RECEIVED
OCT 20 2016
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

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

The State, ... Respondent,

v.

Joshua William Porch, ... PETITIONER

PETITION FOR WRIT OF CERTIORARI

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

Michael J. Anzelmo
Matthew A. Abee
NELSON MULLINS RILEY & SCARBOROUGH LLP
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 Petitioner Joshua William Porch

QUESTIONS PRESENTED

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

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

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

Thus, the questions presented are:

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

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

TABLE OF CONTENTS

CERTIFICATION REGARDING REHEARING

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

STATEMENT OF THE CASE

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

A. Application for an Arrest Warrant

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

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

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

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

B. Porch's Arrest and Interrogation

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

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

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

C. *Franks v. Delaware* Hearing

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

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

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

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

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

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

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

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

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

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

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

(App. at 130-31.)

D. Porch's Trial and Conviction

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

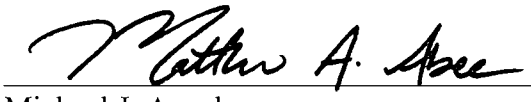
CONCLUSION

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

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

[Signature on following page.]

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
October 20, 2016

RECEIVED

OCT 20 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison Renee Lee
Circuit Court Judge

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

The State, ... Respondent,

v.

Joshua William Porch, ... PETITIONER

PROOF OF SERVICE

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

Document Served: **PETITION FOR WRIT OF CERTIORARI**

APPENDIX (three volumes)

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
Cindy K. Hess
Sr. Administrative Assistant

October 20, 2016