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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

The Honorable Alison Renee Lee  
Circuit Court Judge

**RECEIVED**  
AUG 17 2016  
SC Court of Appeals

Case No. 2011-GS-4003359

Appellate Case No. 2013-002531

The State, ..... Respondent,  
v.  
Joshua William Porch, ..... Appellant.

**PETITION FOR REHEARING**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo  
SC Bar No. 72933  
E-Mail: michael.anzelmo@nelsonmullins.com  
Matthew A. Abee  
SC Bar No. 101100  
E-Mail: matt.abee@nelsonmullins.com  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201  
803.799.2000

Robert M. Dudek  
Chief Appellate Defender  
South Carolina Commission on Indigent Defense  
Post Office Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

*Attorneys for Joshua William Porch*

Columbia, South Carolina  
August 17, 2016

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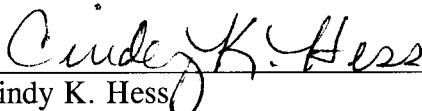
Joshua William Porch, ..... Appellant.

**PROOF OF SERVICE**

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

Document Served: **PETITION FOR REHEARING**

Counsel Served: **U.S. Mail**  
J. Anthony Mabry , Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, SC 29211-1549

  
\_\_\_\_\_  
Cindy K. Hess  
Sr. Administrative Assistant

August 17, 2016

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1320 Main Street / 17th Floor / Columbia, SC 29201  
Tel: 803.799.2000 Fax: 803.256.7500  
www.nelsonmullins.com

Matthew A. Abee  
Admitted in SC and NC  
Tel: 803.255.9335  
matt.abee@nelsonmullins.com

August 17, 2016

**Hand Delivered**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
1015 Sumter Street - 5th Floor  
Columbia, SC 29201

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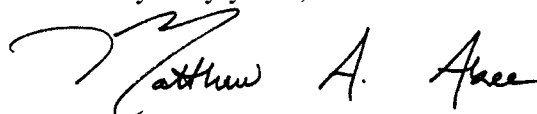
RE: The State v. Joshua William Porch  
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Our File No. 38769/01522

Dear Ms. Kitchings:

Enclosed for filing in the above-reference matter please find the original and seven copies of a Petition for Rehearing, along with a check for the filing fee. Please return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of the this document.

Very truly yours,



Matthew A. Abee

MAA:ckh  
Enclosures

cc: J. Anthony Mabry, Esquire  
Robert M. Dudek, Esquire