STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Thomas W. McGee, III, Circuit Court Judge

Appellate Case No. 2025-000902

Sherman Green, ... Respondent,

v.

City of Columbia and George Simpson, Defendants, of which George Simpson is the Appellant.

FINAL BRIEF OF RESPONDENT

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II. Whether Appellant has failed to address Respondent's 42 U.S.C. § 1983 *Evans v. Chalmers,* 703 F.3d 636, 648-649 (4th Cir. 2012) claim before the trial court, or in this appeal, as relates to Appellant's failures in his post-warrant conduct such that the claim should be remanded for further proceedings?

III. Whether there exists a genuine issue of material fact as to whether an objectively reasonable officer would have believed probable cause existed for Sherman Green's arrest for murder?

IV. Whether there exists a genuine issue of material fact, or whether Appellant has preserved for review the issue, whether officers of reasonable competence could disagree on whether to seek an arrest warrant for Respondent for murder?

STATEMENT OF CASE

On November 15, 2021, the Respondent filed an action in the Richland County Court of Common Pleas against Appellant pursuant to 42 U.S.C. § 1983 alleging violation of his clearly established rights for Appellant's 1) failure to investigate prior to arrest of Respondent, without probable cause, pursuant to *Sevigny v. Dicksey*, 846 F.2d 953, 11 Fed. R. Serv. 3d 315 (4th Cir. 1988), 2) failure to disclose exculpatory evidence refuting probable cause to the assigned solicitor following Respondent's arrest upon warrant for murder and incarceration for sixty-nine (69) days pursuant to *Evans v. Chalmers,* 703 F.3d 636, 648-649 (4th Cir. 2012)[1], 3) failure to disclose, or omitting, material information refuting probable cause to the magistrate judge in obtaining Respondent's arrest warrant for murder pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), 4) false arrest for custodial detention prior to securing a warrant pursuant to *Rogers v. Pendleton*, 249 F.3d 279, 294 (4th Cir. 2001) and/or for false arrest following the issuance of an invalid warrant for sixty-nine (69) days, and 5) malicious prosecution for arrest upon warrant, if facially valid, without probable cause pursuant to *Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012).[2] R. pp. 342-350. On December 20, 2021, Appellant answered and asserted the defense of qualified immunity that he "did not violate any clearly established constitutional rights" and that his "actions were at all times objectively reasonable under the circumstances." R. pp. 28, 37. On December 20, 2021, this action was removed to the United States District Court for the District of South Carolina and on May 23, 2022, remanded to the

[1] As provided in more detail in Section II below, Appellant has not raised as an issue on appeal Respondent's 42 U.S.C. § 1983 claim for violation of his rights pursuant to *Evans v. Chalmers,* 703 F.3d 636, 648-649 (4th Cir. 2012), or raised any argument before the trial court, regarding Appellant's post-warrant conduct.

[2] Respondent also alleged claims against the City of Columbia pursuant to the South Carolina Tort Claims Act for negligence, false imprisonment and malicious prosecution; such claims which are not before the Court at this time.

Richland County Court of Common Pleas for "[d]efendants failure to provide timely unambiguous consent to the removal of the action." R. p. 10.

After extensive discovery, Appellant and the City of Columbia filed motions for summary judgment on May 3, 2024, and May 6, 2024; respectively. On August 26, 2024, and December 5, 2024, Respondent filed his memorandum in opposition and amended memorandum in opposition to both Appellant's and the City of Columbia's motions for summary judgment; respectively. On December 6, 2024, Judge Mark Hayes heard the City of Columbia's motion for summary judgment and denied the same on January 15, 2025, stating "the existence of probably [sic] cause is a factual dispute." R. p. 2. On January 27, 2025, the City of Columbia moved for reconsideration of denial of its motion for summary judgment; such motion for reconsideration remains to be scheduled.

On February 19, 2025, Judge McGee heard Appellant's motion for summary judgment for qualified immunity.[3] On April 10, 2025, Judge McGee issued an order denying Appellant's motion and that he:

> found certain material issues of facts as to the elements of all claims against Mr. Simpson including, but not limited to: (1) whether Simpson conducted a sufficient investigation of the incident before seeking and obtaining a warrant for murder; (2) whether Simpson fully disclosed all relevant, known information before seeking and obtaining a warrant for murder; (3) whether Simpson's actions in seeking and obtaining a warrant for murder included any material omissions or representations; (4) whether Simpson's acts and/or omissions caused or contributed to a false arrest of Plaintiff; and/or (5) whether Simpson's acts and/or omissions caused and/or contributed to a malicious prosecution of the Plaintiff.

R. pp. 4-5. On April 21, 2025, Appellant moved for reconsideration of denial of Appellant's motion for summary judgment and on May 14, 2025, Respondent filed his memorandum in

[3] Following the hearing, Judge McGee issued a preliminary finding via email in favor of Respondent and requested a proposed order denying summary judgment to which Appellant's counsel submitted a letter objecting to Respondent's proposed order. R. pp. 540-563; R. pp. 564-575.

opposition to reconsideration. R. pp. 644-660. On May 8, 2025, Appellant filed and served this notice of appeal. R. p. 679. On June 27, 2025, Judge McGee filed an order stating, "the Court was informed of Defendant's withdrawal of the Motion to Reconsider filed 4/21/25. This withdrawal was consented to by Plaintiff. As a result, the prior 6/23/25 Form 4 requiring a proposed order denying the Motion is moot."[4] R. p. 7.

This matter is now before the Court for denial of Appellant's motion for summary judgment for qualified immunity upon the trial court's finding of genuine issues of material fact as to the existence of probable cause for Respondent's arrest.

[4] Prior to Appellant's withdrawal of his motion for reconsideration, Judge McGee requested Respondent draft a proposed order denying Appellant's motion for reconsideration.

STANDARD OF REVIEW

"Appellate courts review summary judgment determinations from the same position as the circuit court." *Meier v. Burnsed*, 445 S.C. 288, 293 914 S.E.2d 130 (Ct. App. 2025) *(*citing *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 190, 886 S.E.2d 674, 684 (2023)). Summary judgment is appropriate only if the record before the circuit court demonstrates "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 190, 886 S.E.2d 674, 684 (2023) (quoting Rule 56(c), SCRCP). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." *Byers v. Westinghouse Elec. Corp*., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992).

a. 42 U.S.C. § 1983 Federal Malicious Prosecution Claims & Qualified Immunity

To state a 42 U.S.C. § 1983 federal claim for malicious prosecution, "a plaintiff must allege that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (citing *Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012)).[5] "[T]he existence of probable cause is normally a question for the jury, material fact." *Melton v. Dermota*, 940 F.2d 652, fn. 5 (4th Cir. 1991). "[W]hen the existence of probable cause depends on the credibility of witnesses, the question of probable cause is for the jury." *Still v. K-Mart Corp*., 865 F.2d 255, 255 (4th Cir. 1988). However, "[a]llegations that an arrest made pursuant to a

[5] Respondent notes that he has pleaded, and argued, a claim for false arrest for lack of probable cause for his approximately six (6) hours of pre-warrant custodial detention, or for the entire sixty-nine (69) day incarceration period should the arrest warrant be deemed invalid, separate from his claim of malicious prosecution for his detention for sixty-nine (69) days following his arrest pursuant to warrant for murder.

warrant was not supported by probable cause, or claims seeking damages for the period after legal process issued—e.g., post-indictment or arraignment—are considered a § 1983 malicious prosecution claim" rather than a false arrest or imprisonment claim." *Brooks v. City of Winston-Salem*, 85 F.3d 178, 182 (4th Cir. 1996).[6]

In reviewing claims of qualified immunity, genuine issues regarding the sufficiency of evidence are to be determined at trial and not on appellate review. *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). In *Johnson*, the Court held a denial of summary judgment as to qualified immunity on factual grounds "was not immediately appealable because it merely decided 'a question of evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial.'" *Plumhoff v. Rickard*, 134 S.Ct. 2012, 188 L.Ed.2d 1056, 572 U.S. 765, 772 (2014); *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) ("a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' . . . is not appealable."). A defendant is, however, "entitled to reassert the defense at trial, pursuant to which the jury could resolve the disputed facts in his favor, such that qualified immunity applies." *Merchant v. Bauer*, 677 F.3d 656, fn. 6 (4th Cir. 2012); *See also ACLU of Maryland v. Wicomico County*, 999 F.2d 780, 784 (4th Cir. 1993) (stating "the

[6] Although Respondent respectfully submits the correct recitation of this Court in *Carter v. Bryant* reasserts that "probable cause is typically an issue for the jury in a malicious prosecution case" and whether a claim is for false arrest, in the absence of a facially valid warrant, or malicious prosecution upon a "facially . . . warrant . . . supported by probable cause, . . . would . . . be for . . . the court," analysis of federal malicious prosecution claims is controlled by federal law pursuant to the Supremacy Clause of the United States Constitution. *Carter v. Bryant*, 429 S.C. 298, 310-316, 838 S.E.2d 523, 530-533 (S.C. App. 2020); *Montgomery v. CSX Transp., Inc.,* 362 S.C. 529, 544, 608 S.E.2d 440 (S.C. App. 2004) (reiterating federal claims are "controlled by federal substantive law and state procedural law . . . as long as the state procedural law does not conflict with federal substantive right").

defendant's entitlement to immunity turns on a factual dispute, that dispute is resolved by the jury at trial").

b. Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." *State v. Dunbar*, 587 S.E.2d 691, 356 S.C. 138, 142 (S.C. 2003). "Issues not raised and ruled upon in the trial court will not be considered on appeal." *Id*. (citing *Humbert v. State,* 345 S.C. 332, 548 S.E.2d 862 (2001). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id*. (citing *State v. Russell,* 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001). "No point will be considered which is not set forth in the statement of issues on appeal." *Id*.; Rule 208(b)(1)(B), SCACR; *State v. Bray,* 342 S.C. 23, 535 S.E.2d 636 (2000) (it is error for an appellate court to consider issues not raised to it); *State v. Prioleau,* 345 S.C. 404, 548 S.E.2d 213 (2001).

FACTS

In the light most favorable to the Respondent, the following was submitted to the court below:

I. Appellant's Investigation & Solicitation of Warrant

On October 4, 2023, Sherman Green ("Respondent"), through counsel, conducted the deposition of George Simpson ("Appellant") regarding his investigation into probable cause against Respondent for murder on the evening of December 4, 2019, and Appellant's application for a warrant for murder the following morning on December 5th, 2019. When Appellant arrived on the scene and after speaking to the other investigators on scene, he was informed that Respondent and Ms. Aja Prophet ("Prophet") were witnesses and/or persons of interest related to the death of Dara Washington ("Decedent") and that Respondent had been "detained" for

"assaulting the decedent." R. p. 371, lines 15-18. Appellant was also informed that Decedent had a history of drug problems and had even gone to rehab and swallowed a large amount of cocaine. R. p. 395, lines 5-18. Appellant agreed that he was told on the scene that Respondent "told [Officer] Brewer that he needed to go contact the victim because he was high and just assaulted his cousin." R. p. 396, lines 13-16. Appellant was also informed that "EMS administered Narcan" on Decedent and Respondent "informed [] responding officer, that his cousin was Prophet was just assaulted by the victim and he got him out of the room. The victim was high on crack." R. p. 397, lines 1-14; R. p. 398, lines 1-4. Appellant was further informed that "[Decedent] had taken crack and believes that is why he's acting out. She states that [Prophet] started yelling for help. And there was a 911 call placed by a third party named Jessica, who states that she heard a woman yelling for help on the bottom floor." R. p. 398, lines 16-23. Appellant was also informed that Respondent "observed the [Decedent] through the window naked and yelling that people were after him. And . . . Ms. Prophet had blood on her face from where the victim had attacked her." R. p. 399, lines 15-19.

Appellant next reviewed the hotel closed circuit video footage ("Video") of the incident as it occurred from just outside Respondent and Prophet's hotel room in which they resided. R. p. 372; R. p. 404, lines 1-15. Respondent and Prophet were then transported into Appellant's custody for interrogation where Respondent was currently being "held without an arrest warrant" and "not free to go" for approximately six (6) hours. R. pp. 378-79; R. p. 406, lines 3-13; R. p. 408. Appellant conducted Respondent's interrogation and other officers conducted Prophet's, however, "Investigator Montgomery and Investigator Davidson gave [Appellant] a full list of everything that they spoke about" with Prophet. R. p. 379, lines 4-6. During Appellant's interview of Respondent, "[Respondent] stated that he assaulted the victim because he observed the victim

physically assaulting a witness who was also inside the room, Ms. Aja Prophet, and he felt he needed -- or need to protect her from the victim." R. p. 392, lines 1-9. Respondent initially referred to the assault as "tussling" and Appellant was asked, "tussling indicates a physical altercation, doesn't it? A: Yes." R. p. 407, lines 8-14. Respondent did "admit that to me [at] the very tail end of the interview, then he finally told me that he punched him." R. p. 393, lines 1-3. Appellant did confirm that when he's "telling [Respondent] that you have no clue how he died, and we talked about this. You don't want to -- you want to be straight with him, right? A: Yes. Q: Okay. So, is that statement true at the time, you have no clue why he died? A: (Nods head.) Yes." R. p. 409, lines 4-10. Appellant explained, "I didn't have any knowledge as far as what caused the death. I just knew that he had been assaulted before dying. And also that he had consumed drugs before dying." R. p. 409, lines 12-15. Appellant, otherwise agreed, that if Respondent had not caused Decedent's death, he would have issued a magistrate charge against Respondent. R. p. 410, lines 18-24. Appellant also agreed "that if you're acting lawfully and defending yourself, that you shouldn't be charged or arrested . . . ." R. p. 412, lines 9-11; R. p. 413, lines 5-7. When Appellant was asked, "[d]o you know for certain who hit Mr. Washington in the face? A: I do -- I do know for certain that both hit Mr. Washington in the face." R. p. 419, lines 22-25. Further questioning of Appellant clarified, "Ms. Prophet told you that she drew blood from Mr. Washington, is that right? A: Yes." R. p. 420, lines 11-13.

In Ms. Prophet's interview, she explained that Decedent had taken two doses of crack cocaine and "freaked out" while they were in the room. R. p. 400, lines 6-25. "So, there she's trying to express to [Respondent] who's outside the room that she's in danger and she needs help. Is that correct? Yes, that's what she mentioned in that interview right there." R. p. 401, lines 17-21. Ms. Prophet further stated that Decedent was not letting her leave the room and was assaulting

her. R. p. 402. Appellant elaborated that "she started attacking him and using her hands to punch him in the face and to get him to open up the door but he still was pushing her off and wouldn't let her out . . . she was mentioning that to [Respondent], who was outside of the room trying to get him to help her to get out of the room." R. p. 331; R. p. 402; R. p. 403, lines 9-12. Respondent eventually gained entry into the room and engaged Decedent such that "he's not hitting him to cause him to bleed and he's hitting him like a woman." R. p. 405, lines 15-22. With the exception of the late admission from Respondent regarding punching as opposed to tussling with Decedent, Appellant found Respondent's statements truthful and/or corroborated. R. p. 393, lines 19-25; R. p. 394, lines 9-12.

Appellant next prepared, and/or caused to be prepared, the arrest warrant for Respondent's arrest for murder ("Warrant") for the magistrate's execution. The Warrant's narrative recited:

> On 12/4/2019 at 1601 Sunset Dr. located within the city limits of Columbia, county of Richland, the def. did act with malice aforethought after escalating a verbal confrontation with the victim which turned physical without being provoked to do so by striking the victim several times which his hands before having to be pulled away from the victim by a witness to the incident. The def. then proceeded to grab the victim who he then threw out of the room at the location which caused the victim's body to strike a wall and fall down after being assaulted. The victim then ran away from the def. before collapsing a short distance later where he was found by medical personnel who pronounced him deceased on scene. The def. knew that police were already on the way and still verbally stated to the victim "you better hope the police get here before I get in there" moments prior to the attack being initiated. The incident was partially captured on surveillance footage. The def. was identified at the scene of the incident.

R. p. 539.[7] Appellant personally delivered the proposed Warrant to Magistrate Judge Ladson for execution on the morning of December 5, 2019. R. p. 377; lines 10-12. However, Appellant "felt

[7] Sgt. Thomas, Appellant's supervisor, was unable to identify a passage in the warrant that identified the cause of death. R. pp. 474-75.

that voluntary manslaughter"[8] was the more appropriate charge. R. p. 385, lines 3-4. "[]I wasn't comfortable with it. And [Seargeant Valerie Moore] basically said that she was going to look into it for me." R. p. 384; R. p. 385, lines 5-8. Appellant "didn't personally feel like that in itself was set in stone, malice aforethought." R. p. 387, lines 5-7. "I'm not saying I didn't agree with murder, but I wanted involuntary manslaughter. I personally felt like it was a better fit. But I understand that probable cause existed for murder." R. p. 425, lines 1-5. Respondent was subsequently arrested pursuant to the Warrant and incarcerated for sixty-nine (69) days until his release following a finding of lack of probable cause at his preliminary hearing.

Appellant next proceeded to the autopsy of Decedent being conducted by Amy Durso ("Durso") as the forensic pathologist about 9:00 in the morning of December 5, 2019. R. pp. 380-381. Appellant arrived just as Durso was making her first incisions and informed her that the suspected cause of death was due to "assault" to which he received a look of "surprise[]." R. p. 382, lines 23-25; R. p. 383, lines 3-4. "[N]o assault was suspected." R. p. 299. "[W]hen I initially approached [Durso] and asked her if she was seeing anything in reference to an assault, she was not under the impression that an assault happened. And she physically told me that she was under the impression it was just a cocaine overdose." R. p. 421, lines 14-20. Upon review of the preliminary finding from the autopsy, Appellant stated "I mean, I can't -- I can't say whether or not it will be fatal. I mean, on the surface it wouldn't appear to, but obviously without knowing the full context, it will be hard to say for sure." R. p. 414, line 25; R. p. 415; lines 1-4. Appellant also explained, "I couldn't -- I mean, couldn't say that either just looking at this. I'm not a medical professional. Q: So, we agree we need a medical professional to make the cause of death, right?

[8] Appellant alternates between voluntary and involuntary manslaughter as the charge he felt was more appropriate.

A: Essentially, yes." R. p. 416, lines 1-6. When asked, "[d]id you ever tell them that, in your own words, in your own memorandum, to the solicitor's office that you were told right after that it's a suspected cocaine overdose?," to which he answered it would have been with Dan Goldberg after the preliminary hearing and Respondent's release from incarceration. R. p. 417, lines 4-7; R. p. 418, lines 7-9. Appellant still disagrees with Durso's determination that Decedent did not die from traumatic injury. R. p. 422, lines 2-6.

"[F]rom pre arrest warrant until a prelim, whether it's one day plus or minus, you didn't speak to any other prosecutors during that time? A: I'm not sure if I did or not. I don't --- Q: You don't recall? A: Yeah." R. p. 391, lines 13-19.

II. Post-Warrant & Preliminary Hearing Dismissal

a. Dan Goldberg

On November 28, 2023, Respondent conducted the deposition of Dan Goldberg ("Goldberg"), Fifth Circuit Assistant Deputy Solicitor, regarding his recollection of the prosecution of Respondent as the solicitor assigned to the case. Initially, Goldberg was unable to recall any communication between himself and Appellant following his assignment to Respondent's case until its ultimate dismissal for lack of probable cause on February 12, 2020. R. pp. 519-520. On May 18, 2020, Goldberg spoke with Amy Durso ("Durso"), the forensic pathologist solely responsible for the determination of Decedent's cause of death, to discuss her conclusions. He confirmed with Durso that "there is no evidence that he was beaten to death" and that "[i]f he was not high on cocaine, he would've walked away from this altercation; the cocaine is what caused his demise." R. p. 521, lines 20-21; R. p. 522, lines 1-4. Goldberg similarly confirmed that Durso said, "this [is] the most unprosecutable case in her career that was actually labeled a homicide." R. p. 522; lines 8-16. Goldberg ultimately decided not to revive the action

for prosecution. R. p. 523. On cross examination by Appellant's counsel, Goldberg was asked, "[i]n the surveillance footage, did you ever witness any other crimes by Mr. Green?," to which Goldberg responded, "Not that I recall." R. p. 524; lines 7-9.

b. Amy Durso

On December 12, 2023, Respondent conducted the deposition of Dr. Amy Durso ("Durso"), forensic pathologist, regarding her initial examination and autopsy of the Decedent as the sole determiner of the cause of death and her conversations with Appellant on the morning of December 5, 2019, following Respondent's arrest for murder. R. p. 526. When Durso was asked about her preliminary determination of the cause of death on the morning of December 5th, she confirmed that she "was told that there was cocaine involved per the investigators. So --and I didn't find anything else to explain his death during my autopsy." R. p. 527, lines 5-8. Durso further testified that toxicology aside, that she could not make a determination as to the cause of death. R. p. 528. Notwithstanding, Durso "ruled out direct blunt force trauma because . . . he had some scratches on him but he [did] not have bleeding in his head, nothing's -- there's no fatal -- directly fatal blunt force injuries from the fight." R. p. 529; lines 4-9.

Durso also confirmed that officer Zachary Jackson and Appellant were in attendance the morning of the autopsy about the time she either initiated, or was conducting the autopsy, and was informed that the Decedent was involved in an altercation. R. pp. 530-531. Durso noted that information regarding the altercation did not impair her ability to conduct the autopsy, however, did not recall any other conversations regarding the Decedent. R. pp. 532, 537. Durso testified that she would not have formed an opinion about the cause of death until February 19th, 2020, and

that a contributing factor in the final determination of death for cocaine use, excited delirium[9], could not and should have been determined during the autopsy. R. pp. 533-534.

Next, Durso recalled a conversation with Dan Goldberg on May 18, 2020, where she may have informed him that there was no evidence that the Decedent was beaten to death; a position with which she ultimately agreed. R. p. 536, lines 21-25. She further agreed that the cocaine alone could have killed Decedent. R. p. 340.

c. Preliminary Hearing

On February 12, 2020, at Respondent's preliminary hearing ("Hearing") for murder, Municipal Court Judge Susan Porter ("Porter") determined the Department lacked probable cause to charge Greene stating, "[t]here's no evidence in the record, whatsoever, that the assault caused the death." R. p. 517, lines 12-13. Specifically, Appellant testified as follows:

> A: . . . turned physical without being provoked to do so . . .
>
> Q: But you said he was high and paranoid as well.
>
> A: Correct
>
> Q: . . . but when you don't let someone leave that can be kidnapping, right? You agree with that?
>
> A: Yes, I do agree with that.
>
> Q: . . . . And I think you've testified that Mr. Green tells you that he sees Ms. Prophet being assaulted by Mr. Washington, that's his statement to you after you come to the scene and investigate, right?
>
> A: Correct.
>
> Q: And you said on direct that the victim got aggressive with her, I mean, those are your exact words, I wrote them down.
>
> A: Correct.

[9] Dr. Durso noted that excited delirium is rare, a gray area, and not completely understood. R. pp. 535-536.

Q: And at some point she actually let's Mr. Green in, right?

A: Correct.

Q: . . . does Sherman Green say to you in your investigation I told her to call police?

A: He did state that he asked a individual to call the police to allow them – allow him to come inside of the room due that, due to Ms. Prophet being assaulted, he did tell me that.

Q: . . . . Did they do any Narcan treatment for this gentleman who's high on drugs?

A: . . . The lab – the lab results are still pending, but they did – they did – yeah, they don't come back that any kind of Narcan or anything was used, but I'm still waiting on the full report to come back.

Q: . . . what was is – what is the official cause of death?

A: It hasn't been officially term - -- determined just yet. . . . .

Q: . . . you don't have any preliminary indications from the – from the pathologist to say this is blunt force trauma which caused bleeding on the brain or exsanguination due to the any- -- what is it? I mean, what is it?

A: . . . Coroner Gary Watts mentioned to me was that there was blunt force trauma involved, he did have presence of cocaine metabolites weren't at a level to where they would be fatal.

A: Well what I can say is that those – that assault contributed to the fact that Mr. Washington was pronounced deceased.

R. p. 485, lines 23-24; R. p. 496, lines 16-17; R. p. 497, lines 6-15; R. p. 498, lines 7-10; R. p. 499, lines 12-14; R. p. 501, lines 14-19; R. p. 503, lines 3-25; R. p. 504, lines 1-20.

ARGUMENTS

I. This Court should dismiss this appeal where Appellant is not entitled to review of a denial of summary judgment in South Carolina or upon issues of fact.

Appellant, George Simpson, is now before this court on appeal of the trial court's denial of his summary judgment motion asserting qualified immunity as to Respondent's 42 U.S.C. § 1983 claims which allege violation of his clearly established rights for Appellant's 1) failure to investigate prior to arrest of Respondent, without probable cause, pursuant to *Sevigny v. Dicksey*,

846 F.2d 953, 11 Fed. R. Serv. 3d 315 (4th Cir. 1988), 2) failure to disclose, or omitting, material information refuting probable cause to the magistrate judge in obtaining Respondent's arrest warrant for murder pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), 3) false arrest for custodial detention prior to securing a warrant pursuant to *Rogers v. Pendleton*, 249 F.3d 279, 294 (4th Cir. 2001) and/or for false arrest following the issuance of an invalid warrant for sixty-nine (69) days, and 4) malicious prosecution for arrest upon warrant, if facially valid, without probable cause pursuant to *Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012). [10] Resp. Amend. Memo at 14-22. Appellant admits that the Respondent's "right to be free from arrest absent probable cause was clearly established" and so only the trial court's factual review of probable cause is presented in this appeal. App. Brief at 16; R. p. 53.

a. Pursuant to *Johnson v. Fankell*, 520 U.S. 911 (1997), this Court should dismiss this appeal where "the right to immediate appellate review" in 42 U.S.C. § 1983 actions "is a federal procedural right that . . . does not apply in a nonfederal forum" and denials of summary judgment are not appealable in South Carolina.

Pursuant to the Supremacy Clause of the United States Constitution, federal claims are "controlled by federal substantive law and state procedural law . . . as long as the state procedural law does not conflict with federal substantive right except where state procedure does not conflict." *Montgomery v. CSX Transp., Inc.,* 362 S.C. 529, 544, 608 S.E.2d 440 (S.C. App. 2004). "[T]he Supremacy Clause of the United States Constitution [] provides that any state law that conflicts with federal law is 'without effect.'" *Eggleston v. United Parcel Serv., Inc.,* 428 S.C. 373, 834 S.E.2d 713, 716 (S.C. App. 2019). However, the U.S. Supreme Court in *Johnson v. Fankell*, 520 U.S. 911 (1997) held that "[d]efendants in a state-court § 1983 action do not have a federal right

[10] As provided in more detail in Section II below, Appellant has not raised as an issue on appeal Respondent's 42 U.S.C. § 1983 claim for violation of his rights pursuant to *Evans v. Chalmers,* 703 F.3d 636, 648-649 (4th Cir. 2012), or raised any argument before the trial court, regarding Appellant's post-warrant failure to inform the assigned solicitor of Durso's preliminary findings.

to an interlocutory appeal from a denial of qualified immunity." *Johnson v. Fankell*, 520 U.S. 911, 911 (1997). "[T]he right to immediate appellate review . . . is a federal procedural right that simply does not apply in a nonfederal forum." *Id*. at 921.

> Petitioners were able to argue their immunity from suit claim to the [state] trial court, just as they would to a federal court. And the claim will be reviewable by the [appellate court] after the trial court enters a final judgment, thus providing petitioners with a further chance to urge their immunity. Consequently, the postponement of the appeal until after final judgment will not affect the ultimate outcome of the case.

Id. at 921. Otherwise, state courts control the issue of appealability. *Id*. at 919 ("the general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'")

In South Carolina "it is well settled that an order denying summary judgment is never reviewable on appeal." *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010) (citing *Olson v. Faculty House of Carolina*, *Inc*., 354 S.C. 161, 580 S.E.2d 440 (2003)). An appellate court is "prohibited from reviewing" the denial of a motion for summary judgment because it is "never subject to review, not in an interlocutory appeal []or even after final judgment." *AJG Holdings, LLC v. Dunn*, 392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011). "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for directed verdict." *Id*.

Accordingly, this appeal from an order denying his motion for summary judgment for qualified immunity as to any of Respondent's 42 U.S.C. § 1983 claims should be dismissed pursuant to

Johnson v. Fankell, 520 U.S. 911, 911 (1997) which defers to South Carolina Law on the appealability of denials of summary judgment, and South Carolina never allows such review.

b. Alternatively, were this court to analyze Appellant's appeal pursuant to federal procedural law, this Court should dismiss this appeal as concerning unappealable issues of fact and not Respondent's clearly established right(s) as a matter of law.

On May 14, 2025, this Court dismissed this appeal, sua sponte, because "[t]his appeal arises out of an order of the circuit court denying Appellant's motion for summary judgment [and] . . . is not immediately appealable" ("Dismissal Order"). Dismissal Order. On May 16, 2025, Appellant filed his petition for rehearing ("Petition for Rehearing") citing *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) for the holding that denial of a claim of qualified immunity is an appealable final decision. *Mitchell v. Forsyth*, 472 U.S. 511, 527. Petition for Rehearing at 2. This Court reinstated the appeal stating, "we reinstate the appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) . . . ('We hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' . . . .).'" Order Reinstating. Following Respondent's request for clarification of the Order Reinstating, this Court clarified that "nothing prevents the parties from arguing the issue of appealability in their appellate briefs." Order Clarification.

Notwithstanding the holding in *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) which provided that a "denial of a claim of qualified immunity, . . . on an issue of law, is an appealable 'final decision,'" the Supreme Court later clarified the appealability from denials of summary judgment on the issue of qualified immunity upon genuine issue of material fact in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). In *Johnson*, the Court held a denial of summary judgment as to qualified immunity on factual grounds "was not immediately appealable because it merely decided 'a question of evidence sufficiency,' i.e., which facts a party may, or may not, be

able to prove at trial.'" *Plumhoff v. Rickard*, 134 S.Ct. 2012, 188 L.Ed.2d 1056, 572 U.S. 765, 772 (2014); *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) ("a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' . . . is not appealable."). "The Court noted that an order denying summary judgment based on a determination of 'evidence sufficiency' does not present a legal question in the sense in which the term was used in *Mitchell*, the decision that first held that a pretrial order rejecting a claim of qualified immunity is immediately appealable." *Plumhoff,* 572 at 773. The Court further "observed that a determination of evidence sufficiency is closely related to other determinations that the trial court may be required to make at later stages of the case" and "that appellate courts have 'no comparative expertise' over trial courts in making such determinations and that forcing appellate courts to entertain appeals from such orders would impose an undue burden." *Id*. at 773. Otherwise, *Johnson* determined that the issue of immediately appealable was relegated to, "not which facts the parties might be able to prove, but, rather, whether or not certain given facts show a violation of 'clearly established' law." *Johnson*, 515 at 304. Accordingly, appeals from denials of summary judgment on the issue of qualified immunity for issues of material fact, as opposed to whether there exists a clearly established legal right, are not immediately appealable.

The order denying Appellant's motion for summary judgment ("Order Den. MSJ") provides, "Judge McGee found certain material issues of facts as to the elements of all claims against Mr. Simpson . . . . Because the Court finds that there are genuine issues of material fact regarding the claims against Defendant Simpson, this Defendant's Motion for Summary Judgment is respectfully DENIED." R. p. 4-5. The Order Den. MSJ makes explicitly clear that the basis for denying summary judgment is upon the existence of "genuine issues of material fact" as opposed to issues

of law. Alternatively, nowhere in Judge McGee's Order Den. MSJ are legal issues considered including whether Respondent's rights were not clearly established. Similarly, Appellant admits that Respondent's rights in this action have been clearly established. App. Brief at 16; R. p. 53.

Because the Order Den. MSJ is founded upon issues of material fact as opposed to the legal issue of whether Respondent's rights were clearly established, it is not immediately appealable, even pursuant to federal procedure, and this Court should dismiss.

II. Appellant has failed to address Respondent's 42 U.S.C. § 1983 *Evans v. Chalmers,* 703 F.3d 636, 648-649 (4th Cir. 2012) claim before the trial court, or in this appeal, as relates to Appellant's failures in his post-warrant conduct such that the claim should be remanded for further proceedings

Respondent has pleaded, twice referenced in his memoranda in opposition, and provided sufficient evidence of Appellant's violation of 42 U.S.C. § 1983 and his rights pursuant to *Evans v. Chalmers,* 703 F.3d 636, 648-649 (4th Cir. 2012) for failure to inform Goldberg, the assigned solicitor, of evidence tending to conclusively refute probable cause following Respondent's arrest pursuant to warrant for murder. In the absence of any rebuttal from Appellant below or in this appeal, this claim should be remanded for further proceedings without review for lack of preservation.

"[W]hen . . . a prosecutor retains all discretion to seek an indictment, police officers may be held to have caused the seizure and remain liable to a wrongfully indicted defendant under certain circumstances. In particular, officers may be liable when they have . . . failed to disclose exculpatory evidence to the prosecutor." *Evans v. Chalmers*, 703 F.3d 636, 648-649 (4th Cir. 2012). In the filing of his complaint on November 15, 2021, Respondent pleaded a federal claim pursuant to *Evans v. Chalmers* and has presented evidence of Appellant's failure to disclose to, or for withholding from, the Fifth Circuit Solicitor's Office that 1) Appellant had no knowledge as to what the cause of death was, 2) that Durso's preliminary determinations led to substance abuse

overdose, and/or that 3) Respondent was acting in defense of his residence and family/friend resulting in Respondent's continued incarceration for approximately sixty-nine (69) days until the murder charge was dismissed at preliminary hearing on February 12, 2020. *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012).

> At all times as provided above, **Simpson acted under color of state law**, . . . was at all times lacking . . . sufficient evidence to establish probable cause for homicide . . . or any other criminal violations and Simpson unlawfully arrested Plaintiff, performed a deficient investigation of known exculpatory evidence, made material omission(s) or misrepresentation(s) in the presentation of information to Judge Ladson in obtaining arrest warrant for Plaintiff, **willfully or recklessly withheld or misrepresented evidence to the Fifth Circuit Solicitor's Office** and/or used excessive force against Plaintiff **in proximate violation of his First, Fourth, Fifth, Sixth and Fourteenth Amendment Rights**.

R. p. 17. On August 26, 2024, and December 5, 2024, Respondent again argued his *Evans v. Chalmers* claim for Appellant's failure to disclose post-warrant evidence refuting probable cause to the Solicitor in his memorandum in opposition and amended memorandum in opposition to Appellant's motion for summary judgment; respectively. R. pp. 308-309; R. pp. 343-344. When Appellant was asked, "[d]id you ever tell them that, in your own words, in your own memorandum, to the solicitor's office that you were told right after [the Warrant] that it's a suspected cocaine overdose?," to which he answered it would have been with Dan Goldberg after the preliminary hearing dismissal and release of Respondent from incarceration. R. p. 417, lines 4-7; R. p. 418, lines 7-9. Goldberg was similarly unable to recall any communication between himself and Appellant following his assignment to Respondent's case until its ultimate dismissal for lack of probable cause on February 12, 2020. R. p. 519; lines 23-25; R. p. 520, line 1. Upon information and belief, Appellant has never argued against this claim and does not do so now.

In the absence of any argument by Appellant tending to address any material issue of fact or law as to Respondent's allegations that Appellant failed to disclose to the Solicitor's Office

evidence tending to refute probable cause for murder, denial of Appellant's motion for summary judgment should be affirmed and/or his appeal denied for lack of preservation of argument as to this claim.

III. There exists a genuine issue of material fact as to whether an objectively reasonable officer would have believed probable cause existed for Respondent's arrest.

Appellant first argues that he "could have reasonably believed there was sufficient probable cause to arrest the [Respondent], that is 'to believe that [Respondent] was committing or had committed a criminal offense." App. Brief at 19. Respondent respectfully submits that 1) a genuine issue of material fact exists as to whether an objectively reasonable officer would believe that Respondent committing the crime for murder and 2) that probable cause for other crimes does not negate a Fourth Amendment violation of Respondent's rights pursuant to a 42 U.S.C. § 1983 malicious prosecution claim according to the U.S. Supreme Court in *Chiaverini v. City of Napoleon,* 144 S.Ct. 1745, 1751, 219 L.Ed.2d 262, 268-269 (2024). Otherwise, Respondent respectfully submits that under a totality of the circumstances he was acting in self defense of his residence and others such that Appellant's arguments as to the existence of probable cause for other crimes does not negate the lawfulness of Respondent's actions.

a. There exists a genuine issue of material fact as to the existence of probable cause for murder.

"[T]he unlawfulness of seeking out and executing a warrant after learning facts establishing a suspect's innocence was clearly established by [the] holding in *Merchant v. Bauer*, 677 F.3d 656." *Thurston v. Frye*, 99 F.4th 665, 678 (4th Cir. 2024). In *Merchant v. Bauer*, the court held that qualified immunity was not appropriate where "the officer lacked probable cause to conduct the arrest, despite the issuance of a warrant, because he knew information before applying for the warrant that both undermined any other evidence the officer might have had and tended to

exonerate the plaintiff of the crime." *Id*. In the absence of probable cause pursuant to arrest, the burden shifts to Appellant to show that the arrest was not contrary to clearly established law. *Thurston v. Frye*, 99 F.4th 665, 676 (4th Cir. 2024) (citing *Stanton v. Elliot*, 25 F.4th 227, 233 n.5 (4th Cir. 2022)). Appellant admits that the Respondent's "right to be free from arrest absent probable cause was clearly established." App. Brief at 16. Further, as cited by Appellant, "[b]ecause qualified immunity is an affirmative defense, the defendant bears the burden of proving the challenged act was objectively reasonable in light of the existing law." App. Brief at 16 (citing *Varrone v. Bilotti*, 123 F.3D 75, 78 (2nd Cir. 1997). Respondent's clearly establish rights having been admitted by Appellant and established by law, only the question of whether the trial court erred in finding of a genuine issue of material facts as to the issue of probable cause for murder remains.

The standard for probable cause is objective; it exists when "at the time the arrest occurs, the facts and circumstances within the officer's knowledge would warrant the belief of a prudent person that the arrestee had committed or was committing an offense." *Barfield v. Kershaw Cnty. Sheriff's Office*, No. 15-1198, 11 (4th Cir. Jan 07, 2016). Probable cause is determined by a "totality-of-the circumstances" approach. *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "While probable cause requires more than bare suspicion, it requires less than that evidence necessary to convict." *United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998) (internal quotation marks omitted). "It is an objective standard of probability that reasonable and prudent persons apply in everyday life." *Id*. A court should only consider the information the officers had at the time they sought the warrant. *Graham v. Gagnon*, 831 F.3d 176, 184 (4th Cir. 2016). Yet the probable-cause inquiry "examine[s] the facts within the knowledge of arresting officers to determine whether they provide a probability on which reasonable and prudent persons

would act; we do not examine the subjective beliefs of the arresting officers to determine whether they thought that the facts constituted probable cause." *Id*. at 185. "While the existence of probable cause is normally a question for the jury, material fact." *Melton v. Dermota*, 940 F.2d 652, fn. 5 (4th Cir. 1991). S.C. Code 16-11-450 further provides, "[a] law enforcement agency may use standard procedures for investigating the use of deadly force as described in subsection (A), but the agency may not arrest the person for using deadly force unless probable cause exists that the deadly force used was unlawful." S.C. Code 16-11-450(B).

"'Murder' is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. §16-3-10 (2015)." *State v. Campbell*, 28219, Appellate Case 2022-000349, 5 (S.C. Jul 17, 2024). "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." *State v. Long*, 325 S.C. 59, 64 480 S.E.2d 62 (1997). "[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); *State v. Mekler*, 626 S.E.2d 890, 368 S.C. 1 (S.C. App. 2005). "A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person . . . ." S.C. Code § 16-11-440(C) (emphasis added). Further, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978)). *See State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)

("[the plaintiff] doesn't have to wait until his assailant gets the drop on him, he has a right to act under the law of self-preservation and prevent his assailant getting the drop on him; if it is apparent, or reasonably apparent his assailant is taking steps to get the drop on him, he must take steps first to prevent such assailant from getting the drop on him."). A defendant does not have to wait until actually fired upon to use force to defend his life. *State v. Nichols*, 325 S.C. 111, 117-18, 481 S.E.2d 118, 121-22 (1997); *see also State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d at 913 (2000) (holding that once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act). *State v. Harris*, 674 S.E.2d 532, 382 S.C. 107 (S.C. App. 2009).

As provided above in more detail above in Appellant's testimony at deposition, Appellant arrived on the scene before taking Respondent into custodial detention and learned from other investigators, and Respondent, that Decedent had been high on crack and just assaulted Respondent's cousin, that Respondent had removed a naked Decedent from his and Prophet's hotel room after witnessing Decedent confine and assault Prophet in their room and following Prophet's calls for help. R. p. 397, lines 1-14; R. p. 398, lines 1-4. Appellant next reviewed the hotel's Video recording of Respondent trying to get into the hotel room further corroborating Respondent's account.[11] R. p. 372; R. p. 393, lines 19-25; R. p. 394, lines 9-12. In the interrogation room, over the course of six (6) hours, Appellant and investigators questioned Respondent and Prophet where they learned additional details about how Decedent had used drugs, demonstrated drug-induced paranoia and had kidnapped Prophet until Respondent finally entered the room and, through force,

[11] The Video shows that, following "The Calm" for about fifteen (15) minutes, as described in Appellant's brief, and the physical interaction leading to ejectment from the hotel room, Decedent remained naked throughout evincing a person in a dangerous and unstable mental state. App. Brief at 7.

ejected Decedent. R. pp. 401-402. Save for Respondent's late admission that he punched decedent, as opposed to "tussled" with him, which Prophet described as non-life threatening, Appellant believed Respondent's account. R. pp. 393-394; R. p. 407, lines 8-14. Appellant, otherwise, maintained that he "didn't have any knowledge as far as what caused the death" but wanted to charge "involuntary manslaughter." R. p. 409, lines 12-15; R. p. 425, lines 1-2. According to Durso, "there is no evidence that he was beaten to death" and that "[i]f he was not high on cocaine, he would've walked away from this altercation; the cocaine is what caused his demise." R. p. 521, lines 20-21; R. p. 522, lines 1-4. Goldberg reported that Dr. Durso said, "this [is] the most unprosecutable case in her career that was actually labeled a homicide." R. p. 522; lines 8-16. Goldberg additionally testified that he did not recall witnessing Respondent committing any other crimes. R. p. 524; lines 7-9. At the preliminary hearing on February 12, 2020, Judge Porter determined there was a lack of probable cause for murder in stating, "[t]here's no evidence in the record, whatsoever, that the assault caused the death." R. p. 517, lines 12-13. On December 6, 2024, Judge Mark Hayes heard the City of Columbia's motion for summary judgment and denied the same on January 15, 2025, stating "the existence of probably [sic] cause is a factual dispute." R. p. 2. On April 10, 2025, "Judge McGee found certain material issues of facts as to the elements of all claims against Mr. Simpson . . ." and so was the third presiding judge to determine a genuine issue of material fact existed as to probable cause for murder if cause existed at all. R. pp. 4-5.

Where there is at least a genuine issue of material fact under a totality of circumstances whether probable cause existed to charge Respondent with murder during his lawful defense of his residence and of others, the trial court's order denying Appellant's motion for summary judgment should be affirmed. Similarly, although probable cause for other offenses is not dispositive under

federal law pursuant to the holding in *Chiaverini v. City of Napoleon* as more particularly argued below in Section III(b), the evidence creates at least a genuine issue as to whether there was sufficient evidence for probable cause that Respondent caused Decedent's death as it relates to voluntary and involuntary manslaughter where there was "no evidence in the record, whatsoever, that the assault caused the death." R. p. 517, lines 12-13. With regard to the assault and battery, obstruction of justice[12] and breach of peace offenses, there still remains at least a genuine issue of material fact as to probable cause for each if Respondent was acting lawfully in defense of his residence or others.

b. Pursuant to *Chiaverini v. City of Napoleon*, 144 S.Ct. 1745, 219 L.Ed.2d 262 (2024), the alternative charging doctrine does not apply to federal malicious prosecution claims.

Appellant next argues that "[e]ven if probable cause to support a murder charge was questionable, [Respondent's] arrest was not unlawful. Probable cause may be based on an uncharged offense. *Jackson v. City of Abbeville*, 366 S.C. 662, 669, 623 S.E.2d 656, 660 (Ct. App. 2005)" specifically referencing manslaughter, involuntary manslaughter, assault and battery at various levels, obstruction of justice and breach of peace. App. Brief at 19-20. Respondent respectfully submits that Appellant's reliance on the South Carolina state court holding in *Jackson v. City of Abbeville* is inapplicable in a federal malicious prosecution claim and that the U.S.

[12] The South Carolina Supreme Court held in *State v. Smith*, 592 S.E.2d 302, 357 S.C. 182, 186 (2004) that defendant's "belief that revealing all [he] knew about the crimes could expose [him] to prosecution as an accessory after the fact or as a principal in the murder and armed robbery of the grocery store proprietor was reasonable. [He] was therefore entitled to a directed verdict on the misprision charge because [his] concealment of inculpating information was protected by [his] privilege against self-incrimination." *State v. Smith*, 357 S.C. 182, 187, 592 S.E.2d 302 (S.C. 2004). Respondent's initial description of his physical altercation with Decedent as a "tussle[]" as opposed to punching Decedent should receive 5th amendment protection during his interrogation for murder notwithstanding factual concerns as to whether this amounted to a lie to investigators.

Supreme Court in *Chiaverini v. City of Napoleon* directly contradicts state law and rejects alternate charging and/or uncharged offense doctrine in malicious prosecution claims.

The United States Supreme Court recently held that probable cause for some other crime will not vitiate a claim for malicious prosecution for a baseless crime.

> So if an invalid charge—say, one fabricated by police officers—causes a detention either to start or to continue, then the Fourth Amendment is violated. And that is so even when a valid charge has also been brought (although, as soon noted, that charge may well complicate the causation issue, see *infra*, at 1751 - 1752).
>
> And the same conclusion follows from the common-law principles governing malicious-prosecution suits when § 1983 was enacted. As noted above, a plaintiff in such a suit had to show that an official initiated a charge without probable cause. See *Thompson*, 596 U.S., at 44, 142 S.Ct. 1332; *supra*, at 1749 - 1751. He did not have to show, however, that *every* charge brought against him lacked an adequate basis. Rather, courts in that era assessed probable cause charge by charge. "[I]f groundless charges" are "coupled with others which are well founded," explained one State Supreme Court, the groundless ones could still "constitute a valid cause of action." *Boogher v. Bryant*, 86 Mo. 42, 49 (1885). Another agreed: It was no "defen[s]e that there was probable cause for part of the prosecution." *Barron v. Mason*, 31 Vt. 189, 198 (1858). Or as a leading treatise from the era summarized the rule: "It is not necessary that the whole proceedings be utterly groundless." 2 S. Greenleaf, Law of Evidence 400 (10th ed. 1868); see 1 F. Hilliard, Law of Torts or Private Wrongs § 1, p. 435, n. (*b*) (4th ed. 1874). One bad charge, even if joined with good ones, was enough to satisfy the malicious-prosecution tort's "without probable cause" element.
>
> All that dooms the Sixth Circuit's categorical rule barring a Fourth Amendment malicious-prosecution claim if any charge is valid. That rule receives support from neither half of the claim's name—neither from the Fourth Amendment nor from the malicious-prosecution tort we have invoked as an analogy. And the question is not close, as shown by the parties' decision not to contest it in this Court.

Chiaverini v. City of Napoleon, 144 S.Ct. 1745, 1751, 219 L.Ed.2d 262, 268-269 (2024) (held "[t]he presence of probable cause for one charge in a criminal proceeding does not categorically defeat a Fourth Amendment malicious prosecution claim relating to another, baseless charge"). Appellant may not rely on the existence of probable cause for other offenses to defeat a federal malicious prosecution claim.

Alternatively, the Court in *Chiaverini v. City of Napoleon* suggests that other probable cause may, however, remain at issue with regard to proximate cause. In South Carolina, the damages stemming from misdemeanor charges possessing probable cause after October of 2010 are limited to thirty (30) days concurrent pre-trial detention where Supreme Court Order 2010-10-28-01 mandates releases after detention in an amount equivalent to the maximum sentence:

> IT IS ORDERED that when a defendant charged with a summary level offense(s) is unable to make bond and is detained pretrial for the maximum amount of time the defendant would receive if convicted for the offense(s), the on-call bonding magistrate or municipal court judge shall immediately convert the defendant's surety bond to a personal recognizance bond and discharge the defendant.

S.C. Supreme Court Order, 2010-10-28-01; R. p. 538.

Although Appellant did not address the issue of concomitant proximate harm below or now on appeal, Appellant admitted that if Respondent had not caused Decedent's death he would have issued a magistrate charge against Respondent. R. p. 410. Respondent's claim for malicious prosecution would, at minimum, still survive a proper magistrate charge with only thirty (30) days of the sixty-nine (69) days of incarceration being excluded from the calculation of Respondent's damages if there is a lack of probable cause that Respondent killed Decedent. Accordingly, denial of Appellant's motion for summary judgment should be affirmed where probable cause for other crimes does not defeat his 42 U.S.C. § 1983 malicious prosecution claim.

c. Respondent's 42 U.S.C. § 1983 *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) is sufficiently pleaded, and supported by the evidence such that the trial court's order denying summary judgment should be affirmed. Alternatively, Appellant's arguments on this issue were insufficient and/or explicitly withdrawn at hearing.

Appellant next argues that Respondent's allegations that he "failed to wait for the toxicology report or follow other evidence before obtaining the warrant and therefore despite facial validity, the warrant was defective," is "akin to an argument under *Franks v. Delaware*, 438 U.S. 154 (1978)" and "there is no evidence, or even assertion, that Officer Simpson provided false

information to the magistrate who issued the warrant." App. Brief at 21-22. Respondent respectfully submits that Appellant is commingling his *Franks v. Delaware* claim with his 1) *Sevigny v. Dicksey*, 846 F.2d 953, 11 Fed. R. Serv. 3d 315 (4th Cir. 1988) claim for Appellant's failure to "avail himself of readily available information" by way of Durso's preliminary determination on December 5, 2019, that "there was cocaine involved per the investigators. [] and I didn't find anything else to explain his death during my autopsy" which would have exculpated the Respondent eliminating the basis for an arrest warrant for murder, and his 2) *Evans v. Chalmers,* 703 F.3d 636, 648-649 (4th Cir. 2012) claim for Appellant's failure to inform the Solicitor of similar evidence tending to refute probable cause following Respondent's arrest pursuant to a warrant for murder more specifically discussed in Section II above. However, to the extent Appellant is addressing Respondent's *Franks v. Delaware* claim here, Appellant similarly failed to carry his burden at the summary judgment stage in failing to particularize his argument beyond broad assertion and/or explicitly withdrew this argument at hearing.

"A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.* , 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) (citations omitted). Upon information and belief, Appellant only made general allegations without reference to the record that "the circumstances that [Appellant] knew at the time were set out in the warrant[,] . . . there's no allegation that my client ever misrepresented any of those facts, that he invented facts that he didn't have, that he alleged that he new the cause of death, he knew that the autopsy was pending." R. p. 703. Alternatively, Appellant explicitly withdrew his arguments against the

validity of the Warrant following Judge McGee's inquiries about Judge's Haye's order denying the City of Columbia's motion for summary judgment. Judge Hayes ruled on January 16, 2025, that:

> the arrest warrant, itself, is questionable—if it established probable cause for the arrest of the plaintiff on the charge of murder—though a summary judgment, lens it does not allege that plaintiff caused the victim's death and fails to identify the cause of death.---plaintiff also alleges other deficiencies in the warrant affidavit based on facts that were known or should have been known at the time it was presented to the magistrate.

R. p. 2. Judge McGee inquired, "[i]s there any finding that Judge Hayes made in his Order that I'm bound by as a law of the case?" R. p. 784, lines 9-10. Appellant's counsel responded "[s]o the – it's interesting, Judge, is that I did look at that, and other than the warrant not stating the cause of death, the charges – or the claims, rather, against the City are a completely different body of law than --." R. p. 784, lines 11-14. Judge McGee further explained, "I understand that they're different . . . that doesn't mean that Judge Hayes couldn't have found some fact – made some fact-finding or made some legal . . . finding of law that still might be the law of the case." R. p. 784, lines 15-21. Appellant's counsel responding withdrawing her opposition to claims of Warrant deficiency in stating, "[s]o, in my brief, Judge, No. 3, the issue is whether a finding of probable cause by a neutral, detached magistrate is prima facie evidence of the existence of probable cause. That argument, based on Judge Haye's Order, is not being argued today, and I will withdraw that just form the standpoint of simplicity's sake." R. p. 785, lines 4-9. Appellant reasserted this withdrawal in his counsel's letter to Judge McGee objecting to Respondent's proposed order denying summary judgment in stating,

> [a]t the outset of the hearing, Simpson withdrew his argument III 'WHETHER A FINDING OF PROBABLE CAUSE BY A NEUTRAL AND DETACHED MAGITRATE IS PRIMA FACIE EVIDENCE OF THE EXISTENCE OF PROBABLE CAUSE.' This was withdrawn due to a motion to reconsider pending by the City challenging a ruling by a different judge. It should not be included in this Court's Order. *See* Proposed Order, p. 21.

R. p. 574. Respondent's proposed order on pages 21 through 23 addresses Appellant's failures to make material disclosures to the magistrate in seeking an arrest warrant for Respondent's arrest for murder and concludes with "there exists evidence . . . tending to create a genuine issue of material fact whether Simpson obtained sufficient information to establish probable cause to request the Warrant and or properly disclosed material evidence to the magistrate in seeking the Warrant . . . ." R. p. 562.

Notwithstanding that Appellant's generalized arguments are most probably withdrawn, Respondent has pleaded and provided sufficient evidence of Appellant's violation of 42 U.S.C. § 1983 and his rights pursuant to *Franks v. Delaware* as supported by the pleadings, memoranda and the finding of the trial court below. Respondent pleaded a federal claim pursuant to *Franks v. Delaware* for Appellant's failure to inform Magistrate Ladson or, otherwise, withheld from Magistrate Ladson material evidence which would have resulted in rejection of Appellant's application for Greene's arrest warrant for murder. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (198).

> **At all times as provided above, Simpson acted under color of state law**, . . . **was at all times lacking . . . sufficient evidence to establish probable cause for homicide . . . or any other criminal violations** and Simpson unlawfully arrested Plaintiff, performed a deficient investigation of known exculpatory evidence, **made material omission(s) or misrepresentation(s) in the presentation of information to Judge Ladson in obtaining arrest warrant for Plaintiff**, willfully or recklessly withheld or misrepresented evidence to the Fifth Circuit Solicitor's Office and/or used excessive force against Plaintiff **in proximate violation of his First, Fourth, Fifth, Sixth and Fourteenth Amendment Rights**.

R. p. 17.

"Obtaining an arrest warrant does not provide per se evidence that the warrant was proper or that the officer was objectively reasonable in believing so." *Ferrara v. Hunt*, 2010 U.S. Dist. LEXIS 137739, 11, 2010 WL 5479655 (4th Cir. 2010) (internal citations & quotation marks

omitted). A search warrant obtained upon information obtained with reckless disregard for the truth, will not justify the existence of a warrant if the affidavit considered without the false or reckless information lacks probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978). To prove a seizure was unreasonable because it followed from a deficient warrant, a plaintiff is required to prove defendants deliberately or with a "reckless disregard for the truth" made materially false statements in the affidavit, "or omitted from that affidavit 'material facts with the intent to make, or with reckless disregard of whether [he] thereby made, the affidavit misleading.'" *Miller v. Prince George's County, MD*, 475 F.3d 621, 627 (4th Cir. 2007) (citing *United States v. Coakley*, 899 F.2d 297, 300 (4th Cir. 1990)). "[I]n order to violate the Constitution, the false statements or omissions must be 'material,' that is, 'necessary to the [neutral and disinterested magistrate's] finding of probable cause." *Id*. at 628 (citing *Franks*, 438 U.S. at 155–56).

The Warrant provides:

> On 12/4/2019 at 1601 Sunset Dr. located within the city limits of Columbia, county of Richland, the def. did act **with malice** aforethought after escalating a verbal confrontation with the victim which turned physical **without being provoked** to do so by striking the victim several times which his hands before having to be pulled away from the victim by a witness to the incident. The def. then proceeded to grab the victim who he then threw out of the room at the location which caused the victim's body to strike a wall and fall down after being assaulted. The victim then ran away from the def. before collapsing a short distance later where he was found by medical personnel who **pronounced him deceased on scene**. The def. knew that police were already on the way and still verbally stated to the victim "you better hope the police get here before I get in there" moments prior to the attack being initiated. The incident was partially captured on surveillance footage. The def. was identified at the scene of the incident.

R. p. 539. The Warrant 1) fails to allege Respondent caused Decedent's death, 2) falsely alleges he acted with malice when Appellant disagreed with that conclusion, 3) falsely asserts Respondent acted without being provoked when he, in fact, acted to free Prophet from assault and kidnap in their residence, 4) fails to identify any cause of death, 5) fails to inform Magistrate Ladson of the

evidence of Decedent's drug overdose and administration of Narcan on the scene , 6) fails to inform Magistrate Ladson of the kidnapping and assault event between Decedent and Prophet, 7) fails to inform Magistrate Ladson of the lack of evidence of death by blunt-force trauma, 8) or that Respondent stated he acted to defend his residence and Prophet from Decedent's drug induce attack and kidnapping. In addition to these material omissions above, Appellant testified he did not know what the cause of death was and that he supported a charge of manslaughter; both dispositive facts which appear to have been withheld from Magistrate Ladson.

The trial court's denial of Appellant's motion for summary judgment should be affirmed as to Respondent's *Franks v. Delaware* claim where several material and elemental representations were omitted or misrepresented in the Warrant which, if properly disclosed, would have negated probable cause for murder. Otherwise, Appellant's argument has been explicitly withdrawn and should be denied as waived and/or for lack of preservation.

IV. There exists a genuine issue of material fact as to whether officers of reasonable competence could disagree on whether to seek an arrest warrant for Respondent for murder.

Finally, Appellant argues that where he observed that Ms. Prophet was "not in imminent danger" and that Respondent carried out his verbal threats against Decedent, "if officers of reasonable competence could disagree over whether a warrant should issue, then immunity should be recognized" citing *Malley v. Briggs*, 475 U.S. 335 (1986). App. Brief at 23. Respondent respectfully submits that Appellant recites this specific language and *Malley v. Briggs* for the first time on appeal such that his argument is not preserved. However, should this Court find that this argument encompasses the legal standard of objective reasonableness generally argued before the trial court below, Respondent resubmits that Appellant's argument for objective reasonableness fails to meet his burden under a totality of the circumstances. *State v. Dunbar*, 587 S.E.2d 691,

356 S.C. 138, 142 (S.C. 2003) (holding a party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground).

In addition to the arguments submitted in Section III(a) above that reject Appellant's characterization that Prophet was "not in imminent danger" as opposed to being held captive by a naked, drug-induced trespasser, there exists significant observations by reasonable witnesses preventing the conclusive resolution, in Appellant's favor, of whether officers of reasonable competence could disagree over whether a warrant for murder should have been issued. *Supra* at 9-10. Guided by the U.S. Supreme Court's determination that probable cause is determined by a "totality-of-the circumstances," Appellant cannot simply select two inculpatory and disputed facts in his favor and ignore the remaining exculpatory ones in arguing reasonable officers could disagree. *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Taking the totality of the circumstances, witnesses' observations about the reasonableness of Appellant's murder charge against Respondent directly refute his argument now. Specifically, Judge Susan Porter determined Appellant's testimony failed to establish probable cause to charge Respondent stating, "[t]here's no evidence in the record, whatsoever, that the assault caused the death." R. p. 517, lines 12-13. Durso, in conversations with Goldberg, stated, "there is no evidence that he was beaten to death" and that "[i]f he was not high on cocaine, he would've walked away from this altercation; the cocaine is what caused his demise." R. p. 521, lines 20-21; R. p. 522, lines 1-4. Durso "ruled out direct blunt force trauma because . . . he had some scratches on him but he [did] not have bleeding in his head, nothing's -- there's no fatal -- directly fatal blunt force injuries from the fight." R. p. 529; lines 4-9. Goldberg similarly confirmed that Durso said, "this [is] the most unprosecutable case in her career that was actually labeled a homicide." R. p. 522; lines 8-16. Finally, Appellant testified, "I didn't have any knowledge as far as what caused the death. I just

knew that he had been assaulted before dying. And also that he had consumed drugs before dying."[13] R. p. 409, lines 12-15.

Assuming the above-listed witnesses, including Appellant, represent opinions of objective reasonableness, Appellant fails to carry his burden in resolving the issue in his favor as to whether reasonably competent officers could disagree as to whether an arrest warrant for murder should have been sought when no reasonable officer would seek a murder warrant in the absence of a reasonable foundation for the cause of death or where evidence tending to establish the lawful defense of others and property exists. Accordingly, the trial court's denial of Appellant's motion for summary judgment should be affirmed.

CONCLUSION

Based on the foregoing discussion, Sherman Green respectfully requests this Court dismiss this appeal pursuant to *Johnson v. Fankell*, 520 U.S. 911 (1997) and *Johnson v. Jones*, 515 U.S. 304 (1995) which provides there is no right to appeal from the denial of a motion for summary judgment on the issue of qualified immunity in state courts or for disputes of material fact, remand for further proceedings Sherman Green's *Evans v. Chalmers,* 703 F.3d 636 (4th Cir. 2012) and *Franks v. Delaware*, 438 U.S. 154 (1978) claims for George Simpson's lack of preservation and/or waiver, and affirm the trial court's denial of George Simpson's motion for summary judgment on qualified immunity where there exists a genuine issue of material fact as to whether probable cause existed for issuance of an arrest warrant for Sherman Green for murder.

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[13] Appellant asserts in his factual recitation that he disclosed to his superior officer, Seargeant Thomas, "all the information known to Officer Simpson[,] . . . Sergeant Thomas decided to charge the Plaintiff with murder [and] . . . Solicitor Fyall agreed with a finding of probable cause . . . even in light of the finalized autopsy," however, Respondent refuted Appellants claims of full disclosure to Thomas and Fyall or that Thomas made the decision to charge Respondent at length in his memoranda and before the trial court below; such issues which are not now presented on appeal. App. Brief at 11; R. pp. 334-338.

Respectfully submitted,

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