently.

Q. Okay. Well, did you get to have a conference with all these attorneys? Did all three of these attorneys come see you to talk about that or was there any that didn't come at all?

A. Do you mean together or single?

Q. At any time. Did Arthur Aiken come see you? I'll ask you specifically.

A. Yes.

Q. How many times?
A. Twice that I can recall.
Q. Twice?
A. Yes.
Q. At the Department of -- or at county jail?
A. County jail.
Q. Okay. He came and saw you two times in the county jail. Is that it?
A. That I can recall, yes, sir.
Q. Okay. What about Luke Shealey?
A. Yes.
Q. How many times did he come see you?
A. I'm trying to think. Maybe three. Three, four times that I remember specifically.
Q. Okay. And how about Brian Shealey?
A. About the same.
Q. About the same. Okay. And to your knowledge, did they sit down and talk to your family members to try to learn anything about you to prepare for the trial?
A. Maybe during a phone call because I don't have any family out here.
Q. Okay. Did they ever contact family out in California?
A. I believe they spoke to my mother a couple of times, yes.
Q. Okay. And moving on to the trial of the case, during

the trial of the case on -- listing from page 148, lines 19 through 20, did these attorneys explain to you why they failed to object to speculation opinion testimony based on evidence of other crimes from Justin Mallory, as he stated, it looked like someone raped and killed her, even though you were not on trial or no one was on trial for rape, correct?

A. That's correct.

Q. So when that statement was made and -- did these attorneys ever explain to you why they failed to object to that?

A. Not that I can recall.

Q. Okay. And when these three attorneys failed to call Officer Cohen as an witness to question regarding Applicant's interrogation, your interrogation, and failed to present the full interrogation to the jury arguing Applicant's statements were involuntary, did they ever explain to you why they failed to do that?

A. Not to me. I believe it was so the judge could give an explanation; that had they had an inability to further question her during trial.

Q. Okay. Did they ever -- did they ever sit down and talk to you about that?

A. No, not that I recall.

Q. Okay. And with my third allegation here, did they

ever explain why they failed to present the full interrogation to the jury to argue Applicant's statements were involuntary? Did they ever explain that?

A. No.

Q. Okay. And the Number 4 allegation, did they explain why they failed to conduct a complete cross-examination of Officer Cohen at a previous hearing? That's on page 188 of the transcript. Did they explain that?

A. No.

Q. And Allegation -- the amendment here to Allegation Number 5, when they failed to object to State's Exhibit 6 and 7, the report of the 9-1-1 calls. This is on page 326 and 327 of the transcript. Did they explain to you why they failed to object to that?

A. No.

Q. Okay. Moving onto Number 6. When these attorneys failed to object to the leading question, quote, is that the safeguard to show the evidence isn't tampered with, page 342, line 2 to 3, did this explain that and why they failed to do that?

A. No, not that I recall.

Q. Okay. And Number 7, when the attorneys failed to object to photos of victim's juries as prejudicial, State's Exhibit 18, 19, 22, 23, listed on page 365 of the transcript, did they explain to you why they failed to do

that?
A. No.
Q. When these attorneys or -- or, excuse me, appellate counsel, Michael Anzelmo and Matthew Abee, failed to appeal the Court's ruling regarding Applicant's consent form regarding a DNA buccal swab collection, Exhibit 28, page 377 of the transcript, did they explain to you why they failed or why that -- give an explanation why there was no appeal regarding that issue?
A. No.
Q. And, Number 9, did the attorneys --
MR. SPENCER: Your Honor, if could we back up to 9?
THE COURT: Please.
MR. SPENCER: I'm trying to understand now what was -- why should it have been objected to I guess is my question? Just to understand that allegation.
THE COURT: Sir?
MR. JOHNSON: Excuse me, where are we at?
MR. SPENCER: 8 -- 9. Buccal swab.
MR. JOHNSON: That was on 8. DNA buccal swab collection.
MR. SPENCER: Oh, okay.
MR. JOHNSON: Well, Your Honor, if it's evidence against him and it's --
THE COURT: What was your --

MR. JOHNSON: Its collection and this consent form they're bringing in --

THE COURT: Hold on. I'm trying to -- your objection was because he didn't go by each item here, sir, or what?

MR. SPENCER: I'm just kind of looking for -- I mean, should I have to brief this -- submit a proposed order, I would, you know, kind of need to know what legal theory they're advancing to know why -- to be able to address it and additionally to understand their case. I mean, they're just saying should have objected, but not stating the legal theory and kind of expounding.

MR. JOHNSON: Okay. To try to explain it, to fail to appeal the Court's ruling because they allowed in this consent form regarding DNA buccal swab collection is my understanding. So if they're allowing that in --

THE COURT: You're talking about the trial lawyer?

MR. JOHNSON: -- over objection, then you can appeal that.

THE COURT: You're talking about the appellate lawyers?

MR. JOHNSON: Yeah, Mr. Michael Anzelmo and Matthew Abee were the appellate attorneys.

THE COURT: Isn't that his burden to tell us why -- why he doesn't like it?

MR. JOHNSON: Well, yes, sir, and I'm asking him did you ever receive an explanation as to why that wasn't done.

THE COURT: Well, that's my point. You know, if you wanted to go -- give reasons, ask him, I guess.

MR. SPENCER: I know. Just it would make it a little easier, but I think if I recall -- now I think if I recall that was like supposed to be a hearsay objection. Is that -- that was the objection?

MR. JOHNSON: Well, this particular objection on the consent -- yeah, I think there was a basis for that, but it was denied, so since that was allowed in and it could have been appealed, and I'm just asking did he ever receive any information from the appellate attorneys why they didn't appeal it.

MR. SPENCER: Okay.

THE COURT: And you want to know exactly what?

MR. SPENCER: I was wanting to know -- but now, you know, I -- and I kind of got myself a little mixed up to be honest. I think we're good to go forward.

THE COURT: Okay. Good. That's fine. Thank you-all.

Proceed, sir.

MR. JOHNSON: Okay.

BY MR. JOHNSON:

Q. So you never got an explanation from the appellate attorneys about that?
A. No.
Q. Okay. And the -- moving on, this question is about Exhibit 29. This is under Number 9 of my allegations. Trial attorneys failed to object to buccal swab, 29, page 380 of the transcript, and photos of blood, State's Exhibit 12 and 13, page 401, and State's 10, 17 and 20 on page 405, as prejudicial or cumulative.

Did they ever explain to you why they failed to make those objections?
A. No.
Q. Okay. And on Number 10 of my allegations here, the trial attorneys, Mr. Aiken, Shealey and Shealey, did they explain to you why they failed to object to a leading question regarding crime scene photos, State's Exhibit 24 and 25, on page 396, lines 15 through 20? Did they ever discuss that with you?
A. No.
Q. Okay. And your trial attorneys, you know, failed to object to the leading question, quote, and so from time to time you can in a kitchen have a false-positive on LCD, can't you? Page 416, line 5 through 6.

Did you ever receive an explanation as to why that leading question was not objected to?

A. No, not that I remember.
Q. Okay. And Number 12, that trial attorneys failed to object to leading questions regarding Applicant's buccal swab, State's Exhibit 59; quote, obviously this case was open prior to that, correct? Page 452, lines 18 through 19. Quote, when you receive a new item of evidence, it's just reassigned -- it's just assigned the next number in line. Lines 21 through 23.

Did they ever discuss that with you?

A. No.
Q. And Number 13, appellate counsel, Mr. Michael Anzelmo and Matthew Abee, failed to appeal a ruling regarding the admission of a photo of a bloody shirt, State's Exhibit 36. The Court said may be cumulative. Page 502, line 9.

So do you have any explanation from appellate attorneys why they failed to address that on the appeal?

A. I do not.
Q. Number 14, Applicant's counsel, Mr. Aiken and Mr. Shealey and Mr. Shealey, failed to object to testimony regarding DNA of Applicant as included in comparison to DNA taken from victim's fingernails. Page 527, lines 16 through 25.

Did you ever have a discussion or an answer from them as to why they failed to object to that testimony?

A. No, sir.

Q. Number 15. Trial attorneys failed to object to leading question from the State regarding DNA. Quote: So that means that the DNA could have been Joshua Porch's DNA. Page 528, lines 10 through 11.

Did you ever have an explanation from them about that?

A. No.

Q. Okay. Number 16. Applicant's counsel, Mr. Aiken and Mr. Shealey and Mr. Shealey, failed to object to testimony regarding DNA evidence from the crime scene matching the Applicant, page 531, and from victim's clothing, page 541, lines 16 through 24.

Did they explain that to you?

A. No.

Q. Number 17. Appellate counsel Michael Anzelmo and Matthew Abee failed to appeal the Court allowing leading questions regarding DNA evidence from Investigator Barron, page 544.

Did they ever explain that to you?

A. No.

Q. Number 18. Trial counsel failed to object to a leading question and hearsay testimony by the witness Hargraves. Quote: It was a cry for help? Yes, he was saying help, help. Page 631 lines 19 through 20.

Did you ever receive any explanation about that?

A. No.

Q. Okay. Number 19. Applicant's counsel, Mr. Aiken and Mr. Shealey and Mr. Shealey, failed to object to leading questions to Persia Porch. Quote: So the first time law enforcement approached Mr. Porch, he didn't volunteer any information. Page 655, lines 18 through 21.

Did they explain that to you?

A. No, they did not.

Q. Number 20. Appellate counsel, Michael Anzelmo and Matthew Abee, failed to appeal the Court's decision to allow a portion of Applicant's interrogation by law enforcement regarding allegations that Applicant was gay or abused as a child despite defense objection under Rule 404. Page 814, line 17.

Did you receive an explanation about that?

A. I did not.

Q. All right. Page 21. Trial counsel, Mr. Aiken and Mr. Shealey and Mr. Shealey, failed to object to expert opinion testimony from Investigator Holdorf regarding cellular phone information and tracking for Mr. Mallory's phone records even though he was not qualified as a digital forensic examiner and cellular analyst. Page 927, lines 1 through 7; Page 932 lines 13 through 17; and page 934, lines 5 through 8.

Did you ever receive an explanation why they failed to do that?

A. No.
Q. All right. Number 22. Applicant's counsel, Art Aiken, Luke Shealey and Brian Shealey, failed to object to leading question of solicitor to Investigator Holdorf regarding Justin Mallory's cell phone information and tracking. Quote: He could have arrived a couple of minutes after 3:30, the time you put him at and testified to. Page 934, lines 5 through 7.

Did you ever have any discussion with them about that?

A. No.
Q. Page -- or Number 23. Appellate counsel, Michael Anzelmo and Matthew Abee, failed to appeal the Court's ruling on video of Applicant's interrogation as admissible despite visible polygraph machine in the video. Page 1054.

Did they discuss that with you?

A. No.
Q. Okay. Number 24. Applicant's counsel, Mr. Aiken and Mr. Shealey and Mr. Shealey, failed to object to Applicant's statement to Investigator McDaniels during interrogation in California in answer to the question, Quote: Did you lie about Justin Mallory being there when Nekia was stabbed? Stating he looked up and he said he was not there. Page 1072, lines 4 through 9. And to evidence of other crimes regarding perjury when Investigator McDaniels asked Applicant "Why did you stand up in Court

and lie?" Page 1074, lines 3 through 4.

Did they ever explain that to you?

A. No.

Q. Okay. Number 25. Applicant's counsel, Art Aiken, Luke Shealey and Brian Shealey, failed to object to State's Exhibit 50 regarding the portion of a video-recorded statement by Applicant discussing use of illegal drugs that was then published to the jury. Page 1107, lines 10 through 12. And counsel Luke Shealey stated this evidence was, quote, clearly prejudicial. Page 1130.

Did they ever explain that to you?

A. No, sir.

Q. And Number 26. Appellate counsel, Michael Anzelmo and Matthew Abee, failed to appeal the Court's denial of a motion for mistrial, page 1130, following defense motion based on the introduction of State's Exhibit 50.

Did they explain that to you?

A. No.

Q. Number 27. Applicant's counsel, Arthur Aiken, Luke Shealey and Brian Shealey, failed to object to testimony from Sergeant Godfrey regarding Applicant's statements about fighting with victim. Page 1360, lines 3 through 9.

Did they discuss that with you?

A. No, sir.

Q. Number 28. Appellate counsel, Michael Anzelmo and Matthew Abee, failed to appeal the Court's ruling to prohibit the testimony of Andelyn Rodriguez as third-party guilt involving witnessing previous assaults by Mr. Mallory choking the victim. Page 1497, lines 1 through 2?

Did they discuss that with you?

A. No.

Q. Okay. And when Dr. Marcus, Bradley Marcus, testified and read the report of another pathologist who had passed away, in other words, not that doctor's report, but was allowed to do that and they failed to object to that on the basis, of course, that they were not calling the original doctor to be confronted, he had passed away, but did they make any -- ever give you any information as to you why they failed to object to that to prevent that?

A. No.

Q. Okay.

MR. JOHNSON: Your Honor, just one moment, please.

THE COURT: Yes, sir.

BY MR. JOHNSON:

Q. Now in your original application, did you ever receive any explanation from them about why they failed to move to quash the indictments in your case?

A. No.

Q. Okay. Did you feel that should have been done?

A. Yes.

MR. JOHNSON: Thank you, Your Honor that's all I have.

THE COURT: Cross, sir?

MR. SPENCER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SPENCER:

Q. All right. I'm gonna skip ahead to your fifth allegation. Why is it you feel your counsel should have objected to the 9-1-1 calls?

A. I thought it would be prejudicial. I don't see the reason for including 9-1-1 calls that had nothing to do with me.

Q. You're talking about the 9-1-1 call where Mr. Mallory calls 9-1-1 to report that his wife has been stabbed and is bleeding?

A. Yes.

Q. Okay. And you mentioned you wanted to go to the law library. That's not something that's within the -- your defense attorney's control, is it?

A. You said is it something within their control?

Q. Yeah.

A. I don't know.

Q. Okay. That's up to corrections, isn't it? Or, excuse me, the county jail, right?

A. You'd have to ask them. I'm not positive.
Q. Did you ask them to go to the law library?
A. Several times.
Q. Okay. And they said no?
A. Yes.
Q. All right. Do you have any legal training?
A. No.
Q. But you don't have a specific reason why they should have objected to the 9-1-1 call except that it was bad for your case?
A. I wouldn't know how to phrase it in any type of legal jargon, but I don't see how that was -- I don't see how that would be relevant to the case.
Q. Okay. So you just feel it wasn't relevant, the 9-1-1 call reporting the victim dead or the victim had been stabbed?
A. Correct.
Q. Okay. Got you. All right. Regarding --
I beg the Court's indulgence.
THE COURT: Yes, sir.
BY MR. SPENCER:
Q. Okay. Regarding the question on page 342, this is your allegation Number 6, the question that you feel should have been objected to, "Is that the safeguard to show that the evidence -- that evidence isn't tampered with?", and

the answer was "It is, yes".

If I didn't say it, that was on 342 lines, 2 through 4.

Why was your trial attorney supposed to object to that?

A. To which part exactly?

Q. Well, this is your allegation. Why was the defense attorney supposed to object to that question?

A. Could you repeat the question?

Q. Oh, sure. So the allegation is counsel should have -- failed to object to this question. Is it -- excuse me. Let me restart. Should have objected to this question, "Is that the safeguard to show that the evidence isn't tampered with?" And the answer to that question was: "It is, yes". And my question to you is why should have trial counsel objected to that question?

A. I don't know.

Q. Okay. So why was that prejudicial to your case?

A. You're saying how was it prejudicial to my case?

Q. Yes. How was it prejudicial to your case?

A. That's not an issue I brought up, so I can't actually speak on it.

Q. Okay. And why was counsel supposed to object to the buccal swab?

A. You said buccal swab?

Q. And what's that?
A. You said the buccal swab?
Q. Yes. Why was counsel supposed to object to that?
A. You're talking about obtaining my DNA --
Q. Right.
A. -- without my consent? Is that what you're asking?
Q. Right. You contend it was without your consent?
A. I'm asking you a question. I'm trying to get clarification.

THE COURT: No, sir. Hold on. Stop. Stop. Stop, please.

MR. SPENCER: I'm --

THE COURT: Hold on.

When you sit in that chair, you don't get to ask questions, okay, sir?

THE WITNESS: Yes, sir.

THE COURT: You have to answer those questions, all right, sir?

THE WITNESS: Yes, sir.

THE COURT: I appreciate it very much.

Proceed.

MR. SPENCER: Thank you, Your Honor.

BY MR. SPENCER:
Q. So I guess let's back up. You're saying you didn't give the buccal swab -- you didn't give consent to give the

swab?
A. No, I'm not saying that.
Q. Okay. So why should trial counsel have objected to the buccal swab being admitted into evidence?
A. I can't give you a reason off the top of my head.
Q. Okay. I want to ask you about page 416, lines 5 through 6, and this was Allegation Number 11.
And the question was: And so from time to time you can in a kitchen have a false-positive on an LCD, can't you? And the answer was: Sometimes the LCD will react with the other proteins. For example, some of the things he said, especially like chocolate milk.
Now could you tell me why that was prejudicial to your case?
A. Could you repeat it one more time, please?
Q. Sure. The question that -- your allegation is this should have been objected -- or this should have been objected to. "And so from time to time you can in a kitchen have a false-positive on an LCD, can't you?" And the answer to that question, "Sometimes the LCD will react with the other proteins. For example, some of the things that you said, especially like chocolate milk".
And my question to you is why do you feel that was prejudicial to your case?
A. For them not to object to that? I'm just trying to

get clarification.
Q. Why did that hurt your case? Why was that bad for your case? How did that result in an unfair trial?
A. This isn't an issue that I actually brought up, so I can't --
Q. Okay. So you wouldn't realize that that was actually a question asked by Mr. Aiken and not the prosecution?
A. Did you say do I understand that was a question asked by the prosecution and not Mr. Aiken?
Q. If I was to tell you that Mr. Aiken had asked that question, would you have any reason to disagree with me?
A. No.
Q. Skipping down to allegation Number 14 and that's where the DNA expert testified that your DNA couldn't be excluded as the contributor to the DNA found under the victim's fingernails. Do you know why counsel was supposed to object to that?
A. To my DNA not being excluded?
Q. Right.
A. No.
Q. How about testimony that the DNA evidence found at the scene matched you? Is there any reason counsel should have objected to that?
A. You say the DNA evidence matched me at the scene of the crime should have been a reason why they objected to

that?
Q. Right. Why should they have objected to that?
A. To my DNA being at the scene of the crime?
Q. Uh-huh.
A. No, I don't see any reason why.
Q. Then -- and then the neighbor that testified that Mr. Mallory was crying for help. This is Allegation Number 18. This is page 631. Why was your trial counsel supposed to object to that testimony?
A. Just so I'm clear, you're asking why should they have objected to the testimony of Mr. Hargraves?
Q. Certainly. This is your allegation, so I just want to understand since this is your day in court why should have your defense attorneys objected to that testimony that Mr. Mallory was crying for help when he was knocking on Mr. Hargraves' door?
A. No, I don't know.
Q. And this is Allegation Number 24. This pertains to testimony on 1072 to 1074 and your allegation is counsel should have objected to testimony from the interviewing officer that you told them that Mr. Mallory wasn't at the crime scene. Why -- why should they have objected to that?
A. Could you repeat that one more time, please?
Q. This is your allegation on page 1072. The police

officer testifies that you told them you admitted that Mr. Mallory, the victim's husband, wasn't at the crime scene, wasn't there when the victim was killed, and my question to you is why should counsel have objected to that?

A. Because it wasn't a true statement.

Q. Okay. So you just -- and your contention is that those statements that you made to the police in California weren't correct -- weren't true, right?

A. Yes.

Q. Okay. And as a matter of fact, that's what you testified to at the trial?

A. That's right.

MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. SPENCER:

Q. And I apologize if I didn't ask you this before -- I apologize if I did ask this of you before. Do you have any legal training?

A. No, I don't.

Q. Okay.

MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. SPENCER:

Q. As I understand, one of your allegations, you feel

like your trial attorneys should have objected to the police officer testifying about the cell tower records?
A. Yes.
Q. Do you remember Mr. Lance {sic} Shealey during closing argument arguing that the cell tower records don't lie and that it was proof that Mr. Mallory actually did have time to kill his wife?
A. Do you remember -- you're asking me if I remember the testimony?
Q. Do you recall Lance Shealey making that argument during closing argument?
A. No.
MR. SPENCER: Okay. And, Your Honor, that's on page 1678.
THE COURT: Yes, sir.
MR. SPENCER: Your Honor, I have no further questions.
THE COURT: Mr. Johnson.
MR. JOHNSON: Thank you, Judge.
Sorry, Judge. I'm just writing as fast as can I.
THE COURT: No worries.

REDIRECT EXAMINATION

BY MR. JOHNSON:
Q. You have no legal training. You're not a lawyer, correct?

A. That's correct.
Q. So that's kind of why you wanted to access the law library?
A. That's correct.
Q. And DNA was used against you in this case, correct?
A. Yes.
Q. Yes, sir. And so any objections to buccal swabs, collection of DNA, reliability of DNA, containment of DNA samples and maintaining chain of custody, any ability or any -- any effort to suppress that, to keep that out of evidence, would have been helpful to defense because DNA or creating doubt about the reliability of the DNA could have been helpful to you because DNA was used against you?
A. I agree. Yes.
Q. Correct. Okay.

MR. JOHNSON: I have no more questions, Your Honor.

THE COURT: Okay.

MR. SPENCER: Recross of his last?

RECROSS EXAMINATION

BY MR. SPENCER:
Q. You admitted you cut yourself at the victim's apartment; is that correct?
A. Yes, I was cut there.
Q. You were cut there. Now originally you told police that you cut yourself peeling an apple for your daughter

earlier in the day; is that right?
A. Yes.
Q. Okay. But later you told police that actually Mr. Mallory and Mrs. Mallory were having an argument and you kind of jumped in between and Mr. Mallory stabbed you?
A. He did cut me, yes.
Q. Okay. And then what you explained to -- what you explained to law enforcement is that you cleaned yourself up a little bit and you left; is that correct?
A. Yes.
Q. And actually when you left the victim was not moving and on the couch; is that right?
A. Yes, on the couch.
Q. And she was bleeding from the face and the neck?
A. I didn't say that.
Q. Well, did you say she was bleeding?
A. Not that I can recall.
Q. Did you call 9-1-1?
A. No.
MR. SPENCER: Thank you. No further questions.
THE COURT: Anything else, Mr. Johnson, or not?
MR. JOHNSON: Your Honor, my only question just related about that direct point about DNA.

FURTHER DIRECT EXAMINATION

BY MR. JOHNSON:

Q. The case was initially brought against someone else and then they -- they pulled DNA to come after you, correct? There was another suspect?
A. Yes.
Q. And then they pulled DNA, so DNA was important?
A. Yes.
Q. Because they did use it against you?
A. Yes.
Q. Right.
MR. JOHNSON: Okay. No more questions, Your Honor.
MR. SPENCER: Can I just have maybe two questions?
THE COURT: (Nods head.)

FURTHER CROSS-EXAMINATION

BY MR. SPENCER:
Q. They actually knew your DNA was at the scene when you testified at Mr. Mallory's trials; is that correct?
A. Yes.
Q. But they did some more DNA testing after Mr. Mallory was acquitted; is that correct?
A. I believe so.
Q. And that was when they found DNA on the victim's shirt that matched you?
A. Yes. They knew my DNA was there already.
MR. SPENCER: Thank you.
MR. JOHNSON: No more questions, Your Honor.

THE COURT: You may step down, sir. Thank you.

(Witness excused.)

THE COURT: Mr. Johnson.

MR. JOHNSON: That's all my witnesses, Judge.

THE COURT: Yes, sir.

MR. SPENCER: Your Honor, I'm gonna call Mr. Anzelmo first.

THE CLERK: Could you state your full name, please?

THE WITNESS: Michael J. Anzelmo.

THE CLERK: Spell your last name, please.

THE WITNESS: A-N-Z-E-L-M-O.

(Whereupon, Michael J. Anzelmo was duly sworn by the Clerk of Court.)

THE CLERK: Have a seat right there. Thank you.

MICHAEL J. ANZELMO,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q. Mr. Anzelmo, you were one of the appellate attorneys that represented Mr. Porch?

A. I was. This case came to my prior firm, Nelson Mullins, as part of the appellate defense program started by Bob Dudek and Justice John Few. What we would do in such cases, we were ask to alleviate some of the caseload at appellate defense and Bob Dudek would reach out to seek

appellate attorneys to assist by taking certain cases and help -- assisting him through briefing and argument potentially of those cases.

Q. All right. And so that was basically your role in this, was you were -- your firm was assigned this case?

A. Yes. We met with Mr. Dudek. He asked us to take on Mr. Porch's case. What we do typically in these cases, our standard practice was for a more senior partner like myself to involve our associates to fully review the record, vet the case, looked for and then preserve the meritorious arguments and present those in briefing, which we'd then give to Mr. Dudek who would share with the client, in this case, Mr. Porch. That was our standard practice in these cases.

Q. So you would look through the record and try and find the best issues to raise on appeal?

A. Yes. We would -- we would look through all issues with a blank slate. We did not have any input from others as to what issues should be raised and we tried to find those that had the most likely chance of success based on standard of review, legal issues, whatever is gonna be presented to, in this case, the Court of Appeals, and then ultimately the Supreme Court.

Q. And I think you mentioned you were sort of in the supervisory role for this appeal?

A. That's correct.
Q. And if you could share with me -- with us a little bit of your background. Did you have any clerking experience with any reviewing courts?
A. Yes. So I actually started my career in '04 as a staff attorney at the South Carolina Court of Appeals. I held that position for six months until then chief judge, now Justice Kaye Hearn, asked me to come on as her law clerk, which I did for about two and a half years. As soon as I entered private practice, my practice quickly evolved into about 50 percent litigation matters, business litigation, and then I also represent the South Carolina House of Representatives and the South Carolina Senate in trial level litigation, and then about 50 percent throughout my career has been appellate work.
Q. So you've been consistently doing appellate work for how many years now?
A. Seventeen or eighteen. That's tough to say actually. It's been a while.
Q. All right. And now just to clarify, you don't have any particular memory about this case; is that correct?
A. I don't. I've seen the publicly available documents. Since I started -- let me back up. Yes. I reviewed the publicly available documents. It triggered some recognition, but no specific factual background. This

case came to me I believe in 2015 when I was at Nelson Mullins. I then left in the fall of 2017 to go work for Jay Lucas, the Speaker of the House, as his chief of staff and legal counsel, and then I returned to private practice after the Supreme Court relieved me in this case in 2017, 2018, I can't remember the timeframe, prior to the oral argument in the Supreme Court, but I returned to private practice in 2019, but specific recollections of the case, no, I don't have those.

Q. And just to be clear, I mean, you were involved in the selection of the issues that were raised in this case to the Court of Appeals?

A. Yeah, we spent extensive amounts of times in this instance through the publically available transcript and record. You can see that it was a lengthy trial. It was multiple trials, in fact, and we spent a lot of time vetting the possible issues and, like I said, standard practice would be for us to vet them, discuss them with appellate defense and then brief those issues that we found to be most beneficial.

In reviewing that, I recall this being a rather clean record in that the issues that seemed most meritorious jumped out rather quickly; the constitutional arguments that we raised and ultimately got a published opinion from the Court of Appeals and cert granted in the Supreme Court.

So it was an extensive process that we go through on all of our cases and I have no reason to believe we did anything different in this case.

MR. SPENCER: Thank you. That's all the questions I have.

THE COURT: Mr. Johnson.

MR. JOHNSON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. If there was an issue regarding buccal swabs or a consent form for a buccal swab, whether or not that was allowed into evidence or not, if there was a ruling against a defendant, that is something that can be appealed sometimes when the -- if evidence is admitted and there's an objection, if the actual decision by the trial court is appealed, that can actually reverse a conviction sometimes, can't it?

A. Well, generally your proposition is correct that evidentiary issues can be appealed and ultimately could prove successful, but the burden of proof on evidentiary issues is high. It's abuse of discretion. It is in my experience somewhat rare for those matters to succeed, but, like I said, general practice would have been to vet any potential evidentiary issues that were present and we ultimately concluded that the best defense we could

present to Mr. Porch were the constitutional issues that we ultimately briefed and argued.

Q. Okay. And would your answer remain the same regarding the allegation regarding admission of photos of bloody shirt and objections to that? Would you have the same answer?

A. I would have the same answer.

Q. Okay.

MR. JOHNSON: And under that, of course, I was referencing numbers 8 and 13, Your Honor.

BY MR. JOHNSON:

Q. And moving onto Number 17, that would -- the same thing regarding the question regarding DNA evidence, leading questions. If there's objections at trial to leading questions and the forms of questions, can you appeal the Court's decision regarding that if it links to evidence and could that be something that could reverse a conviction?

A. Generally, that's a correct proposition that they could be appellate issues stemming from that type of situation.

Q. Okay. And during -- would the same be true also regarding -- Your Honor, I'm referencing Number 20, where it discusses failed to appeal portions where there's allegations made about the client on the record under

Rule 404 if there were statements made that felt -- that defense counsel could have objected to and if they did and then they actually came through and objected during interrogation their statements were considered prejudicial, is that's something that's allowed in? Of course, statements made during interrogation is prejudicial. If the Court allows that it in, you could appeal that and that can also reverse a conviction?

A. Again, generally, yes, that if preserved through objection you can appeal those issues. If memory serves correctly, from my review of the public documents one of the issues that we did raise involved Mr. Porch's interrogation, both in California and here in South Carolina, if memory serves. So we believed that given the standard of review versus evidentiary issues and the interrogation issue, the more likely chance of success stemmed from the constitutional issue related to that interrogation.

Q. Okay. And that would also be under Number 23 where they failed to appeal Court's ruling on video of Applicant's interrogation as admissible. You're saying that you have -- you appealed on grounds regarding the interrogation but you were not specific about that ruling, but in general you would have appealed that issue with the admissibility of the interrogation?

A. I think I understand what you're asking. If you're asking if we made a strategic decision on how to appeal that issue, no, that's not what I mean. What I mean is we look for the cases -- the appellate issues with a standard of review that presented the best chance for success. I do not recall specifically any evidentiary issues in this case that seemed to be meritorious, so we didn't pursue those evidentiary issues.

Q. Okay. So any of the things I just listed regarding testimony, leading questions, DNA evidence and the specifics of that interrogation or testimony about that, you're saying you didn't specifically -- you felt it wasn't the best strategy to appeal those?

A. I did not. Again, I don't really have specific recollections of this case, but typically if we had found meritorious evidentiary issues, those would have been included in our appellate briefing and argument. I think it is also notable that the issues we did raise to the Court of Appeals and Supreme Court were found to be preserved. They addressed this -- the Court of Appeals addressed the merits and there were no indications in that opinion that we failed to raise any issues that should have been brought to the Court's attention.

Q. Okay. But if you don't raise the issue, then the Court doesn't --

A. They're not afraid to call you out. Believe me.
Q. Number 26, just referencing motion for mistrial, you did not raise that -- the Court's ruling denying mistrial, you did not raise that as an issue either?
A. I did not see that in the order, so I'll take your word for it.
Q. Okay. And also Number 28, failed to appeal the Court's ruling to prohibit testimony as third-party guilt. Did you not address that at all? You felt that was not sufficient?
A. Again, I don't see that in the order, so I do not believe we raised that in our brief.
Q. Okay. And --
MR. JOHNSON: That's all I have, Your Honor.
THE COURT: All right, sir.

REDIRECT EXAMINATION

BY MR. SPENCER:
Q. One quick thing I didn't ask you, but when you were working at the Court of Appeals, did your work include criminal as well as civil cases?
A. Yes.
MR. SPENCER: All right. That's the only question I had.
MR. JOHNSON: That's it, Judge.
THE COURT: Okay. Thank you, sir.

May he be excused?

MR. SPENCER: Yes, Your Honor.

MR. JOHNSON: No objection. Yes, sir.

THE COURT: Have a good day, sir.

(Witness excused.)

THE COURT: All right. Number 2.

MR. SPENCER: Let me make sure I -- Brian Shealey?

MR. LUKE SHEALEY: You have Luke.

MR. SPENCER: Luke Shealey. I apologize. I'm getting -- I met them this morning.

I would call Luke Shealey to the stand, Your Honor.

THE CLERK: Would state your full name, please.

THE WITNESS: Luke Shealey.

(Whereupon, Luke Shealey was duly sworn by the Clerk of Court.)

THE CLERK: Have a seat right there. Thank you.

LUKE SHEALEY,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q. Mr. Shealey, do I see a family resemblance with the other Mr. Shealey that's in the audience?

A. Yes, you do. He's my twin brother.

Q. All right. And you-all practice together?

A. Yes.

Q. Okay. And, of course, we're here to talk about your representation of Mr. Porch. Can you give us a little background about how you guys came to represent Mr. Porch?
A. Sure. Well, this was originally Jay Cooper's case, who was a public defender. He was counsel of record and he brought me on as a second seat, as well as Art Aiken. I can't remember if it was second or third seat. Art was in private practice, but a very close friend of ours and an accomplished attorney, so we geared up for trial and then we did pre-trial for a couple of days and then Jay passed away un-expectedly, so we had a big pause in the case and then my brother Brian joined us to be the third member and kind of take up some of the load and then we picked up.

I think this case was unusual for a lot of ways. Number one, in that Mr. Mallory, who is the victim's husband, was prosecuted twice for this crime. He was the -- the key suspect out the door for the case and there was a hung jury and there was a not guilty bench trial, and Mr. Porch was kind of the star witness for the State in both of those trials, so that was unusual in and of itself, I think.

You know, we challenged a lot in the way they went about getting a warrant for Mr. Porch's arrest and really had the warrant before they ever went out to California based on what they claimed kind of new evidence, but we

challenged that as not being new and had a big Franks hearing, which you may want to ask me about, but -- so it was strange in a lot of ways to have people die, including expert witnesses on both sides, and it was just bizarre.

Q. All right. And those statements out in California, were they damaging to the case?

A. Tremendously because Josh -- Josh went from being a star eyewitness to the assault by husband against wife to then after intense an interview and polygraph and all of that to give very incriminating statements on video to actually killing himself Mrs. Mallory, so it was very -- very difficult in that it was kind of icing on the cake for the State's new theory.

Q. Right. Well, let's skip -- and we'll circle back, of course, but let's skip to trial strategy. What was the trial strategy that you had going into this case?

A. Well, we lawyers thought that the best trial strategy would be to embrace what Josh said out in California, that essentially he was there that night, that Mrs. Mallory made a romantic overture toward him which he rebuffed and that she got upset, attacked him, she had a knife, and there was this kind of voluntary slash self-defense-style killing because we were -- you know, we've done this long enough to know how rare it is to get statements suppressed and we thought that that would be more palpable to a jury and

possibly be his best chance of success, but Josh did not. He basically told us he was not willing to go along with that and if we tried to go that route he would testify and say that was -- none of that was true. He very much wanted this to be a case of false confession and so he forced our hand a little bit and basically we ended up prosecuting -- our theory was to prosecute ultimately Justin Mallory the way that the State did with two trials and just hopefully embrace that there would be enough reasonable doubt out of that even though we had this -- you know, we had about eight inconsistent statements, plus confession, so we did hire a false confession expert and -- and it did not work unfortunately.

Q. And the false confession expert, she testified at trial?

A. She did.

Q. And what was the version that -- what was the version of events that Mr. Porch testified to and was pursuing?

A. He basically testified to what he had always testified to for the State, which was that he was friends with the Mallorys and had been over there and the State had -- they were all over the husband, Mr. Mallory, I think because he was not a very good guy. I mean, he was cheating on his wife on Mother's Day and that was when this occurred. Josh was there, they had been friends, and he basically -- Josh

testified that they -- you know, he came home in kind of a violent rage and they -- you know, he attacked her, he got in the middle and cut his finger and then, of course, had to address what we were saying was a false confession in California and we had to talk about kind of the tough circumstances of that interrogation and factors that led him to, you know, essentially lie on himself, so. And, of course, he was impeached with all the numerous inconsistent statements. And we ultimately put up Dr. Davis to discuss the circumstances around these types of confessions and try to educate the jury on how -- suggestibility and what a defendant might say if, you know, their kids are being threatened to be taken away and being faced with the polygraph result and all of that. It just -- the jury ultimately didn't buy it.

Q. And Dr. Davis is the false confession expert?

A. Yes.

Q. All right. And I want to circle back to those California confessions. Is it fair to say then what became your trial strategy was to try and knock out those confessions one way or the other?

A. We did. I mean, we tried to knock out this case a bunch of different ways. I mean, we had a big motion to just simply estop this completely 180-degree theory of the prosecution. We had a very intense Jackson v. Denno

hearing where we tried to suppress all of those statements out there, which we lost.

We attacked the -- the way that the State changed their theory and had a big Franks hearing and actually made some new case law in South Carolina. Formerly Franks was only seemingly relevant to search warrants, but obviously the Court of Appeals agreed it was the same analysis to be applied to arrest warrants because our opinion was that they always had evidence of Josh's blood on-scene clearly, so to go to a magistrate and say hey, we've got all this new information, we now see there's blood on his shirt, which they always had which was pretty misleading, but we failed on those.

Obviously Judge Lee didn't see it our way, so we did try to kill the case as best we could and we pressurized it enough we had a pretty decent offer. I mean, he was offered a negotiated range of fifteen to eighteen years on voluntary manslaughter and we talked long and hard with him and went over it a long time to strongly consider that and he was very adamant that he wanted a trial and he wanted this particular theory and really a kind of all or nothing shot at this case.

Q. All right. And I think you, you know, alluded to it, but that Franks issue actually was one of the issues that got raised on appeal?

A. Yes.
Q. And basically your argument on the Franks issue is that the officer that obtained the arrest warrant should have mentioned that they'd already prosecuted somebody two times and should have brought in some other information?
A. Right. They failed -- they failed to give the judge in our humble opinion the complete picture of the case in terms of that there was a -- you know, a third-party suspect that they -- they had already prosecuted who they thought was the killer. There was nothing new except their opinion about who did it. And, of course, they were being sued like crazy by Justin Mallory after his acquittal and so there was a lot of kind of intense pressure on Richland County at this point, but -- so we felt that they didn't give the magistrate the full picture, but Judge Lee disagreed with us.
Q. And tell me if this question is too imprecise, but did you try and capitalize on some of that pressure that some of the sheriff's deputies might have been feeling when they testified?
A. Oh, absolutely. I mean, given that the strategy that we ended up employing about essentially re-prosecuting Justin Mallory, so numerous of the same officers were called and about half of them visibly you could tell still believed Justin Mallory did it and so we tried to seize

upon that. I mean, I remember some of them just being emotionally torn about it because they had worked with Josh in the first two trials and really didn't think he did it and then some of them, you know, were towing the party line and saying in my opinion what they had to say to kind of go forward with the new theory, but we tried to create as much doubt as we could based on those prior prosecutions.

Q. And is it fair to say that you wanted the jury to have some doubt in the sense that maybe Mallory really was the killer?

A. Oh, absolutely. We outright accused him of being the killer throughout the entire trial.

Q. And, of course, now Mr. Mallory testified at Mr. Porch's trial. What was your strategy in terms of handling Mr. Mallory?

A. Just to re-prosecute him the way same way that the State always had although -- I mean, his cheating, the motive for the conflict, the fact that Josh had been there and potentially romantically involved with his wife, the fact that he -- you know, the way he threw his wife's body kind of at the doorsteps of the ER and said, quote, bitch bled all over my car, and just all of the stuff that made the State so hot to trot on him in the first place, so we did try to re-prosecute him simply and accused him of it, which he, of course, denied, and was very happy to testify

he had been acquited, so.
Q. And you made mention of statements attributed to him. Would those have been by Charles Netto? I mean, would that testimony have come from Charles Netto?
A. I'm sorry. Can you --
Q. That would be the security officer at the hospital.
A. Oh, yes. That does sound familiar. Right. They -- he was a security guard and the State definitely called him in the first two trials because he -- you know, people react to -- you know, the State would now say people react to death and trauma in different ways, but Mr. Mallory was definitely unusually angry and aggressive and less sympathetic, which I think is why the State seized on him in the first place, but that -- that was the statement I'm talking about. That she basically bled all over his floors and walls and, you know, it came across originally as him seeming more upset that he had this blood to deal with rather than that his wife was dead.
Q. And just to be clear, he's a witness that you called at Mr. Porch's trial?
A. You'd have to -- I can't tell you one way or the other. I just know that we seized upon those statements as -- so I think we certainly would have and we would have questioned law enforcement about it as well.
Q. And if that's what the record reflects, you wouldn't

have any --
A. No, I don't disagree with that.
MR. SPENCER: I beg the Court's indulgence.
THE COURT: Yes, sir.
BY MR. SPENCER:
Q. All right. I want to start going through some of the allegations a little closer, and the first allegation was failure to investigate, so I guess I would ask what did you and your co-counsel do to investigate this case?
A. Well, we had -- we had private investigators, but essentially it probably required less investigation and tracking down witnesses in some cases. Once it was clear that Josh really wanted to go with the theory of re-prosecuting Mallory, essentially law enforcement had already done our investigation for us because we were just adopting their initial prosecution.
Q. All right. And the second allegation looks like it pertains to a witness that you would have been handling, so do you have the trial transcript up there with you?
A. I don't. I don't know that I ever received one.
Q. We should have got that to you.
MR. SPENCER: I beg the Court's indulgence.
BY MR. SPENCER:
Q. Okay. I'm gonna go to page 148, okay, and I'm just gonna ask you to look at lines 17 to 22 real quick. And

when you've had a chance to look at that, just let me know.
A. Okay.
Q. All right. And so in terms of making an objection that Mr. Mallory said it looked like someone tried to rape her, is that an objection that you feel needed to be made?
A. Well, in the heat of the moment, you know, it says it looked like someone had raped and killed her. I mean, the case -- we'd already gone through a lot at that point and hadn't -- I felt confident the jury was aware there was no sexual assault allegation here and so you've got this man who everybody knows has been acquited and so I was strategically probably trying to pick and choose my fights and not go overboard. I didn't want to get too much sympathy for him in the eyes of the jury, so I think I probably would have let that one slide in the heat of the moment considering now no one was making a rape allegation. It was just kind of his -- what came out of his mouth.
Q. All right. I wanted to ask you too about your recollections concerning Investigator Cohen.
A. Yeah, she was bizarre.
Q. And she was a police officer from California?
A. Yes.
Q. And what was her role in this case?
A. Well, the Richland County officers needed a local liaison and so she helped them and was part of the

interrogation and set up the polygraph and she -- I just -- I mean, I remember she -- prior to the trial being scheduled, she took a 6-week vacation so it had to be continued and then ultimately she -- for the next trial she was under subpoena by your office and just fought the subpoena locally in California and won. I mean, she had no interest in -- she did a lot of damage to Mr. Porch, but she had no interest in appearing at all whatsoever in the case itself.

Q. Is she somebody you really would have wanted to show up at trial?

A. I mean, we -- my recollection is that it was highly unusual. Obviously she was instrumental in the damage being done, but I feel like we made a motion to really curtail any parts of questioning having to do with her about what was ultimately admitted. Someone can correct me if I'm wrong, but I think we were able to limit what came in because she was not around and we certainly can't -- we had no chance to confront her, so I think Judge Lee helped us out on that.

Q. And would you agree they -- that basically Judge Lee didn't allow the State to play any of the videotaped statement that she -- that Mr. Porch gave to her?

A. Yes, that sounds correct.

Q. All right. And is it fair to say that one of the

complaints you made to Judge Lee is that you didn't feel like you had a full opportunity to cross-examine Ms. Cohen?
A. Yes. I mean, she was instrumental in getting the confession in California, so we -- on one hand she wasn't around to testify and be damaging, but on the other hand we also really couldn't get at the crux of a lot of the pressure that was applied to Josh out there. So, you know, she -- Judge Lee obviously limited what could be referenced regarding her and her video, but we still had this impact that only the South Carolina investigators really were allowed to testify to.
Q. And did you complain to Judge Lee that you felt that violated his confrontation rights?
A. Yes.
Q. And now Ms. -- Investigator -- police officer Cohen did testify at a prior hearing; is that correct?
A. Yes, I believe so. I'm trying to remember in my mind whether -- I think something about viewing the videos versus live testimony. I think she did.
Q. All right. And that was your complaint is you anticipated that you were gonna get to cross-examine her again at trial?
A. Right.
Q. And that was the basis of your confrontation clause objection?

A. Right.

MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. SPENCER:

Q. Let me ask you this. Do you recall the 9-1-1 calls in this case at all?

A. I do generally.

Q. In terms of a possible objection, was relevance a feasible argument?

A. No, relevance would not be a successful argument on 9-1-1. I mean, they're routinely admitted in trial courts all throughout South Carolina as being non-hearsay or excited utterance. I mean, we don't have a realistic way of keeping them out. It just wasn't gonna happen.

MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. SPENCER:

Q. Next to this allegation I wrote Shealey, which really doesn't narrow it down quite enough.

I wanted to ask you about the photos of the victim. I imagine some of those photographs were pretty gruesome?

A. Yes.

Q. And did you make objections to try and keep out as many of them as you could?

A. Yeah, we -- in looking at our pre-trial motions

list, I mean, we had a whole pre-trial motion in Number 11 to exclude gruesome photographs, and I feel like Judge Lee worked with us somewhat on that. I mean, we did get out -- some things were clearly cumulative. Obviously they're going to allow some evidence of the crime to be admissible to the jury and I think the State -- I mean, I was relatively impressed with the State in terms of they didn't overreach typically in this type of case.

Q. Right.

A. I think they were clearly aware of the history of it, so it might be somewhat disingenuous to swing for the fences and go overboard, but -- so I don't think they went way overboard, but we had that motion and we basically couldn't get them all out. But Judge Lee maybe allowed two or three and then that was kind of decided prior to the trial, so.

Q. Let me ask you this. Did you see any reason to object to the buccal swab being admitted?

A. No. I mean, so early in the investigation against Justin Mallory, you know, Josh's DNA came up and so law enforcement came to him and asked him for an explanation and he told them I'm friends with them and I cut my hand on an apple and I cleaned it up and then it kind of progressed into some other statements and they even polygraphed him and then he ultimately told the version of events that he

would testify to, so --
Q. And you're talking about testifying against Mr. Mallory?
A. Yes, which was, you know, being there and then going home and cleaning it, but he consented in very easygoing circumstances as a cooperating witness for the State. So DNA as far as our theory for Mr. Porch's trial, we were embracing the fact that his DNA was on the scene in the same way that the State had always embraced and explained it and basically took the approach that if it was good enough for them, that it was good enough for us.

So there was no getting around the DNA on the scene, so we didn't seek to challenge it in any way. Basically our main challenge was -- obviously a lot of pre-trial challenges in that this was a false confession.
Q. And he actually told them they'd probably find his DNA before they actually even tested it?
A. Right.
Q. And in terms of finding blood in the kitchen, on the sink or anywhere else in the house, did you see any basis to object to any of those photos?
A. No, not just simply blood. I mean, obviously we took up the gruesome photos and rulings were made, but a photo of, you know, a blood droplet or an attempt to clean that up. I know there was a lot of discussion of luminol and

what it was able to -- to uncover in terms of presence of possible cleanup. We didn't -- but, again, it wasn't part of our strategy to fight the idea that he had actually bled on the scene.

Q. Right. I'm gonna ask sort of an overarching question in terms of leading questions. When do you object to leading questions?

A. Well, if they're leading, number one, and then if they're particularly damaging in an area that I don't want evidence to be easily pulled out of a witness's mouth. So I don't know if that's -- so sometimes I'll make sort of strategic decisions to not to object if there's some minor lead or something that I don't care about, but my note as to Number 6 where there's a question about failing to object to leading, "is that the safeguard to show that the evidence isn't tampered with", I just don't feel that's a leading question. Yeah, I think a leading question would be "that's a safeguard to show that evidence isn't tampered with, correct?". So Number 6 to me is not leading.

Q. Okay.

MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. SPENCER:

Q. Could you -- my next question's about -- goes to an allegation where I think your brother was actually handling

the witness, but in terms of the cell phone tracking evidence, was that something that you felt was detrimental to your case?

A. No. And, again, in the first two trials against Mr. Mallory the cell phone evidence was generally used to show kind of the opportunity that Mr. Mallory could have been on-scene and had time to do this act. So I think regarding the investigator, I believe it was Holdorf that ultimately testified about it. I mean, we weren't objecting to his qualifications or anything else because we were just simply trying to put that evidence out there. Again, look, Mallory, based on the evidence that law enforcement had in the last two trials, he certainly was available and in the area to do this crime, so we weren't gonna fight Investigator Holdorf about his qualifications. We were just simply trying to, again, re-prosecute Mallory.

Q. So that's kind of consistent with your statement when you tell the jury that the cell phone -- cell phones don't lie?

A. Right.

MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. SPENCER:

Q. All right. I want to just skip ahead. This is actually Allegation Number 25 and this concerns -- it was

State's Exhibit 50, which was one of Mr. Porch's statements to law enforcement, and the allegation is -- pertains to some statements at the end of his statement about drug use and, first of all, I wanted to ask you if you recall that?

A. I do.

Q. Okay. Can you kind of, you know, first just explain what happened?

A. Well, my recollection is that part of the evidence from his statement video I believe that came in ended up with him referencing drug use and we had had -- part of our pre-trial motions were to suppress improper character evidence under 404(b), 403 and so we had litigated many of these issues and so the attorney generals had -- really had been straight-shooters. Obviously they were my opponents in the case, but, again, I had dealt with several prosecutors that had overreached and they had not and so when that came in, you know, I was very surprised and I think the State's response was well, I mean, you should have caught it and, you know, I didn't.

So I made a mistrial motion. I thought it would have been something that we had discussed previously about the parameters of what was admissible or not and so for any -- whether it was an accident on the State's part or whether it was somewhat sneaky, I don't know, but basically once it came in, it was damaging. It was clearly prejudicial as I

said and I made a motion for a mistrial, which was denied, but it was a problem.

Q. All right. I'm just going to talk about that a little bit. Do you recall Judge Lee first, you know, when you originally raised that motion saying you found -- she found a little bit hard to understand what Mr. Porch was saying during that part?

A. I'd have to read the transcript. She might have been trying to minimize the impact of it or maybe she truly couldn't quite understand, but it's clear when it came out it caught us all off guard.

Q. Right. But you would agree with me Judge Lee, first of all, decided that that portion was inadvertently played for the jury?

A. Yes.

Q. And did Judge Lee and our office agree to redact that part out of the statement so once, you know, it was submitted to the jury --

A. Right. Once it was published, I think I made the objection and the mistrial motion and then I think we tried to cure it and make sure that wasn't sent back as they were considering the evidence as an exhibit.

Q. And do you recall Judge Lee -- and I'm on 1131 is where she's making her ruling, but do you recall Judge Lee advising that she thought calling attention to it by

discussing it with the jury or telling them to disregard it would just highlight it?
A. That sounds familiar. I mean, that's always the Catch-22. You know, you request a curative instruction --
Q. Right.
A. -- and you're supposed to request it, but yet we also have to acknowledge that it does highlight it and you're kind of in this terrible situation, so I think that was her opinion of it, but I generally recall that.
Q. And if you had actually wanted a curative instruction, would you have asked Judge Lee for that?
A. I'm sure I would have.
Q. And as far as the actual -- what he had told the police officer, he wasn't saying that he was currently using drugs. He was just saying that he had used them in the past?
A. I'd have to look at the transcript. It was definitely about personal drug use, which was pretty irrelevant to this case.
Q. In terms of -- in terms of what he was saying, would you disagree that he had said he had stopped using drugs after he met his wife?
A. I can't recall without looking at a transcript, but I won't disagree.
Q. You won't disagree.

MR. SPENCER: And, Judge, just to give the relevant pages, that mistrial motion comes up on page 1110 and that's discussed extensively after that. I mean, we ultimately get the ruling on page 1130, 1131.

What I mentioned about Judge Lee saying she didn't even understand what he was saying was on page 1113 and 14. And somewhere in there he mentions he -- they discussed the fact that he was saying he used drugs as a teenager, but he had -- but, you know, he quit them for his wife ultimately, so that would be what the record is on that.

BY MR. SPENCER:

Q. I wanted to ask you too about the situation with the trial. Just as I understand it, the pathologist who originally did the autopsy had died by the time of trial?

A. Yes, Sam Kessler.

Q. All right. And then so another pathologist basically reviewed his work?

A. Yes.

Q. And did he just read out loud what Dr. Kessler had found or did he like do his own analysis?

A. I think he basically just referred to Dr. Kessler's autopsy report. We did have a pre-trial motion trying to prevent that as a confrontation situation because we really couldn't challenge the findings of it and Dr. -- I

think I remember it's Bradley Marcus or Marcus Bradley. I think it's Bradley Marcus, but he was successfully able to testify about Dr. Kessler's findings, but, you know, experts are allowed to rely on other experts I believe was ultimately Judge Lee's ruling and she let him kind of have free reign over it, but -- so we did challenge it and lost.

Q. Is it fair to say that under Rule 703 pretty much an expert's allowed to rely on stuff that other experts would ordinarily rely on?

A. Yes.

Q. And so it wasn't -- it wasn't improper for him to rely on records from another pathologist to do his analysis?

A. Yes, that was Judge Lee's ruling I believe.

MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.

MR. SPENCER: Your Honor, I think that's all the questions I have.

THE COURT: Mr. Johnson.

MR. JOHNSON: Thank you, Judge.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Hello, Mr. Shealey.

A. Hey, good morning.

Q. You testified that you had private investigators?

A. Yes.

Q. But you did not send them to interview Mr. Porch?
A. No. I mean, in my -- in my practice if I have to employ a private investigator, I usually will use that investigator to interview witnesses that I don't have access to because I have access to him. You know, we worked with Mr. Porch about his testimony and everything else, but I -- if there was a lead that he would tell me about, then I would defer that to the investigator. But, no, I didn't have a particular investigator sit down with Mr. Porch.
Q. Okay. But it's possible that investigators, especially someone with law enforcement experience, could have a conversation and think of a question for a client that maybe us lawyers might miss and so that could be helpful?
A. Well, I don't make that my practice because I -- I like to really control what my client says. I don't want him to tell an investigator that doesn't have any legal training something potentially incriminating that he thinks is good and have that investigator report back to me and then also I'm not hamstrung on the fence. I don't make that my practice, but some people do. It is certainly possible.
Q. Okay. How many times did you visit with Mr. Porch prior to trial?

A. Countless. And I was involved relatively earlier with Jay Cooper and we saw him routinely. I mean, not every week certainly, but we prepared him a lot for his trial certainly because he was in the unenviable position of trying to convince a jury that he falsely confessed, which takes -- takes some convincing unfortunately in my view of jurors' general perceptions about well, why would someone say something like that if it wasn't true, so certainly it was more than a couple times. It was numerous. I'm just kind of going through case action sheet here, but a lot.

Q. A lot. Okay. And would you -- did you receive any requests from him about getting access to a law library? Did he make that request to you?

A. I don't recall that. I know that's a general gripe over the years that sometimes when there's limited access to it. I don't even know if -- I mean, the say that Alvin S. Glenn right now is God awful, so I think if someone asked that right now, I'd be like I don't know, but back then they generally had opportunities. We had very little power over controlling what the jail does and how many inmates can be there at one time and I remember having lots of discussions also with Mr. Cooper about law and strategy and I think we would just generally discuss it or bring case law and try to answer as many questions as we could with Mr. Porch. But, no, I never was asked I think to

instruct the jail to give him time in the law library.
Q. Okay.
A. I don't really have that power.
Q. And under Number 2, just kind of moving to my Number 2 off of my list of these allegations, if testimony from Justin Mallory, quote, it looked like someone raped and killed her, of course, at trial you had the ability to object to that since this was not a trial regarding rape, that was not an allegation, but once the jury would hear something like that you could object and say that that was evidence of another crime for which he's not on trial, that's prejudicial, and you failed to do that, correct?
A. Right. I chose not to do that.
Q. Okay. And under Number 3, discussing Officer Cohen, the actual -- just referencing that, the actual exchange -- and, Judge, I referenced the page number on here, and if it's all right I was gonna read from the transcript.

The actual exchange that -- you made a motion and you wanted to prevent the testimony coming in about statements made to Officer Cohen and that these were damaging statements, of course, to Mr. Porch.
A. Right.
Q. And so in that hearing, the judge on page 188 of the transcript where there was an objection made and that cited the Crawford case, the judge says "I disagree with the fact

you had the opportunity to cross-examine her. It wasn't that she wasn't here. She was here. She was under oath giving testimony about the very issue you want to talk to her about. Whether it was a strategy decision on your part or whatever the reason was, you decided not to go into full cross-examination because she was available and there was the opportunity. And I highlight the word "opportunity" because that's what Crawford says, the opportunity for cross-examination. So unless you can point to some other case law that tells me something different", and basically the judge ruled against you and that opportunity did exist because she did testify at a previous hearing, correct?

A. She did testify at a previous hearing, yes.

Q. And you were in a position to ask her more questions at that hearing?

A. Yeah. I think she testified as part of the Jackson v. Denno and then, of course, she has already fought the State's subpoena and was not available for trial, which no one really expected, including the attorney generals. You know, I'm trying to put myself in the mind frame of what I was doing back then, but I think Judge Lee was telling me tough, you know, because maybe strategically I held onto some things in the pre-trial hearing that I wanted to save for trial and then she never came, so I think Judge Lee was saying well, this satisfies Crawford because you did cross

her even though it was maybe not a full trial-type cross. I think that's what Judge Lee's ruling was, but I think we were successful in limiting a lot of her work in the case because she wasn't present, but maybe not everything, and particularly not things where a Richland County investigator was there to basically essentially testify about his work in that moment even though she was sitting right next to him.

Q. Okay. And that would be in response to Number 3 and Number 4 about failure to call Officer Cohen as a witness or to conduct cross-examination. You had a hearing where she was refusing to come to South Carolina is what you testified to?

A. Right. She successfully quashed the State's subpoena, but I did not have her under subpoena.

Q. And did you attempt to bring her at all?

A. No. I mean, on the one hand having her there as a pretty savvy investigator out of California was quite damaging for Josh. I'm glad she wasn't there to testify about her perception and her work, but then since she wasn't there we were trying to really limit what, if anything, they could get in in terms of this confession and certain things. So obviously Judge Lee did not give us all of that, but I didn't -- she beat their subpoena. I didn't have her under subpoena.

Q. Did it raise any suspicions for you to think why would this person not want to come to testify and maybe she should be brought in? Is that a suspicious thing that she's avoiding testimony?
A. It's certainly unusual and I'm sure we tried to infer as much as we could in front of the jury how effective -- here's this key witness that's not here, and I can't remember exactly, but it was bizarre.
Q. Okay. Moving to onto Number 5 regarding the 9-1-1 call, you testified -- I think your answer was -- part of your answer was it was not gonna happen as far as suppressing that when the attorney general questioned you, but the truth is on the 9-1-1 call they can be suppressed if there's an objection and you go into details of the timing between the incident and the phone call, it could be considered hearsay in some instances, correct?
A. I guess it is potentially possible based on the particulars of a 9-1-1 call, but we didn't raise it in this case because we didn't think it was possible.
Q. If there was sufficient timing between what someone witnessed though and what they were saying, if this was not a -- you know, like a present sense impression or something and there was all this time that passed, not an excited utterance, then you could object to that and it could be suppressed so you'd have to go into those details,

correct?
A. That is a possible avenue depending on the case.
Q. Okay. Do you remember how much time -- was there any testimony digging into that question of exactly how much time passed between when the person who called 9-1-1 and what they witnessed? Did you get into that?
A. I can't remember right now how much time there was between the 9-1-1 call versus when Mr. Mallory would have come home. I can't. If you want to show me something, I'd be happy to look, but...
Q. Right. But I'm just saying it would take exploration and a motion and that was not done, so you don't know the answer is my point.
A. I'm sure I knew the answer back then --
Q. Okay.
A. -- and then chose not to bring it -- not to seek to suppress it.
Q. Now under the issue going into -- well, just jumping -- well, going to the next one, Number 6, just to stay in order, leading -- the definition of a leading question. You did not object to, quote, is that a safeguard to show the evidence isn't tampered with. That question actually provides the answer to the person that's being asked the question though, correct?
A. I disagree. I don't believe that is a leading

statement.
Q. Okay. But it's giving information about what the item is?
A. I disagree. I don't think it does.
Q. Well, it says safeguard to show the evidence isn't tampered with. Isn't that describing the object?
A. I mean, the way I read it is, is that the safeguard to show the evidence isn't tampered with.
Q. Right.
A. I mean, maybe that's just my personal opinion. I think a leading question would be "That's the safeguard to show the evidence isn't tampered with, right?". So I just -- I did not object to it that as leading.
Q. Fair enough. Photographs of victim and any objection as prejudicial. You failed to make objections under State's Exhibit 18, 19, 22, 23, and referencing that under Number 7, and, of course, you can object if there's blood in the photographs, if the jury sees the body, if they start seeing photographs with blood, you can object as prejudicial and sometimes that can be granted and they can keep that evidence out, true?
A. Well, we did have a pre-trial motion on that. Number 11 on my pre-trial motions. So that that -- what they were allowed to admit was very well litigated by the time they sought to admit it, so that's arguable.

Q. Okay. Did you consent to that coming in?
A. I mean, again, I'd have to read the transcript, but we -- we took that issue up pre-trial regarding gruesome photographs and they basically -- we won some of that and I think they were limited and then we kind of had a good idea of what was coming, so I didn't object contemporaneously because it was essentially what Judge Lee had already ruled was acceptable in her mind. If it's me, I don't want any photos of anything period, but...

So, no, I did not object contemporaneously because it was already litigated pre-trial.

Q. Okay. To preserve it for appeal, should you have objected at that point?
A. Perhaps.
Q. Well, it doesn't preserve it if you don't object, correct?
A. Right.
Q. Okay. And talking about buccal swabs, moving onto Number 9 and talking about DNA collection, buccal swabs, photos of blood, no objection was made as far as being prejudicial or cumulative. It's true that if you object to DNA, object to buccal swabs, you can actually defeat a portion of this chain as DNA's collected. You can either suppress DNA totally by doing that or you can draw some question into whether or not it's credible DNA evidence;

isn't that true?
A. Again, our strategy was not to contest the DNA in any way in this case because, number one, he consented as he was a cooperating witness for the State in the first two trials and so he had given already sworn testimony in those trials to explain his DNA that the State was very well satisfied with at the time, so giving Mr. Porch's idea about the strategy in this case we simply were not contesting the DNA in any way. We were acknowledging his blood was on the scene. So, no, we did not object to that.
Q. Well, wasn't it new in this situation because his DNA was on the victim's shirt?
A. They always had that. They claimed it was new, but it really was not. I mean, his blood -- they were always aware of his blood in the kitchen and everything else and then they tested -- I mean, his testimony was always that he had got in between and was cut. So for me it was very disingenuous to act like all of a sudden finding blood of her on his shirt is like this is a revelatory idea because he had always testified being cut in the middle of a struggle between them, so. Again, that's why we didn't challenge it. I mean, we challenged it severely in the Franks hearing because we thought the magistrate was not given a full picture, but we didn't -- as a strategic matter we did not attempt to suppress or challenge the idea

that his blood or DNA was on the scene.
Q. Okay. And Number 10, just revisiting, you had no objection to State's Exhibit 24 or 25 or -- at that time these were photos, you did not object to crime scene photos, so if you had a previous motion to suppress you did not preserve it by objecting at that time?
A. Right. We didn't object prior to what we had already litigated.
Q. Okay. And Number 12, referencing buccal swabs, State's Exhibit 59, there were questions. "Obviously this case was open prior to that, correct?", which was a -- could be determined a leading question, or "When you receive a new item of evidence, it's just assigned the next number in line", all questions regarding DNA, was that something you did not object to as a strategic decision as well?
A. Yes.
Q. Okay. And Number 14, failed to object to testimony regarding DNA of Applicant is included in comparison to DNA taken from victim's fingernails, would that also fail under that same strategic decision regarding DNA -- the presence of DNA in the story that you were putting forth?
A. Right. I mean, his DNA was everywhere, including under her fingernails. I think looking at the notes, I mean, they were -- the State was very much scrambling to

try to explain it in the first trial. Even going -- you know, talking about could be dangerous, you know, things like that, under the fingernails, and so we didn't touch DNA or dispute DNA in any way.

Q. And in moving onto Number 15, saying you did not object to leading questions regarding DNA, "So that means that DNA could have been Joshua Porch's DNA", that's also something under 16, failed to object to testimony regarding DNA evidence on the crime scene matching Applicant and from victim's clothing. Would you say you -- that was part of your strategy, but you did not preserve any objections, you didn't make any objections?

A. Right. We didn't object, so there was no reason to worry about preservation because it was completely part of our strategy and we had no other -- we didn't hire a DNA expert to contest it. It was just overwhelming evidence of his DNA that they had already brought and since we were re-prosecuting Mallory we were happy to say that if it was good enough for them, it's certainly now good enough for us.

Q. If you could have kept out his statements, defendant's statements, if that was possible, let's say, for example, if you had a different result and more cross-examination of the officer who refused to show back up or some other things could have been done to suppress statements, would

it then have been possible to say well, if we can keep the DNA out completely and we're eliminating these statements, you could have drastically changed the defendant's situation as far as your defense strategy, correct?

A. I don't think so. If we had kept out the California confession, we'd be stuck with about seven or eight different statements, including sworn trial testimony, so we would still be stuck with his -- with the version of events that he testified to before as a star witness and we would have to explain that DNA the same way he did for law enforcement, so I don't think we would have done anything different there. It would have been nice, but it wouldn't have been different regarding DNA.

Q. Okay. And under 18, was it a leading question -- you failed to object to the leading question of hearsay testimony by witness Hargraves. "It was a cry for help. Yes, he was saying help, help". Page 631.

Was that something you could have objected to?

A. To me, that's an excited utterance, so I think that -- I did not object to that based on my view of that under the rules.

Q. Okay. But, of course, an excited utterance you would have more detailed testimony about what is the person witnessing and, of course, you didn't get into that because you didn't object; is that fair to say?

A. I did not object. Yes.
Q. Okay. And Number 19, failed to object to leading questions to Persia Porch. Quote: So for the first time law enforcement approached Mr. Porch, he didn't volunteer any information, on page 655. You didn't object to that and you could have objected indicating that maybe Mr. Porch did not have a responsibility or burden to give up some information there? Did that seem to place a burden on him?
A. Well, we were kind of in a unique position where all of that ground was argued before us and I remember reading the transcripts of this case and reading Jerry Finney and thinking how easy it would have been for him relatively speaking because, you know, the State seems to be very much embracing Josh because they just -- whether they should have or not because they were looking so hard at Mr. Mallory as a suspect, so it was already before us that he -- we knew that he didn't really come forward and once he was questioned he certainly provided explanations, so we strategically in the moment we were spending so much time and investing so much energy in trying to establish this false confession that we on little things like this that were obvious, little meaning, of course, we can embrace the same lack of volunteering information the same way the State did because how can we not? It was good enough for them, it's good enough for us. So, yeah, that was a -- we

did not object. It was a strategic decision regarding Number 19.

Q. Okay. Under 21, referencing Investigator Holdorf and him not being qualified, he was never qualified as a digital forensic examiner and cellular analyst, never qualified as expert in that field?

A. I don't believe so. I think he had some in-house training, but...

Q. Okay. Do you agree that he provided what could be considered expert testimony though by someone who was not qualified as an expert?

A. Yes, but he helped our theory of defense so we were happy for him to opine -- and Holdorf, in particular. I mean, his chin was quivering. He was -- he clearly believes that Josh Porch was innocent. I mean, he -- he was torn. He was the most torn person. He was very upset about this and so he was -- we just relitigated the evidence that he always had to show that per his analysis of the cell phone that Mr. Mallory clearly could have been on-scene to do this crime, so we -- you know, we wanted that information in evidence.

Q. Is that generally the same response to Number 22 regarding did not object to leading question about -- regarding Holdorf's testimony regarding Mallory's cell phone. He could have arrived a couple of minutes after

3:30, the time he put him at and testified to. Is that something that -- does that fit within your strategy there?
A. Yes.
Q. Okay. And Number 24, failed to object to Applicant's statements to Investigator McDaniels during interrogation in California in answer to the question did you lie about -- about Justin Mallory being there when Nekia was stabbed, stating "He looked up, and he said he was not there". Page 1072 and lines 4 through 9. And to evidence of other crimes regarding perjury when Investigators McDaniels asked the Applicant "Why did you stand up in Court and lie?", what was the purpose for not objecting to that?
A. Was this in his recorded video statement or is this McDaniels testifying? Help me out.
Q. Well, it says here object to the Applicant's statement to McDaniels during interrogation in California.
A. I mean, McDaniels, as part of the interrogation process that was through Jackson v. Denno. This whole line -- chain of questioning and our client's answers to it was deemed admissible, so.
Q. You renewed the objection though at that time?
A. Well, I don't have a basis for -- the moving to suppress was based on, you know, his will being overborne. The fact that McDaniels calls him a liar based on, you know, his past testimony under oath in trials, I mean,

that's just something that we were -- we were having to explain to Mr. Porch's testimony anyway. So I just -- I didn't object to that because it was admissible per Judge Lee and just part of kind of Investigator McDaniels' general approach that we were having to deal with he.

Q. Okay. And just moving onto 25, that you explained under Exhibit 50 the portion regarding testimony or statements about use -- Applicant saying use of illegal drugs and that was published to the jury, you actually heard that when it was played in front of the jury. You heard those statements and made your motion for mistrial?

A. Right.

Q. And referencing page 1107, lines 10 through 12. And you stated it was clearly prejudicial. So even though as the attorney general pointed out, the judge made some statements about whether or not she could understand it, you clearly understood it when you heard it?

A. I could, and I was troubled by it. And, like I said, the prosecution, to the attorney general's office, they had not over-tried their case, they hadn't been overly zealous as sometimes I had encountered, so we had made all our -- we had done all our pre-trial work and I felt that we had pretty good parameters on what was allowed to be on that tape and what was not. You know, I did not -- I mean, it's easy when someone shows you a photograph and say I'm

marking these for ID, you know, this was what we discussed and you confirm, but when you see a CD, I mean, unless you're gonna just go play it, I guess I trusted Mr. Goings a little too much. I'm not saying he did it on purpose. Maybe a clerk burned it, maybe it was inadvertent and they didn't stop it in time, but it came out and, you know, that kind of stuff is damaging in my opinion, which is why I made a mistrial motion.

Q. Are you indicating that you reviewed the version prior to trial and the version you thought was going that you reviewed did not have that information on it?

A. I did not review it. I mean, it was done -- we had set our parameters about what was coming in and then as we're moving, he tells me this is the video and I assume it's gonna have everything contained. I didn't take a moment to insist that a laptop be provided and I need to double-check. I guess I trusted him too much at that point.

Q. Okay. I think I understand what you're saying. I just wanted to clarify. Thank you.

Now the pathologist's testimony. You said you did have a pre-trial motion about that, trying to prevent that testimony because it was not that pathologist's report?

A. Correct.

Q. You did not renew that motion, however, when the

pathologist testified?
A. I don't have a transcript before me, but we litigated the heck out of that pre-trial.
Q. Would you like to see that portion?
A. I mean, if you say I did not, I'm not gonna disagree with you, but --
Q. Well, obviously if the attorney general wants to show it, I believe that objection was not made, but --
MR. SPENCER: Which one are we on?
MR. JOHNSON: This is Dr. Marcus, the pathologist, if you want to show it to him. I don't think he made an objection at the time.
MR. SPENCER: Yeah, that's fine. I don't think he did. I don't think it's in the testimony.
MR. JOHNSON: Right.
BY MR. JOHNSON:
Q. So there's no record as far as I can tell, so you don't believe you made that objection at that time when it was offered into evidence?
A. At the time I can't imagine we wouldn't because we made such a huge deal, but without having a transcript in front of me I just couldn't --
MR. JOHNSON: Your Honor, can I pause for a moment to show him just to be sure and he's sure and everyone's on board?

THE COURT: Yes, sir.

MR. JOHNSON: Your Honor, I'm gonna hand him a portion of the transcript and I believe the testimony we're talking about starts on -- excuse me, Judge. It says 886. Actually it's 885, but I'm gonna hand it up to the witness.

THE COURT: Yes, sir.

BY MR. JOHNSON:

Q. Let me know if I've got that wrong. If that's not on --

A. It looks like I did object.

Q. Where was that?

A. Well, they -- they're referencing on page 884 who they're gonna call next and I bring up we've got a situation, we're having a doctor testifying and not the coroner, the doctor's testimony. I think -- I guess on the record we make the objection subject to prior rulings to preserve the record right before he testifies. I was just thinking out loud and then they confirmed the next witness is Dr. Marcus and they confirm that and then I just say we are just going to make an objection that we made pre-trial that him being allowed to testify, which has already been ruled on, just subject to those prior objections for the record, and the Court says I know it was taken up pre-trial and I did issue a separate order

and I said yes.
Q. Okay.
A. So I feel like I tried to -- I objected prior to him going generally based on the same pre-trial, so I think I -- I think I did.
Q. You did, and I was mistaken. Thank you.
A. I was like I knew I did not care for that and if there's --
Q. Yes. I don't want to put anything false in the record. Thank you for checking.
Now on Number 20 -- excuse me, I'm getting a little lost here, Judge. I'm sorry.
On 27, you failed to object to testimony from Sergeant Godfrey regarding Applicant's statements about fighting with the victim. Is that something that was strategic because you felt like that was part of your defense or did you --
A. I haven't -- without more context, it's hard for me to really answer that question. If you want to show it to me.
MR. SPENCER: Your Honor --
MR. JOHNSON: Okay. Yeah, that's page 1360.
MR. SPENCER: But that was Brian Shealey's witness, not his.
THE WITNESS: Okay.

MR. JOHNSON: Okay.

BY MR. JOHNSON:

Q. And you've indicated that was not your witness, so you'd really have to defer to the other attorney?

A. Sure.

Q. Okay. And so at the end of all this even though he was on trial -- Mr. Porch was on trial for murder, they did hear a statement about possible sexual assault and drug use, illegal drug use?

A. Yes.

Q. And that was prejudicial you'd say against your client?

A. I wholeheartedly agree about the illegal drug use part. It was very prejudicial.

Q. Is it helpful to hear about sexual assault possibly being committed by your client during a murder trial?

A. No, but I just -- it wasn't a part of the case that the State was alleging, so that's why I didn't object. I was kind of picking and choosing my fights with Mr. Mallory given what was about to come, but, no, I did not object to that.

Q. Okay.

MR. JOHNSON: Judge, I'm just gonna review real quick.

THE COURT: Yes, sir.

BY MR. JOHNSON:

Q. Did you receive any information from Mr. Porch or have any discussions about the sufficiency of the indictments or did you feel like they should have been objected to and move to quash them or how did you feel about the indictments?

A. Well, we -- I don't think we made a motion to quash the indictments specifically, but we made a motion essentially to quash the arrest warrants, which were the gist of the indictments pursuant to the Franks issue that got litigated heavily, so. But, no, we didn't have -- I didn't think there was any -- other than -- other than the misleading in my opinion of the magistrate on signing off on the warrants, I didn't think there was -- once that issue was ruled upon, not in our favor, we did not take up a particular issue with the indictments.

MR. JOHNSON: All right. Thank you. I appreciate it.

Judge, no more questions.

THE COURT: Okay. Mr. Spencer.

REDIRECT EXAMINATION

BY MR. SPENCER:

Q. Mr. Shealey, in terms of Ms. Cohen, at the time you cross-examined her for the Jackson v. Denno hearing, did you have any reason to think that she wouldn't be

testifying again later?
A. No. I've never had a case where a lead investigator fought a subpoena to not come to trial.
Q. You kind of guessed my next thought. Any reason to think that she wouldn't want to testify at trial?
A. No.
Q. I wanted to just clarify in terms of the DNA that was found under the victim's fingernails, do you recall that essentially the testimony was they couldn't match it to Mr. Porch, but he couldn't -- he couldn't be excluded?
A. I believe that's what it was and so obviously the State was having to live with that in their first two trials in prosecuting Mr. Mallory and we lived with it the same way because he was there and he cut himself, he got between them, and we didn't contest DNA at all just for strategic purposes.
Q. In terms of, you know, when they found DNA in the kitchen that matched his DNA, they found DNA on -- or, you know, blood on the victim's shirt in which he was a major contributor for one spot, but in terms of the fingernails all they could do for that was just not exclude him?
A. Right.
Q. So that kind of has minimal evidentiary value?
A. To us it was minimal.
MR. SPENCER: I beg the Court's indulgence.

THE COURT: Yes, sir.
BY MR. SPENCER:
Q. In terms of the neighbor, Mr. Hargraves, do you have any reason to think that given that Mr. Mallory just discovered his wife had been stabbed to death, that what he was saying when he was, you know, crying for help, would it be an excited utterance?
A. I believed it would be, so I didn't think we had any way of keeping that out.
MR. SPENCER: I beg the Court's indulgence.
THE COURT: Yes, sir.
BY MR. SPENCER:
Q. Okay. In terms of the statements he gave out in California, they asked him pretty quickly was Mr. Mallory there and he said no. Is that your -- is that your recollection?
A. Yes.
Q. All right. And that's significant because he just testified against Mr. Mallory two times?
A. Right. It was very problematic.
Q. And certainly that was significant in the fact that it would tend to exonerate Mr. Mallory?
A. Yes. I mean, he had already been exonerated. Legally.
Q. Legally. In terms of -- and I think the word

"perjury" got used in here. Do you recall any testimony that -- using the word "perjury"?
A. I think that was just part of Investigator McDaniels' general interrogation technique. I mean, they flew out with arrest warrants to California prior to even getting a statement from Josh, so clearly they had made up their mind, but, of course, wanted evidence that would help them with that claim and so I think, you know, Investigator McDaniels -- he had a very lengthy interrogation, including polygraphs and other things, which we sought to suppress, but that was just the choice of words because McDaniels viewed him as a perjurer because he -- his prior testimony would have been false in his opinion, so we just simply -- our approach, again, was to say that was a false confession, he wasn't a perjurer, but I think we couldn't -- we didn't specifically seek to limit that particular language because it was just part of law enforcement's latest theory.
Q. And would pretty much be the res gestae of the case?
A. I'm sure if we had sought to suppress that particular language, that would have been what was said.
MR. SPENCER: Thank you. I don't have any further questions.
MR. JOHNSON: No questions.
THE COURT: You may step down, sir.

(Witness excused.)
THE COURT: We'll take a 15 or 20-minute break.
All right. Fifteen to twenty minutes, folks. Thank you.
MR. SPENCER: Thank you.
(Recess taken at 11:46 AM.)
(Back on the record at 12:05 PM.)
BAILIFF: Stay seated. Come to order.
THE COURT: I'm ready, sir.
MR. SPENCER: Thank you, Your Honor.
I would call Mr. Aiken to the stand, please.
THE CLERK: State your full name, please.
THE WITNESS: Arthur K. Aiken.
(Whereupon, Arthur K. Aiken was duly sworn by the Clerk of Court.)
THE CLERK: Thank you. You can have a seat right there.

ARTHUR K. AIKEN,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q. Mr. Aiken, you were one of the attorneys on the -- that represented Mr. Porch; is that right?

A. At trial, yes.

Q. At trial. And I wanted to ask you some questions

concerning some of the trial allegations. In terms of the 9-1-1 calls, did you see any means to challenge the 9-1-1 calls?

A. Well, first of all, I don't think formally there was a solid legal objection to them.

Q. Right.

A. Also, my recollection of them is that they were not emotionally charged or anything like that where you would worry about the jury being prejudiced by the 9-1-1 call, so I didn't think a 403 analysis was gonna work.

Q. Right.

A. Not only that, I recall that Mr. Mallory was very composed in his 9-1-1 call and that sort of played into our theory that Mallory was the actual person who committed the crime.

Q. So that's actually something you wanted the jury to hear?

A. That's my recollection. Now, you known, this was nine years ago, so you-all -- you-all be gentle with me on my memory.

Q. Certainly. Certainly. Well, let me ask you this. What is kind of generally your theory on when to object and not to object to leading questions?

A. Well, I don't see any reason to object to a leading question if the substance of the answer doesn't materially

impact your case. I see no reason to do that.
Q. Right.
A. And one of the theories of lawyers that I don't necessarily ascribe to, but some -- some lawyers believe if you object too much you appear to the jury to be trying to prevent them from getting information about the case. Now whether that's true or not I think is subject to some debate. The only time I typically object to leading questions is if there are multiple leading questions, okay, and it appears to me that the questioning attorney and the witness are not clicking. Like the -- the lawyer feels compelled to lead because he feels like he's got to serve up the answer to his witness and if that's happening a lot of times you can throw somebody completely off -- off their game if you -- if you make a leading question objection. And, of course, one thing about leading questions is that there's a simple matter of curing that, which is re-ask the question, because typically that's the judge's ruling. Sustained. Ask him -- ask him a different way.
Q. So they can get the information out anyway?
A. Exactly. And if you're ever concerned about whether you're gonna respond to that with another leading question, all you have to do is say please state whether or not blank. That's all you've got to do. And good lawyers when they have sustained a leading objection, that's their

question that they go to to make sure they don't lead again.

Q. Right.

A. So, I mean, it's kind of much ado about nothing.

Q. Do you remember any significant issue with the chain of custody?

A. No. No. As a matter of fact, we probably would have consented, but our theory was to kind of bog the Government down in some routine questioning of witnesses because they all did -- they did it all in one big chunk with all of the -- all of the people in the chain and it went on for hours, and it was -- it was exquisitely boring, so we wanted them to bore the jury.

Q. I wanted to -- let me grab the trial transcript, and I'm turning to 396, and this is -- I think it will work if you just read -- just give you a chance to look at it yourself, the entire page, and then I'm gonna focus on what I want to focus on.

A. Okay. Yes. Go ahead.

Q. And then the allegation is -- it was lines 15 to 20, that you should have objected to that as leading questions concerning the question as to whether there was blood spatter in the photographs.

A. I agree that the question at line 18 is a leading question. The other questions on the page don't appear to

be leading to me, but --
Q. All right. Let me ask you -- I'm sorry.
A. -- but it sort of falls within the -- in the general approach that I take to making objections to the form of the question, leading and that kind of thing.
Q. Right. It wasn't critical to object?
A. No. No, not to me. I mean, the photo was coming in. I mean, all we were doing was kind of gilding the lily by getting the witness to say is that -- is that blood right there.
Q. Right.
A. I mean, it's in the picture.
Q. And I think that transcript goes up to this page, 452. If not, I'll get the next one. And the allegation is I believe leading questions for lines 18 and 19 and then 21 and 22.
A. I agree that the question at line 18 is leading.
Q. Right.
A. I agree that the question on line 21 is leading, but these were -- this was testimony of people in the chain of custody.
Q. Right. This is --
A. And we weren't even contesting the chain of custody.
Q. And were you agreeing with the evidence technician in this case?

A. Yes, I believe this was an evidence tech who was testifying about the chain and how -- how items were logged in. I mean, we weren't -- we had -- we had no beef with the chain.

Q. So it wasn't important to object to?

A. No. No.

Q. Okay. And then I think that might be it with that transcript --

A. All right.

Q. -- and we'll pick up with the next one.

MR. SPENCER: I beg the Court's indulgence. I got these a little mixed up.

THE COURT: Yes, sir.

BY MR. SPENCER:

Q. And so I'm gonna hand you pages 527 and 528 and this is testimony that the Applicant -- this is testimony about the DNA found under victim's fingernails and the -- Mr. Mallory was excluded and Mr. Porch was included, but the DNA expert testified that he couldn't say it was a match. Did you see a basis to object to that testimony?

A. Are we talking about at page 10 and 11 -- or 528, lines 10 and 11.

Q. Yes.

A. Okay. I agree that that is a leading question, but we -- as Mr. Shealey indicated, we weren't contesting the

DNA.
Q. Right.
A. And also the witness made clear it looks to me like in response to the question at line 7, "Okay. So Mr. -- Justin Mallory was excluded from that" -- wait a minute. That's not what I was looking for.
Okay. Actually that page, lines 10 through 12. "Okay. So that means the DNA could be Joshua Porch's DNA? It could be".
Q. And what's the significance of the phrase "could be" for you?
A. Well, I mean, to me -- to me that means they have a very low level of certainty as to whether that is, in fact, Justin -- I mean, Joshua Porch's DNA.
Q. To a certain extent at least on that issue it's sort of synonymous with reasonable doubt?
A. Correct.
Q. And we might have one more in this transcript. Does this go up to 655?
A. 655? Okay.
Q. Okay. If you've found it --
A. Yeah, line 18 through 21 on 655?
Q. I think that would be -- I think that's right. That's -- and that is Persia Porch, his wife, testifying?
A. Correct.

Q. And that's just -- the question is, I'm paraphrasing here, but, you know, basically saying that Mr. Porch did not volunteer info to the police?
A. Yeah.
Q. Is that anything you felt was necessary to object to?
A. No. No, that was patently obvious to the jury given what had occurred in the two prior trials which were mentioned at the trial where Mr. Porch had given multiple stories on what had occurred.
Q. Okay. I think I just have one more transcript to bring up to you.
A. All right.
Q. I'm gonna hand you up and certainly read what you feel you need to to refresh your memory --
A. Okay.
Q. -- but I'm gonna start on page 1071 and line 17 and just carry over to the end of the next page.
A. Okay.
Q. I just want to know when you're ready.
A. Okay.
Q. All right. And so did you see a means of challenging the statement that anything objectionable about the testimony from -- I believe it was Investigator Godfrey that the defendant admitted that the husband wasn't there when the stabbing occurred?

A. That's not in what I have in front of me, but I can answer your question --
Q. Okay. Thank you.
A. -- so that's okay. Personally I didn't see any means to seek to have that excluded. We had argued all those points in two days of pre-trial and as far as what came up earlier about contemporaneous objections, my recollection is that Judge Lee on the record said that her evidentiary rulings are final. They were not provisional.
Q. Okay.
A. So I don't -- and, like I said, that's nine years ago, okay, so I can't guarantee that's correct --
Q. Certainly.
A. -- but that's my recollection and so that renewal of the objection wasn't necessary. So that issue had already been litigated pre-trial and decided.
Q. Okay. Let me grab that back from you real quick.
A. All right.
MR. SPENCER: I beg the Court's indulgence.
THE COURT: Yes, sir.
MR. SPENCER: Mr. Aiken, thanks for being here today. I don't think I have any more questions for you.
THE WITNESS: Absolutely. Thank you.
THE COURT: Mr. Johnson.
MS. JOHNSON: Thank you.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Aiken, you didn't have anything to do with that previous discussion of the pathologist. Mr. Shealey handled all that. I'm not gonna ask you about that.

A. That's my recollection, yes, sir.

Q. And did you have any -- just to reference the grounds from the original application to kind of get that out before I get into mine, did you have any questions about the indictments since there was that previous motion about the warrants? Did you have any question about challenging the indictments when you reviewed those?

A. Not -- not to my mind. I believe the indictments were proper in form and even if there had been issues about the issuance of a warrant, if the evidence -- if true evidence was properly presented to the grand jury and they true billed an indictment, then I think that that indictment is valid and not subject to being quashed. And as you know, in South Carolina all they've got to do is recite the statutory language and insert your client's name in there and that's good enough. I mean, I don't necessarily agree with that, but that's the law.

Q. Yes, sir. Just kind of going back and starting with my amended application, and if some of these are really falling under the responsibility of the other counsel at

trial, please let me know.
A. I will to the extent that I can.
Q. Yes, sir. Was there an initial conversation with my client about him wanting access to a law library at all?
A. I don't recollect ever hearing any discussion about a law library.
Q. How many times did you go out to meet with my client, Mr. Porch?
A. To be honest with you, over nine years later I really can't tell you. I know that we tried to go as a group, everybody together so everybody would know what was happening with the case and what the client's wishes were rather than having to relay information back and forth. So I agree with -- with Luke Shealey that we went out there a bunch.
Q. Do you remember delivering copies of discovery to Mr. Porch?
A. I didn't have anything to do with that.
Q. Okay. And moving on through Number 2, there was a statement made on page 148 of the transcript basically from Justin Mallory. It looks -- it looked like someone raped and killed her, referencing the victim. Did you -- basically I'm just confirming nobody objected to that?
A. That's my -- that's my recollection, yeah.
Q. Okay. And do you feel like that is something that

could have been objected to since that was referencing sexual assault in a murder trial?

A. Well, the -- the problem is that if you object and you win, what do you get, okay? You're not gonna get a mistrial based on inadvertent blurting out of something that's not -- has no evidentiary support in the record as far as a potential crime. So you're not gonna get a mistrial, so what's your remedy? Well, your remedy is a curative instruction. Well, I mean, does not -- does not that focus the jury's attention on that?

Q. Uh-huh.

A. I would be more hopeful that it would just go and fall off like water off an oily duck and they would have no idea, you know, that anybody had said that. So I -- I mean, I don't think it's deficient performance not to object to that, and even if it were, I don't think it's prejudicial.

Q. Okay. Dealing with Number 3 and Number 4 off of my application and Officer Cohen, is it true that there was a previous hearing with an opportunity to -- to question Officer Cohen and there was that exchange where a Crawford objection was made and then the judge related that the defense counsel, including you, had the opportunity to do that at that time and it was not done, right?

MR. SPENCER: Your Honor, I just -- that was -- that

was a witness that I think we've already established Mr. Shealey handled.

THE COURT: I thought so, too.

THE WITNESS: Yeah, I didn't have anything to do with that particular witness.

MR. JOHNSON: All right. Moving on. Thank you.

BY MR. JOHNSON:

Q. The 9-1-1 calls, the discussion of that admission at trial, of course, you indicated that was simply a strategic decision because you didn't feel like they were damaging or something that you didn't really needed to worry about?

A. Pretty much, yeah.

Q. And Number 6, you have the same answer there as far as leading question, the answer you just gave is the same?

A. Yeah. Okay.

Q. Also with photos of victim injuries in Number 7, just confirming, and I'll put on the record, you feel that you've already answered that and your answer would not change?

A. Yes, I think I've given an answer to that.

Q. Okay. And buccal swabs of DNA under Number 9 and the failure to object to leading questions during crime scene photos and, Number 10, all of those were strategic decisions and your answer kind of remains to what you've already said?

A. Nothing new to add.
Q. And going to Number 12, of course, buccal swab, that -- you know, leading questions or DNA questions, that would remain your answer?
A. Correct.
Q. And the same thing for Number 14 with an actual comparison -- as the attorney general asked you, comparison under the fingernails, you felt like that was something for strategic reasons you were not going to challenge?
A. Pretty much, yeah.
Q. Okay. And the same for Number 15 regarding my -- Mr. Porch's DNA and failed to object to testimony regarding DNA evidence at 15 and 16, your answer would be the same with what you've just given?
A. Right.
Q. Okay. And the same under 18, the testimony by witness Hargraves regarding a cry for help, you feel like that was a leading questions, but for the reasons you've already given you did not object?
A. Well, you know, if your only -- if your only theory to keep that evidence out is a leading question, okay, I think my prior answer about how I typically handle leading questions is correct, but the big -- the proponent's theory for that evidence was -- or the opponent's theory to exclude that from evidence was hearsay, I think -- I think

it still comes in because I don't think that statement's hearsay.
Q. Okay.
A. Because he's saying help, help. I mean, you're not offering it for the truth of the matter asserted in the statement, so it's not hearsay to begin with.
Q. Okay. And to Number 19 in regards to leading questions of Persia Porch, your answer would remain as to what you've already given?
A. Correct. Yes.
Q. And under 21, and I don't know if this was your witness or how you can answer it, regarding cell phone records and expert testimony given by Investigator Holdorf, was that not your witness to handle or --
A. That was not my witness, but I did -- we did discuss that among the -- among the group of Mr. Porch's lawyers and we specifically said we want that evidence in --
Q. Okay.
A. -- so don't say anything about the qualifications because I was afraid the Government was gonna say wait a minute, you know, he's not an expert, he can't testify to that at this trial, and they might -- they might have kept it out.
Q. Okay. So you wanted it in?
A. We wanted it in and we didn't want to give any

indication that there was any issue as to admissibility.
Q. Got you. And the same thing under 22, the question to Holdorf being leading and information tracking --
A. Right.
Q. -- the same justification?
A. Correct.
Q. Under 24 on my application, there's a statement failed to object to Investigator McDaniels during interrogation in California in answer to the question "Did you lie about Justin Mallory being there when Nekia was stabbed?", and said "He looked up, said he was not there", and to evidence of others, did you not feel that an objection was appropriate at that time, evidence of other crimes or basically seeming to imply perjury or something?
A. Well, it's an interrogation, okay?
Q. Uh-huh.
A. Officers are gonna say things during interrogations that we don't like and clients are gonna say things during interrogations that we don't like, but just because there's some insinuation in the question of a possible crime, I don't think is enough to keep it out.
Q. Okay.
A. Keep out the question and the answer in an interrogation. I mean, after all, our Government says you can lie to a witness in a -- I mean, to a defendant in an

interrogation.
Q. That's true.
A. It's pretty much open season.
Q. And moving onto 25, discussing Exhibit 50, this video that Mr. Shealey objected to and the -- kind of the publishing of this video where at the end there was discussion of client/Applicant/Mr. Porch using illegal drugs, did you have the opportunity to try and review the video before it was set in front of the jury?
A. I didn't have anything to do with that video. I know we did discuss how we should pitch the mistrial motion --
Q. Okay.
A. -- among the lawyers, but I didn't -- I'm not sure I was aware of that video until -- until shortly before the trial and I don't think I ever looked at it because I was not questioning those witnesses.
Q. Okay. And on Number 27, I don't know if this is something you were involved in, failed to object to testimony from Sergeant Godfrey regarding Applicant's statements about fighting with the victim. Is that something that was fitting in your scheme of the defense or was that not your responsibility?
A. I don't recall that at all.
MR. SPENCER: Your Honor, that was Brian Shealey's witness.

THE COURT: All right.

MR. JOHNSON: Very good.

That's all I have for this witness, Your Honor.

THE COURT: All right.

THE WITNESS: Thank you, Mr. Johnson.

MR. JOHNSON: Thank you.

MR. SPENCER: I have a brief follow-up.

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. SPENCER:

Q. I did want to talk real quickly about Exhibit 50, and I know that wasn't something you were involved in, but in terms of what was played for the jury, you're not saying that you -- you're not saying that you or the Shealeys never saw a copy of that video, you're just saying that particular video?

A. No. No. No. That's exactly right. You're correct. Basically we -- we divvied up the witnesses and because of just the volume of material that had to be reviewed, two prior trial transcripts, I mean, all kinds of -- there was more witness material than in the average case, three times more, and so we divvied up the witnesses and everybody had witnesses they were responsible for and that's what you were focussing your attention on.

Q. Certainly.

A. Because everybody couldn't review everything. There was just no way to do it, there just wasn't enough time, and that was a witness that I didn't -- I wasn't responsible for. So I probably did review the video, but I don't think I really connected what was in the video to it actually being played in court. I don't think I thought through that whole thing because that was not my witness.

Q. Certainly.

MR. SPENCER: That's all the questions I have, Your Honor.

THE COURT: Mr. Johnson.

MR. JOHNSON: No more questions, Judge.

THE COURT: Thank you, Mr. Aiken.

THE WITNESS: Thank you, sir.

(Witness excused.)

MR. SPENCER: I'm gonna call Brian Shealey, Your Honor, and just I also may need to recall Luke Shealey after that just to give a heads-up.

THE CLERK: State your full name, please.

THE WITNESS: It's Brian Shealey.

(Whereupon, Brian Shealey was duly sworn by the Clerk of Court.)

THE CLERK: Thank you. You can have a seat right there.

THE COURT: All right, sir.

BRIAN SHEALEY,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q. Mr. Shealey, I kind of want to first talk about Investigator Holdorf. Do you remember him as a witness?

A. I do. He was the lead investigator, I believe, on the first prosecutions of Mr. Mallory and he was a very important witness for us.

Q. And tell me what your strategy was with Mr. Holdorf.

A. My strategy with him was that he was the sheriff's department's scapegoat in the prosecution of Josh, but that, you know, basically we were embracing the State's first two prosecutions as the truth and he was our star witness. So we ran him through his investigation. He was unwavering in his belief that Justin Mallory was the true killer and we embraced that and so, I mean, everything he did was perfect in terms of our examination of him in front of the jury.

Q. All right. And he -- his testimony about the cell phone tracking, I mean, you've heard testimony from your brother and Mr. Aiken, but would you agree that the cell phone tracking evidence is something you-all wanted in?

A. We definitely wanted that in.

Q. And I think this is the only time I'm gonna have to

bring the transcript up to you. Let me grab the right part first. I'm gonna go to page 1360. I think the way it's phrased in the pleadings is that Sergeant Godfrey testifies and says that Mallory -- or, excuse me, that Mr. Porch fought the victim, and I'm on 1360, lines 1 through 9. If you could flip to that real quick. And, first of all, does Investigator Godfrey ever use the word "fight"?

A. I think he describes it as an altercation.

Q. Okay. Is there anything objectionable about that?

A. I mean, this was the -- I mean, I was not part of the team for the couple of days of pre-trial, but, you know, I was very much aware of the litigated pre-trial and we were trying to suppress all of that -- all those California statements, but we knew they were coming in and so, I mean, we had gotten through a couple of different pre-trial rulings and Judge Lee was letting it in, so that was what was a recorded statement that the jury got to see and then I think, you know, that was coming in. So, you know, I was not objecting to that because we had already litigated it.

Q. All right. And I wanted to -- let me take that transcript before I forget. I wanted to kind of backtrack all the way to the very first allegation and I think Mr. Porch said that nobody ever brought him discovery or

showed him discovery. Did you go through discovery -- you and the other lawyers go through discovery with Mr. Porch?

A. I mean, I got -- I was the last lawyer to get involved on the team. You know, I was there more for like the trial prepping.

Q. Certainly.

A. But, again, I've practiced law with my brother for a long time now and so that -- you know, we always are exhaustive with discovery. We like to have our clients really know every little angle of it and educate them. Especially if they're testifying. I mean, we spend -- I don't know if this will be your next question, but in terms of preparation with clients, I mean, we do exhaustive practice examinations, cross, and so, I mean, we spend many, many hours of work on that.

Q. Another thing I wanted to hopefully clear up, you actually -- we've been talking about the mistrial issue where there was some testimony about drug use that was heard by the jury, but as far as -- as far as the video statement, you would have had a copy of that video statement? Not the one that was actually put in trial, but a different copy that you would have reviewed?

A. Yeah, we had that video and so, you know, I do agree with my brother and we -- that was all litigated, you know,

it was our understanding that the -- none of that drug reference was coming in at all, and we did have a really good through the course of the trial working relationship with Mr. Goings and that -- that did blind side us. I mean, you know, that was Luke's witness, you know. I think he testified it's kind of relatively easy to look at a photograph and make sure it's what it's supposed to be, but we were upset. I'll just say that. We were -- we were really upset when that came out.

MR. SPENCER: Your Honor, I think that's all the questions I have.

THE COURT: Mr. Johnson.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Shealey, was there a request made by Mr. Porch to access the law library?

A. I don't recall.

Q. Okay. And do you have anything to add regarding meetings with Mr. Porch? I mean, do you know how many times you met with him?

A. I don't. I just know it would have been quite a few, especially for a testifying witness. It would have been a lot.

Q. Okay. And you didn't have anything to do with delivering discovery to him?

A. No, I did not.
Q. Under Number 2 when the statement was given about -- the statement from Justin Mallory "It looked like someone raped and killed her", regarding the victim, were you there and did you have the ability to object to that at that time?
A. I don't think that was my witness.
Q. Okay.
A. I think that was Luke's.
Q. Okay. And the issue with interviewing Officer Cohen, were you available to cross-examine Officer Cohen at that previous hearing?
A. I was not there.
Q. You were not there. Were you responsible for dealing with the 9-1-1 call and that issue of objecting to it or not?
A. I don't think so.
Q. Okay. Were you involved under Number 7 going to discuss photos of the crime scene or objections to photos under Number 9? Were you involved in all that process of photos under Number 10, talking about all those photos, was that your call or someone else?
A. I know that was litigated pre-trial, which I was not a part of that. You know, what we -- you know, it's been nine years, but what we do pretty much whenever we have

pre-trial that is, you know, sometime prior to the trial, we normally as a matter of housekeeping kind of get up before we even start the case with the trial judge, especially if it's the same trial judge that did the pre-trial, as matter of housekeeping get up and say -- kind of go through what the rulings were and that way we're not having to necessarily do the contemporaneous objections, which the jury may not understand why we're doing that, it's kind of awkward, and so I think we -- I think we probably did in this case, I can't recall, but I wasn't part of the pre-trial on that. I just remember that the photos were pretty much like preordained what Judge Lee was allowing in, so we -- we didn't make any big fuss over it in front of the jury.

Q. Okay. And the same answer that was given previously as far as buccal swabs and DNA evidence as they referenced it under 14, and I'll just list -- I don't know if that's regarding your responsibility or not -- under 15 talking about statements about Joshua Porch's DNA, and under 16, is that something that involved you as far as making that decision or making those objections?

A. I mean, we made -- the team made the decisions, but, you know, again, that was our strategy to embrace the DNA just due to the prior statements about being there and -- I mean, his -- his DNA was there. That was part of what

we were kind of getting back to with his first testimony.
Q. Okay. And would your answer be the same regarding objection of hearsay statements as listed under 18 and 19 for Witness Hargraves and the cry for help or the statement by -- questions to Persia Porch, "So the first time law enforcement approached Mr. Porch he did not volunteer any information?", as far as not objecting to those, would your answer be the same or was that not your responsibility?
A. I don't think those are my witnesses, but I'm --
Q. Okay.
A. -- uncertain that was my brother's.
Q. Okay. And under 21 and 22 referencing testimony of Investigator Holdorf and the cell phone information, your failure to object to expert testimony by him, your answer would be the same, that you felt he was beneficial to your case?
A. He was our hero. We let him -- we were embracing everything that he did.
Q. Okay. And as you go through and as we've discussed, under 24, 25, talking about the video recording, is there anything you can add to that, the video that came in that you just discussed with the attorney general and drug use by the defendant, was that your responsibility to review that prior to that coming in or that was not really your job?

A. Yeah, I guess, since it was Luke's witness, I would say that he, you know, just like with the photograph, would have been the one responsible, but, again, that wasn't done and we were extremely upset when that came out.
Q. Okay. Did you have the ability though to stop and say I'd like to review that copy you're about to play to the jury?
A. Yeah, I think we could have, but we didn't though. I think we had a lot of trust with Mr. Goings.
Q. Okay. Got you. Did you have any issues with the indictments or was that your responsibility?
A. I know that Luke and Jay Cooper litigated exhaustively on the -- you know, that the State should be collaterally estopped from malicious prosecuting and I know they did the Franks hearing, so I -- I just don't think we did with the indictments because we kind of attacked everything concerning the -- the warrants.
Q. Okay. And you have nothing to add regarding the pathologist and the objection? That was your brother's responsibility.
A. That was my brother's and I think that was pre-trial litigated as well, but, yeah, Luke handled that.
Q. Very good.
MR. JOHNSON: No more questions, Your Honor.
THE COURT: Mr. Spencer.

MR. SPENCER: No further questions.

THE COURT: Thank you, sir.

(Witness excused.)

MR. SPENCER: Your Honor, if permitted, I'd like to recall Luke Shealey briefly.

THE COURT: Certainly. I'll allow that.

MR. SPENCER: Thank you.

THE COURT: You're still under oath.

MR. SPENCER: Thank you, Your Honor.

LUKE SHEALEY,

having been previously sworn, testified as follows:

FURTHER DIRECT EXAMINATION

BY MR. SPENCER:

Q. Mr. Shealey, there's one thing I forgot to ask you about before, which is did you go through discovery with Mr. Porch?

A. Yes, and I know Jay, knowing him like I did, was very methodical and would have gone through discovery and likely would have left Mr. Porch with some discovery, but obviously with an instruction to not share it. I think at the public defender's office at the time we had a special form we have clients sign saying you're receiving this kind of against our advice, but certainly need to review it. I do see a note that Jay made from July 23rd of 2010 where he actually had Josh transported to the

courthouse specifically to watch the interrogation videos. So Jay was always very good about that and I was his second seat and so that was certainly accomplished.

Q. And then the last thing I wanted to talk to you about is just to clarify because you mentioned you had not reviewed the actual -- you know, you didn't look at the actual exhibit that was put into evidence, that Exhibit 50, before it was played for the jury, but you had a copy of that interrogation that you would have reviewed if that makes sense?

A. Right. Through discovery we had lengthy hours long -- I think there was a couple of different interrogations in California, including a polygraph, so pre-trial we obviously had the Jackson v. Denno and our 404 and 403 objections. Plus with Investigator Cohen not coming to trial, we ended up gaining a lot of rulings that whittled down what was admissible in terms of his statements. Certainly the crux of his incriminating statements were allowed to come in, so my recollection was that we had an understanding, you know, that certain portions of the testimony were definitely coming in --

Q. Right.

A. -- but we also had an understanding that certainly extraneous drug use and various nicknames that we had successfully been able to prevent him being called, I

think he had a nickname that was pretty inflammatory, Mr. Goings -- I did not expect Mr. Goings to have included whether it was on purpose or inadvertently the drug reference on the video that was submitted for the jury. So I did not review it in the moment because, you know, I think we've already talked about it, so. But it was way condensed to what generally was received in discovery based on all the challenges.

Q. Okay.

A. And we just were blindsided by it. I don't know if it was on purpose or a mistake, but it came in and then I moved for mistrial.

MR. SPENCER: Great. Thank you. I appreciate your -- I appreciate you being here. I don't have any further questions.

THE COURT: Mr. Johnson.

MR. JOHNSON: No questions, sir.

THE COURT: You may step down, sir.

(Witness excused.)

THE COURT: So --

MR. SPENCER: That would be the State's case, Your Honor.

If I could give a brief closing if you would like to hear that.

THE COURT: Yes, sir. That's fine.

MR. SPENCER: Certainly. And, you know -- because there's numerous, numerous allegations in this. I think, first of all, off the bat I think we can quickly dispense with the idea that they didn't investigate this case. This transcript shows clearly otherwise. This transcript shows they know what they're doing.

And we've heard a lot about leading questions and obviously all three have testified to more or less what I think we'd agree all attorneys do, which is they don't object to every single leading question. That's just not something that's done.

In terms of the situation with Officer Cohen, that seems to be a situation that they manipulated rather than them doing something that would constitute a deficiency of counsel. However, I would note that, you know, there was no expectation that Officer Cohen would not be willing to come to South Carolina and testify at trial and be moving to quash her subpoena. I don't think anyone anticipated that and attorneys are not required to be clairvoyant. Nonetheless, I think they manipulated -- leveraged that situation to the benefit of their client.

I'm not sure I understand precisely what -- the allegations with the 9-1-1 calls. I saw in the prosecutor's closing argument a reference to Mr. Mallory, you know, basically screeching or having a high voice,

which would tell me it was sort of an excited utterance situation. Mr. Aiken's recollection is that felt he was a little bit more mild mannered than you would want, so either way this is something that's coming in. Either you want it in because it shows he's way to too relaxed for somebody that's found his wife murdered or it's excited utterance and there's no doubt that would come in. Either way in the big scheme of things, it's certainly not gonna affect the outcome of trial.

In terms of photographs, I think, you know, when you look through the record they managed to keep out what they could. In terms of -- in terms of how that would create an appellate issue, I mean, it's a pretty high standard on review to meet. If they have a probative purpose and the judge finds that the danger of prejudice as you're aware, of course, doesn't substantially outweigh the probative value, it's coming in and the reviewing court's gonna give a lot of deference to that. So, I mean, none of those allegations, whether it's trial attorney allegations or appellate attorney allegations, really are gonna amount to much.

I fail to see how you could object to a buccal swab or a consent to give a DNA sample when Mr. Porch volunteered long before he was even a defendant as opposed to a witness.

In terms of DNA evidence, I think everybody knew his DNA -- he admitted his DNA was gonna be on there -- on the scene before they tested it.

And I think the testimony you heard about trial strategy is pretty sound.

In terms of testimony from Mr. Hargraves, this is the neighbor, basically what happened is Mr. Mallory testified that once he, you know, found the victim, he was trying to get some help and Mr. Hargraves testified that he was banging on the door and was crying for help and a leading question, "Was that a cry for help?", really isn't anything that's problematic from a defense standpoint. I don't see there's any reason to think this wouldn't be excited utterance.

I think we've heard a lot about the cell phone tracking testimony and Investigator Holdorf in general and, you know, certainly that's something they wanted in as a matter of trial strategy.

I think all the testimony -- I'm not quite sure what they're getting at with some of the allegations concerning the statements that came in. They were challenged multiple times, multiple ways, and, of course, they tried to keep it out on what they termed a Franks violation. They were aggressive about that. They brought in a false confession expert to try and discredit that

confession, which obviously was pretty -- pretty devastating to the defense.

Really probably the allegation that might be most interesting here is the Exhibit 50 and that's where there's some testimony that comes in at the end of the video, a statement that references his use of drugs, and basically Judge Lee found -- you know, Judge Lee considered this carefully. She found that it wasn't grounds for a mistrial. She -- in her view, in her professional judgment, it wasn't something you'd want to call attention to and I think we heard from Luke Shealey that, you know, that certainly can be -- that's always the dilemma when you have something, you know, you don't necessarily want to highlight it. If it's something the jury isn't gonna focus on, you don't want to necessarily refocus them on it, and they did take the steps of cutting that bit of the statement out so the jury when they had the statement -- video statement for deliberations wouldn't have been able to access that testimony anymore, and Judge Lee gave a considered ruling on that. I don't think it's -- bear in mind this is a murder prosecution and I think, you know, in general a jury is not gonna convict somebody of murder because they might have used drugs somewhere in their past. I just don't think that's really gonna be a problem. I think

far more problematic for Mr. Porch is the fact that he had admitted multiple times he had lied even, you know, when he was gonna go with the version of events where he -- where he intervened in a domestic dispute. He has to admit that he lied several times to even get to that point, but as far as in reference to drugs it's clear that he said he wasn't using drugs anymore, that he had stopped using drugs when he met his wife, so I don't know that that really is going to present a problem as far as it being heard by the jury and certainly not when nobody -- not when the State never references it again, it's taken out of the statement, and everybody moves on.

Regarding the allegations for appellate counsel, Mr. Anzelmo didn't have a clear memory of this particular brief, but I did put him up, and the reason I put him up was to establish he's supervising a couple of other attorneys and they're going through this record to raise what the best issues are and the Franks issue has to be the best issue. Counsel's not required to raise every potentially meritorious review -- raise every meritorious issue. They're allowed to select amongst the ones that they think are going to get the best result, and I think that's clearly what happened in this case when you consider his testimony about how to methodically go through this record and trying to pick the right issues

to raise. And if you look at the issues that they're saying should have been raised, it's clear the standard is you have to show that it was clearly stronger than the issues that were actually raised on appeal, and there's nothing nearly as strong as the Franks issue, and that was an issue that was well argued I thought by the Shealey brothers. I think that was an issue that was well argued on appeal and my normal job is working on direct appeals and I'd have to say for our office Anthony Abee wrote an excellent brief because that is quite a -- quite a bit to put together a brief like he had to put together to unravel that argument where those omissions were being argued as the Franks violation.

Real quickly I think I can summarize the issues they wanted to raise on appeal. I mean, they're just in terms of the consent to search form for buccal swab, that -- I recall that objection was hearsay. It would go towards -- obviously go towards state of mind. It would be something that would be admission of opponent -- of a party, which is what the prosecutor said in the record. It's not something that would have changed the outcome of the trial.

You know, Number 13 is the admission of a photo of a bloody shirt, and it's true as they say in the pleadings that Judge Lee said it may be cumulative, but

you have to read the rest of it because she explains the ruling further, and it's on 502 of the transcript in lines 9 through 15, and she says it may be cumulative, but it would be less dramatic and less prejudicial than pulling out a shirt and handling -- handing the shirt, putting on gloves and all that in front of the jury to show the shirt and to show where the cuts were taken, and this is the shirt -- they took ten cuttings from this shirt and one of them was -- nine of them were the victim's DNA and one of them -- it was her shirt and one of them had DNA where Mr. Porch was the major contributor, and she said I think the photograph would accomplish the same thing without having to go through all the drama of pulling the shirt out, so I think it's relevant and I think that ruling is pretty unsalable on appeal. Further, it shows she's trying to minimize the prejudice.

Allegation 17 was they're supposed -- they were supposed to appeal the Court's ruling allowing leading questions. Well, that's pretty wide discretion under Rule 611 where the judge has the discretion to allow leading questions, you know, frankly, just to move the case along. I -- I don't see how that's an abuse of discretion.

Allegation Number 20 was the reference to -- there's

some questioning basically put to Mr. Porch whether he was gay or abused as a child and there was an objection made under Rule 404 and we have a ruling on pages 814 through 815. Basically our argument was if we start taking stuff out of that portion of the recorded interview, it would break up the flow and our office was worried that the jury would think that we were -- something was being hidden, so that's what we argued, and Judge Lee ruled with us and felt like under the -- under the circumstances it was not unduly prejudicial, and when you're reviewing a -- when a reviewing court is reviewing a judge's 403 ruling, they give a great bit of deference to that, so that's a hard -- that's a hard issue to pull. Certainly not clearly as strong as the Franks issue.

Number 23, that's also something that was addressed in the record on page 1053 and 54. The objection by one of the Shealeys was that the video showed a polygraph machine. Judge Lee, first of all, argued -- or found consistent with our office's argument that, first of all, lot of jurors wouldn't even know that that was a polygraph machine, but she also observed it was -- it didn't show it being hooked up to Mr. Porch. There's nothing to show he was actually getting a polygraph. It was something that, you know, was visible to somebody who

knows what a polygraph machine is during the interview, but there's no indication that Mr. Porch actually was polygraphed in that video recording that was actually entered into evidence.

And then the argument that there should have been -- Allegation Number 26 was that appellate counsel should have raised the issue of the denial of mistrial based on the introduction State's Exhibit 50, which is, again, where we had some disclosure of some inadvertent testimony about drug use.

I think actually, too, just to back up on that and go through that, it appears that we actually gave the Shealey brothers a chance to stop the video. I don't know -- you know, one thing I was trying to make sure was clear was they had a copy that they were viewing, we had a copy that -- by we, I mean our office had a copy we were putting into evidence. Whether they matched exactly, I have no idea. I'm only looking at the record, but I think clearly there was a mixup where we actually offered the opportunity to stop the video and I don't think they realized when we kept playing it that that was what was gonna come out. Regardless of where that falls, when ruling on a mistrial motion, there's a deference there to -- the language that's important there is a mistrial should only be granted out of manifest

necessity and certainly the drug use is something either you could give a curative instruction or as Judge Lee observed, you know, if it's not significant enough, it's something you may not want to even highlight. Certainly I think that issue would have been preserved should it -- it wasn't raised, but had it been raised, but I think a thorough examination of the issue would have shown that Judge Lee did not have -- had the means to cure or limit the damage from that and that it wasn't something that manifest necessity required granting a mistrial on.

The last issue was appealing the Court's ruling prohibiting testimony from Andelyn Rodriguez, third-party guilt involving witnessing previous assaults by Mr. Mallory and choking the victim. They were allowed to put out some evidence that there had been a prior domestic dispute between Mr. Mallory and the victim, Mrs. Mallory, but not to go into specifics. Judge Lee put on the record that it was a 2002 incident and we're dealing with a 2006 murder and she just didn't think that it was -- should be admissible and she put that record on pretty clearly and I think -- I think that's something that would hold up on appeal because, frankly, it was a remote incident and it would just be character evidence as opposed to something that had a legitimate probative purpose in this trial.

And certainly in regards to all of the evidence that we had in this case of those video statements, so many changes and versions of events and that sort of thing, I think -- across the board I think we would argue there just isn't any prejudice from any particular deficiencies because at the end of the day the evidence was really overwhelming.

And, Your Honor, unless you have any further questions, that would be our position and we'd ask that the application be denied.

THE COURT: Yes, sir.

Mr. Johnson.

MR. JOHNSON: Thank you, Your Honor. I'll just state regarding all of the appellate counsel arguments and the claims that were raised, I believe Number 8, 13, 17, 20, 23 and 26 and 28, I think the record's pretty clear on that, and I'd ask the Court to please review that. I think everything as far as the record and the transcript that's been recited here is all accurate. I'll let my arguments stand on those.

And regarding the rest of it, I think with the testimony there's been clear statements made. For instance, there's testimony about strategy. Well, this wouldn't have made a difference regarding DNA or pictures, but obviously what if the objections were

made? What if there was a strong effort to suppress DNA and all of a sudden there was no DNA linking Mr. Porch and then all of a sudden things could have changed drastically, and I think Mr. Shealey indicated as well, of course, that would have been great if things, you know, had been done totally different and supporting evidence was kept out, and so the point I think I was trying to make here with this amended application was if there could have been a -- could there have been a stronger effort to keep out DNA buccal swabs or to make that seem less reliable since there was DNA, a link between Mr. Porch and that item of clothing of the victim.

And since they initially, I believe, testified that they felt like, you know, they -- they were going with this defense and there was an issue with that DNA, they had to deal with it, and I would argue that -- well, I've always heard that you've got to preserve your objections and so if I ask them during the trial did you preserve this objection or that objection as I cited in my questioning, it's my understanding you're not preserving it for appeal if you don't raise that objection when an item's coming into evidence.

And if I'm wrong about that, well, then that's just what I'm arguing. I would say that you have to

keep raising that. I think the language is you've got to raise that objection every opportunity when they're bringing in DNA or whatever it is, including the photographs or testimony.

There were statements made about well, the 9-1-1 or whether or not it would have been admissible. Of course, sometimes 9-1-1 calls are not admissible. Sometimes they can be kept out entirely. The same thing with photographs if there's blood and there's an argument made. I know that there were pre-trial motions and there was some ruling, but my point would be if there's no in-depth objection and anything about the 9-1-1 that was really gone into as far as the timing, then, of course, we don't -- if defense counsel did not figure that out, that's something that might have been helpful to Mr. Porch. It could have gone in, it could have been kept out.

And as things go, you know, the same thing with leading questions. To object to a solicitor or to an attorney general on direct and to break up their rhythm of questioning sometimes would argue if they're gonna obviously try and ask questions that are helpful to their case, it could be beneficial to the defense to simply object to the leading questions and break up their rhythm, back them off of the point, possibly move

them into something -- maybe they'll forget what they were gonna ask and actually then move into something else and forget something entirely. It's happened before and sometimes that is a good strategy as well. If you've got a legitimate objection regarding leading or hearsay, sometimes it really does help. And I know that's obviously kind of a tactical decision there as they indicated, but that would be my argument.

The argument regarding Exhibit 50 and the video, Mr. Shealey stated, and I think it was in the record, that clearly it's prejudicial. He did not -- I asked him specifically did you stop and say wait, let me see that copy that you're about to publish to the jury so I can review it, he said he did not because he was basically trusting the prosecution in that, and just obviously from day-to-day trial experience it is possible to walk up and say wait, before we punish this let's review exactly what you're gonna show the jury, and that was not done. It contained statements made about drug use -- illegal drug use by Mr. Porch, which is clearly not gonna be helpful in any trial, especially since this was not drug a trial, it would not be relevant. It would be highly prejudicial.

I would argue that in combination with this statement by -- I think Mr. Mallory saying well, it looks

like the victim was sexual assaulted. It's not a CSC trial. This is a murder trial and there could have been some way to deal with that, to object to that, make it clear to the jury that they were not to consider that, although, of course, the tactical decision could be as I think Mr. Aiken said to move away from that and not draw attention to it, which is what some people would do. I would argue that that could have been done.

Also Mr. Porch has indicated he wanted access to some help with legal research and that was not given as far as getting access to a law library. He testified that he did ask for that. He testified that he was not really able to sit down and talk to his attorneys a sufficient number of times, which, of course, is not what they said and it's two different stories there, but he's indicated that he really did not get the chance, did not get evidence, did not get physical copies of the discovery and did not get to really sit down and review evidence in such an important case and obviously would be very important.

And there was also testimony about -- well, it's been explained, Judge. Of course, there was testimony about objections to all photographs and leading questions regarding as it, once again, leads into the DNA. I would just rest on that argument that, you know, if they attack

it, then obviously it could have been more successful, but we don't know if there was not a real effort there to move at that time or to interrupt or to object to questions and leading questions to cut them off and possibly drawing some doubt about this DNA that did link Mr. Porch to the victim, and that's all I have, Judge.

THE COURT: Okay. Thank you.

Gentlemen, all of you have been very patient with me throughout this matter. I have by my count six PCR's to take home with me and I'll rule as soon as I can. In June or July I have been saddled with making general sessions cases go away.

So, anyway, I'll get it to you just as soon as I can, folks.

MR. SPENCER: Yes, sir.

MR. JOHNSON: Thank you, Judge.

THE COURT: If I have a question, I'll send it obviously to everybody, okay?

Thank, you-all. Have a good weekend.

MR. SPENCER: Thank you, Judge.

(Whereupon, the proceedings were concluded at 1:20 PM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 27th day of May, 2022.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

December 6, 2023

/s/ Stacy S. Johnson

STACY S. JOHNSON, RPR
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Joshua William Porch, #357979, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2018–CP–40–4103 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. George M. McFaddin, Jr.
Applicant's Attorney:	Ola A. Johnson, Esq.
Respondent's Attorney:	David A. Spencer, Esq.
Trial Counsel:	Arthur K. Aiken, Esq. Luke A. Shealey, Esq. Brian R. Shealey, Jr., Esq.
Appellate Counsel:	Michael J. Anzelmo, Esq. Matthew A. Abee, Esq.
Date of Hearing:	May 27, 2022
Court Reporter:	Stacy S. Johnson

RICHLAND COUNTY
FILED
2024 DEC 19 PM 12: 21
JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

This matter comes before the Court by way of Applicant Joshua William Porch's application for post-conviction relief (PCR) filed on August 3, 2018. Respondent, the State of South Carolina, made its Return on November 8, 2018, requesting an evidentiary hearing to resolve the claims as set forth in the application. On March 21, 2022, Applicant, through PCR Counsel Ola A. Johnson, Esquire, filed an amendment to his application for post-conviction relief asserting an additional twenty-eight claims of ineffective assistance of trial and appellate counsels.

An evidentiary hearing was convened on May 27, 2022, before the Honorable George M. McFaddin, Jr. Applicant was present and represented by Ola A. Johnson, Esquire. Senior Assistant Attorney General David A. Spencer represented Respondent. At the hearing, Applicant proceeded forward on the claims set forth in his original and amended applications. In support of

these claims, Applicant testified on his own behalf, and Respondent presented testimony from Michael A. Anzelmo, Esquire (Appellate Counsel), Luke A. Shealey, Esquire (Counsel L. Shealey), Arthur K. Aiken, Esquire (Counsel Aiken), and Brian R. Shealey, Jr., Esquire (Counsel B. Shealey).[1]

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In January 2011, the Richland County Grand Jury indicted Applicant for murder (2011–GS–40–3359). Counsel L. Shealey, Counsel Aiken, and Counsel B. Shealey represented Applicant. Fifth Circuit Assistant Solicitors Cary N. Goings and Curtis A. Pauling, III, prosecuted the case.

On November 12, 2013, Applicant proceeded to a jury trial before the Honorable Alison R. Lee. The jury found Applicant guilty as indicted. On November 25, 2013, Judge Lee sentenced Applicant to imprisonment for fifty (50) years.

Applicant filed a timely notice of appeal and was represented on appeal by Michael J. Anzelmo, Esquire, and Matthew A. Abee, Esquire, who raised the following issues:

> I. Whether the trial court erred in failing to void the State's arrest warrant under Franks v. Delaware?

[1] Counsel L. Shealey, Counsel B. Shealey, and Counsel Aiken are referred to collectively as Trial Counsel.

II. Whether the trial court erred, and violated Porch's rights under the Confrontation Clause, in limiting Porch's testimony based on the unavailability of a State witness?

After briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction on August 3, 2016. State v. Porch, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016).

Applicant filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The petition was granted by Order dated August 22, 2017. After briefing and oral argument, the South Carolina Supreme Court dismissed the writ as improvidently granted on May 30, 2018. State v. Porch, 423 S.C. 332, 815 S.E.2d 446 (2018). The Remittitur was returned to the circuit court on the same day.

FACTS GIVING RISE TO THE CONVICTION

Nekia Mallory ("Victim"), mother of two (2) small children, was murdered in the early morning hours of May 14, 2006. Victim was stabbed to death in her home in Richland County. Victim had one (1) stab wound to the right side of her neck and one (1) superficial stab wound over her right eye. Victim had also been beaten about the head. The knife wound to Victim's neck proved fatal. A large amount of blood was found in the den of Victim's apartment, where her body was discovered, and a small amount of blood was found in her kitchen. Victim's kitchen gave the appearance that someone had attempted to clean up the blood therein by wiping it with a cloth. Additionally, a spot of blood was found on a bottle of dish detergent or cleaner under Victim's kitchen counter. The murder weapon, a knife, was never recovered, nor was the cloth used to wipe up the blood in Victim's kitchen. (R. pp. 155–196, 260–338, 339–351, 351–94, 395–430, 431–78, 480–557, 730–52; Trial Tr. pp. 125–66, 233–311, 319–31, 331–74, 388–423, 512–59, 561–638, 886–908).

Victim's husband, Justin Mallory ("Mr. Mallory"), came home at approximately 3:30 a.m. on May 14, 2006. At that time, he discovered Victim in the above-described condition on the floor of the den in the apartment they shared. Upon finding Victim, Mr. Mallory immediately checked on the couple's two (2) children, who were asleep in a bedroom, before seeking assistance from neighbors by banging on their doors.[2] Mr. Mallory called 911 for help at that time. Mr. Mallory waited for EMS to arrive before picking up Victim's body and driving her to Providence North East Hospital, where Victim was pronounced dead. Mr. Mallory, got Victim's blood on him during his transportation of her body to the hospital. (R. pp. 155–196, 260–338, 339–351, 431–78, 546–57; Trial Tr. pp. 125–66, 233–311; 319–31, 512–59, 627–38).

Mr. Mallory fully cooperated with the police in their investigation. Mr. Mallory informed investigating officers of his whereabouts on the night of Victim's murder, consented to a search of all of his property, and submitted a DNA buccal sample. In detailing his version of the events on the night in question, Mr. Mallory admitted he had been with another woman romantically before finding Victim's body. Mr. Mallory confessed the two had stayed at a motel and stopped at a convenience store before he drove the woman to her home. Mr. Mallory stated once he parted ways with the woman, he talked with friends on his cell phone during his drive home to the apartment he shared with Victim, where he discovered her body. Mr. Mallory stated he sought assistance from neighbors and called 911. Mr. Mallory confirmed he heard gurgling sounds coming from Victim, picked her up, placed her in his van, and drove her to the hospital. (R. pp. 155–96, 260–338, 351–94, 431–78, 753–87; Trial Tr. pp. 125–66, 233–311, 331–81; 512–59; 909–43).

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[2] Victim's neighbor, Shareed Hargraves, testified when Mr. Mallory came to his door for assistance, he did not have any blood on his person. (R. pp. 546-557; Trial Tr. pp. 627- 38).

Mr. Mallory was initially charged and indicted for Victim's murder in Richland County. The Fifth Circuit Solicitor's Office prosecuted the case. Mr. Mallory faced two separate trials before the Honorable Thomas Cooper on the murder charge. The first trial ended with a hung jury. During Mr. Mallory's second trial, the jury acquitted Mr. Mallory of the murder charge. (R. pp. 155–96, 260–338; Trial Tr. pp. 125–66; 233–311).

Following his acquittal, Mr. Mallory contacted the Richland County Sheriff's Office and Sheriff Leon Lott. Mr. Mallory informed the Sheriff's Office he was not involved in Victim's murder and asked that they re-open the investigation of her case. Richland County Sheriff's Office did re-open the investigation into Victim's murder, assigning Chief Deputy David Wilson to conduct its review. Chief Deputy Wilson's investigation focused on Applicant, who had testified as a key State's witness during both of Mr. Mallory's trials. (R. pp. 155–96, 260–338, 787–98, 800–40; Trial Tr. pp. 125–66, 233–311, 943–54, 1011–51). Chief Deputy Wilson realized Applicant had given multiple inconsistent versions of the events leading to Victim's murder, including stating on one occasion, he cut his right hand, and on another occasion, he cut his left hand. (R. pp. 800–40; Trial Tr. pp. 1011–51).

Police first approached Applicant the day after the Victim's murder, following a statement given by Mr. Mallory on the night of Victim's murder. Mr. Mallory told investigating officers that the only individuals who could have possibly committed Victim's murder were either the maintenance man or Applicant, as each man had recently been in the couple's apartment.[3] In his first statement to officers, Applicant denied being present at the scene at the time of the crime,

[3] Applicant was a neighbor of Victim and Mr. Mallory.

claiming he knew nothing about Victim's murder. Applicant's wife, Persia Porch, also told police at that time Applicant had been with her on the night of Victim's murder.[4]

Shortly before Mr. Mallory's first trial, prosecutors discovered there was unidentified blood containing male DNA in the kitchen of Victim's apartment. About a year after Victim's murder, Applicant was again contacted by police in an attempt to identify this unknown male DNA. At that time, Applicant admitted being present at Victim's apartment earlier in the evening of Victim's murder and cutting his hand while slicing an apple. Applicant was polygraphed on this statement and failed the polygraph test. Upon further questioning, Applicant gave a third version of his testimony of the events that took place on the evening of Victim's murder, where he stated he had been at the crime scene "fooling around" with Victim when Mr. Mallory came home and attacked her with an object. In this version, Applicant testified his hand was cut while intervening in the attack. Applicant claimed he was facing Mr. Mallory when this occurred. Applicant admitted he bled in Victim's kitchen as a result of his wound and attempted to clean up his blood before leaving the apartment. This was the version of events Applicant testified to during Mr. Mallory's two (2) trials for Victim's murder, of which he was ultimately acquitted. (R. pp. 575–96,603–11, 558–74, 612–57, 666–729, 787–96; Trial Tr. pp. 667–88, 736–44, 650–66, 745–90, 819–82, 943–52).

Chief Deputy Wilson requested additional DNA testing after Mr. Mallory's acquittal in Victim's murder. This additional testing revealed Applicant's DNA on Victim's shirt, as well as in her kitchen.[5] DNA consistent with Applicant's had also previously been found under the Victim's fingernails. Conversely, no DNA matching Mr. Mallory's was found on the Victim or under her

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[4] Applicant's wife changed her statement at Applicant's trial, where she testified Applicant left their apartment during the night of Victim's murder, returning sometime later in the night or morning. (R. pp. 558-74, Trial Tr. pp. 650-66).

[5] Applicant's blood was found on the bottom right side of Victim's shirt.

fingernails. During this time, it was determined Applicant is left-handed, as is consistent with both of Victim's stab wounds being to her right side. Notably, Mr. Mallory is right-handed. The criminal re-investigation of Victim's murder ultimately determined Applicant to be Victim's killer. An arrest warrant for Applicant in association with Victim's murder was obtained on July 7, 2009. (R. pp. 431–79, 800–40; Trial Tr. pp. 512–60, 1011–51).

Investigators with the Richland County Sheriff's Office traveled to California on July 8, 2009, where they arrested Applicant that night. Investigators began questioning Applicant shortly after midnight on July 9, 2009; thereafter, Applicant provided a statement implicating himself in Victim's death, alleging her murder was an accident. Applicant admitted Mr. Mallory was not present when Victim was killed.[6] (R. pp. 796–98, 841–93, 907–64, 975–76, 977–1067, 1225–35; Trial Tr. pp. 952–54, 1055–1107, 1134–91, 1216–17, 1343–1431).

Later that same day, Investigators questioned Applicant a second time. In his second statement, Applicant claimed Victim "came on to him," he rejected her, she got a knife, a struggle between the two ensued over the knife, and Applicant ended up hitting Victim several times in the forehead during that struggle. This version of events is consistent with Victim's autopsy results. (R. pp. 841–93, 907–64, 975–76, 977–1067, 1236–39; Trial Tr. pp. 1055–1107, 1134–91, 1216–17, 1343–1431).

Investigators questioned Applicant again on July 10, 2009. This interview was recorded on videotape.[7] In his third statement, Applicant further implicated himself in Victim's murder.

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[6] This statement was inconsistent with the sworn testimony Applicant had given during Mr. Mallory's two prior trials.

[7] Prior to rendering his third statement, Applicant was polygraphed/interviewed by a Los Angeles County detective, Officer Cohen. Officer Cohen, who polygraphed Applicant appeared and testified at his Jackson v. Denno, 378 U.S. 368 (1964) hearing. Officer Cohen was subpoenaed for Applicant's trial. However, Officer Cohen successfully challenged the out of state subpoena in a

Applicant admitted on the night of her murder, he "came on" to Victim, who then rejected his advancements; he then stabbed her, causing the injuries that resulted in her death.[8] Applicant admitted he attempted to clean up the crime scene and disposed of the murder weapon. After hearing all of the evidence and Applicant's confessions, the jury found Applicant guilty of Victim's murder. (R. pp. 841–93, 907–64, 975–76, 977–1067, 1199–1202; Trial Tr. pp. 1055–1107, 1134–91, 1216–17, 1343–1431, State's Ex. 50; 1806–09).

CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.
   a. "Trial counsel failed to call three witnesses that would have perjured investigator."
   b. "Trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003)."
   c. "Unreasonably failing to preserve the issue for direct review."
   ~~d. "Jurisdiction"~~[9]
      ~~i. "Trial Counsel failed to establish subject matter jurisdiction."~~
      ~~ii. "Jurisdiction was not established on the record or at all."~~
      ~~iii. "According to § 14-9-120 Richland County doesn't have jurisdiction to hear, or try, convict and sentence murder charges."~~

California Court where that court ruled Officer Cohen did not have to return to South Carolina for Applicant's trial, which she did not.

[8] Mr. Mallory testified at Applicant's trial. Mr. Mallory's testimony helped establish Applicant as Victim's murderer. Mr. Mallory was able to account for his whereabouts up until just moments before he discovered the Victim's body, began banging on neighbors' doors, and called 911. Mr. Mallory provided cell phone records and tower information showing him coming from another location and heading toward the apartment where he and the Victim lived while talking to friends on his cell phone, as was consistent with his original testimony. (R. pp. 155-96, 799; Trial Tr. pp. 125-66, 971).

[9] Applicant withdrew this allegation at his evidentiary hearing. (PCR Tr. p. 5).

On March 21, 2022, Applicant, through counsel, filed an amended application for post-conviction relief alleging the following additional claims for relief:

2. Ineffective Assistance of Counsel.
   a. Discovery.
      i. Failed to properly review the evidence with Applicant and prepare him for trial.
   b. Failure to Subject the Prosecution's Case to Meaningful Adversarial Testing.
      i. Failed to call Officer Cohen as a witness to question regarding Applicant's interrogation and failed to present the full interrogation to the jury to argue that Applicant's statements were involuntary.
      ii. Failed to conduct a complete cross-examination of Officer Cohen at a previous hearing. (p. l88, lines 7-13).
   c. Failure to Object.
      i. Failed to object to speculation, opinion testimony, and evidence of other crimes from Justin Mallory, "It looked like someone raped and killed her" (p. 148, lines 19-20).
      ii. Failed to object to State's Ex. 6 and 7 (report and 911 calls), (p. 326, 327).
      iii. Failed to object to the leading question "is that the safeguard to show that the evidence isn't tampered with?" (p. 342, lines 2-3).
      iv. Failed to object to photos of victim's injuries as prejudicial, States Ex. 18, 19, 22, 23. (p. 365).
      v. Failed to object to Buccal Swab States Exh. 29 (p. 380) and photos of blood States Ex. 12, 13 (p. 401) and State's Exhs. 10, 17, 20 (p. 405) as prejudicial and cumulative.
      vi. Failed to object to leading questions regarding crime scene photos State's Ex. 24, 25 (p. 396, lines 15-20).
      vii. Failed to object to a leading question "and so from time to time you can in a kitchen have a false positive on a LCD, can't you?" (p. 416, lines. 5-6).
      viii. Failed to object to leading questions regarding Applicant's Buccal swab State's Ex. 59, "obviously this case was opened prior to that? Correct?" (p. 452, lines 18-19), "when you receive a new item of evidence it's just assigned the next number in line?" (lines 21-22).
      ix. Failed to object to testimony regarding DNA of Applicant as "included" in comparison to DNA taken from Victim's fingernails. (p. 527, lines 16-25).

x. Failed to object to leading question from the state regarding DNA, "so that means that that DNA could have been Joshua Porch's DNA?" (p. 528, lines 10-11).

xi. Failed to object to testimony regarding DNA evidence from the crime scene matching applicant (p. 531) and from Victim's clothing (p. 541, lines 16-24).

xii. Failed to object to leading question and hearsay testimony by the witness Hargraves, "it was a cry for help? Yes, he was saying help, help" (p. 631, lines 19-20).

xiii. Failed to object to leading questions to Persia Porch "so the first time - law enforcement approached Mr. Porch, he didn't volunteer any information?" (p. 655 lines 18-21).

xiv. Failed to object to expert opinion testimony from Inv. Holdorff regarding cellular phone information and tracking for Mr. Mallory's phone records even though he was not qualified as a digital forensic examiner and cellular analyst (p. 927, lines 1-7, p. 932, lines 13-17, p. 934, lines 5-8).

xv. Failed to object to leading question from solicitor to Inv. Holdorf regarding Justin Mallory's cell phone information and tracking "he could have arrived a couple minutes after 3:30, the time you put him at and testified to?" (p. 934, lines 5-7).

xvi. Failed to object to Applicant's statement to Inv. McDaniels during interrogation in California in answer to the question "did you lie about Justin Mallory being there when Nakia was stabbed?" stating "he looked up, and he said he was not there" (p. 1072 lines 4-9) and to evidence of other crimes regarding perjury when Inv. McDaniels asked Applicant "why did you stand up in court and lie?" (p. 1074, lines 3-4).

xvii. Failed to object to State's Ex. 50 regarding a portion of a video recorded statement by Applicant discussing use of illegal drugs that was then published to the jury. (p. 1107, lines 10-12) and counsel Luke Shealey stated that this evidence was "clearly prejudicial" (p. 1130).

xviii. Failed to object to testimony from Sgt. Godfrey regarding Applicant's statements about fighting with Victim. (p. 1360, lines 3-9).

xix. Trial Counsel failed to object to Dr. Bradley Marcus testifying when he was not the doctor that performed the forensic evaluation.[10]

3. Ineffective Assistance of Appellate Counsel
   a. Failed to appeal court's ruling regarding Applicant's consent form regarding DNA Buccal Swab collection Ex 28. (p. 377).
   b. Failed to appeal ruling regarding admission of photo of bloody shirt (State's Ex. 36) court said it may be cumulative. (p. 502, line 9).
   c. Failed to appeal court allowing leading questions regarding DNA evidence from Inv. Barron (p. 544).
   d. Failed to appeal court's decision to allow in portion of Applicant's interrogation by law enforcement regarding allegation that Applicant was gay or abused as a child despite defense objection under Rule 404 (p. 814, line 17).
   e. Failed to appeal court's ruling on video of Applicant's interrogation as admissible despite visible polygraph machine in video. (p. 1054).
   f. Failed to appeal the courts denial of a motion for mistrial (p. 1130) following defense motion based on the introduction of State's Ex. 50.
   g. Failed to appeal the court's ruling to prohibit the testimony of Andelyn Rodriguez as 3rd party guilt involving witnessing previous assaults by Mr. Mallory choking the Victim. (p. 1497, lines 1-2).

Before this Court are the Richland County Clerk of Court records from the underlying conviction and sentence, Applicant's records from SCDC, Applicant's complete appellate record, all of the pretrial and trial transcripts, and this post-conviction relief action records.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[11] provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

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[10] On May 27, 2022, Applicant, through counsel, amended his application for post-conviction relief to include one additional allegation at his evidentiary hearing. (PCR Tr. pp. 4–5).
[11] S.C. Code Ann. §§ 17-27-10 *et seq*.

2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord

Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively

incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a

fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is

entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

This Court finds applicable the strong presumption that at all stages of Trial Counsel and Appellate Counsel's representation of Applicant, they rendered adequate assistance and exercised reasonable professional judgment in their representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1(a): Trial Counsel failed to call three witnesses that would have perjured the investigator.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to call witnesses. Specifically, Applicant averred Trial Counsel failed to call three witnesses[12] that would have perjured the investigator. This Court finds this allegation to be without merit.

An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d

[12] Notably, the three witnesses Applicant alleged would have perjured the investigator were never enumerated within the application or presented at the evidentiary hearing.

807 (1998). Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

Findings

This Court finds Applicant failed to meet his burden of proof as to this allegation because he did not present the testimony of these witnesses at the evidentiary hearing, and therefore, he has not established he was prejudiced by Trial Counsel's alleged deficient representation. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding a PCR applicant failed to show prejudice from his Trial Counsel's failure to hire an expert because he failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The South Carolina Supreme Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony per the rules of evidence at the PCR hearing to establish prejudice from the witness's failure to testify at trial. See Glover, *supra*.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1(b):	**Trial Counsel failed to properly move to quash the indictment pursuant to S.C. Code Ann. § 17-19-90.**
Allegation 1(c):	**Trial Counsel failed to properly preserve the issue for direct review.**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly move to quash the indictment pursuant to S.C. Code Ann. § 17-19-90 and to preserve the issue for appeal. This Court finds these allegations are without merit.

The indictment is a notice document, and any challenges to its sufficiency "shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." S.C. Code Ann. § 17-19-90 (2010); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The sufficiency of the indictment is determined by whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises defendant of elements of the offense that is intended to be charged. Gentry, 363 S.C. at 101–02, 610 S.E.2d at 499 (citing State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003)).

An indictment that cites the applicable general criminal statute is sufficient to fulfill the required notice and jurisdictional functions, where the body of the indictment indicates the particular crime of which the defendant is accused. See Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). When defendant timely objects to the sufficiency of the indictment, before the jury is sworn, a ruling that an indictment is not sufficient will result in the quashing of the indictment

unless the defendant waives presentment to the grand jury and pleads guilty. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494.

Non-jurisdictional defects apparent on the face of the indictment must be timely raised as required by S.C. Code Ann. § 17-19-90, or they are waived. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963). While the failure to allege certain circumstances of the crime may be grounds to quash an indictment for insufficient notice, such a defect does not necessarily implicate the court's subject matter jurisdiction, which is satisfied so long as the elements of the offense are sufficiently stated. Names of victims or co-defendants are classified as non-jurisdictional defects. Thompson v. State, 357 S.C. 192, 593 S.E.2d 139 (2004), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel should have moved to quash his indictment. (PCR Tr. pp. 21–22).

On cross-examination, Counsel L. Shealey testified that they did not file a motion to quash the indictments but did move to quash the arrest warrants. (PCR Tr. p. 88). Counsel L. Shealey testified that the arrest warrants were the "gist" of the indictments, and they challenged them at the Franks[13] hearing. Id. Counsel L. Shealey testified that he believed the magistrate who signed off on the arrest warrant was misled, but the trial court did not agree, so they did not challenge the indictments. Id.

[13] Franks v. Delaware, 438 U.S. 154 (1978)

Counsel Aiken testified to his belief that the indictments were in proper form. (PCR Tr. p. 101). Noting that Applicant had a Franks hearing regarding the issues concerning Applicant's arrest warrants, Counsel Aiken testified that even if there were issues with the indictments, where the Richland County Grand Jury issued a true billed indictment, he believed that the indictment would be valid and not subject to being quashed. Id. Counsel Aiken testified that to meet that burden, the law of South Carolina requires only a recitation of the statutory language wherein the client's name is inserted. Id.

Findings

This Court finds Applicant's indictment clearly states the name of the victim, the crime charged, the date of the crime, and the manner of death. The indictment is also signed and stamped as true-billed. On its face, the indictment is sufficient to give Applicant and Trial Counsel notice of the allegation Applicant was required to answer and set forth the necessary elements of the offense. See S.C. Code Ann. § 17-19-20 (2014) ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

Additionally, Applicant failed to present any legal authority regarding this allegation at his PCR evidentiary hearing. Moreover, this Court finds any challenge to the indictment would have been non-meritorious—especially after the trial court denied Trial Counsel's motion to quash the arrest warrants. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane,

811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(a)(i): Trial Counsel failed to properly review the evidence with Applicant and prepare him for trial.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly review the discovery and evidence with Applicant and prepare him for trial. This Court finds this allegation is without merit.

An applicant who alleges his or her defense attorney was ineffective in failing to spend more time preparing or providing a copy of the discovery materials must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. Likewise, in order to prevail on a claim that counsel did not review discovery with applicant, the applicant must demonstrate prejudice by showing what

evidence could have been discovered or what other defenses could have been pursued. Id. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. Harris, 377 S.C. at 76, 659 S.E.2d at 145–46 (citing David v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

On direct examination, Applicant testified he was not adequately prepared for his trial. (PCR Tr. p. 7). Applicant testified that his attorneys did not sufficiently review evidence with him or prepare him for trial. Id. Applicant testified he and his attorneys had a couple of discussions, but "there wasn't much information being exchanged," rendering him unaware of what was happening during his trial. Id. Applicant testified that during those meetings, he was mostly attempting to figure out if there was "something he would be able to do" and informing his attorneys of any case law that he wanted to be investigated. (PCR Tr. p. 8). Applicant testified he never spoke with a private investigator about his case, nor did a private investigator review audio and video recordings from evidence with him. Id. Applicant testified that at the time of his PCR evidentiary hearing, he still had not received any of his discovery. Id. Applicant testified that Counsel Aiken met with him at the county jail on two occasions. (PCR Tr. p. 9). Applicant testified that Counsel L. Shealey and Counsel B. Shealey met with him at the county jail on about three or four occasions. Id.

On direct examination, Counsel B. Shealey testified that he had worked with his brother for many years, and they were always exhaustive with reviewing discovery with clients. (PCR Tr. p. 113).

On direct examination, Counsel L. Shealey testified that he reviewed discovery with Applicant. (PCR Tr. pp. 119). Counsel L. Shealey testified that Jay Cooper noted that on July 23rd, 2010, Applicant was transported to the courthouse to review the interrogation videos. (PCR Tr. pp. 119 –120).

Findings

As an initial matter, this Court finds Counsel L. Shealey's and Counsel B. Shealey's testimony **credible** on this issue and Applicant's testimony **not credible**. Counsel B. Shealey **credibly** testified that he did not specifically recall, but he and Counsel L. Shealey were methodical about discovery and preferred their clients to see everything. Counsel L. Shealey **credibly** testified that they reviewed discovery with Applicant. The only evidence Applicant presented to this Court was his testimony that none of the attorneys ever went over discovery with him which this Court finds **not credible**. Further, Applicant failed to provide what could have been discovered, what other defenses could have been pursued, or how the outcome of his trial would have been different had Trial Counsel further reviewed discovery with him. Applicant has failed to meet his burden in proving any prejudice he suffered from the alleged failure to review discovery. See Harris v. State, *supra*.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(b)(i): **Trial Counsel failed to call Officer Cohen as a witness to question regarding Applicant's interrogation and failed to present the full interrogation to the jury to argue that Applicant's statements were involuntary.**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to call Officer Cohen as a witness during his trial and failed to present his full interrogation to the jury to argue that Applicant's statements were involuntarily given. This Court finds this allegation is without merit.

PCR Evidentiary Hearing

On direct examination, the following occurred with Counsel L. Shealey:

Q. All right. I wanted to ask you too about your recollections concerning Investigator Cohen.
A. Yeah, she was bizarre.
Q. And she was a police officer from California?
A. Yes.
Q. And what was her role in this case?
A. Well, the Richland County officers needed a local liaison and so she helped them and was part of the interrogation and set up the polygraph and she -- I just -- I mean, I remember she -- prior to the trial being scheduled, she took a 6-week vacation so it had to be continued and then ultimately she -- for the next trial she was under subpoena by your office and just fought the subpoena locally in California and won. I mean, she had no interest in -- she did a lot of damage to Mr. Porch, but she had no interest in appearing at all whatsoever in the case itself.
Q. Is she somebody you really would have wanted to show up at trial?

A. I mean, we -- my recollection is that it was highly unusual. Obviously she was instrumental in the damage being done, but I feel like we made a motion to really curtail any parts of questioning having to do with her about what was ultimately admitted. Someone can correct me if I'm wrong, but I think we were able to limit what came in because she was not around and we certainly can't -- we had no chance to confront her, so I think Judge Lee helped us out on that.

Q. And would you agree they -- that basically Judge Lee didn't allow the State to play any of the videotaped statement that she -- that Mr. Porch gave to her?

A. Yes, that sounds correct.

Q. All right. And is it fair to say that one of the complaints you made to Judge Lee is that you didn't feel like you had a full opportunity to cross-examine Ms. Cohen?

A. Yes. I mean, she was instrumental in getting the confession in California, so we -- on one hand she wasn't around to testify and be damaging, but on the other hand we also really couldn't get at the crux of a lot of the pressure that was applied to Josh out there. So, you know, she -- Judge Lee obviously limited what could be referenced regarding her and her video, but we still had this impact that only the South Carolina investigators really were allowed to testify to.

Q. And did you complain to Judge Lee that you felt that violated his confrontation rights?

A. Yes.

Q. And now Ms. -- Investigator -- police officer Cohen did testify at a prior hearing; is that correct?

A. Yes, I believe so. I'm trying to remember in my mind whether -- I think something about viewing the videos versus live testimony. I think she did.

Q. All right. And that was your complaint is you anticipated that you were gonna get to cross-examine her again at trial?

A. Right.

Q. And that was the basis of your confrontation clause objection?

A. Right.

(PCR Tr. pp. 53–56).

On cross-examination, the following occurred with Counsel L. Shealey:

Q. Okay. And under Number 3, discussing Officer Cohen, the actual -- just referencing that, the actual exchange -- and, Judge, I referenced the page number on here, and if it's all right I was gonna read from the transcript. The actual

exchange that -- you made a motion and you wanted to prevent the testimony coming in about statements made to Officer Cohen and that these were damaging statements, of course, to Mr. Porch.

A. Right.

Q. And so in that hearing, the judge on page 188 of the transcript where there was an objection made and that cited the Crawford case, the judge says "I disagree with the fact you had the opportunity to cross-examine her. It wasn't that she wasn't here. She was here. She was under oath giving testimony about the very issue you want to talk to her about. Whether it was a strategy decision on your part or whatever the reason was, you decided not to go into full cross-examination because she was available and there was the opportunity. And I highlight the word "opportunity" because that's what Crawford says, the opportunity for cross-examination. So unless you can point to some other case law that tells me something different", and basically the judge ruled against you and that opportunity did exist because she did testify at a previous hearing, correct?

A. She did testify at a previous hearing, yes.

Q. And you were in a position to ask her more questions at that hearing?

A. Yeah. I think she testified as part of the Jackson v. Denno and then, of course, she has already fought the State's subpoena and was not available for trial, which no one really expected, including the attorney generals. You know, I'm trying to put myself in the mind frame of what I was doing back then, but I think Judge Lee was telling me tough, you know, because maybe strategically I held onto some things in the pre-trial hearing that I wanted to save for trial and then she never came, so I think Judge Lee was saying well, this satisfies Crawford because you did cross her even though it was maybe not a full trial-type cross. I think that's what Judge Lee's ruling was, but I think we were successful in limiting a lot of her work in the case because she wasn't present, but maybe not everything, and particularly not things where a Richland County investigator was there to basically essentially testify about his work in that moment even though she was sitting right next to him.

Q. Okay. And that would be in response to Number 3 and Number 4 about failure to call Officer Cohen as a witness or to conduct cross-examination. You had a hearing where she was refusing to come to South Carolina is what you testified to?

A. Right. She successfully quashed the State's subpoena, but I did not have her under subpoena.
Q. And did you attempt to bring her at all?
A. No. I mean, on the one hand having her there as a pretty savvy investigator out of California was quite damaging for Josh. I'm glad she wasn't there to testify about her perception and her work, but then since she wasn't there we were trying to really limit what, if anything, they could get in in terms of this confession and certain things. So obviously Judge Lee did not give us all of that, but I didn't -- she beat their subpoena. I didn't have her under subpoena.
Q. Did it raise any suspicions for you to think why would this person not want to come to testify and maybe she should be brought in? Is that a suspicious thing that she's avoiding testimony?
A. It's certainly unusual and I'm sure we tried to infer as much as we could in front of the jury how effective -- here's this key witness that's not here, and I can't remember exactly, but it was bizarre.

(PCR Tr. pp. 68–71).

Findings

As an initial matter, this Court finds the record provides that the admissibility and voluntariness of Applicant's statements were heavily litigated in a two-day Jackson v. Denno[14] hearing on March 27 and 28, 2013. During that hearing, Officer Cohen did testify. This Court finds that any allegation that Counsel L. Shealey[15] did not argue Applicant's statements were involuntary is wholly refuted by the record. The trial court found that Applicant's statements were voluntary in its Order filed on November 12, 2013.

This Court further finds Counsel L. Shealey's testimony on this matter **credible**. Counsel L. Shealey **credibly** testified that if Officer Cohen had appeared at Applicant's trial and offered testimony, they would not have had the opportunity to suppress as much of Applicant's recorded

[14] 378 U.S. 368 (1964).
[15] Counsel L. Shealey primarily handled all matters regarding Officer Cohen. (PCR Tr. pp. 103-104).

confession testimony and interrogation statements as they were able to. Counsel L. Shealey **credibly** testified that showing the jury the entirety of Applicant's interrogation in California directly conflicted with their trial strategy and would have prejudiced Applicant's case. This Court agrees, and Counsel L. Shealey cannot be deficient in failing to introduce testimony that would have served only as a detriment to Applicant's case. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective.); see also Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Additionally, Applicant did not present Officer Cohen as a witness at the evidentiary hearing, nor did he present any evidence to substantiate his claim beyond his mere speculation. Prejudice from Trial Counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).; see also Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has

failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(b)(ii): Counsel L. Shealey failed to conduct a complete cross-examination of Officer Cohen at a previous hearing (p. l88, lines 7-13).

Applicant alleged Counsel L. Shealey was constitutionally ineffective for failing to conduct a complete cross-examination of Officer Cohen at a previous hearing. Specifically, Applicant cites trial transcript page 188, lines 7–13, in his allegation. This Court finds this allegation is without merit.

PCR Evidentiary Hearing

See PCR Evidentiary Hearing in Allegation 2(b)(i), *supra*.

Findings

This Court finds the combination of the record and Trial Counsel's **credible** and **persuasive** testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that Counsel L. Shealey provided an objectively reasonable strategy in not questioning Officer Cohen more thoroughly at the Denno hearing because he had no reason to believe Officer Cohen would not

appear at Applicant's trial. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (holding when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel). Under the circumstances, this was a reasonable strategy, and Trial Counsel cannot be deemed deficient.

Furthermore, Applicant failed to present the testimony of Officer Cohen or any other evidence that had Counsel L. Shealey more thoroughly cross-examined Officer Cohen, the outcome of his trial would have reasonably been different. Prejudice from Trial Counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). In order to show prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).; see also Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Failure to Object

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object on several grounds. These allegations are discussed *infra*.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d

1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

Allegation 2(c)(i): Trial Counsel failed to object to speculation, opinion testimony, and evidence of other crimes from Justin Mallory, "It looked like someone raped and killed her" (p. 148, lines 19-20).

Applicant alleged that Trial Counsel was constitutionally ineffective for failing to object to speculation, opinion testimony, and evidence of other crimes from Justin Mallory. Specifically, Applicant avers Trial Counsel was ineffective for failing to object to Mr. Mallory's testimony during Applicant's Trial, "it looked like someone raped and killed her." (Trial Tr. p. 148). This Court finds this allegation to be without merit.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in

another." Id. at 693. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

To avoid a finding of ineffectiveness, and where counsel articulates a strategy, counsel must also articulate a valid reason for employing a particular strategy. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Thereafter, that strategy is measured under an objective standard of reasonableness. Id.; see also Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges."). When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010).

PCR Evidentiary Hearing

On direct examination, the following colloquy occurred with Counsel L. Shealey:

> Q. Okay. I'm gonna go to page 148, okay, and I'm just gonna ask you to look at lines 17 to 22 real quick. And when you've had a chance to look at that, just let me know.
> A. Okay.
> Q. All right. And so in terms of making an objection that Mr. Mallory said it looked like someone tried to rape her, is that an objection that you feel needed to be made?
> A. Well, in the heat of the moment, you know, it says it looked like someone had raped and killed her. I mean, the case -- we'd already gone through a lot at that point and hadn't -- I felt confident the jury was aware there was no sexual assault allegation here and so you've got this man who everybody knows has been acquitted and so I was strategically probably trying to pick and choose my fights and not go overboard. I didn't want to get too much sympathy for him in the eyes of the jury, so I think I probably would have let that one slide in the heat of the moment considering now no one was

making a rape allegation. It was just kind of his -- what came out of his mouth.

(PCR Tr. pp. 52–53).

On cross-examination, Counsel Aiken testified to the following:

Q. Okay. And moving on through Number 2, there was a statement made on page 148 of the transcript basically from Justin Mallory. It looks -- it looked like someone raped and killed her, referencing the victim. Did you -- basically I'm just confirming nobody objected to that?
A. That's my -- that's my recollection, yeah.
Q. Okay. And do you feel like that is something that could have been objected to since that was referencing sexual assault in a murder trial?
A. Well, the -- the problem is that if you object and you win, what do you get, okay? You're not gonna get a mistrial based on inadvertent blurting out of something that's not -- has no evidentiary support in the record as far as a potential crime. So you're not gonna get a mistrial, so what's your remedy? Well, your remedy is a curative instruction. Well, I mean, does not -- does not that focus the jury's attention on that?
Q. Uh-huh.
A. I would be more hopeful that it would just go and fall off like water off an oily duck and they would have no idea, you know, that anybody had said that. So I -- I mean, I don't think it's deficient performance not to object to that, and even if it were, I don't think it's prejudicial.

(PCR Tr. pp. 102–103).

Findings

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Counsel L. Shealey **credibly** testified that strategically, he was choosing his battles and did not want to go

overboard. Counsel Aiken **credibly** testified that the resulting remedy would have been trivial even if they objected to the testimony. This Court finds Trial Counsel's articulated trial strategy for not objecting to Mr. Mallory's testimony to be objectively reasonable under the circumstances.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(c)(ii): Trial Counsel failed to object to State's Ex. 6 and 7 (report and 911 calls), (p. 326, 327).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to State's Exhibits 6 and 7, which were the incident report and 911 calls associated with Victim's murder being entered into evidence. This Court finds this allegation is without merit.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...." Rule 403, SCRE.

PCR Evidentiary Hearing

On cross-examination, Applicant testified that Trial Counsel should have objected to the 911 calls because he felt they were prejudicial. (PCR Tr. p. 22).

On cross-examination, Counsel Aiken testified it was a strategic decision to refrain from objecting to introducing the 911 calls as he did not feel they were damaging to Applicant. (PCR Tr. p. 104). Counsel Aiken testified that the 911 calls established that Mr. Mallory was very composed during his call to 911, which helped establish Trial Counsel's theory of the case. (PCR Tr. p. 93). Counsel Aiken recalled his belief that the 911 calls bolstered Trial Counsel's theory of Mr. Mallory as the individual who actually murdered the Victim. Id. Counsel Aiken testified he did not believe there was a solid legal objection to be made to the admission of those calls. Id. Counsel Aiken testified to his recollection that the 911 calls were not emotionally charged, nor did they give him any reason to fear that the jury would be prejudiced against Applicant by hearing them, therefore, Counsel Aiken did not feel as though an objection under Rule 403 would have been successful in these circumstances. Id.

Findings

This Court finds the combination of the record and Trial Counsel's **credible** and **persuasive** testimony that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Counsel Aiken **credibly** testified that there was no objectionable basis to argue for the exclusion of the 911 calls, and he felt the calls were not damaging to Applicant. Counsel Aiken further **credibly** testified that the 911 call was

not emotionally charged and that they had no reason to think it was prejudicial to Applicant's case. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective.); see also Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(c)(iii): Trial Counsel failed to object to the leading question, "Is that the safeguard to show that the evidence isn't tampered with?" (p. 342, lines 2-3).

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the leading question, "Is that the safeguard to show that the evidence isn't tampered with?" on trial transcript page 342, lines 2–3. This Court finds this allegation is without merit.

Under Rule 611(c), SCRE, leading questions "should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." The true test of whether a question is leading is whether it suggests the answer. State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); Wigmore, Evidence, Vol. III, s 769, p. 122 (1940). A question that does not suggest an answer in the affirmative or negative is not a leading question. Smith v. Union-Buffalo Mills Co., 100 S.C. 115, 84 S.E. 422 (1915).

Trial

During the direct examination of Investigator Robert Oates, the following occurred:

> Q: And why do you follow that specific procedure?
> A: It's for the chain of custody. It's to make sure that the evidence and — it's protected, as far as my part of the actual evidence submission process. It's a safeguard that we use. It's my initials and the date. And also with our evidence forms, that coincides with the actual safeguard or evidence tape, this procedure.
> Q: Is that the safeguard to show that the evidence isn't tampered with?
> A: It, is, yes.

(Trial Tr. pp. 341, l. 20–342, l. 4).

PCR Evidentiary Hearing

On direct examination, Counsel L. Shealey testified to the following:

> Q. Right. I'm gonna ask sort of an overarching question in terms of leading questions. When do you object to leading questions?
> A. Well, if they're leading, number one, and then if they're particularly damaging in an area that I don't want evidence to be easily pulled out of a witness's mouth. So I don't know if that's -- so sometimes I'll make sort of strategic decisions to not to object if there's some minor lead or something that I don't care about, but my note as to Number 6 where there's a question about failing to object to leading, "is that the safeguard to show that the evidence isn't tampered with", I just don't feel that's a leading question. Yeah, I think a leading question would be "that's a safeguard to show that

> evidence isn't tampered with, correct?". So Number 6 to me is not leading.

(PCR Tr. p. 59).

Findings

This Court agrees with Counsel L. Shealey and finds the question posed to Investigator Robert Gates during direct examination was not leading. While the answer sought was in the affirmative or negative, the question did not suggest the answer. Nevertheless, even if this Court were to find this question was a leading question, this Court cannot find that, but for this question, there is a reasonable probability the outcome of trial would have been different. See Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial."). Furthermore, this Court finds the objection would not have been meritorious. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(c)(iv): Trial Counsel failed to object to photos of victim's injuries as prejudicial, States Ex. 18, 19, 22, 23. (p. 365).

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the admission of photos of the victim's injuries as prejudicial in State's Exhibits 18, 19, 22, and 23 on page 365 of the trial transcript. This Court finds this allegation is without merit.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The admissibility of a photograph is a matter resting in the sound discretion of the trial judge, whose decision will not be reversed without a showing of an abuse of that discretion. Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982); see also Ward v. Epting, 290 S.C.

547, 351 S.E.2d 867 (Ct. App. 1986) (determination of relevancy of photograph is within trial court's discretion). A photograph should be excluded if calculated to arouse the sympathy or prejudice of the jury or if irrelevant or unnecessary to substantiate facts. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). To be classified as unfairly prejudicial, photographs must have a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010).

In State v. Rosemond, Rosemond argued introduction of six enlarged color photos of the victims, three from the scene and three autopsy photos, should not have been admitted. 335 S.C. 593, 518 S.E.2d 588 (1999). The Supreme Court held the photographs were relevant, material, corroborated the pathologist's testimony, showed the victims in substantially the same condition as Rosemond left them, and the photos were not particularly gruesome as the bodies had been cleaned of blood. Id.; Torres, 390 S.C. 618, 703 S.E.2d 226 (autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant); State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), quoting Nichols v. State, 267 Ala. 217, 100 So.2d 750, 756 (1958)) ("Courts and juries cannot be too squeamish about looking at unpleasant things, objects, or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, should not exclude it.")).

Trial

During the direct examination of Investigator Robert Oates, the State introduced the following exhibits:

> Exhibit No. 18 is going to be an injury to the right side of the victim's neck. It's a close-up photograph.
> Exhibit No. 19 is going to be an injury across the right side eyelash of her eye of the victim. It's a close-up shot, photograph.
> Exhibit No. 23 is bruising on the neck of the victim, a close-up photograph.
> Exhibit No. 23 was bruising of the neck of the victim. That was without a scale.
> And Exhibit No. 22 is going to be the same as the first but with a scale this time.

(Trial Tr. pp. 364, l. 24–365, l. 9).

PCR Evidentiary Hearing

On direct examination, Counsel L. Shealey testified that they filed pretrial motions to keep out as many of the photos depicting the Victim's injuries as possible. (PCR Tr. pp. 56–57). Counsel L. Shealey testified that they were unable to prevent the jury from seeing all of the crime scene photos, which was an outcome they had anticipated. (PCR Tr. p. 57).

On cross-examination, Counsel L. Shealey testified that he did not contemporaneously object to the admission of this evidence as the parameters of what the State was allowed to admit at trial regarding this evidence had been very well litigated by the time they were admitted at trial. (PCR Tr. p. 73). Counsel L. Shealey testified that Judge Lee had already ruled on what was acceptable to admit in her mind; therefore, as the issue had already been litigated pretrial, he did not contemporaneously object to the admission of these exhibits during trial. (PCR Tr. p. 74).

On cross-examination, Counsel B. Shealey testified he and co-counsel "did not make any big fuss over [the admission of these photos] in front of the jury," as he recalled the admission of these photos being "pretty much like preordained [as to] what Judge Lee was allowing in." (PCR Tr. p. 116).

Findings

As an initial matter, this Court finds the photographs Applicant contends Trial Counsel

should have objected to were admissible, and the failure to object to admissible evidence is not objectively unreasonable.

Based on the finding that the photographs were admissible, this Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Furthermore, the issue of the admissibility of the photographs was heavily litigated pretrial, and any objection would have been overruled. Trial Counsel cannot be deficient for failing to object to admissible evidence and Applicant cannot show any resulting prejudice. See Hough, *supra*; see also State v. Collins, 409 S.C. 523, 535, 763 S.E. 2d 22, 28 (2014) (quoting Camargo v. State, 327 Ark. 631, 940 S.W.2d 464, 467 (1997) ("Even the most gruesome photographs may be admissible if they tend to shed light on any issue… acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered." (internal citation omitted)).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(c)(v): Trial Counsel failed to object to Buccal Swab States Ex 29 (p. 380) and photos of blood States Ex. 12, 13 (p. 401) and State's Ex. 10, 17, 20 (p. 405) as prejudicial and cumulative.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the admission of the buccal swab, States Ex. 29 (Trial Tr. p. 380), photos of blood, States Ex. 12, 13 (Trial Tr. p. 401), and State's Ex. 10, 17, 20 (Trial Tr. p. 405) as prejudicial and cumulative. This Court finds these allegations are without merit.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Trial

During Applicant's trial, State's Exhibit 29, a buccal swab was introduced without objection into evidence. (Trial Tr. p. 380). State's Exhibits 12 and 13 were described to the trial court as follows:

> State's Exhibit 13 is a general picture of the kitchen area showing the sink, the counters on the left, the stove, refrigerator, and most of the floor that's in the kitchen. This particular photograph has markers on the floor, and those markers on the floor is where I had noted something in particular that I wanted to collect. And the reason we use markers. A, B, C, D, and all the way through Z, if we have them, we put those markers there and take a picture. So if I take a swab from marker A, I will mark the box that it's marker A. So when we go back to the laboratory, we have these pictures and I know exactly where I took that blood. That's why we mark them.
>
> State's Exhibit 12 is a close-up of the blood drops that I could see on the kitchen floor, which also has the markings A, B, and C.

(Trial Tr. p. 400–401). State's Exhibits 10, 17, and 20 were described to the trial court as follows:

> State's Exhibit 20 is a close-up of the spot of blood that was on the kitchen floor and it's marked A. I have an A marker on it.
>
> State's Exhibit 17 is a close-up of the spot of blood that was on the sink. That's with marker E.
>
> State's Exhibit 10 is a close-up of [ ] some blood that was on the floor of the kitchen and it has a marker C.

(Trial Tr. p. 405).

PCR Evidentiary Hearing

On direct examination, Counsel L. Shealey testified that he saw no reason to object to Applicant's buccal swab being admitted into evidence. (PCR Tr. p. 57). Counsel L. Shealey testified that Applicant's DNA came into issue during the State's case against Mr. Mallory. Id. Counsel L. Shealey testified that Applicant had already consented to the sample of his DNA as a cooperating witness for the State during its first two trials against Mr. Mallory, where he had already given sworn testimony in those trials to explain the presence of his DNA at the crime scene. (PCR Tr. p. 75). Further, Counsel L. Shealey testified that Applicant had informed investigating officers that they would probably find his DNA at the crime scene before they even tested his DNA. (PCR Tr. p. 58).

Counsel L. Shealey testified that Applicant had consented to provide his DNA as a cooperating witness for the State; therefore, Trial Counsel's theory for Applicant's trial included embracing the fact that Applicant's DNA had been at the crime scene in line with the same facts the State had always embraced and explained in their prosecution of Mr. Mallory. Id. Counsel L. Shealey testified that they did not attempt to challenge the buccal swab in any way, as there was no possibility to "get around" the fact that Applicant's DNA was at the crime scene. Id.

On direct examination, Counsel Aiken testified that it was not Trial Counsel's strategy to contest the DNA evidence in Applicant's case. (PCR Tr. p. 97–98).

Similarly, Counsel L. Shealey testified that it was not a part of Trial Counsel's strategy to fight the idea that Applicant had actually bled at the crime scene; therefore, they did not see any basis to object to any of the photos of blood presented by the State. (PCR Tr. p. 58–59).

On cross-examination, Counsel L. Shealey testified that as he and co-counsel were acknowledging Applicant's blood was at the crime scene in line with the version of events he had presented during Mr. Mallory's trials, they did not object to admittance of the DNA evidence. (PCR Tr. p. 75).

On redirect examination, Counsel L. Shealey testified that Applicant's DNA was found in the Victim's kitchen, and blood was found on Victim's shirt, which, when analyzed, showed Applicant as a major contributor to the DNA Sample taken therefrom. (PCR Tr. p. 89).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any

resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds the testimony of Counsel L. Shealey and Counsel Aiken **credible** and **persuasive**. From the records and Trial Counsels' **credible** testimony, this Court finds Applicant willingly provided his DNA and testified to it under oath in two separate trials of the Victim's husband, Mr. Mallory. Trial Counsel's strategy regarding the buccal swab and photos of blood is objectively reasonable under their theory of the case. As such, this Court cannot find Trial Counsel deficient "where counsel articulates a strategy" and "articulate[s] a valid reason for employing [that] [] strategy." Roseboro v. State, *supra*.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(c)(vi): Trial Counsel failed to object to leading questions regarding crime scene photos State's Ex. 24, 25 (p. 396, lines 15-20).

Applicant alleged that Trial Counsel was constitutionally ineffective for failing to object to leading questions. Specifically, Applicant alleges that Trial Counsel should have objected to a leading question on trial transcript page 396, lines 15–20, regarding the crime scene photos depicted in State's Exhibits 24 and 25. This Court finds this allegation is without merit.

See Rule 611(c), SCRE, *supra*; see also Tyner, *supra*; Union-Buffalo Mills Co., *supra*.[16]

Trial

The descriptions of State's Exhibits 24 and 25 were given to the trial court as follows:

> State's Exhibit 24 is a -- it's just a general picture from a distance of the living room area where the couch was, and there is a coffee table, and then the rug in front of the couch. I think it's a TV to the left of the couch, and then it was the blinds where the back sliding door opens…
>
> State's Exhibit also 25 is really just a close-up of the couch and the wall behind it and the area that's right in front of the couch.

(Trial Tr. p. 396). Applicant avers Trial Counsel should have objected to the following question on the direct examination of Investigator Zane Padgett as follows:

> Q: And does that depict the blood splatter above the couch that you just testified about?
> A: Yes, sir, it does.
> Q: And it also contains the depictions of the two pools of blood, one on couch and one on the floor, that you testified about?
> A: It does, sir.

(Trial Tr. p. 396).

PCR Evidentiary Hearing

On direct examination, Counsel Aiken testified that he did not see any reason to object to a leading question where the substance of the answer to that question does not materially impact your case. (PCR Tr. pp. 93–94). Counsel Aiken testified that while he believes the question depicted on the trial transcript, page 396, line 18, is a leading question, he contended that it was not something he felt was critical to object to. (PCR Tr. pp. 95–96). Counsel Aiken testified that it was clear to him that the photo was going to be admitted into evidence, and the photo depicts blood spatter. (PCR Tr. p. 96).

[16] Cited in Allegation 2(c)(iii) on page 34.

On direct examination, Counsel L. Shealey testified that as it was not a part of Trial Counsel's strategy to fight the idea that Applicant had actually bled at the crime scene, therefore, they did not see any basis to object to any of the photos of blood presented by the State. (PCR Tr. pp. 58–59).

On cross-examination, Counsel L. Shealey testified that as he and co-counsel were acknowledging Applicant's blood was at the crime scene in line with the version of events he had presented during Mr. Mallory's trials, they did not object to admittance of the DNA evidence. (PCR Tr. p. 75).

On redirect examination, Counsel L. Shealey testified that Applicant's DNA was found in the Victim's kitchen, and blood was found on Victim's shirt. (PCR Tr. p. 89).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. While the question was leading, Trial Counsel articulated an objectively reasonable and valid reason why they did not object. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective.); see also Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Indeed, this Court cannot find this single leading question garners the requisite

prejudice to warrant a reversal and the granting of a new trial. Had Trial Counsel objected to this line of questioning, the State simply would have rephrased its question and still elicited the same testimony.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2(c)(vii): Trial Counsel failed to object to a leading question "and so from time to time you can in a kitchen have a false positive on a LCD, can't you?" (p. 416, lines. 5-6).

Applicant alleges that Trial Counsel was constitutionally ineffective for failing to object to the leading question "and so from time to time you can in a kitchen have a false positive on a LCD, can't you?" (Trial Tr. p. 416, ll. 5–6). This Court finds this allegation is without merit.

See Rule 611(c), SCRE, *supra*; see also Tyner, *supra*; Union-Buffalo Mills Co., *supra*.

Trial

At trial, during the cross-examination of Investigator Zane Padgett the following occurred:

> Q: And so from time to time you can in a kitchen have a false positive on an LCD, can't you?
> A: Yes, sir, it does. Sometimes the LCD will react with the other proteins. For example, some of the things that you said, especially like chocolate milk.

(Trial Tr. p. 416).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The only testimony on this allegation was taken from Applicant in direct and cross-examinations where Applicant indicated that the allegation was not one he raised. (PCR Tr. pp. 15–16). This Court finds the question cited by Applicant was asked during cross-examination by Counsel Aiken, and there was no legal basis for Counsel Aiken to object to his own question. See Miller, *supra*. Furthermore, pursuant to Rule 611(c), SCRE, this Court finds the question asked was used to develop the witness's testimony.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(viii): Trial Counsel failed to object to leading questions regarding Applicant's Buccal swab State's Ex. 59, "obviously this case was opened prior to that? Correct?" (p. 452, lines18-19), "when you receive a new item of evidence it's just assigned the next number in line?" (lines. 21-22).

Applicant alleges that Trial Counsel was constitutionally ineffective for failing to object to leading questions regarding Applicant's buccal swab State's Ex. 59, "obviously this case was opened prior to that? Correct?" (Trial Tr. p. 452, ll. 18–19), "when you receive a new item of evidence it's just assigned the next number in line?" (Trial Tr. p. 452, ll. 21–22). This Court finds these allegations are without merit.

See Rule 611(c), SCRE, *supra*; see also Tyner, *supra*; Union-Buffalo Mills Co., *supra*.

Trial

On direct examination of Tena Goff the following occurred:

Q: And when you received -- obviously this case was open prior to that, correct?
A: Yes.
Q: When you received a new item of evidence, it's just assigned the next number in line?
A: It is. It's all computer generated.

(Trial Tr. p. 452, ll. 18–23).

PCR Evidentiary Hearing

On direct examination, Counsel Aiken testified he did not see any reason to object to a leading question where the substance of the answer to that question does not materially impact your case. (PCR Tr. pp. 93–94). Counsel Aiken testified that he and co-counsel agreed with the evidence technician in Applicant's case, recalling his belief that the evidence technician was offering testimony about the chain of custody and how items were logged into it. (PCR Tr. pp. 96–97). Counsel Aiken testified that he agreed that the questions on lines 18 and 21 were leading

but clarified that these statements were made as a part of the testimony of people in the chain of custody. (PCR Tr. p. 96). Counsel Aiken testified that he and co-counsel were not contesting the chain of custody in this case. Id. Counsel Aiken testified that he and his co-counsel had no issue with the chain of custody in Applicant's case. (PCR Tr. p. 97). Counsel Aiken testified that, for those reasons, it was not crucial for Trial Counsel to object to the cited questions. Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Counsel Aiken's testimony **credible** and **persuasive**. The record and Counsel Aiken's **credible** testimony provide that they had an objectively reasonable trial strategy in deciding not to object to these two questions. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective.); see also Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Furthermore, this Court cannot find that the failure to object to these two questions garners the requisite prejudice to warrant a reversal and the granting of a new trial. Indeed, Applicant's guilty verdict did not hinge on these two questions.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(ix): **Trial Counsel failed to object to testimony regarding the DNA of Applicant as "included" in comparison to DNA taken from Victim's fingernails. (p. 527, lines 16-25).**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to testimony on trial transcript page 527, lines 16–25, regarding the DNA of Applicant as "included" in comparison to DNA taken from Victim's fingernails. This Court finds this allegation is without merit.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of

ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Trial

On direct examination of Investigator John Barron, the following occurred:

> Q. Were you able to compare that sample to Joshua Porch?
> A. Yes.
> Q. And how did those profiles compare?
> A. Joshua Porch's known DNA contained the same alleles that were present in that small amount of DNA from the male underneath the fingernails of Nakia Mallory.
> Q. Okay. And what is the significance of that, as far as exclusion or inclusion?
> A. Well, as far as excluded and included, he would be included.

(Trial Tr. p. 527, ll. 16–25).

PCR Evidentiary Hearing

On cross-examination, Applicant testified that he did not see any reason Trial Counsel should have objected. (PCR Tr. p. 28).

On cross-examination, Counsel L. Shealey testified that it was a strategic decision not to object to the comparison of Applicant's DNA to that of DNA found under Victim's fingernails because Applicant's DNA was everywhere at the crime scene, including under Victim's fingernails. (PCR Tr. p. 76).

On redirect examination, Counsel L. Shealey testified that he believed the testimony given during Applicant's trial regarding the DNA found under Victim's fingernails could not conclusively establish a match to Applicant's DNA but noted that Applicant could not be excluded as a potential DNA match. (PCR Tr. p. 89). Counsel L. Shealey testified that Applicant had established by his sworn testimony that he was at the crime scene, where he cut himself when he got between Mr. Mallory and Victim. Id. Counsel L. Shealey testified that they did not contest the DNA evidence

in Applicant's case, which aligned with their trial strategy. Id. Counsel L. Shealey testified that the evidence showed Applicant was a major contributor to the DNA samples in Victim's kitchen and on Victim's shirt. Id. Counsel L. Shealey testified that, by comparison, the DNA evidence found under Victim's fingernails, which solely established Applicant could not be excluded as a potential DNA contributor, had minimal evidentiary value. Id.

On direct examination, Counsel Aiken was questioned directly regarding the question posed on the trial transcript page 528, lines 10–12, stated as follows:

> Q: Okay. So that means the DNA could be Joshua Porch's DNA?
> A: It could be.

(Trial Tr. p. 528). Counsel Aiken testified that the phrase "could be" in that context signified to him that the DNA expert had a very low level of certainty as to whether the DNA did, in fact, belong to Applicant. (PCR Tr. p. 98). Counsel Aiken testified in the affirmative that, to a certain extent on this issue, the statement is "sort of synonymous with reasonable doubt." Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The record and Counsel L. Shealey's and Counsel Aiken's **credible** testimony provide that they employed a reasonable trial strategy through their representation in the instant case. Furthermore, even if Trial Counsel could not provide an objectively reasonable strategy for their choice not to object here, this Court cannot find them deficient when the evidence was already in the record. Applicant had testified in two

prior trials to the presence of his DNA at the crime scene, and any objection would have been overruled. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective.); see also Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(x): **Trial Counsel failed to object to leading question from the state regarding DNA, "so that means that that DNA could have been Joshua Porch's DNA?" (p. 528, lines 10-11).**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the leading question, "So that means that the DNA could have been Joshua Porch's DNA." (Trial Tr. p. 528). This Court finds this allegation is without merit.

See Rule 611(c), SCRE, *supra*; see also Tyner, *supra*; Union-Buffalo Mills Co., *supra*.

PCR Evidentiary Hearing

On cross-examination, Counsel L. Shealey testified that it was part of his and co-counsel's trial strategy to not object to this DNA evidence. (PCR Tr. p. 77). Counsel L. Shealey testified that he and co-counsel did not hire a DNA expert to contest this evidence, as the State had presented overwhelming evidence that Applicant's DNA was at that crime scene. Id. Counsel L. Shealey testified that the State had already presented this evidence during their attempted prosecutions of Mr. Mallory twice, and as he and co-counsels strategy relied on re-prosecuting Mr. Mallory, they were happy to establish that if the evidence was "good enough for [the State], it's certainly now good enough for us." Id.

Counsel L. Shealey testified that even in the hypothetical situation that he and co-counsel had been able to completely suppress Applicant's statements, thereby keeping the discussion of the presence of Applicant's DNA at the crime scene out of his trial entirely, it would not have changed Trial Counsel's defense strategy in Applicant's case. (PCR Tr. pp. 77–78). Counsel L. Shealey testified that even in that scenario, Applicant would have still been facing his own seven or eight inconsistent statements regarding his version of events leading up to Victim's murder, including his sworn testimony during Mr. Mallory's trials. (PCR Tr. p. 78). Counsel L. Shealey testified that Applicant's defense would still, therefore, be bound to the version of events testified to by Applicant as a star witness in the prosecution of Mr. Mallory, thereby forcing them to explain the presence of Applicant's DNA at the crime scene in the same manner Applicant had explained it to law enforcement. Id.

On direct examination, Counsel Aiken testified that he did not see any reason to object to a leading question where the substance of the answer to that question does not materially impact

the case. (PCR Tr. pp. 93–94). Counsel Aiken testified that he agreed that the cited question was leading. (PCR Tr. p. 97). However, Counsel Aiken testified in concurrence with the earlier testimony of Counsel L. Shealey, that it was not Trial Counsel's strategy to contest DNA in Applicant's case. (PCR Tr. p. 97–98).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The combination of the record and Counsel L. Shealey's and Counsel Aiken's **credible** testimony provides that Trial Counsel employed an objectively reasonable strategy in Applicant's case. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective.); see also Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). The record provides that Applicant was the Victim's neighbor and he never contested his presence at the scene or that he cut himself at the scene.

Additionally, while the question was leading, Trial Counsel articulated an objectively reasonable and valid reason why they did not object—that Trial Counsel was not contesting Applicant's DNA at the scene where Applicant testified in two prior trials to that very thing. Even if this Court were to find Trial Counsel deficient for failure to object to this leading question, which

it does not, this single leading question does not garner the requisite prejudice to warrant a reversal. Notably, had Trial Counsel objected to this line of questioning, the State simply would have rephrased its question and still elicited the same testimony.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xi): Trial Counsel failed to object to testimony regarding DNA evidence from the crime scene matching Applicant (p. 531) and from Victim's clothing (p. 541, lines 16-24).

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to testimony regarding DNA evidence from the crime scene matching Applicant (Trial Tr. p. 531) and from Victim's clothing (Trial Tr. p. 541). This Court finds this allegation is without merit.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Therefore, "[j]udicial scrutiny of counsel's performance must be highly

deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Trial

On direct examination of Investigator John Barron, the following occurred:

> In this case the major contributor would be from the blood, because the blood would have contributed most of the DNA from the swab like this, and it also matched Joshua Porch.

(Trial Tr. p. 531).

> A: . . . One of the samples was a mixture of another individual and Nakia Mallory. It was a major/minor contributor. The major contributor matched Joshua Porch.
> Q: And to what degree of certainty were you able to make that identification for Joshua Porch's DNA?
> A: To an absolute degree of certainty. Again, the statistics was 110 quintillion, which is a statistical number that is so strong, that it would have been conclusive to be his DNA.

(Trial Tr. p. 541, ll. 16–24).

PCR Evidentiary Hearing

On cross-examination, Applicant testified that he did not see any reason why Trial Counsel should have objected to the testimony. (PCR Tr. p. 28).

On recross-examination, Applicant testified that the charges associated with Victim's murder were initially brought against another individual,[17] before police "pulled DNA to come after" him. (PCR Tr. p. 33). Applicant testified that officers were aware of the presence of his DNA at the crime scene when he testified as a witness in the State's case against the Victim's

[17] Victim's husband, Justin Mallory was originally charged with having committed Victim's murder. Mr. Mallory faced two trials on those charges before being acquitted at the conclusion of his second trial.

husband, Mr. Mallory, who was initially suspected of committing her murder. Id. Applicant testified to his belief that investigators conducted additional DNA testing of the evidence following Mr. Mallory's acquittal in the State's case against him for Victim's murder. Id. Applicant testified that investigators were already aware of the presence of his DNA at the crime scene when they discovered DNA on Victim's shirt matching his own. Id.

On cross-examination, Counsel L. Shealey testified that while the State claimed Applicant's DNA evidence on Victim's shirt was new evidence, the State always had that evidence. (PCR Tr. p. 75). Counsel L. Shealey testified that he and co-counsel did not challenge this evidence as he believed it to be a disingenuous argument to view the finding of Applicant's blood on Victim's shirt as a revelatory idea. In contrast, Applicant had always testified to being cut in the middle of a struggle between Mr. Mallory and Victim. Id. Counsel L. Shealey testified that he and his team did challenge this evidence during Applicant's Franks hearing as they did not believe the magistrate judge was given a full picture of this case when they issued Applicant's arrest warrant. Id. However, Counsel L. Shealey testified that it was a strategic decision not to attempt to suppress or challenge the idea that Applicant's blood or DNA was at the crime scene. (PCR Tr. pp. 75–76).

On direct examination, Counsel Aiken testified that it was not Trial Counsel's strategy to contest the DNA evidence in Applicant's case. (PCR Tr. pp. 97–98).

On cross-examination, Counsel Aiken testified that their strategy in Applicant's case was to embrace the DNA evidence due to Applicant's prior statements about being there and because Applicant's DNA was found at the crime scene. (PCR Tr. p. 116).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The record provides that Applicant provided his DNA willingly and testified to it under oath in two separate trials of the Victim's husband, Mr. Mallory. This Court finds Trial Counsel's strategy objectively reasonable under their case theory. As such, this Court cannot find Trial Counsel deficient "where counsel articulates a strategy" and "articulate[s] a valid reason for employing [that] [] strategy." Roseboro v. State, *supra*.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xii): **Trial Counsel failed to object to leading question and hearsay testimony by the witness Hargraves, "it was a cry for help? Yes, he was saying help, help" (p. 63l, lines 19-20).**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the leading question, "it was a cry for help?" and the answer "[y]es, he was saying, "help, help." (Trial Tr. p. 631). This Court finds this allegation is without merit.

See Rule 611(c), SCRE, *supra*; see also Tyner, *supra*; Union-Buffalo Mills Co., *supra*.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Trial counsel may be deficient for failing to object to hearsay testimony without a valid trial strategy. Thompson v. State, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018). However, trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. Id. 423 S.C. at 246, 814 S.E.2d at 493. Relevant considerations are the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object. Id. 423 S.C. at 246, 814 S.E.2d at 493–94.

Trial

During direct examination of Shaheed Hargraves (Hargraves), the following occurred:

Q. Now, had you heard anything the night of May 13th, or going into the morning hours of May 14th, prior to Justin Mallory knocking on your door?
A. No.
Q. That's the first sounds that you heard?
A. Yes.
Q. And what was his — can you describe to him — to the jury how he was acting?
A. It was like a cry for help.
Q. And did you hear him beat on other doors before he got to yours?
A. Yeah, that's what woke me up. He was beating on the doors?
Q. All right. Beating on your doors, or —

A. All the neighbors. It was like he went from apartment to apartment like "help".
Q. Okay. So your apartment wasn't the first one he came to?
A. If I heard him beating on the other doors, my apartment wasn't the first one.
Q. Did you know it was Justin Mallory before you opened the door?
A. Did I say what?
Q. Did you know it was Justin Mallory who was beating on the doors?
A. No.
Q. And you said that he was — it was a cry for help?
A. Yes, he was saying "help, help". That's when I opened the door.
Q. Was he emotional?
A. Yeah.

(Trial Tr. pp. 630, l. 18–631, l. 23).

PCR Evidentiary Hearing

On cross-examination, Counsel L. Shealey testified that he did not object to Hargraves' testimony as this statement was an excited utterance under his view of the rules. (PCR Tr. p. 78).

On redirect examination, Counsel L. Shealey testified that he did not believe they would have had any way of keeping Hargraves' statements from being admitted into evidence. (PCR Tr. p. 90).

On cross-examination, Counsel Aiken testified that he did not think the statement was hearsay because it was not being offered to prove the truth of the matter asserted. (PCR Tr. pp. 105–106).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court agrees with

Counsel Aiken and Counsel L. Shealey and their **credible** testimony that there was no legal basis for an objection to the statement, and even if they had objected, it would have been admitted.

Additionally, under Rule 611(c), SCRE, leading questions "should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Here, this Court finds the testimony was not leading and was necessary to develop the witness's testimony, and Trial Counsel cannot be deficient for failing to object to admissible questions. Further, and for the same reason, Applicant cannot prove prejudice from Trial Counsel's alleged failure to object to the leading question.

Further, this Court finds that the testimony fit the excited utterance exception to the general rule prohibiting hearsay. See Rule 803(2) (providing "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule). Hargraves testified at trial that Mr. Mallory was beating on apartment doors and crying for help. Hargraves testified that Mr. Mallory was emotional and again reiterated that it was a cry for help. Because these statements fit the excited utterance exception, Trial Counsel cannot be deficient in not objecting. Further, and for the same reason, Applicant has failed to prove prejudice from Trial Counsel's alleged failure to object to this testimony based on hearsay. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xiii): Trial Counsel failed to object to leading questions to Persia Porch: "So, the first time - law enforcement approached Mr. Porch, he didn't volunteer any information?" (p. 655 lines 18-21).

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to leading questions to Persia Porch: "So, the first time - law enforcement approached Mr. Porch, he didn't volunteer any information?" (Trial Tr. p. 655, ll. 18–21). This Court finds this allegation is without merit.

See Rule 611(c), SCRE, *supra*; see also Tyner, *supra*; Union-Buffalo Mills Co., *supra*.

Trial

During direct examination of Shaheed Hargraves, the following occurred:

> Q: So the first time law enforcement approaches Mr. Porch, he didn't volunteer any information about the knowledge he had of what occurred at the Mallory residence?
> A: That's correct.

(Trial Tr. p. 655, ll. 18–21).

PCR Evidentiary Hearing

On cross-examination, Counsel L. Shealey testified to the following regarding this allegation:

> Well, we were kind of in a unique position where all of that ground was argued before us and I remember reading the transcripts of this case and reading Jerry Finney and thinking how easy it would have been for him relatively speaking because, you know, the State seems

> to be very much embracing Josh because they just -- whether they should have or not because they were looking so hard at Mr. Mallory as a suspect, so it was already before us that he -- we knew that he didn't really come forward and once he was questioned he certainly provided explanations, so we strategically in the moment we were spending so much time and investing so much energy in trying to establish this false confession that we on little things like this that were obvious, little meaning, of course, we can embrace the same lack of volunteering information the same way the State did because how can we not? It was good enough for them, it's good enough for us. So, yeah, that was a – we did not object. It was a strategic decision . . . .

(PCR Tr. pp. 79–80).

On direct examination, Counsel Aiken testified that he found no issue in the statement that would render an objection necessary. (PCR Tr. p. 99). Counsel Aiken testified that it was patently obvious to the jury that Applicant had not volunteered information to the police, given that in Mr. Mallory's two prior trials, which were mentioned during Applicant's trial, Applicant had given multiple versions of his account of the events leading to Victim's murder. Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Counsel L. Shealey's and Counsel Aiken's testimony **credible** and **persuasive**. This Court further finds Trial Counsel employed an objectively reasonable strategy and articulated a valid reason for not objecting to the leading question. See Roseboro v. State, *supra*; see also Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (finding when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.). Furthermore,

this Court finds any objection to this line of testimony would have been futile. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xiv): **Trial Counsel failed to object to expert opinion testimony from Inv. Holdorf regarding cellular phone information and tracking for Mr. Mallory's phone records even though he was not qualified as a digital forensic examiner and cellular analyst (p. 927, lines 1-7, p. 932, lines 13-17, p. 934, lines 5-8).**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the expert opinion testimony from Investigator Holdorf regarding the cell phone information and tracking of Mr. Mallory's phone records, where Investigator Holdorf had not been qualified as a digital forensic examiner or cellular analyst. (Trial Tr. pp. 927, 932, 934). This Court finds this allegation is without merit.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account

of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

To avoid a finding of ineffectiveness, and where counsel articulates a strategy, counsel must also articulate a valid reason for employing a certain strategy. See Roseboro v. State, *supra*. Thereafter, that strategy is measured under an objective standard of reasonableness. Id.; see also Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges."). When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010).

Trial

Applicant alleges Trial Counsel should have objected to the following colloquy at trial:

> Q: And what did you determine from those phone records, once you reviewed them?
>
> A: The tower locations, you get the time of the call. It would give you an approximate area where he was. From one call to another call you could figure out a direction of travel and it was consistent. I mean, the phone calls won't tell you how fast someone was going or exactly where they were, so you would try to mark right in the middle where the tower would be.

(Trial Tr. pp. 926–27).

Q: And that's assuming that he stayed at the apartment of Ricki Cook for how long? I mean, how much time did you give Mr. Mallory from dropping off Ricki Cook in the timeline that you developed?

A: Initially you really can't go too much off that. You can theorize a couple minutes here or a couple minutes there, but it really would have come from the cell phone itself with the tower information and going halfway in between the towers.

(Trial Tr. p. 932).

Q: So based on your investigation, he could have arrived a couple minutes after 3:30, the time that you put him at and testified to, correct?

A: Yes, sir.

(Trial Tr. p. 934).

PCR Evidentiary Hearing

On direct examination, Counsel L. Shealey testified that he did not see a reason to object to Investigator Holdorf's qualification as an expert witness about cell phone tracking evidence in Applicant's case. (PCR Tr. p. 60). Counsel L. Shealey testified that during the State's two trials against Mr. Mallory, cell phone evidence was used to show Mr. Mallory had the opportunity to commit this crime. Id. Counsel L. Shealey testified that he and co-counsel were not objecting to Investigator Holdorf's qualifications because they wanted the jury to hear that information in line with their trial strategy of re-prosecuting Mr. Mallory. Id. Counsel L. Shealey testified that this strategy was consistent with his statement to the jury during his closing argument at Applicant's trial: "Cell phones don't lie." Id.; (See Trial Tr. pp. 1671–1672).

On cross-examination, Counsel L. Shealey testified that he and co-counsel were happy for Investigator Holdorf to offer his opinion during Applicant's trial as Investigator Holdorf helped Trial Counsel's theory of defense. (PCR Tr. p. 80). Counsel L. Shealey testified that Investigator Holdorf "clearly believe[d] [Applicant] was innocent." Id. Counsel L. Shealey testified that they

simply re-litigated the evidence that Investigator Holdorf had always used to show "per his analysis of the cell phone, that Mr. Mallory clearly could have been on-scene to do this crime." Id. Counsel L. Shealey testified that the aforementioned evidence presented by Investigator Holdorf was information Trial Counsel wanted to be admitted into evidence. Id.

On cross-examination, Counsel Aiken testified that while Investigator Holdorf had not been his witness to handle during Applicant's trial, he and co-counsel did discuss his testimony and specifically decided that they wanted the evidence to be admitted into evidence. (PCR tr. p. 106). Counsel Aiken testified that Trial Counsel made a strategic decision not to object to Investigator Holdorf's qualification as an expert to ensure that the jury heard his testimony. (PCR Tr. p. 106–107).

On direct examination, Counsel B. Shealey testified that it was his trial strategy during Applicant's trial to proffer Investigator Holdorf's testimony regarding his original investigation of this case and embrace his "unwavering belief" that Mr. Mallory was the Victim's true killer. (PCR Tr. p. 111). Counsel B. Shealey testified that Trial Counsel sought to establish the State's version of events leading to the Victim's murder set forth during Mr. Malloy's prior trials as the truth. Id. Counsel B. Shealey testified that Trial Counsel used Investigator Holdorf as their "star witness" to help convey that to the jury. Id. Counsel B. Shealey testified that everything Investigator Haldorf testified to in front of the jury was good for Applicant's case. Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any

resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds the combination of the record and Trial Counsel's **credible** testimony that they articulated and employed an objectively reasonable trial strategy in handling Applicant's defense. Trial Counsel **credibly** testified that Investigator Holdorf's testimony was helpful for Applicant's case and they strategically wanted that testimony before the jury. This Court agrees and finds Trial Counsel cannot be deficient and Applicant has failed to show any resulting prejudice from the alleged deficiency. See Roseboro, Solem, and Smith, *supra*.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xv): **Trial Counsel failed to object to leading question from Solicitor to Inv. Holdorf regarding Justin Mallory's cell phone information and tracking "he could have arrived a couple minutes after 3:30, the time you put him at and testified to?" (p. 934, lines 5-7).**

Applicant alleges that Trial Counsel provided ineffective assistance when they failed to object to leading questions. Specifically, Applicant alleges that counsel should have objected to a leading question asked by the Solicitor to Investigator Holdorf, regarding Justin Mallory's cell phone information and tracking. This Court finds these allegations are without merit.

See Rule 611(c), SCRE, *supra*; see also Tyner, *supra*; Union-Buffalo Mills Co., *supra*; Roseboro, *supra*; Solem, *supra*; Smith, *supra*.

Trial

Applicant alleges Trial Counsel should have objected to the following question asked on direct examination at trial:

> Q. So based on your investigation, he could have arrived a couple minutes after 3:30, the time that you put him at and testified to, correct?
> A. Yes, sir.

(Trial Tr. p. 934, ll. 5–7).

PCR Evidentiary Hearing

See Allegation 2c(xiv) PCR Evidentiary Hearing section, *supra*.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. While the question was leading, this Court finds the combination of the record and Trial Counsel's **credible** testimony that they articulated and employed an objectively reasonable trial strategy in the handling of Applicant's defense. See Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

Furthermore, this Court cannot find that but for Trial Counsel not objecting to this one question, the result of trial would have been different. See Strickland, *supra* (finding "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xvi): **Trial Counsel failed to object to Applicant's statement to Inv. McDaniels, during interrogation in California, in answer to the question, "Did you lie about Justin Mallory being there when Nakia was stabbed?" stated, "he looked up, and he said he was not there" (p. 1072 lines 4-9) and to evidence of other crimes regarding perjury when Inv. McDaniels asked Applicant "why did you stand up in court and lie?" (p. 1074, lines 3-4).**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to statements made by Applicant to Investigator McDaniels during his interrogation in California. Specifically, Applicant avers Trial Counsel should have objected to the question, "Did you lie about Justin Mallory being there when Nakia was stabbed?" stating, "he looked up, and he said he was not there." (Trial Tr. p. 1072). Additionally, Applicant avers Trial Counsel was constitutionally

deficient for failing to object to evidence of other crimes regarding perjury when Investigator McDaniels asked Applicant "why did you stand up in court and lie?" (Trial Tr. p. 1074). This Court finds these allegations are without merit.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688–89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Trial

On direct examination of Sergeant Shawn McDaniels the following occurred:

> A: . . . basically "did you lie about Justin Mallory being there when Nakia was stabbed?" That was the only time that -- that was the first time that he had a -- he had a response, so to speak, you know, through facial expressions, and, you know, that stood out to me. He looked up and he said he was not there.

(Trial Tr. p. 1072, ll. 4–9).

> A: . . . When I asked him "well, why did you stand up in court and lie without showing any sign of remorse?"

(Trial Tr. p. 1074, ll. 3–4).

PCR Evidentiary Hearing

On cross-examination, Counsel L. Shealey testified that Investigator McDaniels took part in Applicant's interrogation process, which was discussed during pretrial hearings. (PCR Tr. p. 81). Counsel L. Shealey testified that the interrogation process was litigated during Applicant's Denno hearing, wherein the whole chain of questioning and Applicant's answers to those questions were deemed admissible by Judge Lee. Id. When questioned why he renewed his objection during Applicant's trial, Counsel L. Shealey clarified that he made a motion to suppress statements made by Applicant during his interrogation as he submitted to the trial court that Applicant's statements were the product of his will being overborn. Id.

Regarding the statements made by Investigator McDaniels alleging perjury, Counsel L. Shealey testified that Investigator McDaniels based his comments on Applicant's past testimony given under oath during Mr. Mallory's trial. (PCR Tr. p. 82). Counsel L. Shealey testified that they were faced with reconciling Applicant's previous testimony with his confessions to officers in California regardless of Investigator McDaniels' statements. (PCR Tr. pp. 81–82). Counsel L. Shealey testified that he ultimately did not object to the cited statements by Investigator McDaniels as they were already deemed admissible by Judge Lee during pretrial hearings. (PCR Tr. p. 82).

On redirect examination, Counsel L. Shealey testified that during the statements Applicant gave to officers in California, Applicant was asked "pretty quickly" whether Mr. Mallory was present for the crimes in question, and Applicant answered "no." (PCR Tr. p. 90). Counsel L. Shealey testified that although Mr. Mallory had already been legally exonerated, Applicant's statement was very problematic for Trial Counsel. (PCR Tr. pp. 90–91). Counsel L. Shealey testified that Investigator McDaniels, as part of his interrogation technique, used the term

"perjurer" and viewed Applicant as a perjurer because Applicant's prior testimony appeared to be false to Investigator McDaniels in light of Applicant's confession. Id.

However, Counsel L. Shealey testified that they did not specifically seek to limit the particular language utilized, as it was "just part of law enforcement's latest theory." (PCR Tr. p. 91). Counsel L. Shealey testified that their approach in rebutting this theory was to contest that Applicant gave a false confession and was, therefore, not a perjurer. Id. Counsel L. Shealey testified that Investigator McDaniels conducted a very lengthy interrogation of Applicant, including the use of polygraphs, which Trial Counsel sought to suppress. Id. Counsel L. Shealey testified that Investigator McDaniels' approach was in line with the State's search for evidence that would help them in their already cemented theory that Applicant had murdered Victim. Id. Counsel L. Shealey testified that the State's belief of Applicant's guilt was evident when South Carolina officers flew out to California with arrest warrants before obtaining a statement from Applicant. Id. Counsel L. Shealey testified that had they objected, the argument would have been that it went to the *res gestae* of the case. Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. To the first part of the allegation within the trial transcript page 1072, this Court finds Investigator McDaniels was being used to lay a foundation for the admission of Applicant's confession. Investigator McDaniels had personal knowledge of this statement as he was the officer who took the statement. This Court

finds any objection to Investigator McDaniels' testimony would have been non-meritorious. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

Turning to the second part of this allegation on page 1074 of the trial transcript, this Court finds the testimony was admissible, and any objection would have been non-meritorious as the testimony went to the *res gestae* of the case. See State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (Ct. App. 2013) ("Evidence of other acts may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 835–36 (2003) ("Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case.). Prejudice cannot be shown if the statements or acts were admissible, and an objection would not have prevailed before the court. Anderson, 354 S.C. at 436, 581 S.E.2d at 835–36.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xvii): Trial Counsel failed to object to State's Ex. 50 regarding a portion of a video recorded statement by Applicant discussing use of illegal drugs that was then published to the jury. (p. 1107, lines 10-12) and Counsel L. Shealey stated that this evidence was "clearly prejudicial" (p. 1130).

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to State's Exhibit 50 being admitted into evidence. Specifically, Applicant's allegation is regarding a portion of a video-recorded statement made by Applicant during his California interrogation discussing his use of illegal drugs, which was then published to the jury. (Trial Tr. p. 1107). This Court finds this allegation is without merit.

Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. Rule 404(a), SCRE; State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012); State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001).

PCR Evidentiary Hearing

On direct examination, Counsel L. Shealey testified that Applicant's statements to officers were recorded on video, and this video was subsequently admitted into evidence during Applicant's trial. (PCR Tr. p. 61). Counsel L. Shealey testified that this video of Applicant's statements ended with Applicant making references to drug use. Id. Counsel L. Shealey testified that he and co-counsel had made pretrial motions to suppress improper character evidence under Rules 404(b) and 403, SCRCrimP. Id. Counsel L. Shealey testified that the State's response to his motion for a mistrial based on the video evidence of drug use being played to the jury was "well, I mean, you should have caught" it; however, Counsel L. Shealey conceded that he did not. Id. Counsel L. Shealey testified that he and co-counsel had done their pretrial work and felt as though they had "pretty good parameters on what was allowed to be on that tape and what was not." Id.

Counsel L. Shealey testified that he moved for a mistrial because of the improper character evidence played to the jury. Id. Counsel L. Shealey testified that the evidence was clearly prejudicial to Applicant's case, so he motioned for a mistrial, which was ultimately denied. (PCR Tr. p. 61–62). Counsel L. Shealey testified that everyone involved in Applicant's case was caught off guard by the discovery of Applicant's statements pertaining to drug use being included in State's Exhibit 50. (PCR Tr. p. 62). Counsel L. Shealey testified that ultimately, Judge Lee's decision that the referenced portion of State's Exhibit 50 was played for the jury inadvertently. Id.

Counsel L. Shealey testified that once the evidence was played, he objected, made the motion for a mistrial, attempted to cure the error of admission, and ensured that State's Exhibit 50 was not published to the jury containing the statements pertaining to drug use. Id. Counsel L. Shealey testified that he could have requested a curative instruction, which creates a potential "Catch-22" situation where you highlight that to the jury. (PCR Tr. pp. 62–63). Counsel L. Shealey testified that if he had wanted a curative instruction on this issue, he would have asked for it.[18] (PCR Tr. p. 63). Counsel L. Shealey testified that the discussion of personal drug use was "pretty irrelevant to this case.[19]" Id.

On cross-examination, Counsel L. Shealey testified that he first heard the statements referencing Applicant's drug use in State's Exhibit 50 when it was played in front of the jury. (PCR Tr. p. 82). Counsel L. Shealey testified that he did not review the video prior to trial, as he and the

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[18] During Applicant's PCR evidentiary hearing, Assistant Attorney General Spencer acknowledged the relevant citations in his discussion of Counsel L. Shealey's motion for a mistrial during Applicant's trial. (PCR Tr. p. 64). , Assistant Attorney General Spencer stated that the mistrial motion was first mentioned on page 1110 of the trial transcript and was discussed extensively thereafter. Id. Assistant Attorney General Spencer noted that, ultimately, Judge Lee issued her ruling on this issue on page 1131 of the trial transcript. Id.

[19] To clarify, Assistant Attorney General Spencer referenced a discussion during Applicant's trial regarding the referenced statements in State's Exhibit 50, noting the fact that in his statements, Applicant contended he used drugs as a teenager but had quit them for his wife. (PCR Tr. p. 64).

State had set their parameters about what information was allowed into evidence. (PCR Tr. p. 83). Counsel L. Shealey testified that he may have trusted Solicitor Goings too much in not insisting a laptop be provided to him so he could double-check the video evidence. Id.

On further direct examination, Counsel L. Shealey testified that while there was an understanding among the parties that certain portions of Applicant's testimony would be coming in, there was also an understanding that "certainly extraneous drug use and various nicknames that [Trial Counsel] had successfully been able to prevent [Applicant] from being called" would not come in. (PCR Tr. p. 120). Counsel L. Shealey testified that he did not review State's Exhibit 50[20], in the moment because he did not expect Solicitor Goings to have included the statements referencing Applicant's potential drug use on the video that was played to the jury. (PCR Tr. p. 121). Counsel L. Shealey testified that he felt as though the parties had already discussed the issue, so Trial Counsel was blindsided by the inclusion of those statements. Id.

On direct examination, Counsel B. Shealey testified that he and co-counsel had a copy of the entire video detailing Applicant's interrogation with officers in California that contained the portion utilized by the State in State's Exhibit 50. (PCR Tr. p. 113). Counsel B. Shealey testified that the video evidence in Trial Counsel's possession was distinct from the extracted portion used as State's Exhibit 50. Id. Counsel B. Shealey testified that he agreed with Counsel L. Shealey that these issues had been pre-litigated, creating an understanding amongst Trial Counsel that the comments pertaining to character evidence would not be presented to the jury. (PCR Tr. pp. 113–14). Counsel B. Shealey testified that they were "blindsided" by the inclusion of the statements related to Applicant's drug use being included in State's Exhibit 50. (PCR Tr. p. 114).

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[20] For clarification, Counsel L. Shealey testified that he had reviewed the evidence provided to him by the Solicitor; however, he had not reviewed the copy the State brought to court before it was played for the jury. (PCR Tr. pp. 120–21).

Findings

As an initial matter, this Court finds from the record that Trial Counsel successfully argued in pretrial matters to exclude the admission of character evidence based on Rule 404(b) and Rule 403, SCRCrimP.

At trial, when the State moved to enter Exhibit 50 into evidence and publish it to the jury, Counsel Aiken renewed his pretrial objection, and the trial court overruled his objection. (Trial Tr. p. 1107). Exhibit 50 was played in its entirety to the jury, and once Trial Counsel realized that the portion containing drug use had not been redacted, Trial Counsel moved for a mistrial relying on State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992). The trial court denied Trial Counsel's motion for a mistrial. The trial court determined that it was an inadvertent admission of evidence that should have been redacted and ordered that it be redacted before it went back to the jury. The trial court further distinguished Applicant's case from the Smith case in that the State in Smith attempted to use the character information against the defendant. In this case, the State agreed not to use it against Applicant.

Turning to the first prong of Strickland, this Court cannot find Trial Counsel deficient for failing to object to the admission of Exhibit 50 when Trial Counsel did object pretrial and renewed their objection at trial. However, from the record, this Court finds Trial Counsel deficient for not reviewing the version of the video the State introduced at trial to ensure the drug testimony was redacted. While Trial Counsel relied on their pretrial motions to suppress any character evidence, Trial Counsel had a duty to ensure the video the State introduced did not contain the character evidence.[21]

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[21] This Court is not remiss with the duty the State had to also ensure the video did not contain character evidence the trial court ruled inadmissible.

Turning to the second prong of Strickland, this Court finds Applicant has failed to prove that Trial Counsel's deficient performance garnered the requisite prejudice to require a reversal of his conviction. This Court agrees with the trial court's decision to deny Trial Counsel's motion for a mistrial. This Court agrees with the trial court's assessment and distinction between this case and State v. Smith. Further, this Court finds no prejudice in this performance where the testimony of prior drug use before the murder occurred was not relevant to the case before the jury. Notably, Trial Counsel diligently argued for the mistrial and was able to have the video redacted before it went back to the jury during deliberations.

While Trial Counsel's performance was deficient in this matter, Trial Counsel's deficient performance does not garner the requisite prejudice to warrant a reversal of his convictions. Indeed, this Court cannot find that, but for Trial Counsel's deficient performance in this matter, the result of Applicant's trial would have been different where the inadmissible evidence was irrelevant to Applicant's guilt.

Accordingly, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xviii): Trial Counsel failed to object to testimony from Sgt. Godfrey regarding Applicant's statements about fighting with Victim. (p. 1360, lines 3-9).

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to testimony from Sgt. Godfrey regarding Applicant's statements about fighting with Victim (Trial Tr. p. 1360). This Court finds this allegation is without merit.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688–89. "Representation is

an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Trial

On direct examination of Sergeant Brian Godfrey, the following occurred:

> Q. And let's go into the statement. I know it's already been published to the jury. Just in your own words, what did the defendant tell you in that first meeting on July 9th, 2009?
> A. The first thing he did was he took Mallory out of the equation, which was significant, because he had already testified it was him, Mallory, or Justin Mallory and Ms. Mallory that were involved in this altercation. So he took Mr. Mallory out of the equation. Now he was to provide for what occurred, since it was just you and Mrs. Mallory. And then he provided the version of events that was read by Investigator McDaniels, which was essentially -- I could read this entire thing or kind of give a brief synopsis.
> Q. Just a brief synopsis of what you recall him saying.
> A: Along the lines of he went over there to see Mr. Mallory. Mr. Mallory wasn't home. Ms. Mallory invited him in. During the course of that she made advances on him, or what he considered advances, and he shunned her. She got upset about that and essentially went and got the knife, came in the room, and then she was accidentally stabbed in the neck during the course of that altercation.

(Trial Tr. pp. 1359–1360).

PCR Evidentiary Hearing

On direct examination, Counsel Aiken testified that he did not see any arguable basis to have Sgt. Godfrey's statement excluded. (PCR Tr. pp. 99–100). Counsel Aiken testified that they had argued the issue during two days of pre-trial hearings. (PCR Tr. p. 100). Counsel Aiken testified that Judge Lee's pretrial rulings were final and not provisional. Id. Counsel Aiken

testified that a renewal of the objection on this issue wasn't necessary as the issue had already been litigated and decided with Judge Lee during pre-trial proceedings. Id.

On direct examination, Counsel B. Shealey testified that Sgt. Godfrey did not use the word "fight" in his testimony but instead referred to the incident as an "altercation." (PCR Tr. pp. 111–112). When asked if there was anything objectionable about Sgt. Godfrey's statement, Counsel B. Shealey testified that while he had not been a part of Applicant's representation from the outset of pretrial proceedings, he was aware that it was a part of Trial Counsel's defense strategy to attempt to suppress all of Applicant's statements made during his California interrogations. (PCR Tr. p. 112). Counsel B. Shealey testified that despite their dedicated efforts to suppress those statements, the trial court had ruled that they were admissible. Id. Counsel B. Shealey testified that Judge Lee had made pretrial rulings allowing the jury to hear the portions of Applicant's video confession containing Sgt. Godfrey's statements, therefore, Trial Counsel did not object to its inclusion as the issue had already been litigated during pretrial proceedings. Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The record provides that Trial Counsel did object to Applicant's statements being entered into evidence during pretrial motions and contemporaneously objected when admitted during trial. The trial court overruled Trial Counsel's objection. Sgt. McDaniels was the first to testify to State's Exhibit 48. (Trial Tr. p. 1091). This Court finds Sgt. Godfrey's testimony on already entered evidence over objection was

merely cumulative to what the jury had already heard. Thus, Trial Counsel was not deficient in their performance. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 2c(xix): Trial Counsel failed to object to testimony from Pathologist on an individual other than Dr. Bradley Marcus, who was the sole doctor who conducted the forensic test of the victim.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to object to the testimony of the Pathologist Dr. Bradley Marcus (Dr. Marcus). Specifically, Applicant takes issue with the testimony of Dr. Marcus being offered in place of the testimony of Dr. Sam Kessler (Dr. Kessler), who originally conducted the Victim's autopsy report but died prior to Applicant's trial. This Court finds this allegation to be without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable'

action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

Trial

The following occurred at the calling of Dr. Marcus to testify at trial:

Mr. Luke Shealey:	I don't believe so. It's not my witness, but I was just thinking since we don't have a situation where we have a doctor testifying and not the coroner, that doctor's testimony, but I think he I guess on the record will make that objection subject to prior rulings to preserve the record right before he testifies. I was just thinking out loud.
The Court:	Whoever the next witness is.
Mr. Pauling:	Dr. Marcus, Your Honor.

. . . .

The Court:	Okay. So Bradley Marcus, is that his -
Mr. Goings:	Yes, ma'am.
The Court:	Are there any issues before we bring the jury back in with respect to his testimony?
Mr. Luke Shealey:	Just — we are just going to make an objection that we made pretrial, that him being allowed to testify, which has already been ruled on. Just subject to those prior objections for the record.
The Court:	And it was taken up during pretrial and I did issue a separate order.
Mr. Luke Shealey:	Yes, ma'am.
The Court:	Okay.
Mr. Goings:	It's our understanding that order allows the submission of his report and his testimony.
The Court:	Yes.

(Trial Tr. p. 884–885).

PCR Evidentiary Hearing

On direct examination, Counsel L. Shealey testified that Dr. Kessler was the pathologist who initially performed the Victim's autopsy. (PCR Tr. p. 64). Counsel L. Shealey testified that Dr. Kessler died prior to trial; therefore, another Pathologist, Dr. Marcus, reviewed Dr. Kessler's work and testified in his place at Applicant's trial. (PCR Tr. pp. 64–65). Counsel L. Shealey testified that they filed a pre-trial motion to prevent Dr. Marcus' testimony from being presented during Applicant's trial as a violation of the Confrontation Clause because Trial Counsel could not challenge the findings of the autopsy report.[22] (PCR Tr. p. 64). Counsel L. Shealey testified that Dr. Marcus successfully testified during Applicant's trial. (PCR Tr. p. 65). Counsel L. Shealey testified that, to his recollection, Judge Lee's ruling was based on the ability of experts "to rely on

[22] Counsel L. Shealey renewed the objections made by Trial Counsel during pretrial proceedings on the record prior to Dr. Bradley Marcus' testimony at Applicant's trial. (Trial Tr. p. 885).

other experts." Id. Counsel L. Shealey testified that it was Judge Lee's ruling that it was not improper for Dr. Marcus to rely on the records of another pathologist to conduct his analysis. Id. Counsel L. Shealey testified that pursuant to Rule 703, SCRE, an expert is allowed to rely on material that other experts would ordinarily rely on. Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds the record refutes this allegation where Trial Counsel moved to suppress Dr. Marcus' testimony pretrial and renewed their objection contemporaneously at trial. (Trial Tr. pp. 884–885).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396–97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752–53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Additionally, our South Carolina Supreme Court has expressly rejected the notion that

appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Allegation 3a(i): Appellate Counsel failed to appeal the court's ruling regarding Applicant's consent form regarding DNA Buccal Swab collection Ex 28. (p. 377).

Applicant alleged Appellate Counsel was constitutionally ineffective for failing to appeal the trial court's ruling regarding Applicant's consent form for DNA buccal swab collection State's Exhibit 28 (Trial Tr. p. 377). This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On cross-examination, Appellate Counsel testified that while generally evidentiary issues can be appealed and could ultimately prove successful, the burden of proof on evidentiary issues is high, noting this standard is an abuse of discretion. (PCR Tr. p. 38). Appellate Counsel testified that, in his experience, it is rare for those matters to succeed. (PCR Tr. p. 38). Appellate Counsel testified that his general practice would be to vet any potential evidentiary issues that were present. (PCR Tr. p. 38). Appellate Counsel testified that while he did not possess specific recollections of this case, typically, if Appellate Counsel had found meritorious evidentiary issues, those would have been included in his appellate briefing and argument. (PCR Tr. p. 41). Appellate Counsel testified that he and his co-counsel looked for the appellate issues using a standard of review that would present the best chance that those issues would succeed. (PCR Tr. p. 41).

Findings

This Court finds Appellate Counsel's decision in deciding not to appeal this issue was based on a reasonable professional judgment. See Tisdale, *supra*. Further this Court finds this

evidentiary issue would not have been successful on appeal. See Smith v. Robbins, 528 U.S. 259, 288 (2000) (concluding in order to meet their burden of proof, an applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal.).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 3a(ii): Appellate Counsel failed to appeal ruling regarding admission of photo of bloody shirt (State's Ex. 36) court said it may be cumulative. (p. 502, line 9).

Applicant alleged Appellate Counsel was constitutionally ineffective for failing to appeal the trial court's ruling regarding the admission of photos of a bloody shirt (State's Ex. 36), where the trial court said they may be cumulative. (Trial Tr. p. 502, l. 9). This Court finds this allegation is without merit.

PCR Evidentiary Hearing

On cross-examination, Appellate Counsel testified that his reasoning for not pursuing any appellate action regarding the suppression of States Exhibit #36 was the same as his decision not to pursue any appellate action regarding the voluntary nature of Applicant's buccal swab. (PCR Tr. p. 39). Appellate Counsel testified that while generally evidentiary issues can be appealed and could ultimately prove successful, the burden of proof on evidentiary issues is high, noting this standard is an abuse of discretion. (PCR Tr. p. 38). Appellate Counsel testified that, in his experience, it is rare for those matters to succeed. (PCR Tr. p. 38). However, Appellate Counsel ultimately maintained that his general practice would be to vet any potential evidentiary issues that were present. (PCR Tr. p. 38).

Findings

This Court finds Appellate Counsel's decision in deciding not to appeal this issue was based on a reasonable professional judgment. See Tisdale, *supra*. Further, this Court finds this evidentiary issue would not have been successful on appeal. See Smith v. Robbins, *supra*.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 3a(iii): Appellate Counsel failed to appeal court allowing leading questions regarding DNA evidence from Inv. Barron (p. 544).

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to appeal the trial court's allowance of leading questions regarding DNA evidence from Investigator Barron (Trial Tr. p. 544). This Court finds this allegation to be without merit.

Trial

At trial, the following occurred:

MR. AIKEN:	Your Honor, I object. He's been leading the witness for the last minute and a half.
MR. UNDERWOOD:	I'm just clarifying to make sure I understood his testimony, Your Honor.
THE COURT:	I'll allow the summary.

(Trial Tr. p. 544, ll. 14–18).

PCR Evidentiary Hearing

On cross-examination, Appellate Counsel was asked whether objections at trial to leading questions and the forms of questions are appealable issues where they link to evidence and could those issues be something that could reverse a conviction, where Appellate Counsel responded that generally, those objections could be appellate issues. (PCR Tr. p. 39).

Findings

This Court finds from a review of the record that the testimony that was objected to at trial as leading was permissible under Rule 611(c), SCRE, where the leading questions were utilized "to develop the witness' testimony." Furthermore, this Court cannot find that this issue was clearly a stronger issue than the ones Appellate Counsel briefed. See Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)) (finding when a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal.). Based on the foregoing, this Court cannot find Applicant would have been successful had this issue been briefed. See Smith, 528 U.S. at 288 (concluding in order to meet their burden of proof, an applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal.).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 3a(iv): Appellate Counsel failed to appeal trial court's decision to allow in portion of Applicant's interrogation by law enforcement regarding allegation that Applicant was gay or abused as a child despite defense objection under Rule 404 (p. 814, line 17).

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to appeal the trial court's allowance into evidence of a portion of Applicant's interrogation by law enforcement regarding allegations that Applicant was gay or abused as a child, despite being

preserved for appeal by Trial Counsel's objection under Rule 404 (Trial Tr. p. 814, l. 17). This Court finds this allegation to be without merit.

Trial

At trial, the following occurred:

> Mr. Luke Shealey: Your Honor, last night we reviewed the one hour proposed video that the State is going to seek to admit into evidence in the interrogation room with Mr. Godfrey and McDaniels. Just out of ah abundance of precaution. Your Honor, I want to make sure there is nothing there that shouldn't be there, since the mention of a polygraph or anything like that. When I started doing that, there was nothing mentioned of polygraph, but we have some other problem issues and I'll pass you a transcript to be prepared and you can see what I'm talking about. There is a section just before the thirty-five minute mark where Officer McDaniels asked my client, number one, "were you attracted to Justin?" That then leads on to. a conversation about whether he is gay or not. "It's a sensitive thing for me because my own wife has asked me if I was gay, I was hanging out too much with my friends and stuff. I went over there and she called me a faggot and stuff." Then later at thirty-five minutes and forty-five seconds we start talking about childhood abuse, as if it was sexual abuse, and that leads into the following page, Investigator McDaniels ' assertion "that it's the biggest secret. It happens to a lot of folks. People sweep it up under a rug and they torture children and then when they get older they wonder why they think certain ways. I mean, your first experience is basically a violation. What are we supposed to think? Do you think like that?" And Mr. Porch answers "no. For awhile it's a struggle, but not now so." And it goes on, "do you find yourself attracted to men?" So basically we have got a couple of issues, and it's really about a three or four

minute period I would imagine in this case where under the Rule 404 (b) I think this is improper character evidence not having anything to do with the truthfulness or dishonesty, but whether he is gay, whether based on his life experiences he might have child molesting tendencies, which have no place in this trial. They don't make it — even if they were considered relevant under 401, they don't make it under 403, because they are unfairly prejudicial, not probative of anything. So the defense's position is if this is being sought into evidence by the State, that this portion certainly has to be redacted so it is not included in the video at all.

MR. GOINGS: The State's position, I don't believe there is anything prejudicial to Mr. Porch in there. They asked the questions. He answered to the gay comment no. I mean, he denied all their questions. I don't know how it's prejudicial to their client. The second thing as — if we have to cut that portion out, then I think it breaks up the flow of the video and I think the jury would be confused by that, and those are our two grounds to keep it in. If the judge sees fit to force the State to cut it out, we would ask that the jury be told that it was by the reguest of the defense and not something -- so they just don't think it's not something that the prosecution is trying to hide from them.

Mr. Luke Shealey: Obviously I would disagree with the State's argument, but I think it should be cut out. But if it isn't cut out, I don't think it should be instructed one way or the other, because it's — you know, it's not on us to prevent prejudicial information that isn't appropriate not going for the truth. I mean, it's not — it's not our burden. They're the ones seeking to introduce this evidence, so it's nobody's fault. They just don't need to be hearing about it at all. But certainly it's a line of questioning being asked by Officer McDaniels which elicit responses which violate the rules would prevent Mr. Porch from having a fair trial, so I think — I think the State has plenty of resources at its disposal. I think they can send

the clerk back to their office, or even have the solicitor's office, as they have been doing all week, and redact that portion of the video. It's about probably three or four minutes, and we have even got this transcript that guides them to it, and I told Mr. Goings exactly where it is. So —

The Court: I'm going to deny your request. I don't find that it falls under 404 as either character evidence or what we commonly call Lyle information. There has certainly been no attempt at this particular point, and I don't believe that there would be any, to characterize him as having homosexual tendencies or engaging in that conduct. I think that the questions that were asked in the course of the investigation that were relevant under the circumstances to ask the questions. They were not dwelled on. He explains and indicates that he's offended by being asked that and it's never discussed again and it hasn't been discussed throughout the course of this trial. So I think by redacting it, it would highlight the information that's been removed, and I don't think that it's prejudicial to the defendant, and so I'm going to deny your request.

(Trial Tr. pp. 811, l. 13–815, l. 7).

PCR Evidentiary Hearing

On cross-examination, Appellate Counsel testified to his recollection that he and co-counsel raised an issue involving Applicant's interrogations in California and South Carolina. (PCR Tr. p. 40). Appellate Counsel testified he and co-counsel believed that, given the standard of review surrounding evidentiary issues versus the standard of review for constitutional issues, the constitutional issue related to the interrogation was more likely to be successful. Id.

Findings

This Court finds Applicant has failed in his burden of proving the issue he contends should

have been raised is a stronger issue that the one raised by Appellate Counsel. Further, this Court agrees with Appellate Counsel that the constitutional issue was a stronger issue than the evidentiary issue. See Smith, *supra*.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 3a(v): Appellate Counsel Abee failed to appeal court's ruling on video of Applicant's interrogation as admissible despite visible polygraph machine in video. (p. 1054).

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to appeal the trial court's ruling regarding the admissibility of Applicant's video recorded interrogation despite the visible appearance of a polygraph machine in the video. (p. 1054). This Court finds this allegation to be without merit.

Trial

At trial, the following occurred:

> Mr. Luke Shealey: Yes, ma'am. Just sitting here discussing the scheduling and the potential evidence that's going to come in concerning the video, I just — and it's the first time that I noticed this, the video that's proposed to introduced into evidence of the one hour interrogation by Godfrey and McDaniels, we all know there is post-polygraph and that's something that's not going to be discussed in front of the jury. My concern is that, in my opinion, yes, I have seen polygraph machines and I happen to know you sit in the same chair. There is enough of the machine, enough of the blood pressure cup, enough of the chair where someone, if they have any background knowledge of that at all, or even watches Law & Order, maybe, will say, "oh, is that a

polygraph machine? What is that?" So I just want to note for the record my objection to the video, again, based on that basis being admissible.

Mr. Goings: Your Honor, the State's position is — I have looked at the video, although I'm familiar with polygraph equipment as well. I don't think a lay person would have any knowledge and would be able to determine what that machine is. And even with my knowledge of what they look like, you couldn't specifically tell that that was a polygraph, part of a polygraph machine. Your Honor. All you see is really clearly is a computer and then another object beside it. It could be a telephone, or any other object, and I don't think it's prejudicial to the defendant. Your Honor.

The Court: And we just briefly looked at the video. It's obviously a computer, and then there is another machine. You know, whether -- I don't know that someone who is not in law enforcement would know exactly what it is. It could look like it's a computer or some other dictaphone or something else. The important thing is that there is nothing attached to them and he's not hooked up to anything. So even if it's there, you know, there is not — he's not attached to any machine. There is nothing to show that he's under any examination by way of any type of machine, whether it is a blood pressure cup, or, you know, pulse, or anything else. There is nothing wrapped around his chest that we can see, so it's noted for the record.

(Trial Tr. pp. 1052, l. 13–1054, l. 4).

PCR Evidentiary Hearing

Appellate Counsel testified he and co-counsel reviewed the appellate issues with a standard of review for the best chance to be successful. (PCR Tr. p. 41). Appellate Counsel testified that he could not recall any evidentiary issues that seemed to be meritorious and they did not pursue

them. Id.

Findings

This Court finds that the evidentiary issue Applicant contends should have been raised is not clearly a stronger issue than the ones Appellate Counsel briefed. See Smith, *supra*. Based on the foregoing, this Court cannot find Applicant would have been successful had this issue been briefed. See Smith, *supra*.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 3a(vi): Appellate Counsel failed to appeal the courts denial of a motion for mistrial (p. 1130) following defense motion based on the introduction of State's Ex. 50.

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to appeal the trial court's denial of a motion for mistrial (Trial Tr. p. 1130). Specifically, Applicant takes issue with State's Exhibit 50, which depicted a portion of Applicant's statements to law enforcement officers during his interrogation in California. Applicant takes particular issue with the inclusion of statements regarding Applicant's drug use in State's Exhibit 50. This Court finds this allegation to be without merit.

Trial

At trial the trial court described the statements at issue in State's Exhibit 50 as follows:

> What I found on the video that I looked at was that at one hour, eleven minutes and forty-five seconds the question came up had he ever tried drugs, and there was a conversation for about another minute, maybe two minutes, in which he stated that he had tried drugs, that Justin was no the one who introduced him to the drugs. He started using drugs in the ninth grade when he was seventeen. He would use it once or twice a day. Then—once or twice in a while. Then it – it sounded like "when we moved to Canada" he used it

> every day. It might have been Columbia. I couldn't tell. He used every day. Then he stopped when he met his wife. He stopped before that. And then when he met his wife, his wife was against drug use, and so he definitely had stopped at that particular point.

(Trial Tr. p. 1129).

The Court went on to deny Trial Counsel's request for a mistrial stating that:

> …[A]nd that it appeared that it was inadvertent, that there was a request to turn off the video earlier, and so I think it was inadvertent and it's not being used in the same manner in which the evidence of cocaine use is being used in the State v. Rebecca Smith, and so, therefore, I'll deny the request for a mistrial.

(Trial Tr. p. 1130). In its ruling, the trial court, in discussing a potential curative instruction, advised Trial Counsel that calling attention to these remarks by discussing it with the jury or telling them to disregard those statements would serve only to highlight them. (Trial Tr. p. 1131). The trial court allowed Trial Counsel to attempt to redact that portion of the video evidence. (Trial Tr. p. 1132). The State raised no objection to this and made assurances that they had no intention of questioning the defendant on the stand about any prior drug use or using any part of prior drug use that may have been heard in that video in closing argument. (Trial Tr. p. 1132).

Findings

This Court finds that the evidentiary issue Applicant contends should have been raised is not clearly a stronger issue than the ones Appellate Counsel briefed. See Smith, *supra*. Based on the foregoing, this Court cannot find Applicant would have been successful had this issue been briefed. See Smith, *supra*.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 3a(vii): Appellate Counsel failed to appeal the court's ruling to prohibit the testimony of Andelyn Rodriguez as 3rd party guilt involving witnessing previous assaults by Mr. Mallory choking the Victim. (p. 1497, lines 1-2).

Applicant alleged Appellate Counsel was constitutionally ineffective for failing to appeal the trial court's ruling to prohibit the testimony of Andelyn Rodriguez regarding third-party guilt. Specifically, Applicant avers Appellate Counsel should have appealed the trial court's ruling to exclude the testimony of Andelyn Rodriguez regarding previous assaults allegedly committed by Mr. Mallory against Victim. (Trial Tr. p. 1497, ll. 1–2). This Court finds this allegation to be without merit.

Trial

The trial court explained its reasoning for excluding the testimony at issue in Applicant's allegation as follows during Applicant's trial:

> … And I allowed the testimony about prior — any prior difficulties he had — he may have had with his wife. To allow the defense to be able to put in a complete defense and be able to continue to discuss the prosecutorial decisions related to going forward with the case against Mr. Mallory, and I allowed generally the evidence that they were having difficulties.
>
> I did not specifically allow the specific threats, and still under the impression that it would not be permissible, because I think that the prejudice outweighs its probative value.
>
> And while there has been evidence that there was prior difficulty, I think to allow someone to come in and testify about the specifics of what went on gets into a lot of both prior bad acts of a witness. And even though it may relate to a defense in the matter, I still think that the fact that there was evidence about that there had been some prior difficulties and that there were threats made is sufficient to raise the question about the decisions the prosecutors may have made in going forward and why they decided to go forward with the matter. And the specifics are not — while they may be — while they may be relevant, I think the fact that it occurred in 2002, it introduces into this case information that's not ultimately — the specifics of it

> ultimately are not relevant in terms of whether there is third-party guilt, so I'm not going to allow that testimony.

(Trial Tr. pp. 1495–1497).

Findings

This Court finds that the evidentiary issue Applicant contends should have been raised is not clearly a stronger issue than the ones Appellate Counsel briefed. See Smith, *supra*. Based on the foregoing, this Court cannot find Applicant would have been successful had this issue been briefed. See Smith, *supra*.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

|CONCLUSION PAGE FOLLOWS|

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16th **day of** October**, 2024.**

GEORGE M. MCFADDIN, JR.
Presiding Judge
Fifth Judicial Circuit

Sumter, South Carolina

WITNESSES

Sgt. Shawn McDaniels
Richland County Sheriff's Office

ARREST WARRANT NUMBER

Warrant No.: I-918184

ACTION OF GRAND JURY

TRUE BILL

[redacted]

Foreperson of Grand Jury
Date: JUN 16 2011

VERDICT

Foreperson of Petit Jury
Date:

Docket Number 2011-GS-40 - 03359

The State of South Carolina
County of Richland

COURT OF GENERAL SESSIONS

June 2011Term

THE STATE

vs.

JOSHUA PORCH

DEFENDANT

INDICTMENT FOR

MURDER

S.C. CODE §16-3-0010
CDR Code: 0116
FELONY (Exempt)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

2506

Defendant

I, _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. Pls. And G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on June 15, 2011, the Grand Jurors of Richland County present upon their oath:

MURDER

That Joshua Porch, did in Richland County on or about May 14, 2006, feloniously, wilfully and with malice aforethought, kill one Nakia Mallory, by stabbing the victim in neck, and that the said victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, THE CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

A Lan Wilson

ALAN WILSON (CNG) by JM
SOUTH CAROLINA ATTORNEY GENERAL

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette Williams
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

2508

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE)
vs. Joshua Porch,)
AKA: —)
Race: B Sex: M Age: [redacted])

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011 -GS- 40 - 33591
A/W#: I-918184
Date of Offense: May 14, 2004
S.C. Code §: 16-3-10
CDR Code #: 0116

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☒ PLEADS TO: Murder
In violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST: 72512 75911
Assistant Attorney General SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections** ☐ **County Detention Center,** for a determinate term of 50 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total: $ _____ plus 20% fee: _____ $ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:		$ _____
§14-1-206 (Assessments 107.5%)		$ _____
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$ _____
§14-1-211 (A)(2)(DUI Surcharge)	$100	$ _____
§56-5-2995 (DUI Assessment)	$12	$ _____
§56-1-286 (DUI Breath Test)	$25	$ _____
Proviso 47.9 (Public Def/Prob)	$500	$ _____
§14-1-212 (Law Enforce. Funding)	$25	$ _____
§14-1-213 (Drug Court Surcharge)	$150	$ _____
§50-21-114 (BUI Breath Test Fee)	$50	$ _____
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$ _____
Proviso 90.5 (SCCJA Surcharge)	$5	$ _____
3% to County (if paid in installments)		$ _____
TOTAL		$ _____

Clerk of Court/Deputy Clerk Jeanette McBride
Court Reporter: M. Watts

PTUP _____
_____ days/hours Public Service Employment

CERTIFIED TRUE COPY OF ORIGINAL FILED
Jeanette McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

Obtain GED ☐
Attend Voc. Rehab. Or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Presiding Judge Alison Renee Lee
Judge Code: 218
Sentence Date 11/25/2013.

SCCA/217 (03/2011)