THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Richland County Grand Jury indicted Joshua Porch ("Porch") for the murder of Nakia Mallory in 2011. (Trans. Dated 11/18/13 at 4; R. 0119). A Richland County jury found Porch guilty of murder on November 25, 2013, and the trial court sentenced him to fifty years' imprisonment that same day. (Trans. Dated 11/25/13 at 1806–09, 1833; R. 1199-1202). Porch timely filed and served his notice of appeal. (Notice of Appeal; R. 1256).

FACTS

In the early morning hours of May 14, 2006, Nakia Mallory was murdered. The Richland County Sheriff's Department ("RCSD" or "the RCSD") initially charged Justin Mallory ("Mallory") with the crime. (Trans. Dated 11/18/13 at 163; R. 0193). Mallory's first trial ended with a hung jury. (*Id.*). For his second trial, Mallory opted for a bench trial, and the court found him not guilty. (*Id.* at 163–64; R. 1093-94).

In each trial, Porch testified for the State as an eyewitness to the crime. (Trans. Dated 11/25/13 at 1521–23; R. 1092-1094). Porch testified he witnessed an altercation between Nakia and Mallory. (*Id.*). Porch also witnessed Mallory strike Nakia with a weapon, causing her to bleed. (*Id.*). Porch intervened in the dispute and suffered an injury himself, which caused his own blood to be left at the scene. (*Id.*).

Following the State's failure to obtain a conviction against Mallory, the RCSD focused their attention on Porch. (Trans. Dated 11/21/13 at 1057–59; R. 0843-0845). On July 7, 2009, the RCSD obtained a warrant for Porch's arrest. (Trans. Dated 11/21/13 at 1058; R. 0844). The RCSD did not inform the magistrate of Porch's prior involvement with RCSD's investigation of the crime or Justin Mallory's trials. (Trans.

Dated 11/12/13 at 54–56, 74–75; R. 72-74, 92-93). Instead, the RCSD explained only that Porch's statements placed him at the scene of the crime and that newly tested blood evidence matched the blood left at the scene by Porch.[1] (Trans. Dated 11/12/13 at 7–10, 54–56; R. 0025-28, 72-74).

On July 8, 2009, investigators with the RCSD, Sergeants Shawn McDaniels and Brian Godfrey, travelled to California with the arrest warrant for Porch. (Trans. Dated 11/21/2013 at 1058–59; R. 0844-45). McDaniels arrested Porch that night. (Trans. Dated 11/25/13 at 1527–28; R. 1098-99). The interrogation began at approximately 1:00 a.m. on July 9, 2009. (Trans. Dated 11/21/2013 at 1065–69; R. 0851-0855).

McDaniels and Godfrey continued their initial interrogation of Porch until somewhere between 5 a.m. and 6 a.m. on July 9, 2009. (*Id.* at 1075–76, 1089; R. 0861-862, 0875) (explaining that Porch's first interrogation concluded "anywhere between five or six a.m."). During that interrogation, Porch allegedly provided a statement implicating himself in Nakia Mallory's death. (*Id.* at 1078; R. 0864).

McDaniels and Godfrey then interrogated Porch for "several hours later that same day," beginning at 2:19 p.m. (*Id.* at 1087–89; R. 0873-875). According to McDaniels, a second interrogation was necessary because Porch's initial statement indicated Nakia Mallory's death was an accident. (*Id.* at 1091; R. 0877). McDaniels described Porch's initial statement:

> Once we got past the fact that Justin Mallory was never present during the stabbing, he stated that he was involved and it was an accident, and that, you know, there was no intent to stab her, and that there was an altercation as a

[1] The warrant failed to include the fact that Porch had previously testified for the State that Porch's blood was at the scene as a result of the altercation with Justin Mallory and the deceased. Instead, the RCSD testimony implied the blood evidence was different from that previous testimony.

> result of her trying to come on to him and he rejected her and then she went to the kitchen and got a knife, because she was rejected, and so I needed to clear that up.

(*Id.* at 1091; R. 0877).

This second interrogation concluded approximately three hours later around 5:15 p.m. (*Id.* at 1093; R. 0879). During this interrogation, Porch added details to this statement allegedly consistent with evidence law enforcement collected. As McDaniels explained:

> Well, it was very significant as it pertains to the evidence that we had from the case file. Of course, it was—you know, he added more to his statement in terms of the interaction, the encounter. It started swaying away from Nakia Mallory being the one to initiate and being the one to kind of come on to him to, you know, that she rejected him. He admitted to calling her a bitch. And he then offered, you know, the explanation describing the sequence of events; that she got upset and that she went to the kitchen and got a knife, after saying "excuse me, you don't talk to me like that." And he also changed his statement at this particular point from the first statement, you know, as it pertains to the struggle itself. You know, he added this time that he struck her a couple of times to the forehead area, which was consistent with the evidence that we had.

(*Id.* at 1102; R. 0888).

McDaniels and Godfrey interrogated Porch for a third time on July 10, and the investigators videotaped this interrogation, unlike the previous two interrogations. (*Id.* at 1186; R. 0959). McDaniels testified that the interrogation video begins around 11:00 a.m. that day, but that his portion of the interrogation occurs approximately six hours later. (*Id.*). During this six hour gap, Roberta Cohen, an investigator with the Los Angeles County Sheriff's Office ("LASD" or "the LASD"), interrogated Porch and administered a polygraph examination. (Trans. Dated. 11/18/13 at 171; R. 0201). The

State subpoenaed Cohen to testify at trial regarding her interrogation. However, despite that subpoena, Cohen refused to testify at Porch's trial and did not appear. (*Id.* at 172–73; R. 0202-203). As a result, the State entered into evidence only the portion of the video showing the interrogation by McDaniels and Godfrey. (*Id.* at 173–74, 191, 199–200; R. 0203-204, 0221, 0229-230; Trans. Dated 11/21/13 at 1106–07; R. 0892-893).

However, over a request 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 video even in Cohen's absence. (Trans. Dated 11/25/2013 at 1498–1500; R. 1069-1071). According to the trial court, Porch's trial counsel had sufficient opportunity to cross-examine Cohen, therefore satisfying Confrontation Clause concerns, despite the fact that Cohen did not appear at trial and could not be cross-examined by Porch before the jury. (Trans. Dated 11/18/13 at 182–85; R. 0212-215).

On November 25, 2013, a Richland County jury found Porch guilty of murder. (Trans. Dated 11/25/13 at 1806–09; R. 1199-1202). The trial court sentenced Porch to fifty years' imprisonment. (*Id.* at 1833; R. 1213).

STATEMENT OF ISSUES

I. Whether the trial court erred in failing to void the State's arrest warrant under *Franks v. Delaware*.

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.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court will not reverse the trial court's decision absent an abuse of discretion. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 146 (2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support. *Id.*, 647 S.E.2d at 166–67.

Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by evidence and not clearly wrong or controlled by an error of law. *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993).

The violation of the Sixth Amendment right to confrontation is not per se reversible error. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994); *State v. Lewis*, 324 S.C. 539, 558, 478 S.E.2d 861, 867 (Ct. App. 1996). The reviewing court must determine whether that error was harmless beyond a reasonable doubt. *Graham*, 314 S.C. at 386, at 444 S.E.2d at 527.

ARGUMENT

I. The trial court erred in failing to void the State's arrest warrant under *Franks v. Delaware*.

The RCSD omitted critical exculpatory information from the arrest warrant in this case. As a result, the warrant failed to establish probable cause for Porch's arrest. Porch suffered prejudice from this error. This Court should reverse.

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 following the warrant's execution. *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). 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.

Id. at 554, 524 S.E.2d at 397 (citing *Franks*, 438 U.S. at 171–72). This test applies both to an act of commission, in which false information is in the warrant affidavit, and acts of omission, in which exculpatory material is not included in the affidavit. *Id.*; *see also Horton v. City of Columbia*, 408 S.C. 27, 36, 757 S.E.2d 537, 541 (Ct. App. 2014) ("However, the *Franks* test also applies to acts of omission while exculpatory information is left out of the affidavit.").

In *Missouri*, police obtained a search warrant for the home of Curtis Sibert for cocaine. *Id.* at 550, 524 S.E.2d at 395. The lead detective submitted an affidavit to support the warrant, which stated in pertinent part:

> Your affiant . . . states that on January 25, 1995 he received information from investigator Sam C. Cureton of the Greenville County Sheriff's Office pertaining to Victor Wyatt Missouri. The information that was relayed to your affiant that Missouri was involved in the manufacture and distribution of crack cocaine. The following is a chronological chain of events leading to your affiants [sic] belief that Victor Wyatt Missouri, and others not yet

> identified, are manufacturing and distributing crack cocaine. . . .
>
> The confidential source of information, who from here forward will be referred to as CSI, stated that for the past two months he has purchased a total of two kilograms of cocaine from Victor Missouri. He would receive this in half kilo quantities every two weeks.
>
> On February 3, 1995, at 4:00 in the morning, Missouri called CSI and told him that [Sibert] was back and they needed somewhere to cook the crack. He said he couldn't cook it at his (Missouri) house because he had relatives there. CSI told him he would give him an answer later and he ultimately told him no. Around 9:00 this same morning CSI paged [Sibert] via his digital pager. [Sibert] returned the call and told CSI they were still trying to get it together. At 10:15 another page was made to [Sibert] with the same results. At 2:00 in the afternoon the CSI drove to [Sibert] apartment at 400 Summit Drive and went in to inquire about his portion of the cocaine. Your affiant wired the CSI with a body transmitter that would enable your affiant to monitor the conversations he had while inside this apartment. Your affiant, while monitoring the audio transmitter, heard a male voice, whom CSI later stated was [Sibert], question CSI about the phone that had been used earlier trying to set the transaction up. This male appeared to be somewhat reserved about talking with CSI about the cocaine. CSI told your affiant that [Sibert] did appear to be nervous about the deal they were trying to make. [Sibert] **told CSI that he had the crack but he would call him when it was right.**

Id. at 550–52, 524 S.E.2d at 395–96 (alterations added) (emphasis in original). Police received and executed a search warrant based on this affidavit and found Missouri in the kitchen standing over a sink, facing a set of triple beam scales. *Id.* at 552, 524 S.E.2d at 396. Inside the sink, police discovered a quantity of cooked, crack cocaine. *Id.* Police arrested Missouri for trafficking in crack cocaine. *Id.*

At the suppression hearing, the lead detective testified that the affidavit contained a false statement, because Sibert never told the CSI there was crack in his

apartment. *Id.* at 553, 524 S.E.2d at 396. The lead detective testified that the CSI informed him on two occasions that day of the search that the crack was not in Sibert's apartment. *Id.* Sibert also explained to the informant he did not want to cook the cocaine at his own home because "his wife was trying to go straight." *Id.* This information was not provided to the magistrate in the supporting affidavit. *Id.*

The *Missouri* 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. Following this conclusion, the 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.* The court held that a substantial basis did not exist, as the omitted information struck at the "very heart of the affidavit's purpose" which was to establish probable cause for a search of Sibert's apartment for crack cocaine. *Id.* at 556, 524 S.E.2d at 398.[2]

The circumstances of the instant case are similar. The police affidavit provided the magistrate with the following information:

> That on 5/14/2006, while at 1103 Pineland Road, Apartment 311-C, in the Dentsville Magistrate District of Richland County, one Joshua Porch did commit the crime of murder, in that he did with malice aforethought, assault

[2] The inclusion of this omitted material created an "affirmative hurdle" which the remaining portions of the affidavit could not overcome. The remaining portions demonstrated that; (1) the suspects arranged to sell cocaine, (2) the suspects transported cocaine to Greenville for this purpose, and (3) the presence of baking soda, a common cocaine production drying and cutting agent, in Sibert's apartment. *Missouri*, 337 S.C. at 556, 524 S.E.2d at 398. The Court acknowledged that these facts made the presence of cocaine in Sibert's apartment a fair probability, but that the insertion of the omitted information defeated this probability. *Id.* ("This, in turn, erodes the basis upon which a magistrate could find probable cause to search [Sibert's] apartment." (alterations added)); *see also State v. Missouri*, 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004) (In addition, because we held in a prior decision that the search warrant in this case was invalid, the evidence seized must be suppressed and Missouri's conviction vacated.").

> 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.

(Trans. Dated 11/12/13 at 9, 12–13; R. 0027, 0030-31).

The RCSD failed to provide key exculpatory information regarding why Porch admitted to being at the scene of the crime during the assault and stabbing and why his blood was found at the scene of the crime. (Trans. Dated 11/12/13 at 54–56, 74–75; R. 0072-74, 0092-93). Porch served as the key eye witness for the State in two prosecutions of Justin Mallory for this crime. As part of that service, Porch admitted to being present at the home of Justin and Nakia Mallory on the night of the murder, of intervening in a domestic dispute between the Mallorys, and watching Justin Mallory injure Nakia. (Trans. Dated 11/25/13 at 1503; R. 1074). In addition, Porch explained his blood was at the scene of the crime because of injuries he suffered as he attempted to intervene in the dispute. (*Id.*). However, the RCSD, having now concluded to pursue Porch for this crime after two unsuccessful prosecutions, included none of this explanatory and exculpatory information in the affidavit. (Trans. Dated 11/12/13 at 7–10, 54–56; R. 0025-28, 0072-74). Omitting this information demonstrates a clear reckless disregard for the truth.

Prior to trial, Porch requested an evidentiary hearing as to probable cause because of the deficient nature of the warrant. The only uncontested language from the affidavit is the following:

> That on 5/14/2006, while at 1103 Pineland Road, Apartment 311-C, in the Dentsville Magistrate 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.

(*Id.* at 7, 12; R. 0025, 0030). This bare allegation can not establish probable cause for the RCSD arrest warrant. The trial court agreed with Porch's trial counsel that the omissions warranted an evidentiary hearing, finding:

> After—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 inculpatory [sic] information.

(*Id.* at 23–24; R. 0041-42).

During the evidentiary hearing, Porch's trial counsel presented testimony from Officer David Wilson of the RCSD and the magistrate that issued the arrest warrant, Judge Phil Newsom. Officer Wilson confirmed that previous RCSD investigators relied on Porch as an eye witness in two previous trials for Nakia Mallory's murder. (*Id.* at 41–42; R. 0059-60). According to Officer Wilson, 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 Nakia Mallory's clothing that matched to Porch. (*Id.* at 53, 64–65; R. 0071, 0082-83).

Critically, the affidavit did not contain this information, and Officer Wilson could not confirm he discussed this information with Judge Newsom. (*Id.* at 50–51, 53; R. 0068-69, 0071). Following Officer Wilson's testimony, Judge Newsom testified that Officer Wilson did not inform him that Porch previously testified on two occasions as an eyewitness to the crime. (*Id.* at 74–75; R. 0092-93).

Despite testimony that the affidavit failed to include exculpatory information and the magistrate's testimony that he was definitely not informed of this information, the trial court refused to void the arrest warrant. The court stated,

> 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.

(*Id.* at 85; R. 0103).

The trial court erred for several reasons. First, Porch's trial counsel showed intent through reckless disregard. It is well-established that affidavits are normally drafted by nonlawyers and in the "midst" and "haste" of a criminal investigation. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). Consequently, the warrant need not include every piece of conceivable information. *United States v. Colkley*, 899 F.2d 297, 300–01 (4th Cir. 1990) (citations omitted). That said, *Franks* protects against omissions designed to mislead or that are made in reckless disregard of whether they would mislead the magistrate. *Id.* at 301 (citation omitted).

This was no hastily thrown together investigation. The RCSD was preparing for the third trial in this matter and prepared an affidavit which failed to include information "clearly critical" to the probable cause determination. *Id.* (citation omitted). The affidavit contained information accusing Porch of Nakia Mallory's murder but which had previously been accepted by the State as part of his role as an eyewitness to that same murder. This is critical information necessary for the magistrate to weigh in determining whether probable cause existed. Under the trial court's formulation of *Franks*, police will have wide discretion to seek arrest warrants based generally on an eyewitness's statements regarding the crime.

Second, the trial court erred because *Franks* required the trial court to assess whether when the material subject to the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant to support a finding of probable cause. The affidavit in this case did not meet this demanding standard. *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (explaining that when the affiant's material recklessness is proved by a preponderance of the evidence, the warrant "must be voided" and evidence or testimony gathered pursuant to it must be excluded (citation omitted)).

Third, the trial court erred by adding Officer Wilson's testimony regarding probable cause to the defective arrest warrant, and relying on Officer Wilson's analysis of certain evidence in determining whether probable cause existed. Such a ruling constitutes a misapplication of *Franks*. The trial court had to examine the magistrate's analysis of the information presented by police, not the government's description of what it would include in the affidavit if granted a mulligan. *See Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999) ("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.").

Courts conducting a *Franks* examination must apply a "totality of the circumstances" test. *See Colkley*, 899 F.2d at 301-02 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). This test requires a "practical, commonsense decision whether, given all the circumstances set forth in the affidavit, there is probable cause to believe the suspect committed the offense. *Id.* at 302 (citations omitted). The language of the

affidavit, when viewed through the lens of *Franks*, *Colkley*, and South Carolina appellate precedent, does not present probable cause that Porch committed the alleged crime. *See also Thompson v. Smith*, 289 S.C. 334, 336, 345 S.E.2d 500, 502 (1986) (defining probable cause as a "good faith belief that a person is guilty of a crime when the belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise").

Thus, the trial court erred in failing to void the arrest warrant and any resulting evidence. *See id.* ("A warrant that violates *Franks* is not subject to the good-faith exception to the exclusionary rule . . . ." (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)). This Court should reverse.

II. The trial court erred and violated Porch's rights under the Confrontation Clause by limiting Porch's testimony based on the unavailability of a State witness.

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 unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

Investigator Cohen's interrogation of Porch constitutes testimonial evidence. In *State v. Stokes*, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009), the South Carolina Supreme Court held that statements taken by police officers in the course of interrogations are testimonial. In addition, the United States Supreme Court considers three factors in determining whether a statement is testimonial: (1) the formal or

systematic nature of the questioning; (2) the objective belief of the declarant whether the statement could be used in a future court proceeding; and (3) the government agent's primary purpose in conducting any questioning of the declarant. *Id.* (citing *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004)).

In *United States v. Ayala*, 469 F. Supp. 2d 357 (4th Cir. 2007), the Fourth Circuit found the declarant's out of court statements non-testimonial. In that case, the defendant, Barry Ayala, challenged the admission of certain statements attributed to a co-defendant, Edward Pope. Police arrested Ayala and Pope during an undercover operation. Earlier that day, police also arrested Stephen Poindexter for drug possession. *Id.* at 359. In an attempt to gain favor with the authorities, Poindexter volunteered to work in an undercover capacity and secure additional arrests. *Id.* Poindexter placed a cell phone call to Pope and explained he knew of a customer looking to buy two eight balls of crack cocaine. *Id.* During their conversation, Poindexter handed the phone to a federal drug agent under the guise that the agent was the customer seeking to purchase crack cocaine. *Id.*

Pope informed the agent that "his guy" would supply the drugs, and the agent and Pope agreed to meet at a fast food restaurant. *Id.* Pope and Ayala arrived at the restaurant and police immediately converged on their vehicle. *Id.* at 359–60. Later, police discovered 1.8 grams of crack cocaine in the interior of the car near where Ayala had been sitting. *Id.* Ayala sought, unsuccessfully, to bar the government from introducing Pope's statements to the agent. *Id.*

On appeal, the Fourth Circuit affirmed the trial court's decision, observing that the co-defendant's statements occurred in a "highly informal" setting—a cell phone conversation. *Id.* at 361 ("Nothing in the record indicates that the incriminating statements resulted from a level of questioning so formal, systematic, or intensive as to be considered an interrogation."). Moreover, Pope had no expectation or indication his statements would be used in a future government proceeding, and Pope did not know he was speaking to a government agent. ("At all times during the conversation, [the agent] presented himself as a buyer seeking to purchase crack cocaine." *Id.* (alterations added)). Last, the agent did not illicit statements from Pope to prove or establish past facts or conduct. Instead, the agent and Pope negotiated the terms and conditions of a drug purchase. *Id.* at 361–62.

The circumstances in *Ayala* bear a stark contrast to the instant case. Investigator Cohen's interrogation did not take place in a "highly informal" setting. To the contrary, it is difficult to conceive of a more formal setting for the questioning of a criminal defendant than that orchestrated by Investigator Cohen and the RCSD. The *Miranda* warnings issued during the interrogation provided fair notice that any statement Porch made could or would be used in a future government proceeding and removed any possibility that the interrogation were "informal." (Trans. Dated 11/18/13 at 173; R. 0203; Trans. Dated 11/21/13 at 1065–69, 1089; R. 0851-855, 875). Finally, the very purpose of this interrogation was to prove or establish past facts and conduct—specifically to prove the State's newest theory regarding Nakia Mallory's murder. Consequently, Investigator Cohen's interrogation of Porch constituted testimonial evidence.

Porch's trial counsel did not have an adequate prior opportunity to cross-examine Cohen regarding this testimonial evidence because Cohen refused to appear at trial. Moreover, the trial court erred in holding that Investigator Cohen's appearance at a pre-trial *Jackson v. Denno*[3] hearing satisfied the Confrontation Clause's prior opportunity requirement. The trial court collapsed the significantly different concerns of pre-trial *Jackson v. Denno* hearings and trial rights under the Confrontation Clause.

In a pre-trial *Jackson v. Denno* hearing, the central concern is the voluntariness or involuntariness of a defendant's confession. That case provides that a defendant in a criminal case is entitled to an evidentiary hearing on the voluntariness of statements made by the defendant prior to submission of such statements to the jury. *See State v. Samuel*, No. 27498, 2015 S.C. Lexis 85, at *2 (S.C. Feb. 25, 2015) (citing *Jackson, supra*); *see also 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.").

On the other hand, the Supreme Court explained the importance of the Confrontation Clause reliability inquiry like so:

> 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". . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. ***It 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, not only about the desirability of

[3] 378 U.S. 368 (1964).

> reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61 (emphasis added).

In fact, by threatening Porch with the introduction of a videotape displaying Cohen's interrogation, the trial court imbued this testimonial evidence with a certain indicia of reliability, counter to Supreme Court precedent. *See Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."). Thus, the trial court erred.

In addition, the trial court's error does not constitute harmless error. The facts of *State v. Graham*, 314 S.C. 383, 444 S.E.2d 525 (1994) are instructive on this point. In *Graham*, the defendant argued that his Sixth Amendment right to confront a witness was violated and the Court agreed.

On the afternoon of January 25, 1992, the defendant, "Tunch" Simmons, Steven Warren, Sr., and Jim Brabham (the "victim") drank beer at a local boat landing. *Id.* at 384, 444 S.E.2d at 526. In the late afternoon, all of the men left the boat landing and returned to a fireworks stand on Highway 17, operated by "Tunch" Simmons. *Id.* Steve Warren, Jr. was working at the fireworks stand that afternoon. *Id.* Earlier in the day, the victim left two shotguns at the fireworks stand in an effort to sell the guns. *Id.* When the men came in from the boat landing, Steve Warren, Jr. gave his father, Steve Warren, Sr., one of the guns, a piece of cardboard, and a shell for the gun. *Id.* The testimony diverged as to the events which followed. *Id.*

The defendant testified that Steve Warren, Sr. and the victim went into the parking lot of the fireworks stand where Steve Warren, Sr. shot the victim in the chest

and then held a second gun on the defendant and forced the defendant to shoot the victim again. *Id.* Steve Warren, Sr. testified that the defendant shot the victim twice with no involvement of Steve Warren, Sr. *Id.* Late that evening, the defendant, Steve Warren, Sr., and Steve Warren, Jr. loaded the victim's body into the bed of "Tunch" Simmons' pickup truck and dumped the victim's body in the river. *Id.* The next day, "Tunch" Simmons' pickup truck was found burning in a wooded area near Highway 17 in Jasper County. *Id.*

The defendant and Steve Warren Sr. were tried and convicted of the murder of Jim Brabham. *Id.* Steve Warren, Jr. agreed to testify for the State in exchange for the State's agreement not to prosecute him for the death of Jim Brabham. *Id.* "Tunch" Simmons pled guilty to accessory after the fact of murder and received an eight-year sentence. *Id.*

At trial, the court prevented the defendant from impeaching Simmons by bringing his eight year sentence to the jury's attention. *Id.* at 385, 444 S.E.2d at 528. The State did not call Simmons to the stand, but the defendant's co-defendant, Warren Sr., did. *Id.* at 386, 444 S.E.2d at 528. Simmons arrived with counsel and announced he intended to invoke his Fifth Amendment right not to incriminate himself. *Id.* Simmons claimed that although he pled guilty in the murder, there was still an indictment for murder pending against him in the case. *Id.* The defendant's counsel objected, arguing that the plea agreement freed Simmons from further prosecution. *Id.* The trial court informed the solicitor that he could not prevent Simmons from testifying under the threat of additional prosecution. *Id.* at 386-87, 444 S.E.2d at 528. The solicitor conceded he could not prevent Simmons from testifying but the solicitor

threatened further prosecution if Simmons did not testify "truthfully." *Id.* at 387, 444 S.E.2d at 528. The solicitor defined "truthfully" as the fact that Simmons was intoxicated at the time of the murder and did not know of the events surrounding the event. *Id.* Unsurprisingly, Simmons testified to this version of events. *Id.*

However, the defendant proffered the testimony of Gary Simmons who testified that Tunch informed him shortly after the murder that "he would have no further problems" with the victim, and that "Tunch" admitted to killing the victim." *Id.* In a unanimous decision, the Court concluded:

> The solicitor's attempted manipulation of "Tunch" Simmons' testimony and the proffered testimony of Gary Simmons raises in our minds the question of the extent of "Tunch" Simmons' involvement in the death of Jim Brabham. As the sole finders of fact, we believe the jury was entitled to know Simmons' sentence. Murder is a serious crime for which [the defendant], who was sixteen at the time of the murder, received a sentence of life in prison. By contrast, Simmons was able to avoid the heavy penalty in exchange for what may have been his silence. We believe [the defendant] was prejudiced by not having "Tunch" Simmons' sentence presented to the jury.

Id. (finding the error was not harmless and reversing and remanding for a new trial (alterations added)).

In this case, investigators from the RCSD and the LASD interrogated Porch for approximately seven hours on July 10, 2009 and videotaped this interrogation. However, the jury only viewed that portion of the videotape featuring investigators from the RCSD, and after the majority of intensive questioning was completed. The State did not enter into evidence the entire videotape as the LASD investigator, Cohen, refused to appear at Porch's trial. The trial court then warned Porch that if he testified regarding Cohen's interrogation, the State would be allowed to rebut that testimony

with pertinent portions of the video, even in Cohen's absence. This violated Porch's rights under the Confrontation Clause and limited the jury's ability as the sole finder of fact to properly assess the credibility of the interrogations and incriminating statements at play in this case.

The trial court collapsed two distinctly different constitutional guarantees and in the process violated Porch's rights under the Confrontation Clause. Porch did not have the opportunity for an adequate cross-examination of Cohen and because of this the trial court should not have entertained the possibility of admitting testimonial evidence involving Cohen. The Confrontation Clause error in this case is unique, but clear, and mandates this Court vacate Porch's conviction.

CONCLUSION

The trial court's rulings under *Franks v. Delaware* and the Confrontation Clause constitute reversible error and this Court should reverse the trial court and vacate Porch's conviction.

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December 8, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

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.

CERTIFICATE OF COUNSEL

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

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Proof of Service

I, the undersigned Paralegal 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):

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