STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Alison R. Lee, Circuit Court Judge
Appeal Case No. 2013-002531

THE STATE

Respondent,

V.

JOSHUA WILLIAM PORCH,

Appellant

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL AND STATUORY PROVISIONS

RULES

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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?

STATEMENT OF THE CASE

On May 14, 2006, appellant Joshua Porch murdered Nakia Mallory in Richland County. On July 7, *2009*, an arrest warrant was issued for Porch charging him with Nakia Mallory's murder. Appellant was arrested for the murder on July 8, 2009 in Los Angeles, California. He was returned to South Carolina. The Richland County grand jury indicted appellant for Nakia Mallory's murder in 2011 (*Ind. # 2011-GS-40-03359*). The case was prosecuted by the Attorney General's Office. Appellant proceeded to a jury trial before the Honorable Alison Rene Lee, Circuit Court Judge, on November 18, 2013; and, on November 25, 2013, the jury found appellant guilty of Nakia Mallory's murder. Judge Lee sentenced appellant to fifty (50) years imprisonment for the murder. (R. 1199-1202, Tr. pp. 1806-09, 1833). This appeal followed raising two (2) issues.

RESPONDENT'S STATEMENT OF FACTS

Nakia Mallory ("the victim"), the mother of two (2) small children, was murdered in the early morning hours of May 14, 2006 in her home, an apartment, in Richland County. The victim was stabbed to death. The victim had one (1) stab wound *to her right* neck and one (1) superficial stab wound over *her right* eye.[1] She had also been beaten about the head. The knife wound to the neck was fatal. A large amount of blood was found in the den of her apartment *and* a small amount in the kitchen. It appeared someone had attempted to clean up the blood in the kitchen by wiping it with a cloth. There was also a spot of blood on a bottle of dish detergent or cleaner under the kitchen counter. The murder weapon, a knife, was never found, nor was the cloth used to wipe up the blood in the kitchen. (R. 155-196, 260-338, 339-351, 351-94, 395-430, 431-78, 480-557, 730-52, Tr. pp. 125-66, 233-311, 319-31, 331-74, 388-423, 512-59, 561-638, 886-908).

The victim's husband, Justin Mallory ("Justin"), came home at approximately 3:30 a.m. on May 14, 2006 and found the victim in the above described condition on the floor of the den. There was blood everywhere in the den. Justin immediately flew into a panic and checked on the couples' two (2) children, who were asleep in a bedroom, and then immediately sought assistance from neighbors by banging on their doors.[2] Justin also called 911 and reported what he had found. After waiting for some period of time for EMS to arrive, Justin could wait no longer and picked his wife up and placed her in his van and drove her to Provident North East Hospital. The victim was pronounced dead there. Justin, of course, got his wife's blood on him

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1 Appellant Porch is left handed.

2 The neighbor, Shareed Hargraves, testified when the victim's husband came banging on his door for assistance, the husband did not have any blood on his person. (R. 546-557, Tr. pp. 627-38).

when he carried her to the van and into the hospital. (R. 155-196, 260-338, 339-351, 431-78, 546-57, Tr. pp. 125-66, 233-311; 319-31, 512-59, 627-38).

Justin cooperated fully with police including informing police of his whereabouts on the night of the murder, signing consents to search all of his property, and submitting a DNA buccal sample. Justin admitted he had been with another woman romantically prior to finding his wife, had stayed at a motel with the woman, stopped at a convenience store, took the woman home, and then drove home talking to friends on his cell phone. When he arrived home, he discovered his wife's body. He sought assistance from neighbors, called 911, heard gurgling sounds coming from his wife, and picked her up and placed her in his van and drove her immediately to the hospital. (R. 155-96, 260-338, 351-94, 431-78, 753-87, Tr. pp. 125-66, 233-311, 331-81; 512-59; 909-43).

The husband, Justin, was initially charged with the murder by the Richland County Sheriff's Office and indicted. The 5th Circuit Solicitor's Office prosecuted the case. Justin was tried twice resulting first in a hung jury and in his second trial an acquittal by Judge Thomas Cooper. (R. 155-96, 260-338, Tr. pp. 125-66; 233-311).

After his acquittal, Justin contacted the Richland County Sheriff's Office and Sheriff Leon Lott. Justin informed the Sheriff's Office he was not involved in the murder and asked that they re-open the investigation into the murder of his wife. As a result, the Richland County Sheriff's Office decided to take a fresh look at the case and assigned Chief Deputy Sheriff David Wilson as the investigator to review the investigation to determine if the wrong person was charged. The investigation focused on appellant, Joshua Porch ("**Porch**"), who had testified in the husband's trials claiming he, Porch, was an eyewitness to the murder. (R. 155-96, 260-338, 787-98, 800-40, Tr. pp. 125-66, 233-311, 943-54, 1011-51).

Police first approached Porch as a result of the husband's [Justin's] statement given the night of the victim's murder. Porch was a neighbor of Justin and the victim. Justin told police the only persons who could possibly have killed his wife were the maintenance man *or* Porch, because they each had been in his apartment recently. Police approached Porch the day after the victim's murder. In his 1st statement to police, **Porch** denied being present at the scene at the time of the crime and claimed he knew nothing about the murder. Porch's wife, Persia Porch, also told police at that time that Porch was with her the night of the victim's murder.[3] Over a year later and shortly before the husband's first trial, prosecutors discovered there was unidentified blood [male DNA] in the kitchen of the victim's apartment. Porch was contacted again by police in an attempt to identify this unknown male DNA. At that time, Porch admitted being present at the scene [the victim's apartment] earlier in the evening of the murder and cutting his hand while slicing an apple. Porch was polygraphed on this statement and failed the polygraph. Upon further questioning, Porch gave a 3rd version where he stated that on the night of the murder he was at the crime scene "fooling around" with the victim, but the victim's husband came home and attacked the wife with an object, and he [appellant **Porch**] was cut on his hand while intervening. Porch claimed he was facing the husband when this occurred. Porch admitted he bled in the kitchen of the home, and before leaving the apartment attempted to clean up the blood. This was the version Porch testified to at the husband's two (2) trials. As previously stated, the husband was ultimately acquitted. (R. 575-96,603-11, 558-74, 612-57, 666-729, 787-96, Tr. pp. 667-88, 736-44, 650-66, 745-90, 819-82, 943-52).

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3 Porch's wife changed her statement at Porch's trial testifying he left the apartment during the night of the victim's murder and returned some time later in the night or morning (R. 558-74, Tr. pp. 650-66).

Chief Deputy Wilson realized Porch had given inconsistent versions of the event, including stating on one (1) occasion he cut his right hand and on another occasion he cut his left hand. Porch also admitted he had attempted to clean up the crime scene [the kitchen] where he had bled. (R. 800-40, Tr. pp. 1011-51).

Chief Deputy Wilson requested additional D.N.A. testing after the husband's acquittal. It revealed appellant **Porch's** blood [DNA] was on the victim's shirt, not just in the kitchen. Porch's blood was found on the bottom right of the victim's shirt. D.N.A. consistent with Porch's DNA had also previously been found under the victim's fingernails. No DNA of the husband was found on the victim or under her fingernails. It was also determined Porch was left-handed, and both stab wounds to the victim were on *her* right side. The husband [Justin] was right-handed. The criminal re-investigation of the murder ultimately determined Porch murdered the victim, and an arrest warrant for murder was obtained on July 7, 2009. (R. 431-79, 800-40, Tr. pp. 512-60, 1011-51).

Investigators with the Richland County Sheriff's Office traveled to California on July 8, 2009 and arrested **Porch** that night for the victim's murder. Porch was questioned shortly after midnight on July 9, 2009, resulting in **Porch** providing a statement implicating himself in the victim's death, alleging it was an accident. **Porch admitted the victim's husband [Justin] was not present when the victim was killed, i.e. Porch had perjured himself in the husband's two (2) trials.** (R. 796-98, 841-93, 907-64, 975-76, 977-1067, 1225-35, Tr. pp. 952-54, 1055-1107, 1134-91, 1216-17, 1343-1431, State's 47).

Later that same day, the investigators questioned Porch again. In this statement, Porch claimed the victim "came on to him," and he rejected her, and she got a knife and there was a struggle over the knife, and he [Porch] ended up hitting her several times in the forehead. This

was consistent with the autopsy results. (R. 841-93, 907-64, 975-76, 977-1067, 1236-39, Tr. pp. 1055-1107, 1134-91, 1216-17, 1343-1431, State's 49).

Investigators questioned Porch again on July 10th, and this interview was videotaped.[4] In this statement, Porch made further incriminating statements implicating himself in the victim's murder. Porch admitted it was he who "came on" to the victim; she rejected him, and he ended up killing her [stabbing her].[5] Porch admitted he attempted to clean up the crime-scene and carried the murder weapon with him and disposed of it. After hearing all of the evidence, including appellant Porch's confessions, including his videotaped confession, the jury found Porch guilty of the victim's murder. (R. 841-93, 907-64, 975-76, 977-1067, 1199-1202, Tr. pp. 1055-1107, 1134-91, 1216-17, 1343-1431, State's Ex. 50; 1806-09).

ARGUMENT I.

What Occurred Below

Prior to trial, Porch moved to suppress all evidence flowing from his arrest in California for murder, specifically his confessions. Porch alleged the arrest warrant contained false information and omitted exculpatory material, and therefore his confessions should be suppressed pursuant to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). Judge Lee conducted a suppression [Franks] hearing regarding the circumstances of the issuance of the

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

5 In a strange but appropriate twist of fate, Justin Mallory, the husband, testified at Porch's trial helping establish that it was in fact Porch who murdered the victim Nakia Mallory. Justin accounted for his whereabouts up until just moments before he discovered the body, began banging on neighbors doors, and called 911. This included cell phone records and tower information that showed Justin coming from another location [i.e. dropping off the paramour] and headed toward the apartment where he and his wife lived while talking to friends on his cell phone. (R. 155-96, 799, Tr. pp. 125-66, 971).

arrest warrant and whether the warrant was supported by probable cause. (R. 19-114, 1243, Tr. 11/12/2013, pp. 1-96; Defendant's Ex. 6 [Arrest Warrant]). At the conclusion of the hearing, Judge Lee found the arrest warrant did not contain any false statement and was supported by probable cause, and even including the exculpatory material Porch alleged should have been included, there was still probable cause to support the arrest warrant for murder; therefore, Porch's motion to suppress his confessions was denied. (R. 103-08, 116-28, Tr. 11/12/2013, pp. 85-90; Tr. 11/18/2013, pp. 1-13). Porch alleges on appeal Judge Lee erred in this ruling. Porch is wrong.

Standard of Review
(General Appellate Standard)

The conduct of a criminal trial is left largely to the discretion of the trial judge, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982). Therefore, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id.

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

The Fourth Amendment applies to all seizures of the person. United States. v. Brignoni-Ponce, 422 U.S. 873 (1975); State v. Khingratsaipon, 352 S.C. 62, 572 S.E.2d 456 (2002). An arrest of a person is a "seizure" within the meaning of the Fourth Amendment of the United States Constitution. United States v. Mendenhall, 446 U.S. 544 (1980). The standard of review

of Fourth Amendment search *or* seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with the appellate court only being able to reverse the ruling of a trial judge where there is clear error. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015); State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013); State v. Tindall, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010); State v. Tynes, 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013).[6]

Standard of Review
(Magistrate's Issuance of a Warrant)

Warrants are constitutionally preferred; and, in determining whether they should issue, magistrates are concerned with probabilities, not certainties. *See* State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976). As a result, a reviewing appellate court gives great deference to a magistrate's determination of probable cause. *See* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012)(other numerous citations omitted). When determining

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6 State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)(holding the validity of a search or seizure depends upon "a number of antecedent determinations, each of which is inherently fact-specific" and "entails an inquiry into the totality of the circumstances" and an appellate court must affirm if there is "any evidence" to support the ruling); State v. Thompson, 363 S.C. 192, 199, 609 S.E.2d 556, 560 (Ct. App. 2005)(deferential standard of review applies in a challenge to a trial court's fact-driven affirmation of probable cause.). "On appeal from a suppression hearing, the appellate court will give deference to the circuit court's findings and only reverse if there is clear error." State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2007), *quoting* Brockman, 339 S.C. at 66, 528 S.E.2d at 666. As a result, if there is any evidence to support the trial judge's ruling it will be affirmed on appeal. *See* Taylor, *supra*; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012); State v. Cheeks, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012). The appellate court may conduct its own review of the record to ascertain if there is any evidence to support the ruling. Davis, *citing* Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459-60. In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law. Tynes, *supra*, *citing* State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). *But see* State v. Kinloch, 410 S.C. 612, 767 S.E.2d 253 (2014).

the propriety of the issuance of a warrant, the duty of the appellate courts is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. *See* Kinloch, 410 S.C. 617, 767 S.E.2d 155; State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009); State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). In making such a decision, an appellate court must consider the totality of the circumstances. Jones, *supra* (stating under the totality of the circumstances test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed); State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for ... conclud[ing] that probable cause existed." Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03. However, all that is necessary for the issuance of a warrant is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing* State v. Sachs, 264 S.C. 541, 555, 216 S.E.2d 501, 508 (1975).

Probable Cause to Arrest

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

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

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

Brinegar v. United States, 338 U.S. 160, 169, 69 S.Ct. 1302, (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742, 103 S.Ct. at 1535. South Carolina has adopted the "totality of the circumstances" test of Illinois v. Gates, *supra*, in determining whether sufficient probable cause exists to issue a warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); Martin, *supra*.

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

The Franks hearing

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

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

This was significant to Chief Wilson. Porch had also told police on one (1) occasion that it was his left hand that was cut and testified at the husband's trials that it was his left hand that was cut.[7] In his statement to police placing himself at the scene at the time the husband supposedly attacked the wife, Porch claimed he was facing the husband when he [Porch] was stabbed or cut, and the victim, Nakia Mallory, was standing behind him. Chief Wilson believed it was highly unlikely that if Porch's left hand had been cut, that he would have dripped or gotten blood on the bottom right of the victim's shirt when she was standing behind him. Chief Wilson also noted in reviewing the file that the victim was stabbed in what would be her right shoulder or neck area. Porch was left-handed. The victim's husband was right handed. It was more consistent with the assault on the victim that she was stabbed by a perpetrator who was left handed. This would also be consistent with the drop of Porch's blood found on the bottom right of the victim's blouse. As a result of all of the evidence in the case, Chief Wilson believed there was probable cause to arrest Porch for the victim's murder, and Chief Wilson believed Porch actually committed the murder. (R. 43-87, Tr. 11/12/2013 pp. 25-69).

Chief Wilson sought and obtained an arrest warrant for murder from Magistrate Phil Newsome. Judge Newsome issued the arrest warrant for the murder of Nakia Mallory against Porch. (R. 43-87, 87-93, Tr. 11/12/2013 pp. 25-69, 69-75).

The Arrest Warrant Affidavit

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

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

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

(R. 1243, Arrest Warrant, Defendant's Ex. 6).[8] The arrest warrant for murder was subsequently served on Porch in California, and he thereafter confessed that the husband [Justin] was not present during the crime, and it was he who killed the victim.

The Lack of Merit of Porch's Argument

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

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

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

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8 Both Chief Wilson and Magistrate Newsome testified Wilson told Newsome other information than what was in the arrest warrant affidavit, such as background information on the case; however, due to the passage of time between the issuance of the arrest warrant and the Franks hearing, neither Chief Wilson nor Magistrate Newsome could remember what they discussed. (R. 43-93, See Tr. 11/12/13, pp. 25-75).

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

Id. at 156.

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

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

of whether it made, the affidavit misleading to the issuing judge. Missouri; United States v. Blauvelt, 638 F.3d 281, 289 (4th Cir. 2011). The defendant must also show that the omissions were material, meaning that their "inclusion in the affidavit would defeat probable cause." Clenney, 631 F.3d at 664; United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990).

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

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

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

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

The protections of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) do not apply to warrant application proceedings. Clenny, 631 F.3d at 665; Colkley, 899 F.2d at 302-03. "The Supreme Court has shown no inclination to impart the panoply of trial protections into the

warrant application process with all the attendant burdens and delays such a step would entail." Id. at 665; *See* Franks, 438 U.S. at 166-72.

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

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

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

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

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

A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. Tate, 524 F3d at 454. "'[M]ere [] negligen[ce] in ...recording the facts relevant to a probable-cause determination' is not enough." Colkey, 899 F.2d 301 (*quoting* Franks, 438 U.S. at 170). "[T]he omission must be 'designed to mislead' or must be made 'in reckless disregard of whether [it] would mislead'" United States v. Tate, 524 F.3d 449, 455 (4th Cir. 2008). "The defendant must also show that the omitted material was necessary to the finding of probable cause, i.e., that the omitted material was such that its inclusion in the affidavit would defeat probable cause." United States v. Shorter, 328 F.3d 167, 170 (4th Cir. 2003)(citations and internal quotation marks omitted). In this case, Porch offered no evidence the officer omitted information with the intent to mislead the magistrate whether intentionally or recklessly. In fact, Judge Lee specifically found there was nothing false in the affidavit. And, even including the exculpatory material Porch alleged was omitted, there was still sufficient probable cause to support the issuance of the arrest warrant. (Tr. 11/12/2013, pp. 85-90; Tr. 11/18/2013, pp. 1-13). The facts elicited during the *in camera* hearing show Chief Deputy Wilson did not intend to mislead the magistrate.

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

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

As Gates recognized, and as here, affidavits are normally drafted by officers in a criminal investigation; therefore, technical requirements of elaborate specificity once exacted under common law pleading have no proper place, and they should be viewed in a common sense and realistic fashion.[10] Affidavits must be judged on the facts presented not the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). The Affidavit here supplies sufficient

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

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

probable cause to issue the arrest warrant charging Porch with murder. State v. Lynch, 412 S.C. 156, 179-84, 771 S.E.2d 346 (Ct. App. 2015).

The facts of this case are similar to those in United States v. Moody, 762 F.Supp. 1491 (N.D. Ga. 1991), where the Court found no Franks hearing was due to a murder defendant despite his claim that a search warrant affidavit omitted facts suggesting another suspect in the crime. A judge and lawyer were assassinated by mail bombs. The investigation first focused on one individual, but a search of his property proved fruitless. The investigation then shifted to the defendant for whom the police obtained search warrants. The defendant thereafter moved to suppress evidence seized pursuant to those warrants and contended that the warrant affidavits failed to disclose evidence implicating the first suspect. The Court, however, found that the defendant failed to demonstrate that the omitted information concerning the government's investigation of the other suspect, if included in the affidavit, would have defeated probable cause. In addition, the Court emphasized that to satisfy the Fourth Amendment's probable-cause requirement, the government need not demonstrate that a person is the chief suspect in a criminal investigation. Rather, implicit within the concept of probable cause is the notion that the government may pursue multiple, perhaps even divergent, lines of investigation so long as the government establishes probable cause as to each prior to the issuance of any warrant. In Moody, the evidence marshaled by the government against the first suspect did not exonerate the defendant. At most, the evidence indicated that the defendant and the first suspect may have conspired to commit the crimes charged. Accordingly, the Court found that the defendant's allegations were insufficient to raise issues worthy of an evidentiary hearing under Franks. Moody, *supra*.

Similarly, in State v. St. Louis, 128 Conn. App. 703, 18 A.3d 648 (2011), *certification denied*, 302 Conn. 945, 1011 WL 5581322 (2011), the Court held that the warrant to search the defendant's property for the murder victim's body was supported by probable cause notwithstanding the supporting *affidavit's allegedly improper omission of the defendant's statements inculpating another person* as the defendant's statements suggested that the victim was dead and buried; the defendant's neighbor recalled seeing a "big hole" dug in the backyard of the defendant's property; the defendant, on the last day when the victim was seen alive, stole a checkbook and drove the victim's vehicle to a credit union, where he attempted to use the victim's license to cash a check made payable to the victim; and a jail house informant stated that the defendant admitted murdering and burying the victim. Id.

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

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

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

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

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

(Porch's Proposed Affidavit). Judge Lee found even including the alleged exculpatory material Porch alleged should have been included, there was still probable cause to issue the arrest warrant charging Porch with the victim's murder. (R. 103-08, 116-28, Tr. 11/12/2013, pp. 85-90; Tr. 11/18/2013, pp. 1-13). Judge Lee's findings of fact and conclusions of law are supported by the evidence. Considering the affidavit *as submitted by Porch* there is/was probable cause to issue the warrant for Porch's arrest for murder. State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015).

Furthermore, Porch omits incriminating evidence against Porch developed during the investigation that would have come with the exculpatory evidence had Chief Collins drafted the affidavit the way Porch argues it should have been drafted. The victim's husband informed

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

blood in the kitchen before leaving the crime scene. Porch stated he was facing the husband, and away from the victim when his hand was cut. Porch's DNA was found on the kitchen floor of the victim's apartment. DNA consistent with Porch's DNA was found *under the victim's fingernails*. Neither a jury nor a circuit judge believed Porch's final statement or testimony in two (2) different trials of the husband.

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

ARGUMENT II.

There was no Confrontation Clause violation.

What Occurred Below

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

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

interrogated him was not there at trial; and he would not be able to present his complete and full story to the jury. Judge Lee informed Porch he could testify to what occurred earlier in this questioning session [with the Los Angeles detective] if he wished, but if he did and he went too far, it would probably open the door to the State being allowed to introduce portions of the videotape in reply or rebuttal. Porch indicated he did not want the State to rebut using the videotape when the witness was not there. He also stated he had not seen the redacted video yet. Judge Lee indicated Porch would be allowed to review the redacted videotape (R. 1068-74, Tr. pp. 1497-1503).

Porch then testified in his own defense, and was not limited in any way in his testimony, and did testify to threats and promises he alleged were made by the Richland County detectives and also testified that the same type of threats or behavior occurred during his interrogation by the Los Angeles detective. After Porch testified, the State did not play the earlier portion of the videotape in reply or rebuttal of Porch's testimony. (R. 1075-1198, Tr. pp. 1503-1627). Porch did not proffer any other testimony he would have testified to had the Judge Lee not informed him of the possibility of reply or rebuttal with the videotape. (R. 1068-1198, Tr. pp. 1497-1627).

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

Lack of Preservation of the Issue

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

informed him it would probably open the door to reply or rebuttal evidence from the videotape itself. Porch argued this impinged on his right to testify. He alleged he was not able testify fully and therefore to present a complete defense. The court made clear he could testify to anything he wanted to, including what occurred in the earlier interview, but the State had the opportunity to rebut it through the video. Porch stated he did not want State to rebut his testimony using the video when the detective on the video was not there, thus conceding the issue. (R. 1068-74, Tr. pp. 1497-1503).

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

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

The Confrontation Clause

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

The Lack of Merit of Porch's Argument

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

reply or rebuttal testimony. (R. 1068-74, Tr. pp. 1497-1503). There was no Confrontation Clause violation.

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

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

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

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

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

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

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

Third, Porch testified about what occurred in each interview, including this earlier interview on the videotape, and the State did not play the videotape in reply or rebuttal. This portion of the tape was never introduced. (R. 1074-1198, See Tr. pp. 1503-1627). There was no Confrontation Clause violation.

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

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

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

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

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

CONCLUSION

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

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December 4, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Alison R. Lee, Circuit Court Judge
Appeal Case No. 2013-002531

THE STATE

Respondent,

V.

JOSHUA WILLIAM PORCH,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled " Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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December 4, 2015

CERTIFICATE OF SERVICE

I Anthony Mabry, hereby certify that I have served the Final Brief of Respondent in the foregoing action by depositing two copies of same in the United States Mail to:

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