

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

The State, ... Respondent,

v.

Joshua William Porch, ... PETITIONER

APPENDIX
VOLUME THREE

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 : PETITIONER	Alan Wilson Attorney General John W. McIntosh Chief Deputy Attorney General Donald J. Zelenka Senior Assistant Deputy Attorney General Anthony Mabry Assistant Attorney General S.C. Attorney General's Office P.O. Box 11549 Columbia, SC 29211-1549 (803) 734-6305 Daniel E. Johnson Solicitor, Fifth Judicial Circuit Post Office Box 192 Columbia, SC 29202 Attorneys for Respondent

**APPENDIX
INDEX**

**APPENDIX
VOLUME ONE**

Record on Appeal Volume 1	1

**APPENDIX
VOLUME TWO**

Record on Appeal Volume 2	484

**APPENDIX
VOLUME THREE**

Record on Appeal Volume 3	988
Final Brief of Appellant.....	1272
Final Brief of Respondent	1301
Final Reply Brief of Appellant.....	1350
Court of Appeals Opinion August 3, 2016	1369
Appellant Porch Petition for Rehearing August 17, 2016.....	1378
Order Denying Petition for Rehearing September 20, 2016.....	1385

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. 2011-GS-4003359

Appellate Case No. 2013-002531

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

RECORD ON APPEAL
VOLUME III

Michael J. Anzelmo SC Bar No. 72933 E-Mail: michael.anzelmo@nelsonmullins.com 1320 Main Street / 17th Floor Post Office Box 11070 (29211-1070) Columbia, South Carolina 29201 803.799.2000 Mervin Ashley Alexander Garry SC Bar No. 100088 E-Mail: ashley.garry@nelsonmullins.com 101 Constitution Avenue, NW / Suite 900 Washington, DC 20001 202.712.2800 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 Appellant	Alan Wilson Attorney General John W. McIntosh Chief Deputy Attorney General Donald J. Zelenka Senior Assistant Deputy Attorney General Anthony Mabry Assistant Attorney General S.C. Attorney General's Office P.O. Box 11549 Columbia, SC 29211-1549 (803) 734-6305 Daniel E. Johnson Solicitor, Fifth Judicial Circuit Post Office Box 192 Columbia, SC 29202 Attorneys for Respondent

1 would call Brian Godfrey.

2 SERGEANT BRIAN GODFREY, having been first duly
3 sworn, testified as follows:

4 THE CLERK: Thank you. Have seat on the witness
5 stand, please.

6 State your name for the record.

7 THE WITNESS: Brian Godfrey, G-O-D-F-R-E-Y. It's
8 B-R-I-A-N.

9 DIRECT EXAMINATION BY MR. GOINGS:

10 Q. Good afternoon.

11 Sergeant Godfrey, how are you?

12 A. Great, sir.

13 Q. Would you please tell the jury where you are currently
14 employed?

15 A. The Richland County Sheriff's Department.

16 Q. And how long have you been employed there?

17 A. I'm in my sixteenth year.

18 Q. And when you joined the Richland County Sheriff's
19 Department, what was your position or your rank?

20 A. When I first joined?

21 Q. Yes.

22 A. I was a judicial service officer. I actually worked
23 here in the courthouse and operated the paddy wagon.

24 Q. And at some point in time did you become an
25 investigator with the Richland County Sheriff's Department?

1 A. Yes, sir.

2 Q. When was that?

3 A. 2000.

4 Q. You took the exam?

5 A. Yes, sir.

6 Q. Received training?

7 A. Yes, sir.

8 Q. In investigations?

9 A. Yes, sir.

10 Q. Did that include conducting interviews and

11 interrogation of suspects?

12 A. Yes, sir.

13 Q. And we will get more into that in a little bit, but you

14 became sergeant when?

15 A. May of 2012, I believe.

16 Q. Okay. So in 2006, you were just an investigator with

17 the -- or 2009, you were just an investigator with the

18 Richland County Sheriff's Department?

19 A. Yes, sir.

20 Q. And you have been doing that for approximately how

21 long? Seven years -- or nine years?

22 A. About six years. About six years -- nine years at that

23 time, yes.

24 Q. Okay.

25 A. In 2009, yes, sir.

1 Q. You had a chance to participate in many investigations,
2 I'm assuming?

3 A. Yes.

4 Q. You had a chance to interview and interrogate numerous
5 suspects --

6 A. Yes, sir.

7 Q. -- over that time?

8 A. Yes, sir.

9 Q. And when did you become involved with the investigation
10 into Mr. Porch with regards to the Nakia Mallory homicide?

11 A. July 3rd of 2009.

12 Q. Tell the jury about how you became involved.

13 A. I was advised by Chief Wilson to assist in the review
14 of this case, and that's what I did..

15 Q. Was there any other agents that were also assigned to
16 review?

17 A. Sergeant McDaniels as well.

18 Q. Okay. And what did you do as the first part of your
19 investigation?

20 A. We conducted a case review on the case just to kind of
21 familiarize -- I didn't have anything to do with the initial
22 case, so I just kind of familiarized myself with the facts
23 and the reports and the statements that had been taken
24 prior.

25 THE COURT: I'm sorry, I can barely hear you. You

1 need to speak up a little bit, please.

2 THE WITNESS: I apologize.

3 THE COURT: Thank you.

4 BY MR. GOINGS:

5 Q. So back in 2006, when the homicide was -- when the
6 death took place of Nakia Mallory, you were not involved in
7 the investigation?

8 A. No, sir, I was not.

9 Q. Did you have any hand in the investigation?

10 A. No, sir.

11 Q. Did you have any role in the two trials against Justin
12 Miller?

13 A. I did not.

14 Q. So the first time that you -- did you even know about
15 the case at that time?

16 A. Yes, sir, I was familiar with what -- that a homicide,
17 or an alleged homicide had occurred, yes, sir.

18 Q. But you didn't have any active role in investigating
19 it?

20 A. I did not.

21 Q. Not until 2009?

22 A. That's correct.

23 Q. And you said that you reviewed the case file. What
24 parts did y'all review?

25 A. Just the transcript, the statements that were taken, a

1 lot of these photos, the reports that were generated as a
2 result of the first investigation of the case.

3 Q. And your involvement, did it come after or before the
4 new DNA testing -- or the DNA testing performed on the
5 clothing?

6 A. After.

7 Q. After?

8 A. Yes.

9 Q. So you had already had that information?

10 A. I did.

11 Q. Was the arrest warrant already secured by Chief Wilson
12 by the time you became involved?

13 A. No, sir, I don't believe so. I don't believe so. I
14 believe it was after.

15 Q. Okay. So you reviewed all the prior statements of Mr.
16 Porch?

17 A. Yes, sir.

18 Q. Including his trial transcript?

19 A. Yes, sir.

20 Q. And all the evidence that was uncovered by the
21 investigation of Holdorf and Strange?

22 MR. BRIAN SHEALEY: Objection to the leading, Your
23 Honor.

24 THE COURT: Sustained. Rephrase the question.

25 MR. GOINGS: Yes, ma'am.

1 BY MR. GOINGS:

2 Q. This would include the prior investigations, correct?

3 A. That's correct.

4 Q. Now, did you have -- what was your concerns after
5 reviewing the file?

6 A. The fact that Mr. Mallory's story had remained
7 consistent, never changed. And the fact that Mr. Porch's
8 story had changed several times.

9 The injury was significant for me as well, because it
10 was on her right side versus her left side.

11 The version that Porch gave would have been he would
12 have been between Mallory, which was said Mallory was facing
13 Ms. Mallory. Mr. Mallory was right handed. All the
14 injuries were on her right side. That would have been
15 inconsistent. The fact he was cut on his left hand is
16 significant, in that a lot of times in incidents such as
17 this where a knife is used, an individual will cut their
18 hand during the course of the assault.

19 Q. Describe that to the jury what you mean by that.

20 A. Probably one of the first things we will do when we
21 check somebody out on a particular homicide that's involving
22 with a knife, where we know some type of sharp instrument is
23 used, we will check their hand just to see if they have any
24 lacerations or anything. Sometimes they will stab in
25 portions. Maybe they will hit something, like the palm. If

1 there is nothing blocking, like a lot of knives will have
2 that little knob on it where it will stop you, but if it's
3 something normal, like a kitchen knife, or something like
4 that that's not going to have that, and when it hits
5 something that, the bones, their hand will actually go down
6 onto the blade and they will get that cut on their hand, so
7 we will look for things like that.

8 Q. Based on your knowledge of the investigations, how many
9 injuries were sustained by Joshua Porch?

10 A. He had been cut on his left hand.

11 Q. Based on your knowledge of the investigation and your
12 review of the file, how many injuries did Justin Mallory
13 have?

14 A. Zero.

15 Q. Based on your review of the file and your knowledge and
16 investigation, how many injuries did Nakia Mallory have?

17 A. Several. Quite a bit.

18 Q. What were they?

19 A. A wound to her neck, a wound to her eyebrow, and
20 several bruises about the head, the side of her head area,
21 if I remember from the pictures.

22 Q. So multiple injuries on Nakia Mallory?

23 A. Yes, sir.

24 Q. Now, you get the new DNA evidence. The arrest warrant
25 is secured. What's the next plan in the course of the

1 investigation?

2 A. We made our preparations to go to California.

3 Q. And when did y'all fly out there?

4 A. July 8th, 2009. We actually arrived in California at
5 three in the afternoon their time.

6 Q. Now, did y'all attempt to locate Mr. Porch in South
7 Carolina first?

8 A. I did not. There were measures. I know there was a
9 better -- I played no role in attempting to locate Mr. Porch
10 prior to. It was my understanding that he was in
11 California.

12 Q. Okay. And what happens once y'all get there?

13 A. We obviously got to get our living arrangements and our
14 rental car at some point during that night. I got ill.
15 There is some speculation whether or not it was jet lag or
16 McDaniels driving, but I did get ill during our dinner, so I
17 went back to the room and tried to sleep it off.

18 Q. What time did y'all arrive in California?

19 A. About three in the afternoon their time.

20 Q. What time did you get back to the hotel?

21 A. Right around dinnertime. I don't remember the exact
22 time. I was right in the middle of my dinner, actually, and
23 just got up and walked away.

24 Q. What was your understanding of what McDaniels was going
25 to do at that time?

1 A. He was just going to go conduct surveillance. We
 2 weren't familiar with the area. He was going to familiarize
 3 himself with where we needed to be the next day.
 4 Q. And you had already made contact with local authorities
 5 there?
 6 A. That's correct. McDaniels was handling most of that.
 7 Q. Okay. So you were -- is it your testimony you never
 8 personally discussed the logistics for any of the --
 9 A. I did not.
 10 Q. That was all McDaniels?
 11 A. Yes, sir.
 12 Q. But you were aware that you had cooperation with the
 13 Los Angeles County Sheriff's Department?
 14 A. Long Beach Police Department.
 15 Q. The Long Beach Police Department?
 16 A. Yes, sir.
 17 Q. And when was the next time that you are -- or you
 18 gained information about the whereabouts of Mr. Porch?
 19 A. I was contacted by Sergeant McDaniels via Nextel while
 20 I was at the hotel room.
 21 Q. Does your report indicate what time that you were
 22 contacted?
 23 A. It doesn't on mine. I can tell you that as soon as he
 24 contacted me I had to wait for a cab, and then the cab took
 25 me to the Long Beach Police Department, and I got there

PAGE INTENTIONALLY LEFT BLANK

PAGE INTENTIONALLY LEFT BLANK

1 about 12:55 in the morning.

2 Q. 12:55 in the morning?

3 A. Yes, sir.

4 Q. What did you observe once you got to the Long Beach
5 Police Department?

6 A. Once I got there I made contact with Sergeant
7 McDaniels. He was talking to some of the officers there.
8 They were just waiting for me.

9 Q. All right. Was Porch in the vicinity or he was secured
10 somewhere else?

11 A. He was not in the vicinity. He was secured in the
12 interview room that they had already placed him in.

13 Q. And what happened next?

14 A. Myself and Sergeant McDaniels went to talk to Mr. Porch
15 in the interview room.

16 Q. Now, describe his appearance. And when I say his, Mr.
17 Porch's appearance, on your first introduction to him.

18 A. All right. He was not handcuffed -- there was a ring
19 there to handcuff him to the table. He was not handcuffed.
20 Those had been removed.

21 We introduced ourselves, advised him of his rights. He
22 was cooperative.

23 Q. Did he appear tired, sleepy, or groggy in any way?

24 A. Not at all.

25 Q. Did he appear to be under the influence of any alcohol

1 or medication?

2 A. No, sir.

3 Q. Did he ever -- where is your understanding of where he

4 was located by Sergeant McDaniels prior to being transported

5 to the Long Beach Police Department?

6 A. At the Walgreen's.

7 Q. And do you know what time that was that he was located?

8 A. I do not. I mean, I heard. I don't have it in my

9 followup what time he was located.

10 Q. You said he did testify -- or you testified that he

11 didn't appear groggy or sleepy or under the influence of

12 anything, is that correct?

13 A. That's correct.

14 Q. And you said the advise of rights was given at what

15 time?

16 A. I have it at 01:12 their time, Pacific Time.

17 Q. I'm going to show you what's been admitted into

18 evidence as State's Exhibit 46. Do you recognize that?

19 A. Yes, sir.

20 Q. What is that?

21 A. That's the Richland County Sheriff's Department advise

22 of rights form that we used that evening.

23 Q. Were you present when that advise of rights form was

24 gone over with the defendant?

25 A. Yes, sir. I signified that by my witness signature on

1 both locations.

2 Q. Did he appear to understand his rights as y'all read
3 them to him?

4 A. Absolutely.

5 Q. Did he indicate whether he wanted to invoke any of
6 those rights as you read them to him?

7 A. He did not.

8 Q. At any point in time during the interview that took
9 place on the early morning hours of July 9th, 2009, did he
10 ever invoke his rights?

11 A. He did not.

12 Q. Did he ever fall asleep during the interview?

13 A. No, sir.

14 Q. Describe how the interview process went. I mean, what
15 occurred?

16 A. It was -- we introduced ourselves. We told him why we
17 were there. We asked him about his involvement in that.
18 Very shortly thereafter we asked him to confirm whether or
19 not Mr. Mallory was present and he stated that he was not.

20 And then shortly after that we asked him "well, since
21 Mr. Mallory was not present, what occurred in the
22 residence," and he gave his version of events, the newest
23 version of events of what occurred in the residence.

24 Q. And how long did the interview last?

25 A. Because this was reduced to writing, it lasted a lot

1 longer. It's ten pages. It took awhile. We were there
2 maybe four hours total, but most -- not all of that. There
3 was different restroom breaks, or water, or -- the actual
4 writing of the statement, so not all of it was interview and
5 interrogation.

6 Q. When the defendant is writing a statement out -- and
7 this is a pretty lengthy statement, is it not?

8 A. Yes, sir.

9 Q. Approximately how many pages?

10 A. On the first one there was ten handwritten pages.

11 Q. When you are doing the questions and the answers and
12 writing the statement out, I mean, this is just a
13 memorialization of what y'all had already covered in the
14 first part of the interview --

15 A. Yes, sir.

16 Q. -- or interrogation?

17 A. Yes, sir.

18 Q. And what time did the statement begin to be
19 memorialized?

20 A. 03:00, or three a.m. their time.

21 Q. Three a.m..

22 So advise of rights signed at 1:12, correct?

23 A. Yes, sir.

24 Q. The written statement started at three a.m.?

25 A. Yes, sir.

1 Q. So how long did the actual interrogation or interview
2 portion last, have lasted?

3 A. So from 1:15 until maybe about an hour and forty-five
4 minutes.

5 Q. And once the statement is started to begin
6 memorialized, that's what takes the remaining time?

7 A. Yes, sir.

8 Q. So from three a.m. until you indicated -- what time was
9 the interview over?

10 A. The -- I believe it was -- I think we were there
11 probably about four hours, so one to five.

12 And some of that time we also had to take and get him
13 processed and get coordination with Long Beach. So -- I
14 mean, there is a lot of other stuff that goes into it, other
15 than just sitting in a room talking to him.

16 When he got booked in, he went to a totally separate
17 part of where we were at, so all of that time frame there
18 was a lot of things that went into that, not just sitting in
19 a room and talking to him.

20 Q. Are you talking about from the 1:12 to the five clock
21 time frame?

22 A. Yes, sir.

23 Q. And at any point in time during this interrogation, or
24 any time when he was writing down the statement, he never
25 invoked his right?

1 A. No.

2 Q. Did you offer him bathroom breaks?

3 A. Yes, sir.

4 Q. Cigarette breaks?

5 A. I don't know if there were cigarette breaks that first

6 night. I don't think we had any. We don't carry them.

7 Neither one of us smoke. I know there was cigarette breaks

8 during the third statement.

9 Q. Okay. Now, did you offer him any water or food if he

10 was hungry or thirsty?

11 A. Yes, sir.

12 Q. Did he indicate whether he needed water or food?

13 A. No, sir.

14 Q. And the --

15 Well, let me ask you this before we get to actually

16 what he told in his statement. When you arrested -- and he

17 was under arrest, correct?

18 A. He was.

19 Q. Okay. And there may be some mention about interview

20 versus interrogation?

21 A. Yes, sir.

22 Q. Correct?

23 A. Yes, sir.

24 Q. I mean, was this an interview or was it an

25 interrogation?

1 A. I would say part of it was an interview and part of it
2 was an interrogation.

3 Q. But it's not uncommon to -- especially when you take
4 people into custody and having an interrogation of a
5 suspect, correct?

6 A. Oh, no, sir.

7 Q. And was he in custody?

8 A. He was.

9 Q. I mean --

10 And my question was going to be, when you are
11 investigating the case, when you make an arrest that late at
12 night, is it -- is it more common to go right in to talk
13 with the suspect, if he's willing, or do you want to wait
14 until the morning?

15 MR. BRIAN SHEALEY: Objection, leading.

16 THE COURT: Rephrase.

17 BY MR. GOINGS:

18 Q. What's the more uncommon? I mean, what are you going
19 to do when you make an arrest, even if it's that late at
20 night?

21 A. I'm going to interview and interrogate him.

22 Q. Okay. So you are not going to wait until the morning
23 time?

24 A. No, sir.

25 Q. Okay. And it's not like that was something special

1 about this case?

2 A. No, sir. In fact, it was our intention to do
3 everything in the morning. It just so happened it worked
4 out that way.

5 Q. Okay. Because McDaniels was able to identify him?

6 A. Yes, sir.

7 Q. The night before?

8 A. Yes, sir.

9 Q. I said the night before. At 10:30?

10 A. Yes, sir.

11 Q. That -- was that planned?

12 A. No, sir.

13 Q. And let's go into the statement. I know it's already
14 been published to the jury.

15 Just in your own words, what did the defendant tell you
16 in that first meeting on July 9th, 2009?

17 A. The first thing he did was he took Mallory out of the
18 equation, which was significant, because he had already
19 testified it was him, Mallory, or Justin Mallory and Ms.
20 Mallory that were involved in this altercation. So he took
21 Mr. Mallory out of the equation.

22 Now he was to provide for what occurred, since it was
23 just you and Mrs. Mallory. And then he provided the version
24 of events that was read by Investigator McDaniels, which was
25 essentially -- I could read this entire thing or kind of

1 give a brief synopsis.

2 Q. Just a brief synopsis of what you recall him saying.

3 A. Along the lines of he went over there to see Mr.
4 Mallory. Mr. Mallory wasn't home. Ms. Mallory invited him
5 in. During the course of that she made advances on him, or
6 what he considered advances, and he shunned her. She got
7 upset about that and essentially went and got the knife,
8 came in the room, and then she was accidentally stabbed in
9 the neck during the course of that altercation.

10 Q. Now, based on your training and expertise in law
11 enforcement -- you have been doing it a long time by this
12 point in time, correct?

13 A. Yes, sir.

14 Q. Tell the jury about, is it common or uncommon --

15 Let me ask it this way. Do most defendants come out
16 and tell you the full story the first time?

17 A. I have worked a lot of murders. I have worked a lot of
18 murders and every murder that I have worked and the suspect
19 that I have interviewed and interrogated, I have never had
20 one that I asked "did you kill this person" and they said
21 "yeah, I stabbed them just to see them die." I have never
22 had anybody to do that, to just come in and say it.

23 Q. Okay. And you know in this case you have had multiple
24 statements from the defendant, correct?

25 A. Yes, I do.

1 Q. Is that uncommon in investigations?

2 A. No, sir.

3 Q. And did Joshua Porch sign the written statement that

4 was memorialized?

5 A. No, sir.

6 Q. What was the attitude like in the room? I mean, was it

7 argumentative, or just --

8 A. Actually it was pretty cordial. Not very

9 argumentative. It was just having a conversation. It

10 wasn't even really that intense, to be honest with you.

11 Q. And you had training in interrogations and interviews,

12 correct?

13 A. Yes, sir.

14 Q. What is the goal, as you know it, as you have been

15 trained, when you are going into that room?

16 A. The primary goal that I have always learned in every

17 course that I have took is to obtain the truth. And I have

18 went in and interviewed and interrogated a number of people

19 and exonerated them, as well as include them, based off the

20 results of that interview and interrogation.

21 Q. So the main goal is not to get a confession, is it?

22 A. It's to get the truth.

23 Q. Now, during the first interview was Mr. Porch ever

24 threatened in any way?

25 A. Absolutely not.

1 Q... I'm not just talking physically. I'm talking about
 2 what types of criminal prosecution may be brought against
 3 him, any prosecution against family members. Was that
 4 threat ever made?

5 A. No, sir.

6 Q. Was a promise of leniency for Mr. Porch, or any of his
 7 family members, ever made by you or Investigator McDaniels?

8 A. No, sir.

9 Q. And you were there the whole entire time?

10 A. Yes, sir.

11 Q. Once you arrived?

12 A. Once I arrived at the Long Beach Police Department.

13 Q. Okay. And what's y'all's training tell you about doing
 14 such acts? I mean, are y'all trained to make promises or
 15 threats?

16 A. Oh, no, sir.

17 Q. In fact, do y'all even have the capability of making or
 18 following through with promises --

19 A. No, sir.

20 Q. -- if they were made?

21 A. No, sir.

22 Q. Because whose determination is it to whether or not to
 23 prosecute somebody or not?

24 A. That would be the solicitor's office.

25 Q. Now, let's move on to the second statement you received

1 from Mr. Porch.

2 A. He was advised of his rights at 2:19 their time, in the
3 afternoon on July 9th, 2009?

4 Q. So the first interview started -- or interrogation,
5 however you want to phrase it, stops five o'clock in the
6 morning?

7 A. Yes, sir.

8 Q. Approximately at five o'clock?

9 A. And that was including walking him to the detention
10 center, getting him booked in. It was a lot of stuff that
11 was involved in that.

12 Q. And then the next one didn't start until your advise of
13 rights says 2:19?

14 A. Yes, sir.

15 Q. So how long was the break in between the two?

16 A. Five -- well, so about nine hours and fifteen minutes.
17 Nine hours, somewhere around there.

18 Q. Okay. And what was the purpose -- I mean, what was the
19 purpose of the statement?

20 A. To -- we had actually talked to him prior to leaving.
21 We asked him if we could come back the next day. We were
22 going to check on some of the forensics and see if they
23 lined up with what he said and talk to some -- you know,
24 clarify some of the things that he had mentioned to us
25 during the course of that first statement. And we actually

1 asked him if it was okay if we could come back and see him,
2 and he was fine with it. So we came back. We told him we
3 were coming back. So the second time we come back was to
4 clear up some of the issues.

5 Q. And we are still at the Long Beach Police Department?

6 A. Yes, sir.

7 Q. And when you got back to the Long Beach Police
8 Department what happened?

9 A. He was -- obviously we are communicating with them, so
10 we are relying on them to go obtain Mr. Porch and bring him
11 to us.

12 We went back to the same interview room that we were at
13 prior. The same circumstances. He wasn't handcuffed in the
14 course of that particular interview either as well, and we
15 advised him of his rights again, just like we did prior.

16 Q. What was his demeanor in meeting him in the afternoon
17 of July 9th, 2009?

18 A. He was fine. It was somewhat of a cordial environment
19 as well. We were there. We just talked about what was said
20 the day prior, or that -- earlier that morning.

21 Q. Are you aware or not if he had been fed and --

22 A. We made sure that we didn't go there until after a
23 certain period of time. We knew he would have to eat. We
24 did ask him if he was thirsty, or hungry, or restroom breaks
25 several times during the course of the entire time that we

1 were there.

2 Q. Did he ever indicate at any point in time that he was

3 thirsty or hungry?

4 A. No. I mean, we got him -- I know he was drinking at

5 some point.

6 Q. Now, did he look sleepy, tired?

7 A. Oh, no, he was fine. He appeared fine to me.

8 Q. Did he appear to understand all the questions that

9 y'all were asking on this occasion?

10 A. Absolutely.

11 Q. And obviously since he was detained at law enforcement,

12 I'm assuming that he wasn't under the influence of anything?

13 A. He did not appear to be.

14 Q. And approximately how long was this interview or

15 interrogation?

16 A. Let's see, I typed this statement. We were there

17 from -- for approximately three hours, from about two to

18 five.

19 Q. Two to five?

20 A. Yes, sir.

21 Q. And describe the format of this particular meeting.

22 A. The format of this particular meeting?

23 Q. Yeah. I mean, how did this -- how was the

24 interrogation taking place? I mean, what was going on? Was

25 it argumentative at this point? I mean --

1 A. No, sir, it was very --

2 Q. Describe it to the jury.

3 A. We were trying to clarify his story he had told us.

4 And told him what the inconsistencies we thought were there,

5 what we thought didn't make sense, and could he explain it.

6 Q. Okay. And did he provide another written statement?

7 A. Yes, sir, he did.

8 Q. You actually said this one was typed out. What time

9 was this statement begun?

10 A. 15:39, which is 3:39 their time in the afternoon.

11 Q. Is this similar to the first one where y'all had some

12 exchange of information, question and answer, and then --

13 A. Yes, sir.

14 Q. -- memorialized it in writing?

15 A. Yes, sir. So we talked from 2:19 until 3:29 -- or

16 3:39, and then we were just -- what we talked about in that

17 period of time.

18 Q. An hour and twenty minutes of back and forth, and then

19 how long did it take to get this statement typed out?

20 A. I type relatively fast, but it was -- I have to -- I'm

21 not as fast as he speaks, so I typed and he would -- it kind

22 of broke. He would say something and I would type it, type,

23 type, type.

24 Q. Now, did you give him an opportunity to review the

25 statement?

1 A. Yes, sir, he was.

2 Q. Did he change it, if he wanted to?

3 A. Absolutely.

4 Q. Did he make any changes as we see the statement today?

5 A. No, sir.

6 Q. Did you witness his signature on it?

7 A. I did.

8 Q. And, again, y'all give him a separate advise of rights

9 for this statement before any conversations took place, is

10 that correct?

11 A. That's correct.

12 Q. Did you see him sign that advise of rights form?

13 A. Yes, sir, I did.

14 Q. Did he understand his rights as y'all went over them?

15 A. Yes, sir.

16 Q. Did he appear to be confused about anything?

17 A. No, sir.

18 Q. At any point in time during this second meeting with

19 Mr. Porch, did he invoke his right to anything?

20 A. No, sir.

21 Q. Right to counsel or right to remain silent?

22 A. No, sir.

23 Q. And let's talk about the location again. You said

24 these were both conducted at the Long Beach Police

25 Department, correct?

1 A. Yes, sir.

2 Q. Is it your policy to record interviews or

3 interrogations?

4 A. At the Richland County Sheriff's Department?

5 Q. Yes.

6 A. No, sir. The only -- the only interview or

7 interrogations that are recorded are in the polygraph room.

8 Q. And this -- these first two meetings were not

9 videotaped or audio taped, is that correct?

10 A. That's correct.

11 Q. Do you know if the capabilities were available?

12 A. I did not see any available in that room.

13 I know there has been mention of a recorder on the

14 phone. I have never used a phone to record. I'm not even

15 sure my phone will record that long. It may or may not, I

16 have never tried it.

17 But, no, sir, I didn't see any capabilities to record

18 at that department, in the room that we were in.

19 Q. And the third statement --

20 Well, before we get there, during the second one, was

21 he threatened --

22 A. No, sir.

23 Q. -- in any way?

24 A. No, sir.

25 Q. And I'm not talking about physically or anything. I'm

1 talking about was he threatened for criminal -- threat of
 2 criminal prosecution, or anything of that nature?
 3 A. Absolutely not.
 4 Q. Was any of his family members threatened in any way?
 5 A. Absolutely not.
 6 Q. Was there any promise of leniency for him if he
 7 cooperated with the investigation and answered the questions
 8 you told him the way y'all wanted him to?
 9 A. No, sir.
 10 Q. Was there any promise of leniency for his family
 11 members, including Persia and Robert Brown, who I believe is
 12 his brother-in-law?
 13 A. No, sir.
 14 Q. And you were there the whole time with Investigator
 15 Godfrey -- I mean Investigator McDaniels, I apologize?
 16 A. Yes, sir, I was.
 17 Q. And he made -- did you ever hear him make any threats?
 18 A. No, sir.
 19 Q. Promises?
 20 A. No, sir.
 21 Q. Anything of that nature?
 22 A. No.
 23 Q. Let's go to the third statement.
 24 This actually occurred at a different location, is that
 25 correct?

1 A. That's correct.

2 Q. And that was at the Los Angeles County Sheriff's
3 Department?

4 A. One of their field offices, yes, sir.

5 Q. But this room was equipped with videotape?

6 A. That's correct.

7 Q. At a different location?

8 A. Yes, sir.

9 Q. So was that common, or -- I mean, is that strange that
10 this facility would have videotape versus another one that
11 doesn't?

12 A. No, sir.

13 Q. And you had a chance to meet with him a third time, you
14 and Investigator McDaniels?

15 A. Yes, sir.

16 Q. What time did this interaction take place on July 10th,
17 2009?

18 A. We actually made contact at eleven o'clock that morning
19 on the 10th. The time that me and Sergeant McDaniels
20 actually talked to him was sometime later. I don't remember
21 the exact time.

22 Q. And he was actually interviewed by a Los Angeles County
23 Sheriff's Department deputy while there, is that correct?

24 A. That's correct.

25 Q. That's the length of time before y'all actually get

1 into the interview room?

2 A. Yes, sir.

3 Q. And you were here in court yesterday, correct?

4 A. I was.

5 Q. You saw the video, y'all's meeting with Mr. Porch on
6 July 10th, 2009?

7 A. I did.

8 Q. And before we get to what he discussed, what was his
9 demeanor like on this particular occasion?

10 A. Pretty consistent with before. He was very
11 cooperative. We had a pretty good rapport, relationship, I
12 would say.

13 Q. And did he appear sleepy or tired even when y'all got
14 in there?

15 A. Absolutely not.

16 Q. And you testified that it was eleven, but y'all didn't
17 meet with him until what time?

18 A. Sometime later. Maybe -- I would be guesstimating.
19 Maybe six or seven. Maybe not that long.

20 Q. So it was awhile later when y'all arrived at the Los
21 Angeles County Sheriff's Department?

22 A. Yes, sir.

23 Q. But still did he appear tired in any way?

24 A. No, sir.

25 Q. When he was meeting with the Los Angeles County

1 Sheriff's Department was he given smoke breaks, bathroom
2 breaks?

3 A. Smoke breaks, bathroom breaks, drink, food.

4 Q. And we saw on the video, he wasn't handcuffed at any
5 point in time during that interview with you, was he?

6 A. No, sir.

7 Q. And y'all try to make individuals as comfortable as
8 possible, correct?

9 A. Yes, sir.

10 Q. And at any point in time from the first statement that
11 was given until July 10th, 2009, did the defendant invoke
12 his rights under Miranda?

13 A. No, sir.

14 Q. Did he ever tell you that "hey, I don't want to talk to
15 y'all any more"?

16 A. No, sir.

17 Q. And if he did, what would have happened?

18 A. We would have walked away.

19 Q. Okay. And anytime from the second waiver of rights
20 that was signed on July 9th, in the afternoon hours, until
21 July 10th, did he ever invoke his rights?

22 A. No, sir.

23 Q. Did he ever say "hey, I'm done with y'all"?

24 A. No, sir.

25 Q. And let's discuss that third statement. I'll get a

1 little closer to the jury yesterday, but based on your
2 recollection, what did Mr. Porch indicate at this point in
3 time?

4 A. He had some details.

5 Q. Such as?

6 A. Taking the knife from the scene and throwing it in a
7 dumpster.

8 The fact that she was standing up versus lying down.
9 when she actually got stabbed during the course of the
10 struggle.

11 That he had never fell on top of her.

12 His clothing description that day.

13 We talked about the cleaning of the car, and those type
14 of different details. We shored up some different details.

15 Q. And the information that was contained in the video,
16 y'all also indicated he handled it about Robert Brown.

17 A. Yes, sir.

18 Q. Do you know who Robert Brown is?

19 A. I think it's his brother.

20 Q. And y'all on the video indicate that y'all wanted his
21 story to match the information that y'all were getting from
22 the jeep that y'all had located?

23 A. Yes, sir.

24 Q. Y'all hadn't, in fact, located the jeep at that point
25 in time, did you?

1 A. Not to my knowledge, no.

2 Q. So that was a lie?

3 A. Yes, sir.

4 Q. Y'all make a lie to individuals in custody?

5 A. Yes, sir.

6 Q. Okay. Is it uncommon?

7 A. Oh, uncommon, no, sir.

8 Q. Okay. And that's a perfectly acceptable way when you
9 are interrogating a suspect?

10 MR. BRIAN SHEALEY: Your Honor, I'm going to
11 object to the leading.

12 THE COURT: Sustained.

13 MR. GOINGS: I'll rephrase, Your Honor.

14 BY MR. GOINGS:

15 Q. Is that inappropriate?

16 A. No, we are able to do things like ask questions like
17 the life wood, somebody will say such and such, such and
18 such, or is there any reason such and such, with the
19 insinuation that maybe something is there to see if what a
20 response is. But to lie is normal. That's not uncommon.

21 Q. When y'all first approached him with the first
22 statement, at any point in time during this interview, while
23 y'all are -- from what we couldn't see on video prior to or
24 before, were any threats made to Mr. Porch about any type of
25 prosecutions that would come down from this?

1 A. Absolutely not.

2 Q. Or any promises of leniency to any type of criminal
3 prosecution, or any other things promised to Mr. Porch, that
4 was not contained in that video?

5 A. No, sir.

6 Q. Were there any threats made against his family,
7 including Persia or Robert Brown, by you or Investigator
8 McDaniels?

9 A. No, sir.

10 Q. Were there offers of leniency for them or thinking that
11 they wouldn't be prosecuted?

12 A. No, sir.

13 Q. At no point in time was that information ever discussed
14 with Mr. Porch?

15 A. No, sir.

16 Q. But y'all did discuss Persia --

17 MR. BRIAN SHEALEY: Objection to leading.

18 BY MR. GOINGS:

19 Q. Did y'all discuss Persia and Robert Brown?

20 A. Yes, sir.

21 Q. In what context?

22 A. We were trying to identify what their involvement may
23 have been in this particular incident, if any at all.

24 Q. Why was that important, at least to Persia? I mean --

25 A. She had provided a statement that he had never left the

1 house. She had provided statements about --

2 For all we know, he may have went and told her
3 everything after it happened. We don't really know what he
4 told her.

5 I have worked plenty of cases where people told their
6 spouse what occurred at a particular incident. We just
7 wanted to see what he had told us that they knew.

8 Q. And with regards to Robert Brown, what kinds of
9 statements did that come out?

10 A. The cleaning of the vehicle, whether or not he went to
11 Mr. Brown for supplies, and whether or not he may have told
12 Mr. Brown what occurred.

13 Q. Did he ever make any admissions as to whether or not he
14 cleaned his vehicle?

15 A. He said he did clean his vehicle up, yes, sir.

16 Q. And the story -- based on these three statements you
17 got from the defendant, did it match the evidence that y'all
18 had?

19 A. It's consistent with the evidence that we had, yes,
20 sir.

21 MR. GOINGS: Beg the court's indulgence.

22 (Off the record)

23 (Back on the record)

24 MR. GOINGS: That's all the questions that I have
25 at this time, Your Honor.

1 THE COURT: Any cross?

2 MR. BRIAN SHEALEY: May it please the court?

3 THE COURT: Yes, sir.

4 CROSS EXAMINATION BY MR. BRIAN SHEALEY:

5 Q. Let's be clear. There was some questioning about
6 interview versus interrogation?

7 A. Yes, sir.

8 Q. Okay. This was an interrogation?

9 A. Every interrogation, in my opinion, begins with an
10 interview. Maybe ask them about life.

11 I do a lot of interrogations and I can't think of one
12 in the last years that I have ever started without
13 interviewing first, so during the course of this there was
14 an interrogation, I agree.

15 Q. Okay. This is a copy of your pretrial transcript.

16 A. Uh-huh.

17 Q. And you were asked specifically "let's be clear." This
18 was not an interview was it?

19 "No, this was an interrogation."

20 A. Yeah, it was an interrogation. I agree.

21 Q. Okay. Now, you got vast experience and vast training
22 to help you do what you do, right?

23 A. Yes, sir.

24 Q. And you have been an investigator for a long time,
25 since 2000, I think you testified to?

1 A. Yes, sir.

2 Q. Okay. Currently you're in cold case files. That's

3 what you investigate, amongst others things?

4 A. Yes, sir. I'm the sergeant over that unit, yes, sir.

5 Q. And back when you were interrogating Mr. Porch, cold

6 case again, right?

7 A. No, sir.

8 Q. You weren't?

9 A. Sergeant McDaniels was over cold case, I believe.

10 Q. You weren't working in cold case then?

11 A. No, sir, I don't believe I started -- I came after

12 McDaniels on that.

13 Q. And would it be true that you were working cold case at

14 the time, roughly?

15 A. Roughly right around that time. I can't remember when

16 the transition was, but I replaced Sergeant McDaniels.

17 Q. Okay. And he is doing white collar crime now?

18 A. Currently, yes, sir.

19 Q. Now, you have heard of the Navy, right?

20 A. Sir?

21 Q. You have heard of the Navy?

22 A. Have I heard of the Navy?

23 Q. Yes.

24 A. The military branch of the service?

25 Q. Yes, sir.

1 A. I was in the Marine Corps, yes, sir.

2 Q. Okay. You have heard of the Navy Seals?

3 A. I have heard of them, yes, sir.

4 Q. Okay. I would like to make that parallel, because they

5 just don't let anybody be in cold case files, do they?

6 A. They don't let anybody just be in cold case files?

7 Q. They don't let a road deputy lead cold case files?

8 A. No, sir.

9 Q. He hasn't had his service skills yet?

10 A. I have near seen a road deputy lead cold case, no, sir.

11 Q. You have to be skilled at what you do, right?

12 A. Yes, sir.

13 Q. Somewhat selective?

14 A. Yes, sir.

15 Q. Okay. And it's hard. You probably have had some

16 success with your investigations to get to that point, is

17 that fair?

18 A. I would agree with that.

19 Q. Okay. And you wouldn't disagree with me to say that

20 you are an absolute skilled interrogator?

21 A. Probably depends on the day.

22 Q. Okay.

23 A. I think sometimes I suck. Sometimes I'm pretty good.

24 Q. Probably?

25 A. Uh-huh.

1 Q. But you are in cold case?

2 A. I am, yes, sir.

3 Q. Now, we were talking about your partner here. He
4 called you his partner, Investigator McDaniels.

5 Y'all had a murder warrant for Mr. Porch when you went
6 out to California?

7 A. Yes, sir.

8 Q. And if you had made contact with him, which you did,
9 regardless of what happened, he was coming back to South
10 Carolina. Not necessarily you, but he was coming back.

11 A. There is a -- there is a process in place dealing with
12 extradition, so it would be -- at that point it would be
13 premature for me to say that I knew that he was coming back
14 at that time.

15 Q. That was your intent?

16 A. The likelihood was he was going to come back.

17 Q. And the whole point of extraditing is to bring him
18 back?

19 A. Yes, sir.

20 Q. Okay. Now, Mr. -- or Investigator McDaniels discussed
21 this case, where he -- even though it's not a policy of
22 Richland County, but he did record a friend that was charged
23 with murder that he believed was innocent. He talked about
24 that. You were here.

25 A. I'm the one who arrested the friend, yes, sir.

1 Q. Right.

2 A. I was down the street.

3 Q. And you have been here throughout this trial?

4 A. Yes, sir.

5 Q. And he did talk about the use of a recording device at
6 that point?

7 A. He wore a body mike at Polo Park off of Polo Road. He
8 went in the office. He was recorded. I was down the street
9 listening, yes, sir.

10 Q. Right.

11 But that's not your policy?

12 A. To wear --

13 Q. To record confessions or interrogations. That's not
14 generally your policy, or Richland County's?

15 A. The -- in that particular instance, anytime we do -- we
16 have undercover who would be wearing mikes all the time,
17 going into residences, locations.

18 It is not our -- on that particular incident I think
19 it's, number one, feasible, because I needed to hear what
20 was going on down the street, but I also think that whenever
21 we send an undercover into a residence, per say, they are
22 wearing some type of recording devise.

23 It is not our policy to record individuals, you are
24 correct.

25 Q. Right.

1 Generally you testified that's not Richland County's
2 policy, and you don't do it.

3 A. That's -- that's not the same scenario that we were in,
4 but I believe it was feasible in that particular scenario.

5 Q. But it's testified to that that's not your policy --

6 A. I agree.

7 Q. -- in Richland County.

8 A. I agree.

9 Q. It certainly wasn't done on this occasion.

10 A. It was not.

11 Q. Okay.

12 A. On the first two, that's correct.

13 Q. But you did make good preparations to go to California,
14 right?

15 A. Yes, sir.

16 Q. But you just -- you weren't going to bring one of
17 these, right?

18 A. I did not bring one of those.

19 Q. And you would agree with me that while that may be
20 tedious, if that thing was running from every point of
21 contact that you had with Mr. Porch, we would have a lot to
22 talk about, right?

23 A. I think we talked about the same thing that's put in
24 those statements.

25 Q. Okay. But you would agree that the things that were

1 put in the statements were drafted or typed by either you or
 2 Investigator McDaniels?
 3 A. We actually put into the paper, that's correct.
 4 Q. Right.
 5 A. The words came from both Mr. Porch and then me or Mr.
 6 McDaniels, yes.
 7 Q. But you are the one that put it down on the paper?
 8 A. As he said it, I'm the one that pushed the keys. That
 9 would be correct, on the second statement.
 10 Q. And if anything missed that paper, because, I mean, you
 11 are human, right?
 12 A. Yes.
 13 Q. You not perfect.
 14 A. I'm human. I agree with that.
 15 Q. If any conversation was missed that could have been
 16 picked up here but didn't make it to that paper, we are not
 17 getting that?
 18 A. That's what -- that's the purpose of signing it twenty
 19 times and us signing it, to make sure we didn't leave
 20 anything out, or there wasn't anything else that needed to
 21 to be put in.
 22 Q. And you would agree that important conversations needed
 23 to be recorded?
 24 A. I don't have any problem with recording.
 25 I don't have any problems with the way this was done

1 either. This has been tested time and time again. I have
2 no issue with what was done in California.

3 Q. But you would agree that the thing that matter, like a
4 trial, or an important charge, things of significance, it
5 would be important to all the context, and, therefore, be
6 recorded. You would agree with that?

7 A. The context is right there. I don't know what other
8 way to answer the question. I have zero problem with the
9 way that the interview and interrogation was done any of the
10 times that we were interviewing and interrogating.

11 Q. Okay. I mean, you would agree that this trial and this
12 conversation we are having is important, right?

13 A. It's extremely important.

14 Q. That's why you have the gentleman right to your left
15 taking it down as we speak, because that's important, right?
16 You don't disagree with that?

17 A. That's their policy. I'm fine if he takes it or
18 doesn't take it. The only people I care to hear it are to
19 my right.

20 Q. Okay. But -- and I'm talking about cold case and you
21 agreed about your vast training and your experience and that
22 you are a -- you know how to interrogate. You are a part,
23 an investigator, right?

24 A. I'm a part of an investigator?

25 Q. That's your title. I know it's sergeant, but you are

1 an investigator.

2 A. I'm a lot of things. I'm a father. I'm a husband.

3 Q. Okay. But in the context of what you are doing in this
4 courtroom, you're an investigator.

5 A. I investigate crimes. I do.

6 Q. Okay. Now, I like to get out the old dictionary and I
7 like to look up things from time to time. You would agree
8 with me that -- and I just looked up the term investigate --

9 A. Okay.

10 Q. -- which means to inquire into a matter systematically.
11 That sounds fair?

12 A. To inquire into a matter systematically?

13 Q. Uh-huh, the definition of investigate?

14 A. It sounds good to me.

15 Q. That seems fair?

16 A. Yes, sir.

17 Q. That doesn't mean to conclude into a matter
18 systematically; conclusion. It's to inquire, right? That's
19 the part of the job of being an investigator?

20 A. To gather facts?

21 Q. Sure.

22 A. That's correct.

23 Q. To inquire into a matter systematically?

24 A. Yes, sir, gather facts, I agree.

25 Q. As an investigator, it might be improper to just jump

1 to conclusion, to make a conclusion, before you have
2 actually looked into the matter or talked to the subject,
3 right?

4 A. Yeah, I think you should remain neutral. I think you
5 should look at every aspect of it. I agree.

6 Q. But you went out there before you talked to Mr. Porch
7 armed with this, this murder warrant?

8 A. Yes.

9 Q. Which you have testified in a previous matter that you
10 got this because you believed he did it?

11 A. Okay, I do believe he did it. I still believe he did
12 it.

13 Q. So before you talked to him, you had made conclusions,
14 right?

15 A. It's impossible to conduct an interview and
16 interrogation without making some type of conclusion.

17 Q. But you had this before you did the interrogation.

18 A. That's because I needed that before going out there.

19 Q. Did you?

20 A. Yes, sir.

21 Q. Why was that?

22 A. To bring him in.

23 Q. Well, I was confused. Investigator McDaniels said that
24 maybe -- I think you just testified he could have walked
25 away. He wasn't walking away anywhere, right?

1 A. I never said he could walk away.

2 Q. Didn't you just testify if he asserted his rights to a
3 lawyer --

4 A. I said I would walk away.

5 Q. You walk away, okay. He is coming back with you?

6 A. Yeah, he's coming.

7 Q. Okay.

8 A. That interview and interrogation would stop, though.

9 Q. We are clear. We are clear.

10 A. Okay.

11 Q. But y'all came out there armed with this?

12 A. Yes, sir.

13 Q. There is no bones about that?

14 A. A copy of that, yeah. He was actually in NCIC, but we
15 had a copy of this person. He knew we had a warrant.

16 Q. And you have been here throughout the entire trial. In
17 fact, when you -- your understanding is as a lead
18 investigator that Investigator McDaniels was actually
19 pressed it on him and said -- you know, pressed his badge on
20 him and said "you thought you got away with it. You almost
21 got away with it," something like that, right?

22 A. That's what he testified. I was not present, but I
23 believe --

24 Q. That's what you understand about the facts when contact
25 was made?

1 A. Yes, sir.

2 Q. And that's an initial confrontation, right?

3 A. I agree.

4 Q. Okay. Now, we have established this is interrogation
5 and we have established that y'all went out there with a
6 murder warrant in hand to go interrogate, right?

7 That was a goal. I think -- I believe Chief Wilson
8 said that was one of the main objectives was to go ahead and
9 interrogate Mr. Porch?

10 A. That's what an investigator would do.

11 Q. Right.

12 Now, y'all got out there on the 8th of July in 2009?

13 A. Yes, sir.

14 Q. And you had reviewed the case, gotten ahold of Chief
15 Wilson. I think you testified that you looked at some
16 transcripts, right?

17 A. Yes, sir.

18 Q. You looked at some of the evidence in the case, the
19 crime scene pictures, right?

20 A. I did.

21 Q. You looked at some of the reports, medical reports,
22 statements from witnesses. I mean, you had a good
23 understanding. You didn't want to be misinformed when you
24 got there. You wanted a basis to start with your
25 interrogation?

1 A. I agree.

2 Q. Okay. You got out there and you secured lodging,
3 proper lodging, right?

4 A. Yes, sir. When I say proper, it was a little further
5 away than we wanted. We didn't realize the town was going
6 to be so big.

7 Q. You wanted a hotel room where you could be comfortable
8 when you were trying to do your job?

9 A. Yes, sir.

10 Q. Okay. Now, you became a little bit ill, right?

11 A. I did.

12 Q. Got a little queazy or sick, I think?

13 A. I had a significant migraine, which in turn made my
14 stomach upset.

15 Q. Okay. So you weren't at that point really able to do
16 your job properly?

17 A. I wanted to recover. I would agree. I was not feeling
18 well.

19 Q. And you were ill. You weren't feeling well enough to
20 do what you went out there to do, right?

21 A. I could have did it. If push came to shove, I could
22 have did whatever I had to. We hadn't intended to really do
23 nothing that night, so I went to sleep.

24 Q. But you weren't at your best, right?

25 A. Was I at my best?

1 Q. When you were ill, that's fair, right? You are not at
 2 your best to --
 3 A. I wasn't feeling, I agree.
 4 Q. Now, in your situation, something that made you feel
 5 not at your best was illness, right?
 6 A. Uh-huh.
 7 Q. So you would agree that someone could not feel well and
 8 not be at their best do a lot of things, right?
 9 A. Sitting in court all week.
 10 Q. I agree.
 11 A. Uh-huh.
 12 Q. Lack of sleep could be one of them. Tired, maybe you
 13 are not at your best?
 14 A. Sure.
 15 Q. Potentially physical distress? If McDaniels driving
 16 and y'all got in a wreck and you hurt your arm or leg, then
 17 maybe you're not at your best, right?
 18 A. Okay.
 19 Q. For example, physical distress, you agree with that?
 20 A. If I broke my leg?
 21 Q. I'm saying that's an example of some way that you, or
 22 anyone, could potentially not be at their best.
 23 A. With a broken leg, yeah, probably not run any
 24 marathons --
 25 Q. Sure.

1 A. -- with a broken leg.

2 Q. Sure. So lack of sleep, physical distress, emotional
3 distress. If something bad happened to you personally and
4 you weren't feeling very well mentally, you are not at your
5 best?

6 A. Sure.

7 Q. Okay. And you would also agree that, and maybe not me,
8 per say, about if someone threatened you and you perceived
9 that threat to be credible, you may not feel at your best?

10 A. Are we speaking hypothetically?

11 Q. Sure. Talking about people, folks, general.

12 A. Probably depended upon the person.

13 Q. Threats to a family member, certainly you may not feel
14 at your best?

15 A. It may depend on the family member threatened.

16 Q. Maybe a family member you didn't like, huh?

17 A. Yeah.

18 Q. But if someone you cared for, like your wife --

19 A. Uh-huh.

20 Q. -- that may not make you feel too well, right?

21 A. Make you feel too well?

22 Q. Sure, not at your best.

23 A. I don't agree I'm not at my best. I probably wouldn't
24 be happy about that.

25 Q. Anybody wouldn't be happy if someone was threatening

1 their wife, right? You would agree with that?

2 A. Probably depends on the wife.

3 Q. Could be.

4 A. Depends on the individual.

5 Q. Okay.

6 A. Yeah.

7 Q. Okay. Now, after you -- I think in your report says

8 that you got some rest, you felt much better and you were

9 able to join Investigator McDaniels, correct?

10 A. I did feel better.

11 Q. And this is still -- well, actually contact was made,

12 as you understand, at Walgreen's maybe around 10:30, 11:00,

13 something like that?

14 A. Yes, sir.

15 Q. McDaniels was doing it on his own and had a

16 confrontation at that point with Mr. Porch at Walgreen's,

17 right?

18 A. Yes, sir.

19 Q. Local police were involved. There were a lot of people

20 out there to help secure?

21 A. That's my understanding.

22 Q. And brought him back to a place where he could be

23 properly interrogated, right?

24 A. Yes, sir.

25 Q. Okay. Now, this was late, per your report. You know,

1 you are getting there around one o'clock?

2 A. Yes, sir.

3 Q. Per McDaniels testimony he had gotten there roughly
4 around 12:30?

5 A. Yes, sir.

6 Q. He was the guy that went there and made contact and had
7 them set up in that interrogation room and he released the
8 shackles. He released his handcuffs or what was keeping him
9 to the table?

10 A. Yes, sir.

11 Q. About thirty minutes he was there and you weren't there
12 with Investigator McDaniels?

13 A. That's correct.

14 Q. So you have no personal knowledge of anything that was
15 said or done at that point in time, other than what you have
16 been told, right?

17 A. That's correct.

18 Q. Thirty minutes, roughly?

19 A. Roughly.

20 Q. Okay. Now, you got three days of interrogation, right?
21 You got -- contact was made the 8th. You got the 9th, and
22 then we have got the 10th we are talking about here?

23 A. Three days of interrogation?

24 Q. Three separate days, 8th, 9th and 10th, that we are
25 talking about here in July?

1 A. I don't think any interrogation was done on the 8th.
 2 Seeings how I didn't get there until the 9th, and that was
 3 the very first one.
 4 Q. That's fair, but contact is made and this process
 5 lasts, at least as far as your involvement, basically over
 6 the course of three days, 8th, 9th, and 10th?
 7 A. Are you including the time that we weren't together?
 8 Q. I'm just including you and --
 9 A. The entire time we were there in California?
 10 Q. I'm including the time that you or either Investigator
 11 McDaniels made contact and had contact with Mr. Porch.
 12 A. No, we did not contact him for two days straight. We
 13 were not with him for two days straight.
 14 Q. Investigator McDaniels --
 15 A. No.
 16 Q. Investigator McDaniels made contact with him on the
 17 8th? That's fair?
 18 A. He did make contact with him on the 8th.
 19 Q. And then y'all were with him twice on occasion on the
 20 9th?
 21 A. We were.
 22 Q. And then the 10th?
 23 A. That's correct.
 24 Q. You watched the whole video about the 10th, right?
 25 A. That's correct.

1 Q. And that was at the end of six and a half hours of
2 talking to another investigator from Los Angeles too?

3 A. That's correct.

4 Q. Okay. So that was at the end of that?

5 A. That's correct.

6 Q. So we got the 8th, as far as the point of contact; the
7 9th and the 10th?

8 A. Uh-huh.

9 Q. Okay. So we are clear.

10 Now, you testified to this, but just so we are all
11 certain, as far as the times, you get there a little after
12 one, but you testified that the entire point of contact
13 where you and Investigator McDaniels are with Mr. Porch is
14 from about one to five, I think. I think Shawn testified
15 one to six?

16 A. Right.

17 Q. One to five, one to six, something like that?

18 A. Somewhere around there.

19 Q. Okay. You are dealing with a four or five hour period
20 of time there, right? The initial statement is generated,
21 right?

22 A. That's not what occurred during that entire time, no.

23 Q. At the end of that time there is a statement?

24 A. Correct, and there was also some period of coordinating
25 his movement, breaks. And there is a lot of things that

1 went into that period of time. This was just not a sitting
2 in a room talking to him for four or five hours straight. I
3 disagree with that.

4 Q. We definitely know that this was on him, exactly how
5 many breaks occurred or what happened, right?

6 A. Yeah.

7 Q. But you would agree with me that that's basically the
8 amount of time that -- to complete everything; your contact,
9 the breaks, the interviews, interrogations, you know?

10 A. Lodging.

11 Q. Writing up, all that kind of stiff?

12 A. Yes, I agree.

13 Q. And this was late. I mean, you must have been really
14 tired, with the time change and everything else. You are
15 feeling ill. This was late, right? And you got there at
16 one a.m. Pacific Time?

17 A. I have never been tired -- and I have worked a lot of
18 murders, a lot of long hours longer than that, and I have
19 never felt tired in the course of an interview with someone
20 related to a murder. I can't think of one time that I felt
21 sleepy during the course of that.

22 Q. All right. But we have already established you are in
23 cold case, and that you are a good interrogator, and you are
24 obviously a superior investigator?

25 A. Training stage. I have more stamina, is that what you

1 are saying?

2 Q. Well, you are obviously well trained.

3 A. Thank you.

4 Q. But your average citizen is probably not, you would
5 agree, right?

6 A. I don't agree. We all have different jobs. We all
7 have different -- some people are night people. Some people
8 are morning people. I don't know the habits of anybody.

9 Q. I'm kind of tired right now. So you are saying it's
10 not fair to the average person who could be tired starting
11 at one o'clock in the morning and ending at six a.m.?

12 A. Are you saying you are the average person?

13 Q. I'm pretty average, yeah.

14 A. Yeah.

15 Q. And you testified that he did not appear sleepy, right?

16 A. I -- I know he wasn't sleepy. He did not appear to be
17 sleepy.

18 Q. Well, we have already heard Investigator McDaniels, and
19 you have been sitting here. That wouldn't have mattered to
20 you if he did appear sleepy. Y'all wouldn't have stopped
21 the interrogation. I mean, Shawn was pretty clear right
22 here.

23 A. I'm going to disagree with you on that, because I have
24 at times terminated -- in my history of interviewing and
25 interrogating people, I have at times terminated, depending

1 on the circumstances.

2 Q. So you are sitting here saying that -- Shawn is saying
3 "why would I? Why would we stop? We are here with the
4 murder warrant. We are here to interrogate somebody about
5 murder. We have got someone to question. Why would we stop
6 then," was his response.

7 A. He didn't -- that wasn't the question, though. You are
8 twisting it a little bit. He is saying "no, we did not --
9 because we arrested him at 12:30, he said he did not appear
10 sleepy.

11 No, we didn't say "let's go take a nap before we do
12 this." I have never taken a nap either. However, I have
13 stopped.

14 Q. Let me ask you this. Were you offering Mr. Porch a nap
15 due to the late hour?

16 A. I have never offered anyone a nap.

17 Q. Okay. But throughout this process of that period of
18 time that contact is made late, late into the early morning
19 hours, a statement was taken, right?

20 A. That's correct.

21 Q. And you have reviewed that statement and you are
22 familiar with it, right?

23 A. Yes, sir.

24 Q. Okay.

25 A. Are we talking about the first one?

1 Q. Yes, sir.

2 A. Yes, sir.

3 Q. Then you know that basically the first thing he is

4 saying about it --

5 MR. BRIAN SHEALEY: May I approach?

6 THE COURT: Yes, sir.

7 BY MR. BRIAN SHEALEY:

8 Q. I don't want to hover, but so you have got your initial

9 question and answer.

10 A. Yes, sir.

11 Q. And question by Shawn McDaniels and answer Joshua

12 Porch. These are going to be the setup for it.

13 And the first question is "what can you tell me," right?

14 A. It says "what can you tell me about the incident that

15 took place at 1103 Pinelane Road, Apartment 311-C, on

16 May 15th, 2006?"

17 Q. And the -- the first word that comes out of his mouth

18 is someone's name?

19 A. That's correct.

20 Q. Who is that?

21 A. She said -- he said -- excuse me?

22 Q. Whose name is that?

23 A. Persia.

24 Q. Okay. But y'all hadn't made any kinds of threats to

25 Persia about potentially getting her in trouble or seeking

1 warrants against her? Y'all hadn't done that?

2 A. No, sir.

3 Q. And you testified about that.

4 And y'all hadn't made any kind of threats or perceived

5 threats about his brother-in-law either?

6 A. Absolutely not.

7 Q. You wouldn't do that?

8 A. No, sir.

9 Q. Okay. But -- I mean, that would be for certain? We

10 would know, right, if this was on?

11 A. Yeah.

12 Q. But first --

13 A. Of course, I'm highly skilled as well, so I would know

14 not to do that.

15 Q. Okay. I mean, maybe. That would tell us for sure.

16 A. You told me I was highly skilled.

17 Q. You are highly skilled. I agree with you.

18 A. Thank you.

19 Q. But the first person's name that comes out of his mouth

20 is Persia, right? On that statement, at least?

21 A. On this statement, yes, sir.

22 Q. And we don't know what else had been talked about

23 before you got there, and we don't know what else is

24 discussed, scenarios, before that statement gets boiled

25 down, but you would agree the first name on that paper is

1 his wife's name?

2 A. Yes, sir.

3 Q. Okay. So that interrogation and that whole process at
4 that point in contact is five hours.

5 Now, that same day y'all have occasion to talk to him
6 again, right?

7 A. Yes, sir.

8 Q. Now, your lodgings are a little bit further away than
9 you would like, but you had a bed to sleep in, right?

10 A. I did.

11 Q. Now, do you have any information what kind of bed Mr.
12 Porch slept in, or if he slept at all?

13 A. Do I have any information about --

14 Q. Do you have any first-hand knowledge about that?

15 A. I was not present in his cell at the time, no, sir.

16 Q. Okay. But you report back your findings to Chief
17 Wilson at that first statement, right?

18 A. Yes, sir.

19 Q. Okay. And I think -- I'm looking at your followup on
20 page three. Goto your followup, please.

21 At the very top of the page where it says that date
22 entry is 7-9-09.

23 A. Yes, sir.

24 Q. "My purpose was to interview Porch about
25 inconsistencies with the statement he provided us today

1 prior and the forensic evidence recovered at the scene."
 2 That's what you wrote on your followup, right?
 3 A. That's exactly what I wrote.
 4 Q. Okay. Okay. And that video -- and we all know this
 5 from watching it, and you are telling Porch on that video
 6 "listen, we showed you. We showed you the evidence. We
 7 have shown. We are not trying to hide anything. We have
 8 showed you."
 9 A. Yes.
 10 Q. I mean, you -- you recall that, right?
 11 A. Yes, sir.
 12 Q. I mean, that's in evidence and the jury has got that.
 13 And your report regarding that second statement, you
 14 know, in regards to your interests in the forensic side of
 15 this, right?
 16 A. Yes, sir. Forensics is always important.
 17 Q. Okay. In this case you showed Joshua pictures of her
 18 body, right?
 19 A. I don't remember the exact pictures that were shown,
 20 but there were some pictures shown to her, yes.
 21 Q. Injuries and that kind of stuff?
 22 A. Yes, sir.
 23 Q. All right. And the first statement was kind of a
 24 self-defense type statement, right? He's -- it boils down
 25 to, you know, we were becoming intimate, something happened,

1 there was an argument about, you know, who was going -- if
 2 she was going to stop or not, whatever, and she comes at me
 3 with a knife and basically -- she comes at me. It's an
 4 accident and kind of maybe falls over the couch, or
 5 something like that. Is that the summary of the first
 6 statement?

7 A. His first statement was he cut an apple, the first
 8 statement, and --

9 Q. I'm talking about the California statement.

10 A. California?

11 Q. Your involvement, right?

12 A. Right.

13 Q. Because you are not on the ground on this case.

14 A. Okay. You said the first statement and that was his
 15 first statement.

16 Q. Your first statement.

17 A. Okay, my first statement.

18 Q. The body of your testimony is regarding the statements
 19 in California, right?

20 A. Okay.

21 Q. I'm not talking about the investigators that actually
 22 were there, you know, talking to witnesses and developing
 23 evidence of that nature. We are talking about California.
 24 I'm not going to bring you back through all that stuff, all
 25 right?

1 A. You said Porch's first statement.

2 Q. And I apologize if I was confusing, but that first
3 statement is basically about her getting a knife and coming
4 at you -- excuse me, coming at Mr. Porch, and, you know,
5 he's trying to get the knife and they fall over a couch.
6 It's kind of an accident scenario, right?

7 A. I would agree.

8 Q. You would agree with that.

9 So then per your report you have a conversation with
10 Chief Wilson and y'all are wanting to get more about the
11 forensic aspect, make things kind of be more consistent.
12 Let's look at some inconsistencies, make things, therefore,
13 more consistent, right?

14 A. Yeah, we didn't believe his story.

15 Q. Okay. But you are showing him evidence. You are
16 showing him pictures, injuries, that kind of stuff, right?

17 A. Yeah, this was unique -- you know, this was particular
18 one was unique.

19 We have to go back to understand the uniqueness. This
20 gentleman, Mr. Porch, had already been interviewed and
21 interrogated in the past about this same case by different
22 investigators. He had already been privy to two previous
23 trials preps.

24 Generally when we interview individuals that we believe
25 to be involved in a crime, they don't have that much access

1 to what we know, so this was unique in that situation. He's
2 had a lot of lot of preps, so we did -- I agree.

3 Q. Is that what you did?

4 A. We did show him some pictures, yes.

5 Q. We are not perfect, right?

6 A. I agree.

7 Q. Okay. Well, I think what we were agreeing about was
8 that you showed him pictures and that you wanted to deal
9 with some of the injuries and that kind of stuff and talked
10 to him about inconsistencies, right?

11 A. Yes, sir.

12 Q. Okay. And in that second statement, that -- and
13 just -- let's get -- and I don't want to beat it over and
14 over again, but basically you testified that y'all made
15 contact at two p.m. and you're done with him by about five,
16 and that includes -- and I'll give you that, bathroom breaks
17 and other breaks and listening to him and talking to him,
18 range of his movement and all that kind of stuff that's not
19 recorded on something like this, but I'll give that to you,
20 two to five, three hours.

21 A. Thank you.

22 Q. Okay. And you were able to match up some of your
23 evidence a little better, correct? You were able to get him
24 to describe palm strikes, right?

25 A. Yes, sir.

1 Q. To the head.

2 You were able to -- and he had mentioned anything other
3 than kind of a self-defense/accident on your first
4 California statement you got from him, but after one you
5 confront him with some of the physical evidence and he's
6 giving you some more, right?

7 A. Yes, sir.

8 Q. Palm strikes, he mentions three, right?

9 A. Yes, sir.

10 Q. He mentions a slice to her eyebrow?

11 A. Yes, sir.

12 Q. Right.

13 He's describing -- and I -- maybe this is the third,
14 but -- and I remember watching that video, and I assume this
15 may have happened some on the second interview as well, that
16 you are wanting to know about the stab wound and -- I just
17 recall you talking about the -- there was bleeding. There
18 was blood and how did that look, and he's talking about it,
19 right?

20 A. I believe so. Yeah, he's talking about that, yes, sir.

21 Q. Okay. And y'all -- in your report, in your followup,
22 you agree that at the end of that statement he's telling you
23 some stuff about things that you feel are consistent, you
24 feel are consistent, right?

25 A. Yes, sir.

1 Q. Okay. And you reviewed this file. You testified to
2 that. You know what the injuries are?

3 A. Yes, sir.

4 Q. Okay. And you were with him for three hours at that
5 point on that same day still, the night, but that three-hour
6 period, right?

7 A. Yes, sir.

8 Q. Without this, but he tells you some more things in a
9 statement that actually you type up, right?

10 A. That's correct.

11 Q. Okay. Now, you are not -- you are not a pathologist.
12 You already established that you are a very good
13 interrogator, but you are not a pathologist, right?

14 A. I thought you said I was an investigator, but I will go
15 with interrogator.

16 Q. Well, being a good interrogator is part and parcel of
17 being a good investigator.

18 A. I'm not a pathologist.

19 Q. You are not a pathologist, but you did look at some of
20 these reports and you know about the injuries, right?

21 A. Yes, sir.

22 Q. So he does talk about very specifically three palm
23 strikes to the head, right?

24 A. Yes, sir, he demonstrated it.

25 Q. Right.

1 In that video he's discussing -- he is saying something
2 to the effect of, and they have it in evidence and they will
3 look at it, but you mean contusions, right? He's talking
4 about that? You were here to watch that part?

5 A. Yes, sir.

6 Q. Look with me, if you would, at State's Exhibit 44,
7 which is the pathologist's report. I'm on page two. Do you
8 agree with me that right there it says, regarding these
9 contusions, "multiple contusions are seen in the
10 subcutaneous scalp. Three are in the midline in the front
11 mid parietal and vertex"?

12 A. It does say that.

13 Q. Okay. When we watched on that video, he's talking
14 about "you mean the three palm strikes to the head", and
15 that's in that statement that he gave you that you typed up,
16 the second statement?

17 A. Are you asking me did I read that document?

18 Q. I'm just saying you are aware of the injuries.. You
19 have already testified to that.

20 A. I know I'm aware of the injuries. I don't know that I
21 ever saw that document.

22 Q. Sure. Okay. I'm just -- this is in evidence and the
23 jury can have it, but you were aware of the injuries?

24 A. I am aware of the injuries.

25 Q. And he gave you a statement that's consistent with what

1 you were aware of?

2 A. Well, as it pertains to injuries?

3 Q. Yes, sir.

4 A. I still think he's lying. I don't think he's

5 completely honest.

6 Q. Okay. But you do agree that when it talks about the

7 contusions here, it's saying there was three?

8 A. He said three.

9 Q. In the front?

10 A. Yeah.

11 Q. Okay. And you have already testified, and it's on that

12 video, that "we provided you with the information. We

13 showed you the pictures, all that kind of stuff," right?

14 A. Yes, sir.

15 Q. Okay. And obviously she got a slice to her eyebrow,

16 right?

17 A. She does.

18 Q. I mean, I don't have to show you the picture of that?

19 You are aware of that?

20 A. I will never forget it.

21 Q. And that's in that second statement, the slice to the

22 eyebrow?

23 A. Yes, sir.

24 Q. Now, exactly when he told you that, I don't know, it's

25 probably not exactly -- it's lots of scenarios or

1 conversations going on within those three hours, right?

2 A. Well, you are wrong on that. The actual conversation
3 took place from 2:19 to 3:39, and then reduced to the
4 writing, so about an hour and quarter.

5 Q. But when the discussion about the eyebrow cut occurred,
6 I mean, I don't -- I can't tell from -- and I just don't
7 know about when it occurred exactly in that three-hour
8 period of time, right?

9 A. I'm telling you.

10 Q. Okay. But there's lots of scenarios going on at that
11 point in time during that second three-hour period, right?

12 A. A lot of scenarios going on in that --

13 Q. Sure. And you are probably running a lot of
14 information past him?

15 A. Asking him questions.

16 Q. Sure.

17 And trying to get information back to him?

18 A. And he's giving us a lot of information.

19 Q. Okay. But we have already established that you and I
20 are not perfect, right? We are good at some things and not
21 so good at other things --

22 A. Yes.

23 Q. -- so it could have -- the order that was typed into
24 your statement isn't necessarily the exact chronological
25 order that he would have given you that information, right?

1 A. The way that it's typed in that statement is how he
2 gave it to me when I typed the statement.

3 Q. Okay. And in that statement there is nowhere about you
4 showing him the pictures, or the evidence, or anything, is
5 it? That may be in your followup, but not in the actual
6 statement that he signs off on, right?

7 A. I'm with you on that.

8 Q. Okay. Now, we know this is a bloody crime scene,
9 right?

10 A. It is.

11 Q. And we know from the pictures that there was blood at
12 various places, and there is blood on the walls, there is
13 blood on the Play Station, the TV, right?

14 I want to show you Defense Exhibit 8. That represents
15 what you understand about part of that house, right?

16 A. I believe so.

17 Q. Okay.

18 A. It looks consistent, yes, sir.

19 Q. All right. And you have already testified that you
20 were showing him pictures of stuff like this, right?
21 Talking about the evidence, right?

22 A. Yes, sir.

23 Q. Okay. But do you recall the pathologist's testimony?

24 A. I do.

25 Q. Okay. Now, his testimony was that it was the jugular

1 vein that was cut, right? It's on the right side of her
2 neck?

3 A. That's correct.

4 Q. I think Investigator McDaniels says it was an artery in
5 his conversations that are recorded, but it's actually a
6 vein, right?

7 A. He is not perfect on that one.

8 Q. All right. And we have already established that you
9 are not a pathologist?

10 A. I am not.

11 Q. Okay. But the testimony as you recall from the stand
12 from Dr. Bradley Marcus is that this is not the type of
13 injury that necessarily would be squirting. It's an oozing
14 because of the vein. It's more of a quickly oozing, but
15 it's not an artery that's pumping blood, like in some
16 horrific movie where you actually it's graphically pumping
17 or squirting. Do you recall that? It's oozing.

18 A. He said there may be some aspiration from the mouth
19 that would be --

20 Q. Sure, as far as the wound itself?

21 A. It would be oozing.

22 Q. Okay. But certainly she was -- she had blood in her
23 lungs and she was coughing and aspirating it, and that, I
24 believe, is, you know, what the discussions were about how
25 the kind of splattering the blood occurred, but certainly

1 you recall it's not a wound that's squirting? It's a wound
2 that's oozing very fast.

3 A. He also said that she was dying pretty quickly. That
4 would -- that would -- that would make me seem that blood is
5 coming out of there pretty fast.

6 Q. But you are not a pathologist, right?

7 A. I'm not.

8 Q. And you are there on that video with Investigator
9 McDaniels, right?

10 A. I am.

11 Q. At that point I recall on the video -- you're right
12 there. You are very close to him and you are trying to get
13 information about what the blood looked like that was coming
14 out of her neck, and you are real close, and then that's
15 when he's -- he said, "all right, well, yeah, it was going
16 like this, right?"

17 And you say "it's squirting."

18 Do you recall that?

19 A. Was that me or McDaniels?

20 Q. It was you. Do you recall that?

21 A. I don't specifically -- I remember some of that
22 conversation.

23 Q. Okay.

24 A. It could have been me.

25 Q. Okay. And you are showing him some evidence in this

1 case during this second interrogation, right?

2 A. I would agree.

3 Q. There is also discussion -- and, again, I keep on
4 thinking back to this video, because it stands out in my
5 mind, about a discussion about what kind of knife it was,
6 what it looks like and how long it was, right?

7 A. Yes, sir.

8 Q. And he describes the knife that's four to five inches,
9 right?

10 A. Yes, sir.

11 Q. I mean, you -- you would agree with what's in evidence
12 here that the depth from the penetration is two and a half
13 to three inches, right?

14 A. That's what it says, yes, sir.

15 Q. That's what the pathologist says, right?

16 A. That's correct.

17 Q. Okay.

18 A. Which -- is that the deceased pathologist or the alive
19 one?

20 Q. It says Dr. Bradley Marcus, who adapted his opinions
21 based on reviewing the initial autopsy report by Dr.
22 Kessler, as well as the transcripts and the photographs.

23 A. My question is when was that report done? I just have
24 never seen that document. I'm just wondering when it was
25 made.

1 Q. It's -- it's on here. It was done by Dr. Bradley
2 Marcus in preparation for trial.

3 A. I'm just wondering if he had it after the interview or
4 before, when he actually made that before or after we
5 interviewed Mr. Porch.

6 Q. That's fine. It's the exact same thing as Mr. Kessler.
7 It is in evidence, so, I mean, we can all look at it.

8 A. Okay.

9 Q. So basically you are able to get a good bit of
10 consistencies for your investigation, based on this second
11 interview, right, interrogation?

12 A. We learned more.

13 Q. Okay. Now, once you are done with him, you take him
14 back to, I presume, where he was left the previous night,
15 right?

16 A. I would presume.

17 Q. You don't have any firsthand knowledge of his lodgings?

18 A. I never visited him.

19 Q. Okay. You are not knowing if he's getting any rest or
20 anything like that? All you know is what you personally
21 observed, right?

22 A. That's correct.

23 Q. But on the 10th, at around eleven, is the testimony
24 that he is handed over to an L.A. sheriff investigator for a
25 period of six and a half hours, or so, right?

1 A. The day prior we asked him could we come back and pick
2 him up the next day and what time and he agreed. So we did
3 show up to pick him up, that's correct.

4 Q. But he's given to this investigator for six and a half
5 hours, right, on the third day?

6 A. Roughly.

7 Q. Okay. And then after that six and a half hours, that's
8 at the end of this three-day process, that's what is the
9 culmination of the video, right?

10 A. That's correct.

11 Q. Okay. And you would agree with me that six and a half,
12 plus roughly one, even though it's a little bit more than
13 that -- I will just say it's seven and a half hours, okay?

14 A. Okay. Are we including the restroom breaks and all
15 that in there?

16 Q. Yeah, that's included -- these are these general time
17 frames.

18 A. I just want to make sure, but we don't know --

19 Q. We don't know how many.

20 A. No.

21 Q. So we got fifteen and a half hours total over three
22 days.

23 Now, his second statement is more consistent with what
24 you know of the evidence, even though you're not a trained
25 pathologist.

1 The statement goes from accident to more of a
2 self-defense, where, you know, he's -- you know, I think the
3 first statement is an accident. The second statement is
4 second more self-defense, and the jury has it so they will
5 look at it and decide for themselves, but after the seven
6 and a half hours of that third day it's more of a standing
7 up situation, right? At the end of the statement he is
8 saying that he was --

9 A. Standing up first.

10 Q. She's coming at him with a knife. They are standing
11 up, right?

12 A. That's correct.

13 Q. Okay. And, again, the video is clear and he's acting
14 it out with you at the end of that seven and a half hour
15 period and says it kind of just goes and gets stuck in her
16 neck, right?

17 A. Yes, it was kind of self-defense accidental.

18 Q. Right.

19 A. Yeah.

20 Q. And I clearly hear your voice and you are saying -- or
21 actually your face is close -- close to you there, but you
22 are pretty close to him and you are saying "you don't want
23 to let go of that knife. Let go of that knife," right? Do
24 you remember that in talking about the knife?

25 A. "Let go of that knife?" No, I said "you didn't want to

1 put that knife in your hand."

2 Q. That's it. That's right. That's right. That's right.

3 Exactly, because, I mean, you don't -- you don't want the
4 knife in her hand when it goes in her neck. You want -- you
5 are suggesting that needs to be in his hand, right?

6 A. I believe it was in his hand, if you are asking.

7 Q. And that's what you were suggesting to him. It's
8 pretty clear, right?

9 A. I'm telling him.

10 Q. You are telling him. You are telling him that the
11 knife needs to be in his hand.

12 A. I'm not saying it needs to be in his hand.

13 Q. Well --

14 A. I don't believe his story.

15 Q. Okay. I mean, it's -- it's up there. It's recorded
16 and it will be back there.

17 Now, three days and fifteen and a half hours of
18 interrogation by a skilled interrogator?

19 A. With restroom breaks, and lunch, and transporting,
20 sure.

21 Q. Sure. Sure.

22 That's what we are dealing with.

23 And we are dealing with evidence that's presented to
24 him, but you are not a pathologist, but he does go over the
25 exact three contusions, which the pathologist describes,

1 right?

2 A. We still haven't confirmed the date on that report.

3 You are assuming that -- if you are saying that I had that
4 report in my possession --

5 Q. No, I'm not saying that you have it, but --

6 A. That's what it sounded like.

7 Q. Well, the pathologist's report would have been done, in
8 your experience, shortly after the murder, right?

9 A. Not that one. I -- I don't remember reading the first
10 one, but --

11 Q. You were here for Bradley Marcus', his testimony,
12 right?

13 A. That would have been his, right?

14 Q. Sure, this was used for trial.

15 A. Right, and I believe that the original pathologist, and
16 it's just my understanding, testified in the first trial,
17 not Mr. Bradley Marcus.

18 Q. Let me just -- let me just -- let me just show you
19 something, if you are confused about that issue.

20 A. I just have never seen that document that you are
21 showing me.

22 Q. And you are one of the lead investigators on this case,
23 right?

24 A. Okay.

25 Q. And this pathology report establishes the cause of

1 death, medically speaking, okay?

2 A. My question is when is the report made?

3 Q. Okay.

4 A. I may have not seen that document.

5 Q. You haven't -- you are saying you may have not seen it,
6 but you are the lead investigator.

7 A. I'm one of the --

8 Q. Co-lead.

9 A. I'm co-lead, that's right.

10 Q. This medical document is from someone that establishes
11 a cause of death.

12 A. Okay. And he was here to testify.

13 Q. Right.

14 And you would want to know the cause of death, and you
15 do know the cause of death?

16 A. I know she got stabbed in the neck. I know why she got
17 killed.

18 Q. But back to your question. I think you are a little
19 confused. That says "I confer with Dr. Kessler's autopsy
20 findings," right?

21 A. That wasn't my question.

22 My question was when the document was made.

23 Q. So you do have a question about if an autopsy was
24 done --

25 A. No, my question is why you are showing me a document

1 that I haven't seen? I just didn't know -- I have never
2 seen that document and you are asking me to answer questions
3 off a document that I have never seen before.

4 Q. But you do recall Bradley Marcus saying that he adopted
5 his beliefs based off reviewing Dr. Kessler's report and
6 transcripts?

7 A. He also said that Dr. Kessler believes that she could
8 have lasted fifteen. He thought it was more than five. I
9 mean --

10 Q. And you agree that in your experience with homicides --
11 you have done a lot, right?

12 A. I have.

13 Q. That these things usually get done pretty quickly,
14 right? The autopsies get done pretty quickly?

15 A. It's done. The report is not necessarily so quickly,
16 and there is always -- and you got to wait for a lot of
17 different things, like toxicology and --

18 Q. Sure, but -- now, you understand the incident date is
19 May 14th, 2006?

20 A. I agree.

21 Q. And you understand that you got involved in 2009?

22 A. I agree.

23 Q. So you understand that the report would have been done?

24 A. That report, no. Maybe a report, yes.

25 Q. A report.

1 A. You show me that report and I tell you if I recognize
2 that one.

3 Q. But you are -- you are calling into question what's an
4 exhibit, State's 44, that the State put in about the cause
5 of death?

6 A. I'm calling into question anything that you hand me.

7 Q. Okay. State's 44?

8 A. Okay.

9 Q. What does State mean?

10 A. That means the state, State of South Carolina.

11 Q. Are you a witness?

12 A. You are handing -- I said anything that you hand me I'm
13 questioning.

14 Q. Okay. And I'm not perfect.

15 A. Well then --

16 Q. But this a State's Exhibit?

17 A. Okay.

18 Q. Are you a State witness?

19 A. Yeah, but you are handing it to me. That's the
20 difference.

21 Q. Well, I didn't generate this, right? You know I didn't
22 generate this.

23 A. Okay.

24 Q. Because it's been sitting on this evidence table.

25 A. But you are questioning me as if I had that document.

1 Q. Are you -- let me ask you this. Are you calling into
2 question any other evidence in this case here?

3 A. Whether or not --

4 Q. Anything else? Maybe this box, or this picture?

5 A. Evidence-wise?

6 Q. Sure.

7 A. Whether or not these are the truth?

8 Q. Okay. But you are not sure this is the truth here?

9 A. No, I believe that. The way you are going at it is,
10 number one, I just have never seen that document, so --

11 Q. You do believe this?

12 A. The doctor was here to testify to that.

13 Q. Okay. Well --

14 A. The way that you are going with it is if I had that
15 document --

16 Q. I'm not --

17 A. The day that I interviewed Mr. Porch --

18 Q. I'm not trying to make you upset. I'm not trying
19 to get you upset --

20 A. -- in my case.

21 Q. -- but you are questioning as a lead investigator that
22 document, okay?

23 A. No, that's not true.

24 I'm telling you I don't -- I'm not -- you are making
25 this sound as if I had that document on the date that I went

1 to see Mr. Porch.

2 Q. I'm not trying to argue with you about it. It's in
3 evidence, so the jury can consider it. Let's move on, all
4 right?

5 A. Great.

6 Q. Okay. Now, if you or Mr. McDaniels made a threat to
7 Joshua's wife or her brother-in-law, it would be on
8 something like this, if it was used, right?

9 A. You said if?

10 Q. Uh-huh.

11 A. It didn't happen.

12 Q. But if it did, it would be on here?

13 A. Not even a probability.

14 Q. Would it -- if it happened, would it be on a report?

15 A. Not even a possibility of it happening.

16 Q. But you would agree if this was used, it would be
17 verified?

18 A. I'm just telling you that it didn't happen. That's
19 verification.

20 Q. Okay.

21 A. He verified it when he signed all these documents
22 saying "I made this foregoing statement freely and
23 voluntarily without fear, or threat, promise, or reward, or
24 hope of any kind." He signed it two times on each page for
25 a total of -- I don't know how many pages. To me that's

1 verification.

2 Q. I mean, you don't know if he's thinking about Persia,
3 or his brother-in-law, or not, do you?

4 A. I know he said that we respected him the entire --
5 since we are referring to the video, that we treated him
6 with nothing with respect the entire time.

7 Q. And y'all developed a great rapport?

8 A. We did.

9 Q. Okay. But 2713 on this transcript refuted that it was
10 in evidence --

11 Let me ask you if you agree with this.

12 A. Okay.

13 Q. And this is concerning this car situation that we have
14 all heard testimony about, right?

15 A. Yes, sir.

16 Q. This is part of this video. It's been transcribed.

17 And this is McDaniel's. "Okay. What else? What else
18 are you missing as far as telling us? Let's talk about the
19 car."

20 You agree that y'all wanted to talk more about that
21 car, right?

22 A. We did.

23 Q. Okay. "You cleaned that car?"

24 And Porch says "no."

25 You would agree with that initially saying that, right?

1 You would agree that initially saying "I didn't clean that
2 car." I mean, it's on the video. I'm just reading you a
3 transcript from it.

4 A. If that's the -- if that is an accurate transcript.

5 Q. Okay. Let me see if you agree with this. Mr.
6 McDaniels was saying "you are telling me exactly what
7 happened with your brother-in-law or your wife does not
8 necessarily mean that they will have to pay for what you
9 involved them in, but you do realize at some point a lot of
10 that is going to come into place?"

11 Porch. "Yes."

12 And eh said to Porch "you are to be honest now."

13 Porch. "Yes, I cleaned the car."

14 So -- I mean, you do agree that first he is saying he
15 didn't clean that car, right?

16 A. Yes.

17 Q. Then he confronted him with in this paragraph both his
18 wife and his brother-in-law, two sentences later he is
19 saying "yes, I did clean that car."

20 A. It's pretty consistent with his character, changing his
21 story. I would agree.

22 Q. And you would agree that was right after discussion was
23 made about his wife, who is the first name on that first
24 statement, and his brother-in-law? You would agree with
25 that? I mean, it's in evidence.

1 A. Say that one more time.

2 Q. You would agree that he did change his story --

3 A. Multiple times, I agree.

4 Q. -- after the slightest mention was made of his wife and

5 his brother-in-law?

6 A. Oh --

7 Q. Do you disagree with the video?

8 A. I think you are twisting it a little bit.

9 Q. Okay. That's why I wrote it on the board.

10 A. He changed his statement multiple times throughout the

11 entirety.

12 Q. At 2713?

13 A. Okay. At that particular moment in time, yes.

14 Q. Okay. I mean, you would agree that at that particular

15 point in time, especially towards the end of that video, you

16 are pretty, pretty close with Mr. Porch. And I give it that

17 the video is very zoomed in, right? This was a zoomed in

18 video, right?

19 A. I don't know.

20 Q. Do you recall that video sitting over there?

21 A. I saw the video. I don't know if it was zoomed in or

22 not.

23 Q. It was pretty close. I mean, for most of the video you

24 can only see Mr. Porch.

25 A. Okay.

1 Q. Do you agree with that?

2 A. It was pointed at him.

3 Q. But then towards later at the end of the video you can
4 see Mr. McDaniels leave for a little while?

5 A. Uh-huh.

6 Q. You kind of slide up on your chair?

7 A. That's correct.

8 Q. Right.

9 And your face was very close to his face?

10 A. I was --

11 Q. You are talking to him. Do you remember this, "momma's
12 love," do you remember that? "Momma's love"?

13 A. "Nothing like a mother's love."

14 Q. That's what it was.

15 A. Uh-huh.

16 Q. But do you remember how close your face was?

17 When you saw it again, and I know y'all don't normally
18 record stuff, but you saw that again, right?

19 A. That wouldn't have been caught right there.

20 Q. But it would have been heard?

21 A. Right. Not my face being close to his, but, yeah.

22 Q. Right, but your face was very close to his face. Do
23 you remember that?

24 A. I was in front of him.

25 Q. And do you remember when he put his hands on his face

1 and you grabbed his hand and said "look at me. Look at me."

2 A. Uh-huh.

3 Q. Do you remember that?

4 A. Yes, I did.

5 Q. I mean, this was closer than we are, but you wanted him
6 to look at you. He put his head down and you grabbed his
7 hand and you said "look at me," right? Do you remember
8 that?

9 A. I did.

10 Q. Okay.

11 MR. BRIAN SHEALEY: Beg the court's indulgence.

12 (Off the record)

13 (Back on the record)

14 BY MR. BRIAN SHEALEY:

15 Q. Thank you.

16 MR. BRIAN SHEALEY: Nothing further, judge.

17 THE COURT: Any redirect?

18 MR. GOINGS: Just briefly, Your Honor.

19 REDIRECT EXAMINATION BY MR. GOINGS:

20 Q. Investigator Godfrey, this was not an interrogation
21 that lasted three days?

22 A. I couldn't hear you, sir.

23 Q. It's not an interrogation that lasted a full three
24 days?

25 A. No, sir.

1 Q. In effect, the number up there is fifteen and a half
2 hours over a three day -- or actually a two-day period,
3 correct?

4 A. That's correct, sir.

5 Q. Okay. No interrogation was done on July 8th?

6 A. No, sir.

7 Q. In fact, y'all didn't find him until what time?

8 A. McDaniels -- Sergeant McDaniels didn't find him until
9 late that evening.

10 Q. I think your report said 10:30 p.m.?

11 MR. BRIAN SHEALEY: Objection to the leading.

12 BY MR. GOINGS:

13 Q. What did your report say about what time he was found?

14 A. It was around 10:30, yes, sir.

15 Q. You were also asked questions about you -- about how
16 you showed him photographs and that you were familiar with
17 the injuries, correct?

18 A. Yes, sir.

19 Q. Would the killer also be familiar with the injuries?

20 MR. BRIAN SHEALEY: Objection. Speculation.

21 THE COURT: Overruled.

22 A. The killer would absolutely be -- absolutely be
23 familiar with the injuries.

24 MR. GOINGS: No further questions, Your Honor.

25 THE COURT: Anything further?

1 MR. BRIAN SHEALEY: No, judge, not from this
2 witness.

3 THE COURT: You may step down.

4 THE WITNESS: Thank you.

5 THE COURT: Any further witnesses from the State?

6 MR. GOINGS: No, ma'am, the State rests.

7 THE COURT: Ladies and gentlemen, you have heard
8 that there was a witness in the Los Angeles Sheriff's
9 Department that interviewed the defendant on July the 10th
10 of 2009. There was a subpoena sent from the State to
11 California to that particular witness. Because that witness
12 does not live in South Carolina, when you send a subpoena
13 for someone who is out of state, they have the opportunity
14 to go before a court to determine whether they must comply
15 with that subpoena. That was done in this particular case
16 in California and the California court determined that the
17 witness did not have to appear in South Carolina pursuant to
18 that subpoena, so there will be no testimony from that
19 witness as to what occurred in any conversations or
20 discussions that that witness had with the defendant in this
21 matter.

22 At this time, ladies and gentlemen, we do have
23 some legal issues which we need to take up outside of your
24 presence. I'm going to ask that you retire to the jury room
25 so that we can discuss those matters. And upon completion

1 whether there is third-party guilt, so I'm not going to
2 allow that testimony.

3 MR. LUKE SHEALEY: Another issue I was hoping to
4 get some clarification on, since Mr. Porch has decided to
5 testify, you know, we've -- in this very unusual situation
6 we have in this case where Investigator Cohen fought her
7 out-of-state subpoena and chose not to come, through no
8 fault of Mr. Goings, through no fault of this court, but
9 also through no fault of Mr. Porch's, you know, we've kind
10 of fashioned the way to go about it I think in Your Honor's
11 opinion is fair to both sides, where we obviously needed to
12 be able to tell that that was the longest interrogation. He
13 was with her for six and a half hours. Some of that was a
14 polygraph, which we can't mention in this court before this
15 jury, so what we have been doing is saying well, he --
16 after -- on that beginning of that day, on the 10th, he was
17 left with a California detective. He was with her six and a
18 half hours. I think they have been able to say including
19 some breaks and things like that, and then turned over to
20 Godfrey and McDaniels. So when Mr. Porch testifies, you
21 know, is he limited strictly to that, or can he say nothing
22 more about the process of that interrogation, what may have
23 been said to him, what threats may have been made, because I
24 think if he's strictly limited just to that, that his right
25 to testify is diminished greatly.

1 So it is an unusual situation that we are placed
2 in, but I just wanted to know the parameters from the court
3 before he testifies so I don't want to defy any potential
4 ruling, but I think that, you know, he should be allowed to
5 discuss, if necessary, anything that happened in there, but
6 for the polygraph. But -- so I -- I've never quite been put
7 in this situation, so I think that any limitation on his
8 testimony as to that situation, other than not being allowed
9 infringes on his right to testify. So I don't know how we
10 deal with it, but I'm bringing it up before we get started.

11 THE COURT: Mr. Goings?

12 (Off the record)

13 (Back on the record)

14 MR. GOINGS: Your Honor, we had -- we had limited
15 it. I thought that was the understanding of how we were
16 going to proceed.

17 The only thing I can think of at this point in
18 time is if Mr. Porch testifies about specific occurrences
19 within that six and a half hour interview with Investigator
20 Cohen, that it opens the door for the possibility of us
21 playing portions of that video as well.

22 THE COURT: I think there is -- I think there is
23 some problems with that, because certainly -- certainly
24 she's not here to be able to state what went on.

25 If she had been here, certainly you would have

1 been able to cross-examine her on those issues and she could
2 have stated, you know, what her view was, and then Mr. Porch
3 would be able to testify as to, you know, what he says
4 occurred, but I think -- I think Mr. Goings is correct, that
5 if you go too far into what occurred, what specifically was
6 said to him and what she did is just going to open the door
7 for them to put the video in.

8 MR. LUKE SHEALEY: Okay. Well, I just wanted to
9 know. I disagree with that ruling completely. I disagree
10 with that position, because he has right the testify.

11 THE COURT: Sure, he does.

12 MR. LUKE SHEALEY: It's not his fault that she was
13 a Government witness who interrogated him for six and a half
14 hours is not here.

15 I wasn't just to -- it's kind of like we have
16 already said, that he was there for six and a half hours
17 with this other detective, that it was more of the same,
18 without going into specific threats or anything that was
19 done, but I would just note my objection for the record and
20 I just disagree with that. I think he has a right to
21 testify, as I indicated through no fault of their own, and
22 that he will not be able to present his complete and full
23 story to the jury. And I just wanted to take it up and I
24 will certainly follow the court's ruling.

25 THE COURT: You know, he can present it, but just

1 understand that if he presents it, then they have got the
2 opportunity to rebut it through the use of the video.

3 MR. LUKE SHEALEY: Well, certainly we don't want
4 them to rebut that using this video when we don't have her
5 obviously here. Maybe I should kind of just hold oral
6 argument in front of them, which I'm not going to do, but I
7 understand your ruling and we won't go into it in any more
8 detail.

9 Those are the only issues I can think of. It
10 didn't take long.

11 Oh, I haven't seen the redacted video from Mr.
12 Goings. I guess I should see that.

13 MR. GOINGS: Your Honor, I worked --

14 THE COURT: You should have done that over the
15 weekend. That's what I told you all to do Friday before we
16 left here.

17 MR. GOINGS: Ma'am?

18 THE COURT: That's what I told you all to do
19 Friday when we left here, for both of you all to get
20 together and look at the video before today. That was
21 supposed to have been done.

22 MR. GOINGS: Well, I -- I think we agreed before
23 we left Friday what we were going to do and where we were
24 going to cut it off. Over the weekend I had tried for six
25 hours, plus. The problem with my video system and my

1 computer is I don't have administrative rights on it,
2 because I guess they don't trust us with our own computers,
3 but it is being edited as we speak right now in my office
4 with our I.T. department, and basically they have -- what we
5 did and what I believe we agreed on was that the 110 mark
6 where Investigator Godfrey gets up and is at the doorway,
7 that there is nothing really relevant from that point on,
8 they are going to cut that portion out and a just have up
9 until the 110 mark and nothing else. That's what I believe
10 we agreed on Friday. It's in the process. They told me --
11 they informed me about twenty minutes ago that it would take
12 about two hours to get it done and they were going to bring
13 it over here to us.

14 MR. LUKE SHEALEY: That sounds accurate to me. I
15 just want to -- you know, after we get done with today and
16 before the evidence goes to the jury, that eyeball it before
17 it gets substituted. That's perfectly acceptable to me.

18 THE COURT: All right.

19 MR. LUKE SHEALEY: Just one final thing, judge,
20 while I'm thinking about it. Mr. Porch will be our first
21 and only witness today, so we need to address the shackling,
22 whether you are going to allow him to walk up. We can't
23 have him shackled for the purposes of that, or whether you
24 want him sitting there, but we would again ask that he not
25 be shackled during his testimony.

1 THE COURT: Well, obviously he would be unshackled
2 so that he can walk freely up and he can walk freely back.

3 MR. LUKE SHEALEY: Yes ma'am.

4 THE COURT: And you may do that now, please.

5 (Whereupon, the defendant was unshackled)

6 THE COURT: Anything else we need to take up?

7 MR. LUKE SHEALEY: I don't believe so, judge.

8 MR. GOINGS: Nothing from the State.

9 THE COURT: You may ask the jury to come in,
10 please.

11 Before the jury comes in, I have ordered lunch for
12 the jury.

13 Please remember that I got at least one juror who
14 says he needs to be at work about four. Depending on how
15 far we get, I will inquire of what time he needs to leave
16 and allow him to do that.

17 (The following takes place in the presence of the
18 jury panel)

19 THE BAILIFF: The jury is seated, Your Honor.

20 THE COURT: Good morning, ladies and gentlemen.

21 THE JURY: Good morning.

22 THE COURT: At this time we are now ready to
23 continue on with the trial of this matter.

24 I hope you all had a good weekend.

25 THE JURY: We did. Thank you.

1 THE COURT: Good. Thank you. I'm glad to hear
2 that. Rest does a lot for everybody.

3 You may call your next witness.

4 MR. LUKE SHEALEY: Your Honor, the defense would
5 call Joshua Porch.

6 JOSHUA WILLIAM PORCH, having been first duly
7 sworn, testified as follows:

8 THE CLERK: Thank you. Have a seat on the witness
9 stand, please?

10 THE CLERK: State your name for the record.

11 THE WITNESS: Joshua William Porch.

12 DIRECT EXAMINATION BY MR. LUKE SHEALEY:

13 Q. Good morning, Josh.

14 A. Good morning.

15 Q. Josh, did you kill Nakia Mallory?

16 A. No, I didn't.

17 Q. Who did?

18 A. Justin Mallory did.

19 Q. How do you know?

20 A. I saw him. The night I was over there I saw them get
21 into a verbal altercation originally over him cheating.
22 Afterwards I saw him strike her several times. I stepped in
23 between both of them to try to stop it, and in turn I had
24 got injured myself. I got paper towels and I ended up
25 leaving.

1 Q. Okay. Why didn't you tell the police this in 2006 and
2 2007?

3 A. I was scared. Nakia and I were kissing, touching each
4 other that night. I didn't want my wife to find out what I
5 had done, and also I didn't want to be involved in this
6 case. I don't want to be charged myself.

7 Q. Okay. Josh, let's step back a little bit before we
8 start talking about this some more.

9 Tell this jury how old are you? Where are you from?

10 A. I'm 30 and I'm originally from Long Beach, California.

11 Q. Okay. Think back to 2006. How old were you then?

12 A. I think about 22, 21.

13 Q. Okay. And then in 2009, how old were you then?

14 A. 25.

15 Q. Okay. Let's talk about Long Beach. Is that where you
16 grew up?

17 A. For the most part. I was born in Compton. I stayed in
18 Long Beach for a few years, and I eventually moved to
19 Seattle and stayed there for about seven years, and went
20 back to California.

21 Q. Okay. And living in Long Beach, who did you leave
22 with?

23 A. My mother, my brother and my sister.

24 Q. Okay. Did you always live with them as a child?

25 A. Yeah. Well, from the ages from when I was born until

1 about five I was living with my mother until -- until I was
2 five.

3 Q. Okay. Now, this is personal, but I have to ask you
4 this. Did something happen as a child that caused you to
5 have to leave your mother's care?

6 A. When I was about five years old, me, my brother and my
7 sister were molested by their biological father, so my mom
8 took us to Seattle to get us out of that situation.

9 Q. And at some point did you also have to leave your mom's
10 care, though?

11 A. Shortly after we came to Seattle, she dropped off us
12 with our aunt because she was the only one able to take care
13 of all three of us, and she went back to California to make
14 sure we had a home and my aunt reported us abandoned, so my
15 mother lost custody of us.

16 Q. Okay. Where did you go from there?

17 A. We stayed with my aunt for the majority of the time,
18 but periodically we would have to go into foster homes.

19 Q. Okay. And how long did you do the foster home
20 situation?

21 A. For a couple of them. It was only maybe a weekend for
22 one. It was like an orphanage kind of. We had to stay
23 there for about a week.

24 Q. Was that easy or was that hard?

25 A. That was hard. The one we stayed at a week was the

1 hardest. They separated me, my brother and my sister. They
2 wouldn't let us see each other, and they would only feed us
3 oatmeal for every meal.

4 Q. Okay. And how old were you when you were abused,
5 again?

6 A. Five.

7 Q. Okay. At some point did you go back to live with your
8 mother?

9 A. Yes, I moved back in with my mom when I was 13.

10 Q. Okay. And where were y'all staying then?

11 A. In Long Beach, California.

12 Q. Did you finish school there?

13 A. I graduated from Milliken High School.

14 Q. Milliken High School?

15 A. Yes.

16 Q. Okay. And what, if anything, did you do after you
17 graduated?

18 A. Right after graduation I went into the military, the
19 Army, and I pretty much -- I didn't know what I wanted to
20 do, so I figured the Army would be the best thing. I would
21 be able to serve my country, travel the world, meet a lot of
22 different people, just having an adventure.

23 Q. That's why you wanted to go in the Army?

24 A. Yes.

25 Q. Did you stay in the Army a long time?

1 A. No, not at all. I was there maybe about a month.

2 Q. Okay. Did you -- what happened with the Army? Did you
3 not like it? What's -- tell the jury.

4 A. I didn't like it. I was young. I was only 17 at the
5 time. My mom had to sign me over to them, but once getting
6 there it wasn't -- it wasn't what I had expected.

7 Q. Okay. Is it fair to say it wasn't a very good fit?

8 A. No, not for me.

9 Q. Okay. So after that experience, what did you do? Did
10 you work? Tell the jury what you did.

11 A. Once I was discharged from the military I went back to
12 Long Beach, California.

13 Q. Let me stop you. What kind of discharge did you get?

14 A. A general discharge.

15 Q. Okay. Go ahead.

16 A. I moved back to Long Beach and got a job at Hollywood
17 Video. Just working full time there.

18 Q. Okay. How long did you work there?

19 A. For almost a year I was working at Hollywood Video.

20 Q. Okay. Did you like that job?

21 A. Actually I loved that job. It's -- I'm really into
22 video games and movies and stuff and you get free rentals,
23 me and my family.

24 Q. What's your favorite movie?

25 A. Avatar.

1 Q. Okay. All right.

2 Did you work anywhere else in California at that time?

3 A. I also worked at Quizno's Subs, and that was maybe for
4 close to a year.

5 Q. Okay. Now, I want to talk to you about Persia. We met
6 Persia the other day. Who is Persia?

7 A. Persia is my wife and the mother of my four children.

8 Q. Okay. Now, was there a time when you met Persia in
9 California?

10 A. Yes, I met Persia in California in the summer of I
11 think it was 2003. She was going to school out there.
12 She's not from California. She's originally from here.

13 Q. What was she -- what type of school was she going to?

14 A. She was going to Brooks College. She wanted to be a
15 fashion designer.

16 Q. Okay. How did y'all meet? Tell the jury about that a
17 little bit, the circumstances behind it.

18 A. It was one night in particular where I'm just sitting
19 at home. I'm just playing video games. My brother and a
20 friend of ours, they come over. They had met a couple of
21 females who were in college also, and they were supposed to
22 be having this party that night and they wanted me to come
23 with them. I really didn't want to. I was fine to sit at
24 home that night, but they had convinced me. They convinced
25 me to go out with them, so we ended up going. And where

1 this party is supposed to be in this apartment complex is a
2 gated community, so they needed somebody to unlock the door
3 for them. And luckily I knew somebody in there, so I called
4 them and they let us in, and I met Persia that night because
5 she was going to the same party.

6 Q. Okay. Did you and Persia instantly hit it off, or how
7 did that start up? How did it ultimately begin talking to
8 each other?

9 A. My brother and -- my brother and her friend Jason
10 decided they were going to play matchmaker. Neither one of
11 us really talking to either one of -- to either one, so my
12 brother kept coming to me saying "she likes you. She's just
13 shy." And my friend kept going to Persia and kept telling
14 her that "he likes you. He's just shy." So eventually we
15 just started talking.

16 Q. Okay. And after that night did y'all start dating?

17 A. Yes, that night we stayed out until the early morning
18 just talking. Exchanged numbers and been talking ever
19 since.

20 Q. Okay. Did you like Persia?

21 A. I love Persia.

22 Q. Okay. So you grew to love Persia?

23 A. Yes.

24 Q. Okay. How long did y'all date, and then tell us about
25 that relationship as it grows in California.

1 A. We weren't dating long before she had gotten pregnant.
2 She had gotten pregnant. I would say about seven -- seven,
3 eight months later we ended up getting married and moving
4 out here.

5 Q. Okay. Let's talk about that.

6 So y'all did make the decision to get married, correct?

7 A. Yes.

8 Q. Okay. Now, how did y'all decide to move out here? I
9 mean, your family was in California, right?

10 A. All my family is in California.

11 Q. Okay. So describe the process with y'all as a couple
12 and how y'all got out to South Carolina.

13 A. Like I said, she's originally from here, from Columbia.
14 She was pregnant and we both were young at the time. She
15 was getting homesick. She really wanted to see her family,
16 and also --

17 She was living with us at the time. That's me, my
18 brother, both my sisters, and my mom, and this was only a
19 two bedroom apartment, so she wanted to come to a place
20 where she could have her own room, at least, until we got
21 our own place. She figured it would be a lot easier for us
22 to come out here and get on our feet, find a place to live,
23 get a car, establish ourselves.

24 Q. Okay. And you had never been to South Carolina before,
25 right?

1 A. No, I have never been here before.

2 Q. Okay. So you were willing to make that commitment and
3 follow her across this country?

4 A. Yes, I loved her.

5 Q. Okay. And at that time you said -- was she still
6 pregnant, or had y'all had your first child?

7 A. When we moved out here she was still pregnant.

8 Q. So when you moved out here, though, what did you do?
9 Did you find work? Was she working? Talk to us a little
10 bit about that.

11 A. I had gotten a job. She wasn't working. She was --
12 she just stayed home. I applied to Food Lion and I got a
13 job there as a bagger and -- I was only working part-time,
14 so I continued looking for work, because it wasn't enough to
15 support a family. We had, like I said, a child on the way.
16 So I get a job at a gas station. I think it's a Corner
17 Pantry across the street from Food Lion on Clemson Road and
18 that was full time and it also paid more, but it still
19 wasn't enough to support my family, so I'm still looking for
20 work and eventually I get a full-time job at Blue Cross Blue
21 Shield.

22 Q. Okay. What were you doing there? Talk to us about
23 what kind of job that was.

24 A. At Blue Cross Blue Shield I was a customer service
25 representative. Like I said, it's full time. Basically I

1 take incoming calls from providers; that would be doctors,
2 nurses, and also just regular people who have insurance
3 policies with us. I'm giving information on benefits.

4 For the providers, they would normally have to give us
5 procedure codes, let us know what specific operation or
6 surgery, whether it was a routine physical, or inpatient or
7 outpatient surgery is covered, and I would tell them how.

8 For the members, I would just given them general
9 information on what kind of co-pay, or down payment, or
10 anything they would have to -- or down payment they would
11 have to make.

12 And claim status, whenever they have an operation done,
13 your claim is submitted to the insurance company, whether
14 it's medical or dental. I would have to give them the
15 status on that, whether we received it, whether it's
16 processing correctly. And if it is processing incorrectly,
17 I would have to adjust it.

18 Q. Okay. Did you like that job?

19 A. Yeah, that was -- that was a pretty cool job.

20 Q. Okay. Now, in what year did you move to South
21 Carolina, do you remember?

22 A. 2004.

23 Q. Okay. So now let's get up to around May, around the
24 summer of 2006. Are you working?

25 A. No, I don't -- I don't think so.

1 Q. Okay. Was your wife working?

2 A. Yes.

3 Q. Okay. Now, did y'all -- how did y'all -- did you send
4 your kids to expensive daycare, or how did y'all take care
5 of the kids?

6 A. It was a team effort. It wasn't just one of us taking
7 care of the kids. Usually I would be the one working. And
8 if for whatever reason I quit my job and started looking for
9 another one, she would pick up the slack and get the job. I
10 would stay home with the kids, feed them, make sure they
11 were fed, play with them, talk to them, make sure they were
12 all taken care of. And when I found another job, she would
13 come back home and take care of the kids.

14 From what happened to me when I was younger I don't
15 really trust a lot of people around my children and I would
16 prefer they would stay out of daycare.

17 Q. Now, getting again back to 2006, you knew the
18 Mallory's, right?

19 A. Yes, I did.

20 Q. How did you know the Mallory's?

21 A. At one point in time we were neighbors.

22 Q. Go ahead. What would y'all do? Would you ever go
23 there?

24 A. I would go over to hang out with Justin pretty
25 regularly, just talking, hanging out, playing video games,

1 maybe having a few drinks.

2 Q. Okay. And you just said you used to live at the Hunter,
3 Mills Apartments, right?

4 A. Yes.

5 Q. Now, in 2006 where were you living?

6 A. At Meredith Square Apartments.

7 Q. Okay. So at that point you weren't living at the same
8 apartment complex?

9 A. No, I wasn't.

10 Q. Okay. Now, Josh, I want to talk to you a little bit
11 now about some of your involvement with the police over the
12 course of this entire investigation, okay?

13 A. (Shaking head yes).

14 Q. Now, I want to talk to you about the day after this
15 incident. Okay.

16 Do you remember Sergeant Strange coming out to your
17 house in 2006?

18 A. Yes, I do.

19 Q. Right on Mother's Day?

20 A. Yes.

21 Q. Okay. And you sat here and you have heard what he
22 talked to you about. What did he ask you?

23 A. The first thing he did was let us know that Nakia had
24 died, and he asked me if I had known anything about it.

25 Q. Okay. And learning that news that Nakia had died, how

1 did that affect you?

2 A. I was genuinely shocked. My wife, when she found out,
3 immediately started crying. We both just had to sit down
4 and take that in. We both liked Nakia and --

5 Q. Why were you shocked?

6 A. Because I didn't know she was dead.

7 Q. Okay. We will get to what you saw in a little more
8 detail, but you didn't know -- you didn't think she was
9 dead?

10 A. No, not at all.

11 Q. Okay. What did you tell Sergeant Strange, though?

12 A. That I was not there.

13 Q. Okay. We have heard about this. We need to take about
14 it. Why did you tell Sergeant Strange that?

15 A. Sergeant Strange let it be known that they had already
16 arrested Justin Mallory, which was -- which is the person
17 who did this, and they had more than enough evidence to
18 convict him.

19 And at the time I didn't divulge anything that I know,
20 because, once again, I was scared of my wife finding out
21 what happened between Nakia and I, and I don't want to be
22 implicated in this murder that I had nothing to do with.

23 Q. Okay. This decision to tell him this was something
24 that you did on the spot, or was this something that you had
25 been thinking about?

1 A. No, it was something that I did on the spot. Like I
2 said, I didn't even know she had died in the first place.

3 Q. Okay. And, again, why would you be scared to tell your
4 wife that you were making out with Nakia?

5 A. Because that would possibly end our marriage.

6 Q. The marriage that you moved across the country for?

7 A. Yes.

8 Q. Okay. Would she like to hear about that?

9 A. No, not at all.

10 Q. Do you regret making out with Nakia?

11 A. Yes, I do.

12 Q. Okay. And, again, were there any other reasons why you
13 chose to keep yourself out of that situation?

14 A. Being young and -- being young and black, I don't know
15 if any of you can really relate to that, but divulging
16 information that you had been out and bled on a murder
17 scene, it usually means you are automatically a suspect and
18 I didn't want that to happen at all.

19 Q. And you said I think just a second ago that he had
20 already told you they had Justin, right?

21 A. They said they had more than enough information,
22 evidence against him to convict him.

23 Q. Okay. Knowing that, did you feel the need to then
24 interject yourself into this situation?

25 A. No, I saw no -- no reason to. They were -- they were

1 police officers. I figured they knew what they were doing.

2 Q. Did you feel that they had the guy and they would be
3 able to do their job successfully without you letting your
4 wife know anything?

5 A. I know they have the guy. I saw what he did.

6 Q. Okay. But that was a lie, right? I mean, what you
7 told Strange, that wasn't the truth, right?

8 A. No, it was not. It was a lie.

9 Q. Okay. Now, did they ever talk to you at all after
10 that; the next day, the next week, the next month?

11 A. No, I didn't see them for over a year.

12 Q. Okay. And sometime around late June of 2007, did
13 Richland County come back out to your house?

14 A. Yes, they did.

15 Q. Who came to your house?

16 A. Captain Smith.

17 Q. Okay. What was he asking about?

18 A. He came out there asking about DNA, said there was DNA
19 on the scene and they had to figure out whose DNA it was,
20 and --

21 Q. When he was asking about DNA, what did you tell him?

22 A. That it was probably mine. I had cut myself while I
23 was there.

24 Once again, I was scared, so I just made up a story
25 saying that I cut myself on an apple while I was at Justin's

1 house.

2 Q. Why were you scared?

3 A. Because Persia still at this time didn't know about
4 Nakia and I, and I didn't want her finding out. And also I
5 still didn't want to get involved in this at all. I didn't
6 want to be considered a suspect.

7 Q. Okay. But you agree that that, not telling Stan Smith
8 the truth about that and how your blood was on the scene,
9 that was a lie, right?

10 A. Yes, that was.

11 Q. Okay. Was this again something that you kind of just
12 made up on the spot because he was asking you about it?

13 A. Yes, everything was just made up on the spot.

14 Q. Okay. And knowing that they had Justin already, did
15 you want to interject yourself into this situation?

16 A. No, not at all. They had the right guy. I didn't see
17 any reason for me to tell them that I was an eyewitness,
18 what I had witnessed that night.

19 Q. Okay. Did Stan Smith come back out to your house that
20 day?

21 A. Yes, he did.

22 Q. Okay. And now what's he -- what's he talking about?

23 A. He had -- he said he had spoken to Sergeant Strange and
24 had asked me if I had told him about this apple story when I
25 had first spoken with him, and I believe I told him that I

1 think I did. And, once again still, I'm not trying to get
2 any -- get any -- get involved in this at all.

3 Q. And, again, why? Why?

4 A. I'm scared. I don't want Persia to find out what
5 happened between me and Nakia, and I don't want to be
6 involved in this case. I don't want to be considered a
7 suspect for something I didn't do.

8 Q. Okay. Now, did they talk to you again? Did they want
9 you to come talk to them at Richland County?

10 A. Yes, they did.

11 Q. Okay. And who did you meet with at Richland County?

12 A. It was Captain Smith, Holdorf. I think White was one
13 of their names.

14 Q. Okay. Now, as you are sitting there, are they
15 basically saying, "look, we need to talk to you some more
16 about this." What is -- what are they telling you?

17 A. They are not really telling me anything. They are just
18 asking me exactly what happened. They had really --

19 At this point in time I just figured that it's too late
20 for me not to get involved, that I have already lied to them
21 previously, that the best thing for me to do is just to go
22 ahead and tell them what I had witnessed that night. So I
23 was a reluctant witness, but, nonetheless, I still did the
24 right thing and told them exactly what happened that night.
25 I testified to it in two trials.

1 Q. Did you want to tell them all this stuff?

2 A. No, not at all. Where I'm from it's frowned upon to
3 sit here and tell on anybody for any particular reason, to
4 the police at least.

5 Q. Okay. And how long did you talk to them?

6 A. For a few hours.

7 Q. Okay. And they questioned you a lot about it, right?

8 A. Yes.

9 Q. Okay. And at this point did you tell them everything
10 that you had seen that night?

11 A. Yes, I told them everything at this time.

12 Q. And who was typing? Was Stan Smith typing?

13 A. Yes, it was.

14 Q. Okay. And he talked to you all about what you had told
15 him, right?

16 A. Yes.

17 Q. At some point did anybody else come in the room?

18 A. Chief Wilson was in the room, but he wasn't really
19 involved in the questioning. It was more him just sitting
20 there watching. That's all.

21 Q. Okay. And this statement is in evidence. And all the
22 details that you provided, is that the truth?

23 A. Yes.

24 Q. Okay. And even when you told him how Nakia said, "how
25 could you" to Justin, was that the truth?

1 A. Yes, everything I said in that final statement that I
2 testified to in both trials is the truth.

3 Q. Okay. Now, after telling them all this, you knew that
4 Persia was going to find out, right?

5 A. Yes.

6 Q. All right. And here you are. You got yourself
7 involved in this, right?

8 A. Yes.

9 Q. Are you a happy man at this point?

10 A. No. I helped them. I testified to what I saw that
11 night, even though it was against my better judgment. I did
12 not want to. And, like I said, I was scared of my wife
13 finding out and I was scared of becoming a suspect. I
14 testified in both these trials. My marriage is now over and
15 here I am on trial for a murder I did not commit.

16 Q. Okay. At some point, based upon you had told Stan
17 Smith and Holdorf and Strange, did Deputy Solicitor John
18 Meadors ever want to come talk to you?

19 A. We did speak with him.

20 Q. Okay. Did he tell you that you would be necessary for
21 this trial?

22 A. Yes, he had put a subpoena out for me to be his
23 eyewitness. He had literally called me his star witness and
24 was telling me how important it was that I would come and
25 testify in both these trials.

1 Q. Okay. And did you do that?

2 A. Yes, I did.

3 Q. And did you want to?

4 A. No, even at this time I still did not want to testify.
5 I didn't want to get any further involved in this
6 investigation, but I did it any ways.

7 Q. And now there has been a lot of talk about -- mostly
8 from McDaniels and Godfrey, about how you knew all the facts
9 about this case and this is how you know this information
10 and all the details. Did Stan Smith, or any of those guys,
11 feed you details on this case?

12 A. I didn't know anything about this case. I was
13 sequestered, just as everybody else was. Once the trial was
14 going on and once I testified, I would leave. I wasn't
15 allowed to hear any other testimonies whatsoever. I didn't
16 know who the witnesses were. I didn't know anything about a
17 911 tape, or the security guard at the hospital. I didn't
18 know any details about the hospital. I'm not -- I didn't
19 even find out how Nakia died, I mean, the full details of
20 it, until McDaniels came and interrogated me in California.

21 Q. Okay. And we will get to that.

22 Did you know who Sherry Tribble was?

23 A. No.

24 Q. Okay. All you knew is what you saw and what you told
25 Stan Smith, right?

1 A. That's it.

2 Q. Okay. After you testified for John Meadors, did you
3 hang around the courtroom and watch the rest of the trial?

4 A. Every time I testified I would leave immediately.

5 Q. Okay. Did you want to be here testifying in this type
6 of thing?

7 A. No, not at all.

8 Q. And why not?

9 A. I never wanted to be involved. Like I said, I never
10 wanted my wife to find out what happened between Nakia and I
11 and I never wanted to become a suspect.

12 Q. Did you kill Nakia?

13 A. No, I did not kill anyone.

14 Q. Who did?

15 A. Justin Mallory.

16 Q. Okay. How do you know?

17 A. I saw him do it.

18 Q. After these two trials, did you learn that Justin
19 Mallory got a not guilty?

20 A. Yes, I did.

21 Mr. Meadors called my wife and I at our home and told
22 us that he was found not guilty. And we asked him, "well,
23 what happens now? Is there anything else that we can do?"

24 He says "no, that's it. There is nothing else we can
25 do. That's twice. That's double jeopardy."

1 He said, "thank you so much for your help. You were a
2 star witness. You did great and we appreciate all your
3 help."

4 Q. Okay. What happened with you and Persia and your
5 marriage?

6 A. From that moment our marriage pretty much went
7 downhill. That's the reason why I moved back to California,
8 just because Persia and I had ended up separating.

9 Q. Okay. In your mind did that have anything to do with
10 the fact that you repeatedly had to talk about how you made
11 out with another woman that night?

12 A. Yes, that was the major reason why our marriage.

13 Q. She was not happy about that?

14 A. Not at all.

15 Q. Okay. And are you on trial for murder?

16 A. Yes.

17 Q. Okay. So the two reasons that you did not want to get
18 involved are actually reality for you now, is that fair?

19 A. Yes, that's the truth.

20 Q. Let's talk about California. Did you move back there
21 because that's where your family is?

22 A. Yes, that's where I grew up. That's where all my
23 family is.

24 Q. And the situation with Persia, do you still love her?

25 A. Yeah, I still love Persia.

1 Q. Y'all are separated because y'all are having problems?

2 A. Yes, our marriage is over.

3 Q. But she still has all your children, right?

4 A. All four.

5 Q. Do you still talk to Persia and talk to the children?

6 A. Every day.

7 Q. Now, back in California what did you do? Did you try
8 to find work? What's going on?

9 A. After I moved back home I had gotten a job about three
10 days later at Big Clyde's Sporting goods. It's -- basically
11 we just have any kind of sporting equipment that you can
12 think of and we sell it. It's not really a commission job.
13 It's an hourly wage, but I was good at it and my manager was
14 planning on promoting me.

15 Q. Okay. Did you like that job?

16 A. I loved that job. I was thinking about pursuing it as
17 a career.

18 Q. Okay. And were you working -- and where were you
19 living? Who were you staying with?

20 A. I was staying with my mother and my brother and both my
21 sisters and a friend of ours.

22 Q. Okay. And let's start bringing you to the night that
23 you got arrested, which I believe is late July 8th of 2009.
24 Were you working that day?

25 A. No, that was -- that was my last day off.

1 Q. Okay. So being that it was a day off, tell the jury
2 what time did you get up? What were you doing that day?
3 Talk to us about your day.

4 A. I got up probably around nine or ten, went through my
5 normal routine; brushed teeth, washed face, took the dog out
6 for a walk. And after that it was just pretty much passing
7 time playing video games, watching TV, until later in the
8 evening where my sister and I, my youngest sister Jada, her
9 and I -- well, all of us are actually really close, but Jada
10 and I always this thing where will go rent like cheesy
11 horror movies and watch them together. So that night we
12 decided to go to Blockbuster and rent a few DVD's. We came
13 back home and she wanted snacks, so we ended up leaving and
14 going to Walgreen's. It's only like a block away from our
15 house.

16 Q. Okay. Let me stop you right there. Was this fairly
17 usual routine for your day off?

18 A. Yes.

19 Q. Okay. Are you -- do you like to sleep until twelve,
20 one, two?

21 A. No.

22 Q. Okay.

23 A. Not at all.

24 Q. What time do you usually go to bed, on average?

25 A. Midnight, one o'clock.

1 Q. Okay. Now, let's talk about these three movies that
2 you got. Are you planning on watching all these movies back
3 to back to back that night?

4 A. No, maybe one of them, or most of one of them.
5 Sometimes I end up falling asleep.

6 Q. Okay. So you wouldn't stay up until three, or four, or
7 five in the morning just watching movies for the heck of it,
8 would you?

9 MR. GOINGS: Objection to the leading, Your Honor.

10 A. No.

11 THE COURT: Sustain as to the leading.

12 BY MR. LUKE SHEALEY:

13 Q. Would you stay up to three, or four, or five in the
14 morning just watching movies?

15 A. No, I have to be -- I have to go to work.

16 Q. Okay. That's not -- is that something that you
17 normally do, ever?

18 A. Just stay up to three, four o'clock in the morning
19 watching movies?

20 Q. Right.

21 A. No.

22 Q. All right. Now, let's get back to Walgreen's, all
23 right.

24 Did something happen at that Walgreen's? And if so,
25 tell the jury what it was.

1 A. Well, my sister -- I think it was me, my sister Jada
2 and my other sister's boyfriend Brandon, she gets her
3 snacks. And as we are leaving, walking up to the register,
4 I see a man walk up to me and he pulled something out of his
5 pocket and puts it up against my chest. I later find out it
6 is Sergeant McDaniels, and he tells me I am under arrest for
7 the murder of Nakia Mallory. I mean, as he does, as he
8 leans close and whispers in my ear that, "you almost got
9 away with it."

10 At this time my --

11 Q. Let me stop you. Let me stop you.

12 What is going through your mind when Sergeant McDaniels
13 walks up to your chest, this guy you have never seen, and
14 says, "you are under arrest for the murder of Nakia
15 Mallory?"

16 A. The first thing that registered was just shock. I
17 really couldn't believe it, because I helped them. I
18 testified in two trials, and now, just like I feared, I'm
19 ending up being arrested for something I didn't do.

20 Q. Okay. Is this your worst nightmare coming true?

21 A. Pretty much.

22 Q. All right. Keep going. What else happens?

23 A. Jada and Brandon didn't exactly realize what had
24 happened at first, so they continued walking. When they did
25 realize I was no longer with them, they turned around and

1 they see Sergeant McDaniels had already placed cuffs on me.
2 He was taking me over to the photo shop within Walgreen's.
3 The few customers that were in there had left by this time.
4 And my sister Jada runs off and Brandon comes back trying to
5 figure out what happened, and I just tell them, "just tell
6 my mom that I'm being arrested. Just tell her that I'm
7 being arrested." So he leaves.

8 And as I'm inside Walgreen's a lot of the Long Beach
9 Police Department starts coming in. There is about 13 of
10 them, all that entered into the building. And as they were
11 all coming in walking around the building and standing
12 around me, Sergeant McDaniels starts saying, "you think this
13 is your time to shine? This isn't your time to shine."

14 Q. Okay. So you are under arrest. Sergeant McDaniels has
15 told you these things. What happens? Where do you go from
16 there?

17 A. I went --

18 Q. Approximately, as best as you can remember, what time
19 of night is it at this point?

20 A. It's pretty close to eleven by now.

21 Q. Okay. Where do they take you?

22 A. They take me down to the Long Beach city jail. It's
23 all in one. The police department. The Long Beach Police
24 Department, and the city jail is all just one building.
25 They take me there. And once we get there, they take me

1 upstairs and put me in a room where they handcuffed me to
2 the table.

3 Q. All right. Now, at some point does McDaniels come in?

4 A. Yes, it was not shortly after I was handcuffed to the
5 table he walked into the room.

6 Q. Is it him and Godfrey, or is it just him?

7 A. It's just McDaniels. Godfrey hadn't even shown up yet.

8 Q. Okay. Now, I want you to describe to this jury what
9 happened next in that initial conversation with Sergeant
10 McDaniels.

11 A. He walks around only a few feet from me and asked me if
12 I'm a monster. And he uncuffs me and he says -- basically
13 he informs me that the reason why he picked me up on his own
14 is because he spoke with Captain Smith and Holdorf and both
15 of them told me how timid I was and mild mannered. I wasn't
16 aggressive at all, which is why I had no problem arresting
17 me on his own without the help of Long Beach Police
18 Department.

19 After that he just goes on this rant. He starts asking
20 me questions. He --

21 Q. Let me stop you right there. Is he advising you of
22 your rights right now?

23 A. No, he hasn't advised me of anything.

24 Q. He's not telling you that you have a right to a lawyer?

25 A. No.

1 Q. He's not telling you that you have a right to not talk
2 to him?

3 A. No.

4 Q. He's not telling you that anything you say can be used
5 against you later?

6 A. No, he didn't advise me of anything at this time.

7 Q. Tell this jury what he did tell you.

8 A. Well, he came in, after he took the handcuffs off,
9 asked me if I'm a monster. And originally I wasn't trying
10 to speak to him. I wasn't saying anything.

11 And he asked me if I am a monster, because I'm not
12 cooperating at all. He says "well, if you are a monster,
13 maybe I should put these cuffs back on, because it pretty
14 much depends on you on what happens later. We can go get
15 Persia." He says Chief Wilson instructed him to come out
16 here to do whatever is necessary to arrest me, or get
17 whatever they could from me, and says that I must be a
18 monster if I'm willing to let everyone else go down with me.

19 Q. Okay. When he's telling you this, about arresting
20 Persia, what is going on in your mind? Do you feel like --
21 tell the jury how do you feel about your choice regarding
22 cooperation?

23 A. I never had a choice on whether or not I cooperated or
24 not. I -- my first priority was to protect my family.

25 The threats that he made to Persia and my

1 brother-in-law Robert I took for true, and I still believe
2 that they would have arrested them.

3 I figured I would go ahead and say whatever it is they
4 need me to say and I could always come back and fight it
5 later on my own. I would much rather do it on my own than
6 to have Persia arrested and my children put into foster care
7 and my brother-in-law arrested, when neither one of them did
8 anything wrong.

9 Q. And had Persia given statements to police before, in
10 '06, or '07?

11 A. Yes, she had given statements.

12 Q. Was McDaniels letting you know that those statements
13 might get her in trouble, unless you came clean with his
14 version of the truth?

15 A. Yes, that's exactly what happened. I didn't have a
16 choice at all in cooperating with them fully. Had I not, my
17 family would have been arrested.

18 Q. After that threat, talk about what happens. What do
19 you do? What is said?

20 A. After that threat I just pretty much cooperated.

21 He asked me if Justin was really there and I just said
22 no, and Godfrey still isn't here at this time, but he just
23 starts asking more questions.

24 Q. Okay. If you had said the truth and not cooperated
25 with him about what he wanted, what did you feel would

1 happen?

2 A. My family would have been arrested. Persia would have
3 gone to jail, Robert would have gone to jail, and would have
4 lost my children.

5 Persia was pregnant at the time and she would probably
6 end up having to give birth while she was incarcerated.

7 Q. Where do you think your children would go if Persia got
8 arrested?

9 A. They would go into foster care. There is --

10 We're her parents. I don't know of anybody else who
11 could take on three small children and one on the way.

12 Q. Okay. So talk to us, tell this jury exactly the way
13 McDaniels is going about it. Is he supplying scenarios? Is
14 he -- just --

15 A. He's --

16 Q. Describe it.

17 A. They were feeding me information the whole time. They
18 supplied me with scenarios. They are showing me autopsy
19 pictures. They are telling me how these wounds are made,
20 how they could possibly happen.

21 I didn't know what a contusion was until they showed me
22 autopsy pictures of where they had peeled the skin off of
23 Nakia and showed me where these things were.

24 Q. We will get to that second statement. We are still at
25 the first statement in the wee hours of the morning of the

1 9th, okay?

2 At some point does Godfrey get there?

3 A. Yes, he eventually showed up, and at that time
4 McDaniels pretty much updates him on what has transpired
5 between the two of us, that I admitted that Justin was no
6 longer there and that I was the cause of Nakia Mallory being
7 killed.

8 Q. Okay. And do you agree with that?

9 A. Not at all.

10 Q. Are you telling him that, though?

11 A. Yes, I had to tell him that.

12 Q. Okay. Do you remember this statement?

13 A. Yes, I do.

14 Q. Okay. This is your signature, right; Joshua Porch?

15 A. Yes.

16 Q. And in it it's twice on every page, isn't it?

17 A. It is. I would have signed it a thousand times if it
18 would keep my family out of jail.

19 Q. Okay, that's what I'm asking.

20 If you had not signed that last page, or the page
21 before that, what did you think would happen?

22 A. I wouldn't have been cooperating with them. Had I not
23 cooperated, my family would have been arrested.

24 Q. Okay. Was that made perfectly clear to you?

25 A. Yes, it was crystal clear in my mind.

1 Q. Now, obviously, based on what you have said, you are
2 here before us today. What is your feeling about the
3 consequences of your actions on that day?

4 A. What's my feeling of the consequences of my actions?

5 Q. Do you think that you would be able to -- the truth
6 will come out at some point? Were you worried about
7 yourself at that point?

8 A. I am innocent. I testified in the first two trial of
9 exactly what I saw. The only reason why I admitted to those
10 statements and made that confession on the tape is to
11 protect my family, to make sure that nobody else got
12 arrested along with me. I was going either way. It didn't
13 matter what I said or what I did, but I'm going to do
14 whatever I can to protect my family.

15 Q. Okay. Just -- do you know how long that interrogation
16 lasted?

17 A. A few hours. I think it was about five, six hours that
18 it lasted.

19 Q. Okay. And we have heard some on the video, and I think
20 it's been asked some of McDaniels, what is this whole 20
21 piece concept that they are talking about? Explain to the
22 jury what that meant.

23 A. This whole 20 piece concept that was just every time I
24 would give them information, they would say, "oh, well,
25 that's 10 pieces. That's 10 pieces. What about that 11th

1 piece," or, "what about that 15th piece." All they are
2 doing is letting me know that they need more information.

3 Every time I would tell them something, they would go
4 back and realize they want more and then come back and tell
5 me, "well, now you are at 17, but we need that 18th piece."
6 Each time they say that, I would just go along with it.

7 I didn't have a choice. I'm going to agree to whatever
8 they say, whatever scenario they bring up. Whatever reason
9 they say I did it, I'm going to agree to it. I -- I'm
10 protecting my family. I don't -- I didn't see any other way
11 to do that.

12 Q. All right. Now, at some point they got done with you
13 on that first interrogation, right?

14 A. Yes.

15 Q. Where are you taken?

16 A. To a -- to a cell. To the Long Beach city jail, which
17 is on another floor.

18 Q. Okay.

19 A. I didn't get any sleep. By the time they finished with
20 this interrogation, it was past the time where I was able to
21 sleep.

22 And the Long Beach city jail is not made for long term.
23 You are supposed to be there about a day or two, tops. This
24 is an incredibly small space. It's the -- the cell is
25 probably about the length of a twin bed, and it's four of

1 them in each cell. You have enough room to jump off your
2 bunk and use the restroom and then get back on.

3 During one period of time they will open up the bars
4 and you walk out. You are not allowed to lay back down
5 again. So, like I said, I could never -- I never had an
6 option of sleeping that day.

7 Where it's 30 people crammed in a space that's not even
8 half the size of this courtroom, sitting on concrete
9 benches, if you have to use the restroom, it's in front of
10 30 other men, because all the toilets are right there in
11 front of everybody, right underneath the TV.

12 Q. Now, at some point on July 9th did Godfrey and
13 McDaniels come talk to you again?

14 A. Yes, a few hours later, actually after leaving.

15 Q. Did you go to the same room? Where did you go?

16 A. I believe it's the same room.

17 Q. Okay. Now, at this time is Godfrey there from the
18 get-go?

19 A. Yes, he is.

20 Q. Okay. Now, at this time do they come -- do they come
21 with a bunch of information; pictures, medical stuff?

22 A. They had a lot of pictures.

23 And this particular time they proceeded to explain to
24 me how Nakia's injuries were caused. They were really
25 interested in the contusions, which is what they talked

1 about the most.

2 Q. Now, let me stop you about that.

3 Are you -- do you have any medical training at all?

4 A. No, I don't.

5 Q. You have a high school education, right?

6 A. Yes.

7 Q. All right. Do you know about medical terminology and
8 what contusions necessarily mean?

9 A. No, I didn't know what they were talking about when
10 they first said it.

11 Q. Now, I can't help but notice that the word contusions
12 comes up in your statement, comes up in the video. Whose
13 word is that?

14 A. That's their word.

15 Q. Okay. So are they confronting you with medical
16 evidence?

17 A. Yes, that's pretty much the entire interrogation is
18 them confronting me with medical evidence.

19 They even went as far as to call who they told me was
20 the medical examiner on their cell phone, who also explained
21 to me exactly what a contusion is and how they are caused.
22 They said it's from a blunt force trauma that -- it doesn't
23 show up on the skin. There is no swelling. You won't be
24 able to see it visibly on your skin. It's all underneath.
25 The only way that you would be able to see it is through an

1 autopsy.

2 Q. Okay. Hold the phone on that.

3 Who is making that phone call to a medical examiner?

4 A. McDaniels.

5 Q. And why is he doing this?

6 A. So they can tell me what a contusion is.

7 Q. And did they do that?

8 A. In detail.

9 Q. And did you then put that in this statement?

10 A. Yes, I did.

11 Q. Do you remember this statement? This is the second
12 July 9th statement?

13 A. Yes. This is the other statement I made.

14 Q. Okay. And is it fair to say that this one focuses a
15 lot on details of injury, right?

16 A. Yes.

17 Q. Okay. This is where -- is it fair that this is where
18 they first get to that palm strike language, right?

19 A. Yes.

20 MR. GOINGS: Object to the leading, Your Honor.

21 THE COURT: Sustained.

22 BY MR. LUKE SHEALEY:

23 Q. Is this where that palm strike information enters their
24 arena?

25 MR. GOINGS: The same objection, Your Honor.

1 THE COURT: Rephrase.

2 BY MR. LUKE SHEALEY:

3 Q. Did they talk about palm strikes?

4 A. Yes, they actually did. They informed me that if
5 someone were to be punched with a closed fist, that that
6 would show up on the skin. It would cause swelling, or it
7 could have possibly even cut somebody, depending on how much
8 force was used.

9 So this is when another scenario came up where they
10 would just ask a question where, "okay. So how were these
11 contusions caused? Did you punch them, or was it just more
12 just you using palm strikes?"

13 And I just went with the most obvious choice, which was
14 palm strikes. It's softer than bone and knuckles and it's
15 not going to leave -- it's not going to cause swelling.

16 Q. Okay. Is that palm strike statement a false statement?

17 A. Yes, it is.

18 Q. Why did you say that?

19 A. To protect my family. I didn't have a choice at all.
20 If I just said, "no, I don't want to talk to you," or, "I'm
21 not saying anything else," then my family would be arrested.

22 Like I said, I'm going to jail either way. It doesn't
23 matter what I say or what I do. The only reason why I'm
24 doing this is to protect my wife and my brother.

25 Q. And this statement is three pages. And what would you

1 feel would have happened if you didn't sign one of those
2 pages?

3 A. That they would be arrested.

4 Q. Okay. Now, it also discusses a cut on Nakia's eye.
5 Did they talk to you about that?

6 A. Yes, they talked to me about all of her injuries.
7 About the contusions, they said there was some I believe on
8 her face, on the side of the head. They said that she had a
9 cut above her eye and that she was stabbed in the neck.

10 Q. Okay. Did you know anything about what had happened
11 that night, other than what you had seen during that brief
12 fight?

13 A. No, I had no other information than what I saw that
14 particular night.

15 Q. Okay. Now, how long in your memory does this
16 interrogation lasts with all the medical evidence?

17 A. Another few hours. Exactly I don't know. It was a few
18 hours.

19 Q. Okay. Now, once it ended where were you put?

20 A. I was put back in Long Beach city jail.

21 Q. In the same holding cell?

22 A. In the same holding cell with 30 other people.

23 And like I said, this jail is not made for long term.

24 You are not allowed to change your clothes. They take your
25 belt, your shoelaces from you, because people end up killing

1 themselves there. You are not allow to brush your teeth or
2 take showers. And by now I believe this is the second day.

3 Q. Is that where you spent the night, the night of July
4 9th?

5 A. Yes.

6 Q. Okay. Did you get any sleep? How much sleep did you
7 get, if any?

8 A. I got -- I got a couple of hours of sleep. Maybe about
9 two hours, tops.

10 Q. Okay. And you -- had you been up since when you got up
11 on July 8th, your day off?

12 A. Yes, I didn't get any sleep that night, and really
13 didn't get any sleep the day after.

14 Q. Okay. Did you have occasion to talk to police again on
15 July 10th?

16 A. Yes. They came and picked me up and took me to -- I
17 don't know where exactly it was. I know it was in L.A., but
18 as far as the building, I think it was like a sheriff's
19 department, something like that.

20 Q. Okay. Who picked you up?

21 A. McDaniels and Godfrey.

22 Q. Okay. And did they then leave you with an investigator
23 from the Los Angeles Sheriff's Department?

24 A. Yes, I was with that investigator for about six and a
25 half hours.

1 Q. Okay. More of the same?

2 A. Yes, it's more of the same.

3 Q. Okay. Now, after that time, that six and a half hours,
4 where did you go?

5 A. I didn't go anywhere, but I was turned over to Godfrey
6 and McDaniels once again and they start off with the 20
7 pieces again. They say I think I'm at 18, or 19 at this
8 time and need more information from me.

9 Q. And that's the video that we saw right there?

10 A. Yes.

11 Q. That hour long video? That was actually recorded,
12 right?

13 A. Yes.

14 Q. Getting back to the first two statements on July 9th,
15 was any of that recorded?

16 A. None of it was recorded. They didn't seem interested
17 in recording anything.

18 Q. Now, getting back to the 10th, on that final
19 interrogation with Godfrey and McDaniels, you said they are
20 talking about what?

21 A. The 20 pieces, about how I need to offer up more
22 information to them.

23 Q. Okay. And they are -- they have got you now talking
24 about a knife, right?

25 A. Yes.

1 Q. Okay. And they are talking about the car, right?

2 A. Yes, they mentioned my jeep.

3 Q. Now, you watched this video. It was all played here in
4 front of us. Does this question by McDaniels sound
5 familiar? "You are telling me exactly what happened with
6 your brother-in-law, your wife does not necessarily mean
7 that they will have to pay for what you involved them in,
8 but you do realize that at some point a lot of that is going
9 to come into place?" Do you remember that?

10 A. Yes, I do.

11 Q. Is that what you saw on that video?

12 A. Yes, it is.

13 Q. Do you recall your answer being "yes"?

14 A. Yes.

15 Q. Do you recall McDaniels saying "and it's important for
16 you to be honest now, because first they are saying -- does
17 McDaniels say "what else are you missing, as far as telling
18 us? Let's talk about the car. You cleaned the car." Do
19 you remember that?

20 A. Yes, I do.

21 Q. And your initial answer is what?

22 A. "No."

23 Q. Okay. But they brought up your brother-in-law and your
24 wife again, didn't they?

25 A. Yes, they did.

1 Q. And you immediately changed your story when confronted
2 with that, right?

3 A. Yes. And him saying that was just letting me know,
4 once again, that my family's life was on the line. My first
5 instinct is to protect them. I figured that would be what
6 anyone would do when one of their loved ones is in jeopardy.
7 I'll take on whatever I have to and fight it on my own,
8 rather than have them experience something like this.

9 Q. And do you remember you then said, "yes, I cleaned the
10 car"?

11 A. Yes.

12 Q. "20 pieces" is what Godfrey says, right?

13 A. Yes.

14 Q. And right below, do you remember McDaniels saying, "and
15 you know we talked to your brother-in-law.. Didn't we tell
16 you that?"

17 A. I remember him saying that.

18 Q. And he says, "all right. Well, we got him too." Do
19 you remember that?

20 A. Yes, afterwards I asked him if he arrested him.

21 Q. Were you worried that they were arresting your family?

22 A. Yes, they told me as much if I weren't going to
23 cooperate.

24 Q. All right. I'm going to bring you back to the night
25 that we are all here for.

1 Did you have occasion to go over to the Mallory's house
2 that night?

3 A. Yes, I would go over there regularly.

4 Q. Okay. Did you go earlier in the day?

5 A. Yes, I had gone there earlier that day with my oldest
6 child, Genesis, my daughter. It wasn't for anything in
7 particular. I just went over and hung out for a little bit
8 and that -- that was all. Justin said he had to run a few
9 errands, so I left. I was there maybe for 10 minutes, 10,
10 15 minutes.

11 Q. Okay. And then later did you have occasion to go back
12 over there?

13 A. Yes, I had gone over there later that evening. I
14 knocked on the door. Nakia answered and Justin wasn't home.
15 I was going over there to buy a bottle of liquor. It was
16 too late. All the liquor stores were closed, so I couldn't
17 just go there get one. She said all the liquor in the house
18 is Justin's, I would have to ask him, but since he wasn't
19 home I couldn't ask him, so I left.

20 Q. Okay. And from that point where did you go?

21 A. From there I went to a friend of mine by the name of
22 Marcus. And I went to his apartment and we played some
23 video games, talked, had a few drinks. And I was over there
24 for I don't know how long. Maybe a few hours.

25 Q. Did you leave and go home?

1 A. I left. I did leave Marcus' house and I didn't go
2 home. At this time it was pretty late. The exact time I
3 wouldn't be able to tell anyone, but I didn't feel like
4 going inside. I just -- I just wasn't ready just to go
5 inside and go to bed, so I figured I would go back to Justin
6 and Nakia's apartment to see if Justin was up, to see if he
7 wanted to hang out for awhile.

8 Q. And how old again are you at this point, in 2006?

9 A. I'm 22 at the time.

10 Q. Okay. And you had your wife and your young child at
11 the house?

12 A. I had my wife and my daughter and my -- we had a second
13 child. My son was a few months old at the time.

14 Q. And you said you weren't ready to go to bed?

15 A. No, I wasn't ready to go in.

16 Q. Why would you have gone to the Mallory's that last time
17 that night? What would you -- what would you be looking to
18 do?

19 A. Really I just wanted to hang out with somebody. I
20 wasn't tired. I was going over there to try to hang out
21 with Justin, maybe have a couple more drinks, talk, maybe
22 play some video games or something. That's pretty much it.

23 Q. Okay. And was Justin there?

24 A. No. I knocked on the door and Nakia had answered.
25 Justin wasn't home. I -- she told me as much. I asked him

1 if he would be home soon. She said he should be.

2 Q. Okay. Did she invite you in?

3 A. Yes, she did invite me in.

4 Once coming in I sat down on the couch. She sat down
5 on the same couch. We were having just a pretty general
6 conversation. It was nothing specific. I had a few drinks
7 and one thing led to another. Nakia and I started making
8 out, touching.

9 Q. Okay. Let me stop you right there. Do you remember
10 who initiated this? Was it you? Was it her? What?

11 A. I couldn't really tell you who initiated anything. It
12 just -- I'm not even sure how it happened myself. It was
13 just mutual. I can't say who initiated what.

14 Q. Is that the first time something that happened with
15 her?

16 A. Yes, the first and only time.

17 Q. Do you remember how long that lasted?

18 A. Not particularly. It wasn't really long at all. I
19 wasn't paying much attention to time.

20 Q. Okay. At some point did y'all stop making out?

21 A. We did. It happened just -- it stopped just as
22 suddenly as it began.

23 Q. Okay. Was there anything sexual? Any clothes off,
24 or --

25 A. No clothes are off. No sex was made. Nothing.

1 Q. Okay. And y'all are both sitting on the couch?

2 A. Yes.

3 Q. Do you remember what time it was?

4 A. No, I don't. I just know it was late. The exact time
5 I couldn't tell you. I wasn't paying any attention to time
6 at that point.

7 Q. Okay. What happens next?

8 A. Shortly after we stopped is when Justin comes home, and
9 he sees me there and it's late. I take it that he was
10 surprised or probably wasn't too happy about seeing me there
11 with his wife at this late hour. And he asked me what am I
12 doing there. I never got a chance to answer.

13 Nakia jumps up and asked him where has he been. She's
14 being real confrontational. She's getting in his personal
15 space. She's pushing him, trying to figure out what he's
16 been doing. She's accusing him pretty much of cheating,
17 asked him pretty much, "where have you been? Who were you
18 with," stuff like that. He's not answering.

19 They keep going back and forth, her pushing, him trying
20 to get away, but can't. The altercation or verbal
21 altercation leads into the kitchen. And once they are in
22 there, I can't really see what they are doing. All I can do
23 is hear them.

24 Q. Well, let me ask you this.

25 Knowing that this fight is now breaking out about --

1 you being there probably isn't helping the situation. All
2 right. Why don't you just leave? Why didn't you just run
3 out that door at that point?

4 A. This isn't the first time that they have gotten into
5 any type of verbal argument.

6 MR. GOINGS: Objection, Your Honor. It goes to
7 character evidence of the witness.

8 MR. LUKE SHEALEY: Your Honor, may we approach?

9 THE COURT: Yes.

10 (Whereupon, the lawyers approached the bench for
11 an off-the-record discussion)

12 BY MR. LUKE SHEALEY:

13 Q. All right. Josh, again you are explaining why you
14 didn't just leave at that moment. Go ahead.

15 A. Like I was saying, this isn't the first time that they
16 have gotten into any argument in front of me. Most times it
17 dies down. It never becomes physical, at least it never has
18 in my presence.

19 Q. Okay. And do you think that you leaving out right then
20 and there, would that make it seem worse?

21 A. Yeah, it would make me look even more -- it would make
22 me look suspicious if all the sudden as soon as he comes in
23 is I jump up and run out the door. I figured I would just
24 stay and see what's beginning on. I didn't -- I mean, they
25 were just arguing.

1 Q. All right. Can you really see them when they are in
2 the kitchen?

3 A. No, I can't see what they are doing. All I can do is
4 hear them.

5 Q. You can hear them?

6 A. Yeah.

7 Q. At any point in time did Nakia say "how could you?"

8 A. Yes.

9 Q. Okay. And you recall that?

10 A. I do recall her saying "how could you."

11 Q. And that is in your statement?

12 A. Yes.

13 Q. Okay. Do they ever come out of the kitchen?

14 A. They do come out of the kitchen. And at this time
15 Nakia is still confronting Justin, and she is actually
16 pretty relentless in trying to figure out what he has been
17 doing and who he has been doing it with. And he's trying to
18 get past her, and as they are coming back into the living
19 room she's in front of him and she just keeps pushing him.
20 At this time I noticed an object in his hand and I see him
21 strike her several times before I actually get up and get in
22 between them to try to break them up.

23 Q. Okay. Let me stop you right there.

24 What does this object look like? Can you tell? Is it
25 a knife? Is it -- what is it?

1 A. I -- I'm not sure. It could have been a knife, or a
2 screwdriver. I'm -- I'm guessing it was a knife. I'm not
3 sure.

4 Q. Okay. Was he moving quickly, or was he moving slowly?

5 A. No, everything is happening fast. It may sound like
6 things are going rather slowly with the way I'm explaining
7 it, but everything that happened happened incredibly fast.

8 Q. All right. From the point he gets in the door to the
9 going in the kitchen and coming back, how long is that?

10 A. Maybe a few minutes, tops, if that.

11 Q. Okay. Tell us what happened as he's striking her with
12 that object.

13 A. After he strikes her a couple of times, I get up and I
14 get in between them.

15 Q. Why? Why?

16 A. Because I'm trying to diffuse the situation. At this
17 time it's gotten out of hand.

18 Q. Okay. Do you remember what hand he's using? Can you
19 tell?

20 A. No. Like I said, everything is happening fast.
21 Everyone is moving. I wouldn't be able to sit here and tell
22 you honestly what exactly hand he was using.

23 Q. Okay. So you jump up in between them. What happens?

24 A. Once I get in between them, I -- I ended up getting cut
25 myself. And after that happens, once I get between them,

1 things -- things stop. Justin walks off down the hallway.
2 I'm assuming he was going -- I don't know where he's going.
3 He goes down their hallway.

4 At this time I'm scared myself. I don't want to be
5 here any more, so -- I'm bleeding. I go into the kitchen
6 looking for paper towels to wipe my hand up. And while I'm
7 in the kitchen I look under the sink and I didn't see any
8 paper towels there. I noticed them on the counter, so I
9 grabbed a few. I wiped my hand up, wrapped my hand up. And
10 as I'm talking out the kitchen I noticed that there is a few
11 drops of blood on the floor. It may sound stupid, but it's
12 my habit of picking up my mess, so automatically I wipe a
13 couple of drops and realize how stupid that is and I leave
14 after that.

15 Q. Okay. Hold on now.

16 Did you scour the kitchen wiping up every single piece
17 of blood that you dropped in there?

18 A. No, I still had several drops of blood all over the
19 floor.

20 Q. Again, why did you wipe that up?

21 A. Just habit. I wasn't thinking. At this time I'm
22 shocked, I'm scared.

23 Q. All right. Now, do you want to hang around at this
24 point?

25 A. No, not at all.

1 Q. Okay. What do you see? Where is Nakia?

2 A. Nakia is on the couch. At this time she's just kind of
3 sitting there. She has her hand up like this, and -- I
4 didn't stop to check her injuries to see how badly hurt she
5 was or anything. I just -- I saw her. And when I saw her,
6 there wasn't blood all over the scene, like they were
7 showing me in all the photos.

8 Q. Okay. Let me ask you this. If Nakia is here, and we
9 know from this trial now that the right -- the wound is on
10 the right side of her neck. Is it fair to say the door is
11 over here?

12 A. Yes, it would be on her left side.

13 Q. Okay. And is that the way that you are going, to that
14 door?

15 A. Yes, I would only be able to see her left side.

16 Q. Okay. So did you see a whole bunch of blood and stuff
17 coming out?

18 A. No. I saw some blood, but what I did see was what I --
19 I didn't think was life threatening at all.

20 Had I known how badly injured she was, I would have
21 called 911 and gotten her help.

22 Q. Okay. But you said you left quickly?

23 A. Yes.

24 Q. And why did you want to leave quickly?

25 A. I didn't want to be further involved in this situation.

1 It's already gotten way out of hand and I was scared. I
2 just wanted to go.

3 Q. But, again, what would you have done if you had known
4 how hurt Nakia was?

5 A. I would have called 911 and gotten her help, had I
6 known how badly hurt she was. I wouldn't be here now.
7 Nobody would have been here now.

8 Q. Where did you go from there?

9 A. I went straight home.

10 Q. Did you wake your wife up and say, "hey, I just
11 witnessed something and I just cheated on you"?

12 A. No, I didn't tell her anything. I didn't tell anyone
13 anything.

14 Q. Okay. And when police came to you the next day, again,
15 why did you say you hadn't been there?

16 A. They had the right guy already. They said as much.
17 They said they had already arrested him, that they had more
18 than enough evidence to convict him. I didn't see why it
19 was necessary for me to tell them exactly that I was there,
20 that I had gotten hurt and my blood was there and that I was
21 making out with Nakia.

22 Q. Would that have been good for your marriage?

23 A. That wouldn't have been good for my marriage at all.

24 Q. And did ultimately it prove bad for your marriage?

25 A. Ultimately it proved to be the catalyst for the end of

1 my marriage.

2 Q. And that very thing that you were scared of, putting
3 yourself into this investigation and on that crime scene,
4 did that end up being bad for you?

5 A. Yes, ultimately me helping law enforcement and
6 testifying in two trials ended up with me becoming a
7 suspect, once Justin Mallory was found not guilty, and they
8 pretty much had to do a public apology. He started suing
9 them and they then came after me.

10 Q. Did you kill Nakia?

11 A. No, I did not kill Nakia, or anyone else.

12 Q. Who killed Nakia?

13 A. Justin Mallory.

14 Q. Josh, thank you. Please answer any questions that the
15 Government lawyer has for you, okay?

16 THE COURT: Any cross?

17 MR. GOINGS: Yes, ma'am.

18 CROSS EXAMINATION BY MR. GOINGS:

19 Q. Mr. Porch, you're a liar, aren't you?

20 A. Are you asking me if I lied?

21 Q. Yes.

22 A. Those first two statements with the police?

23 Q. Yes.

24 A. Yes, I did lie.

25 Q. So you admit to this jury that you're a liar, correct?

1 A. I admit to this jury that during those first two
2 statements I lied, because I was scared of being involved in
3 this, of being considered a suspect and my wife finding out
4 that I cheated on her.

5 Q. Okay. Well, let's go through those first two
6 statements.

7 Well, let's -- first off, let's start with your version
8 of what you think or what you say happened the night of May
9 14th, 2006, okay?

10 And it's your testimony before this jury that the
11 statements that you made in California are no longer
12 correct? Is that what you are saying?

13 A. They never were correct.

14 Q. Never were correct.

15 And that you are saying that the statement that you
16 gave to police on July 2nd, 2007, and your testimony before
17 the jury and judge in the two trials of Justin Mallory is
18 what is the truth?

19 A. That is the truth. I know what I saw.

20 Q. Do you have your statements up there?

21 A. No.

22 Q. Now, let's go to May 14th, 2006.

23 You have just told this jury that you didn't tell the
24 cops the truth about what happened because you didn't want
25 to get involved, is that correct?

1 A. That I was scared that my wife to find out what
2 happened between Nakia and I. And also I did not want to get
3 involved.

4 Like I said, where I'm from you don't do things like
5 that. You don't tell on people. It's frowned upon. You
6 end up getting hurt yourself.

7 Q. So what you are telling me is, your culture, when you
8 see someone who kills another person is not to tell on them?
9 Is that what you want this jury to believe?

10 A. When I was there I didn't know that she was dying, or
11 that she was dead. I didn't find that out until the day
12 after when Sergeant Strange told me.

13 Q. But you found out?

14 A. Yes.

15 Q. And you are still telling this jury that it's your
16 culture, once you found out that she's dead, not to tell law
17 enforcement about what you saw?

18 A. I know law enforcement informed me that they already
19 arrested Justin Mallory, who did do this, and that they had
20 more than enough evidence to convict him.

21 Q. My question is you are telling this jury that your
22 culture says you don't snitch, and that's one of the reasons
23 you didn't tell law enforcement?

24 A. The reasons I didn't tell law enforcement is because I
25 was scared of my wife finding out what happened between

1 Nakia and I, and also I didn't want to get involved at all.

2 Q. What was this story about or this testimony about from
3 where I come from --

4 A. It is frowned upon.

5 Q. -- we don't tell on people?

6 A. Where I come from it is frowned upon for you to tell on
7 anybody for any reason or you could end up getting hurt
8 yourself.

9 Q. All right. So you want this jury to believe one of the
10 reasons you didn't tell law enforcement is because you don't
11 snitch, correct? Ain't that just a fair way of saying it?

12 A. Is that I don't snitch?

13 Q. Tell what you saw is snitching, right?

14 A. No, I didn't never say anything about snitching.

15 Q. Maybe we are getting confused here.

16 You said that where you are from you don't tell on
17 people, correct?

18 A. Yes, there are people who -- it's frowned upon for some
19 people to tell.

20 Q. Is that not called snitching?

21 A. Yes.

22 Q. All right. So you didn't snitch on Justin, supposedly,
23 when you found out Nakia Mallory was murdered, because from
24 where you are from people don't snitch?

25 A. No, that wasn't my reason.

1 The reason for me not getting involved, like I stated
2 earlier, is because I was scared for my wife finding out,
3 and also I just didn't want to get involved. I didn't want
4 to become a suspect myself.

5 Q. Then why tell this jury from where people where you are
6 from we don't tell on people? I mean, what was the purpose
7 of that part of your testimony if you going to tell them now
8 that that wasn't one of the reasons that you used?

9 A. Is that a direct question?

10 Q. Yes, that's a question. I mean, what -- what's the
11 purpose of the testimony about "from where I'm from we don't
12 snitch?"

13 A. It's part of the way that I grew up.

14 Q. And it's part of the reason that you didn't tell law
15 enforcement?

16 A. Yes.

17 Q. Thank you. Finally.

18 Now, so you want this jury to believe that people from
19 where you are from, or where you grew up, if they see
20 someone kill another person, they are not going to tell law
21 enforcement?

22 A. Are you asking me for myself, or just people in
23 general?

24 Q. From your knowledge of people where you grew up and
25 where you grew up and yourself, you are going to tell me

1 that --

2 MR. LUKE SHEALEY: Your Honor, objection. This is
3 calling for speculation.

4 THE COURT: I'll overrule the objection.

5 BY MR. GOINGS:

6 Q. Now, go ahead and answer the question.

7 A. Could you repeat it, please?

8 Q. You to want this jury to believe that people where you
9 come from, saying your culture that you grew up in, that
10 they see someone kill another person, they are not going to
11 tell the police?

12 A. Yes, that's happened before. Where I'm from people, at
13 times, if gangs are involved and a gang were to kill
14 somebody, there are people who will not tell the police what
15 happened, because these people live in their neighborhood.
16 They, like I said, can be harmed themselves for sitting here
17 testifying.

18 Q. Is this a gang murder?

19 A. No.

20 Q. Now, you also said that you didn't your wife to find
21 out is another reason, correct?

22 A. Yes.

23 Q. What did you tell your wife about how you got your hand
24 cut that night?

25 A. I believe I told her something that I cut my hand on a

1 rail at Marcus' house, something like that.

2 Q. And so you wasn't honest with your wife on the first
3 night, is that correct?

4 A. No, I wasn't. Like I said, I didn't want to tell her
5 what happened that night.

6 Q. And you also testified that when the officers arrived
7 on the scene, or to your house the next day, Investigator
8 Strange, correct?

9 A. Yes.

10 Q. He's the one that came and spoke with you?

11 A. Yes.

12 Q. He informed you that they had more than enough evidence
13 on Justin Mallory already?

14 A. Yes, Sergeant Strange --

15 Q. Is that correct?

16 A. Sergeant Strange did tell me that, that they had
17 already arrested him and they had more than enough evidence
18 to convict him.

19 Q. So you used that as part of your reasoning to not get
20 involved, correct?

21 A. Yes, they had -- they had the right guy. There was no
22 reason for me to get involved.

23 Q. Wouldn't you agree, if we are to believe this third --
24 eventually third statement that you gave to law enforcement
25 on July 2nd, 2007, that that would give law enforcement even

1 more evidence against Mallory?

2 A. I would --

3 Q. You would agree, right?

4 A. I would agree, but when someone tells you they have
5 more than enough to convict somebody, why would you need to
6 add more?

7 Q. And you want this jury to believe that that was the
8 reason that you didn't give this detailed statement on July
9 2nd about you being there at the time the incident occurred,
10 because you didn't want to get involved and they already had
11 enough evidence against Mallory?

12 A. And also I was scared, yes.

13 Q. You were scared.

14 I mean, this is pretty damning evidence against
15 Mallory, ain't it?

16 A. It is.

17 Q. But you didn't want to get involved?

18 A. I was scared. I didn't want my wife to find out.
19 Like, once again, I didn't want to get involved. I didn't
20 want to become a suspect to be implicated in this.

21 Q. And you lived with that lie for how long?

22 A. What lie?

23 Q. The first lie that you told Investigator Strange he
24 went out -- when he came out to your house and you said you
25 didn't know anything about it and you wasn't there. How

1 long did you live with that lie?

2 A. A little over a year. I don't know the exact time.

3 Q. May 14th, 2006 is the day that he came out there,
4 correct?

5 A. Yes.

6 Q. Okay. So from May 14th, you got June, July, August,
7 September, October, November, December, January, February,
8 March, April, May, and finally in June of 2007 is when you
9 came forward -- or when -- they actually had to come to you
10 again, didn't they?

11 A. Yes, Captain Smith came out to my house.

12 Q. So it's 13 months.

13 Did you ever tell your wife the truth?

14 A. No. Like I said, I never told anybody what happened
15 that night.

16 Q. Your conscience never got to the best of you and say,
17 "hey, I think I need to let law enforcement know what I saw
18 that night?"

19 A. Law enforcement already arrested the right man.

20 Q. Okay. Your statement gives them more evidence against
21 him, correct?

22 A. And they also informed me they had more than enough
23 evidence to convict them.

24 Q. During that 13 months you didn't think Nakia Mallory's
25 family had a right to know exactly what happened?

1 A. They already knew what happened. Justin Mallory killed
2 her.

3 Q. This is what law enforcement was operating on when they
4 arrested Justin Mallory, is that what you are saying?

5 A. Are you talking about the --

6 Q. I mean, they didn't know this information at that point
7 in time, right?

8 A. No.

9 Q. They don't know why the argument started or anything
10 like that, correct?

11 MR. LUKE SHEALEY: Your Honor, I'm going to
12 object. He's asking him to ask what he might know about the
13 investigation. He hasn't become part of it or aware of it
14 at that point in time. I don't think it's appropriate.

15 THE COURT: Rephrase the question.

16 MR. GOINGS: Yes, ma'am.

17 BY MR. GOINGS:

18 Q. You hadn't told the story yet, had you? This July 2nd,
19 2007 statement, you hadn't told them yet, had you?

20 A. No, I hadn't told the truth yet.

21 Q. So law enforcement couldn't know exactly what happened,
22 according to you, correct?

23 A. That would be correct.

24 Q. Nakia Mallory's family wouldn't be able to know what
25 exactly happened, correct?

1 A. They knew what happened. I'm pretty sure the police
2 informed them that Justin Mallory killed their -- killed
3 Nakia.

4 Q. They didn't know why, did they?

5 A. I don't know.

6 Q. 13 months, according to you, if we believe this last
7 statement that you gave on July 2nd, 2007, we know why,
8 correct?

9 A. Yes.

10 Q. 13 months just sitting there your conscience never told
11 you "I need to tell somebody?"

12 A. They had already arrested the right man.

13 Q. You keep on saying they had already arrested the right
14 man.

15 Your conscience -- I'm asking about your conscience.
16 You didn't think law enforcement had the right to know
17 exactly what you say right now, because you have given so
18 many statements so far, who knows what the truth is any
19 more, but --

20 MR. LUKE SHEALEY: Objection, Your Honor.
21 Improper commentary by counsel.

22 THE COURT: I'll sustain the objection.

23 Rephrase the question.

24 MR. GOINGS: Thank you, Your Honor.

25 BY MR. GOINGS:

1 Q. 13 months you never went and told law enforcement the
2 truth, correct?

3 A. That's correct.

4 Q. All because you didn't want to lose your wife, is what
5 you want this jury to believe?

6 A. Law enforcement had already arrested the man who is
7 responsible for this.

8 Q. Let me ask you this. Do you think if a person kills
9 someone, they should be convicted?

10 A. Should they be -- you mean charged and convicted?

11 Q. Yeah.

12 A. If somebody murdered someone else?

13 Q. Yes.

14 A. Yes.

15 Q. Do you think it's fair for law enforcement to have all
16 the evidence that they can have against that person?

17 A. Law enforcement informed me they already had that.

18 Q. My question is do you think it's fair -- or should law
19 enforcement have exactly all the evidence that they can have
20 before they go to trial against somebody?

21 A. Yes, that would be fair.

22 Q. , Wouldn't you agree in that 13 month period that this
23 would have been helpful to law enforcement?

24 A. Are you asking me what I would think back then, or now?

25 Q. Back then.

1 A. Back then it could have been helpful, but --

2 Q. Could have been helpful? That going to be your
3 testimony, it could have been helpful?

4 A. I'm on trial right now, so apparently it wasn't too
5 helpful.

6 Q. So 13 months go by and you don't tell your wife, you
7 don't tell anybody, "hey, this is what really happened that
8 night," correct?

9 A. That's correct. I was scared. I didn't tell anybody
10 on this earth what had happened that night.

11 Q. Because you didn't want to lose your wife and you
12 didn't want to be a suspect?

13 A. That's correct. If the time arose where I would have
14 to tell something, I would have, like I originally did when
15 I testified in those two trials.

16 When the police came to me, once again, they said they
17 had already arrested Justin Mallory, that they had more than
18 enough evidence to convict him. I was scared.

19 Q. Well, let's go to that second part, okay?

20 You are approached by law enforcement, finally, because
21 DNA has to be explained. Is that your understanding?

22 A. Yes.

23 Q. And Major Smith comes out to talk with you at your
24 house, is that correct?

25 A. Yes, he does.

1 Q. Is Persia there?

2 A. Not that first time.

3 Q. And what happens when he comes out to your house that
4 first time? What's he say to you?

5 A. He tells me that there is DNA that is unexplained for.

6 Q. That's problematic for you at that point, ain't it?

7 A. How so?

8 Q. I mean, you know your DNA is there, don't you?

9 A. I told him that -- I lied about why my DNA was there,
10 but I told him that it would more than likely be my DNA.

11 Q. What did you tell him was the reason at that point in
12 time?

13 A. I then told him that I had cut myself cutting an apple,
14 I believe, for my daughter.

15 Q. So you lied again?

16 A. Yes, I lied to Captain Smith at that time, because,
17 once again, I'm scared and I'm not wanting to be involved in
18 this. I don't -- my wife still doesn't know what happened
19 between Nakia and I. No one knows what really happened that
20 night, so I lied.

21 Q. You don't want law enforcement to find out the truth
22 that you killed Nakia Mallory, do you?

23 A. Justin killed Nakia Mallory.

24 Q. Now, when law enforcement shows up at your door and
25 they explain to you that DNA needs to be explained, do you

1 think there might be some problems with their case at that
2 point in time?

3 A. No.

4 MR. LUKE SHEALEY: Objection, Your Honor.

5 Again, he's asked to speculate about the problems
6 with law enforcement's case. He has no knowledge of that at
7 that time.

8 THE COURT: Rephrase the question.

9 MR. GOINGS: I'll withdraw the question, Your
10 Honor.

11 BY MR. GOINGS:

12 Q. Now, you bring your daughter into this lie, correct?

13 A. My daughter --

14 Q. Genesis?

15 A. -- was with me that day I went there.

16 Q. She wasn't there the day you cut your hand or the time
17 that you cut your hand, was she?

18 A. Are you talking that night when Justin come in?

19 Q. Your last purported truthful statement of what you are
20 telling this jury happened that night --

21 A. No, she wasn't.

22 Q. -- your daughter wasn't there, was she?

23 A. No.

24 Q. You indicated to Major Smith that you cut your hand
25 while making an apple -- to getting an apple for her earlier

1 that day, correct?

2 A. That's correct.

3 Q. And that you actually went on to tell him that you
4 cleaned up, correct?

5 A. That's what it says in the statement and that's what

6 I --

7 Q. Do you need to see the statement again? You forgot
8 what you told law enforcement?

9 A. I lied, and it was years ago.

10 Q. Would you like to review it?

11 A. Yes.

12 Q. Okay.

13 (Witness reviewing document)

14 BY MR. GOINGS:

15 Q. Are you familiar with it now?

16 A. Yes.

17 Q. So you brought your daughter into this lie, correct?

18 A. About being cut, yes.

19 Q. Thank you.

20 All along you are just giving law enforcement enough to
21 explain you out of things, aren't you?

22 A. Yes, I'm trying to keep from being involved and for my
23 wife finding out.

24 Q. And from law enforcement finding out that you actually
25 killed Nakia Mallory, isn't that right?

1 A. No, I'm trying to keep law enforcement from finding out
2 that I was there when Justin Mallory killed Nakia Mallory.

3 Q. Law enforcement comes back the same day, correct?

4 A. Yes.

5 Q. What did they want this time?

6 A. I believe he had asked me if I had told Sergeant
7 Strange about this apple story.

8 Q. What did you tell him?

9 A. I said "I think so."

10 Q. You knew you hadn't told Sergeant Strange about that
11 apple story, didn't you?

12 A. You are asking me for -- you are asking me if I knew?

13 Q. Right now you knew when you told Major Smith that you
14 didn't know if you told Sergeant Strange about the apple
15 story, you knew, in fact, you hadn't told him, didn't you?

16 A. Yes, that's correct.

17 Q. So you lied to Major Smith again, didn't you?

18 A. Yes, I lied.

19 Q. To avoid detection for killing Nakia Mallory?

20 A. No, I didn't kill Nakia Mallory.

21 It was to avoid my wife finding out what happened and
22 that I was even there that night when it happened. I don't
23 want to be involved in this case. I'm scared and I really
24 don't want to be involved.

25 Q. You even went on to go ahead and forced out of the fact

1 that you cleaned up, and they knew that you cleaned up,
2 correct?

3 A. I don't know what they knew.

4 Q. I mean, you admitted that you told Major Smith that you
5 cleaned up the cut on your hand with paper towels, correct?

6 A. Yes.

7 Q. Because you knew after you killed Nakia Mallory you had
8 cleaned up the kitchen, isn't that right?

9 A. I didn't kill Nakia Mallory, so that's incorrect.

10 Q. Well, according to -- well, let's use your version of
11 the truth then.

12 On July 2nd, 2007, you knew, supposedly after Justin
13 Mallory stabbed his wife, you got cut in the process and you
14 cleaned that blood up, correct?

15 A. After Justin Mallory killed his wife, yes.

16 When I got those paper towels to stop the bleeding on
17 my hand, I did wipe up some drops of blood, as y'all will
18 see later in the pictures that they is still drops of my
19 blood on the floor. It was not me stopping to clean up.

20 Q. You wish you would have got them all, don't you?

21 A. No.

22 Q. No? No?

23 A. I --

24 Q. But for a year and a half you didn't tell law
25 enforcement the truth, and you are going on sit here and

1 tell this jury that you didn't wish you got all the drops of
2 your blood up? Then you would have never come into it,
3 would you?

4 A. I don't know.

5 Q. And you wanted to go ahead and explain the cleanup of
6 the murder scene because you knew that you did it.

7 A. I never cleaned up the murder scene.

8 Q. According to your statement, when Nakia Mallory was
9 sitting on the couch, you went to clean up because you cut
10 your hand in this struggle, correct?

11 A. I did get my hand cut by Justin Mallory.

12 Q. Now, let's go to the July 2nd, 2007. You supposedly
13 finally come clean with law enforcement. Is that your
14 testimony?

15 A. I did finally come clean with law enforcement. I did
16 finally tell them what happened that night. I did tell them
17 that I witnessed Justin and Nakia getting into an
18 altercation, where he was the cause of her death later.

19 Q. And you testified twice to this version, your version
20 of the truth, is that correct?

21 A. That's correct.

22 Q. And you said the State called you their star witness?

23 A. Mr. Meadors called me his star witness.

24 Q. Well, let's go through exactly what happened the night,
25 according to you, on May 14th, 2006, okay?

1 Now --

2 First of all, what did you tell Persia about your DNA
3 being -- or your blood being at the Mallory residence,
4 before you got to the July 2nd statement?

5 A. The same thing I told law enforcement, that I cut
6 myself on an apple.

7 Q. Did she question you as to why you lied to her for over
8 a year?

9 A. That did come up?

10 Q. What did you tell her?

11 A. I'm sorry, what did you say?

12 Q. When she said, "Joshua, why lie to me for over a year
13 about cutting your hand," what was your response to it?

14 A. I don't remember. I just remember eventually she found
15 out what happened between Nakia and I.

16 Q. You don't remember what you told her and how you
17 explained to her why you lied about where the cut on the
18 hand came from? Is that what you want this jury to believe?

19 A. Are you -- I don't understand what you are saying.

20 Q. You don't remember what you told her about why you lied
21 to her for over a year about your hand being cut, is that
22 correct?

23 A. Yes.

24 Q. Okay. But you are telling this jury yet that you
25 admitted that you lied to your wife Persia, correct?

1 A. Yes.

2 Q. I mean, why not tell her the truth from the get-go that
3 you cut your hand -- I'll take that back.

4 MR. GOINGS: Strike that question, Your Honor.

5 BY MR. GOINGS:

6 Q. July 2nd, 2007, the police finally gets you to
7 supposedly tell them the truth about you being present when
8 Justin comes home, correct?

9 A. Yes.

10 Q. What time did you originally get to the Mallory
11 residence that night?

12 A. You are talking about when this altercation happened?

13 Q. No, what's the first time that you got there?

14 You testified -- you put in your statement the first
15 time that you got there was around ten or eleven, is that
16 correct?

17 A. You are talking that evening when I went there to buy a
18 bottle of liquor?

19 Q. Yes, the first time.

20 A. Yes, that's -- I believe I said around ten or eleven.

21 Q. Okay. And Justin wasn't home, was he?

22 A. No.

23 Q. And were you having a drink with Nakia on that
24 particular occasion?

25 A. No.

1 Q. How long were you there then?

2 A. A few minutes.

3 Q. Now, the times that you had gone to the Mallory
4 residence, Justin parks his van right in the front of their
5 apartment, is that correct?

6 A. Yes.

7 Q. So when you get there at ten or eleven you know Justin
8 is not home, correct?

9 A. I find out when I asked.

10 Q. Well, did you see his van?

11 A. No. I wasn't paying much attention. I just drove
12 there.

13 Q. You remember not seeing his van, correct?

14 A. Yes.

15 Q. You know what he drives, correct?

16 A. Yes.

17 Q. So when you get there and you don't see his van, you
18 know Justin is not home?

19 A. Yes.

20 Q. Okay. But you still go and ask for him at the door?

21 A. I still asked for a bottle of liquor. I asked to buy a
22 bottle of liquor.

23 Q. Now, you testified that you went to your friend Marcus'
24 house and came back to Justin and Nakia's house around one
25 o'clock in the morning, is that correct?

1 A. If that's what it says. I don't remember the exact
2 times.

3 Q. You don't remember testifying in two trials that you
4 estimated your time of arrival on the second time to Nakia
5 Mallory's residence was at one o'clock in the morning?

6 A. No, I don't remember the exact time.

7 Q. Okay. Would you disagree with that?

8 A. I would say I don't remember.

9 (Off the record)

10 (Back on the record)

11 BY MR. GOINGS:

12 Q. Was Justin's van in front of the apartment at this
13 time?

14 A. When I go back this time?

15 Q. Yes.

16 When you go back, was it in front of --

17 A. No, I don't think so.

18 Q. Huh?

19 A. No, I don't think so.

20 Q. So you knew Justin wasn't home again, correct?

21 A. Yes.

22 Q. But you still went to the door, correct?

23 A. Yes.

24 Q. And Nakia tells you he's not home, correct?

25 A. That's correct, she said that he should be back

1 shortly.

2 Q. And then she invites you in and at some point in time
3 y'all start making out, correct?

4 A. That's correct.

5 Q. How long were you there before you all started making
6 out?

7 A. I couldn't give you an exact time.

8 Q. How long had you known Nakia prior to this date?

9 A. A year. A little over a year.

10 Q. Did you ever have any personal conversations with her,
11 one on one?

12 A. With who?

13 Q. Did you ever have one-on-one conversations with her?

14 A. Yes.

15 Q. Like y'all were alone, or with people?

16 A. There was people around, but as far as Nakia and I
17 speaking to each other with no one else in the conversation,
18 yes, we have had that before.

19 Q. Did you ever flirt with each other?

20 A. Not really.

21 Q. Prior to you getting to that house that night, was
22 there anything in your mind that made you think Nakia
23 Mallory wants you?

24 A. No.

25 Q. You went over there to try to get some from her, didn't

1 you?

2 A. No.

3 Q. And when you got there and saw Justin Mallory's van was

4 still not there, you knew it was a perfect opportunity to

5 try to put the moves on her, isn't that right?

6 A. No.

7 Q. Well, that's eventually what you testified and stated

8 happened, is it not?

9 A. No, that's not what I testified to.

10 I never once said that I went there to try to put the

11 moves on her, to seduce her in any way.

12 Q. But that's --

13 A. I said I went there originally to look for Justin.

14 Q. And y'all eventually started making out, correct?

15 Isn't that what you testified to?

16 A. Yes.

17 Q. According to you, correct?

18 A. That would be the truth.

19 Q. We don't know what Nakia would have told us, do we?

20 A. Unfortunately Justin killed her.

21 Q. Now, who started the interaction, you or Nakia?

22 A. Like I said earlier, I don't remember who started it.

23 It just happened. It's not something that was planned or

24 something that I remember her being the aggressor, or me.

25 It happened.

1 Q. And never before until this night had y'all flirted
2 with each other in any way?

3 A. No, not that I recall.

4 Q. Never had a longing stare at each other?

5 A. You said a longing stare?

6 Q. Yeah.

7 A. No.

8 Q. Never held hands?

9 A. No, Nakia and I had never done anything like that
10 before. We have never had sex, or a secret affair, or
11 anything of that nature.

12 Q. You want this jury to believe that you go over there
13 waiting on Justin and just romance pops off?

14 A. I expect the jury to believe the truth. That's up to
15 them to find out.

16 Q. And that's your version of the truth at this point in
17 time, is it not?

18 A. No, that is the truth.

19 Q. That's not what you told law enforcement in California
20 now, is it?

21 A. That's not what I told law enforcement?

22 Q. In California about what happened. You gave a
23 completely different statement then, didn't you?

24 A. Oh, you mean those false confessions? Yes.

25 Q. We will get to those.

1 It's interesting that you call them false confessions,
2 because that means -- you brought in an expert to say
3 exactly that, didn't you?

4 MR. LUKE SHEALEY: Objection, Your Honor.

5 THE COURT: Rephrase the question.

6 MR. LUKE SHEALEY: This is not appropriate by Mr.
7 Goings.

8 THE COURT: I already answered your objection.
9 Rephrase the question.

10 BY MR. GOINGS:

11 Q. Did you have a false confession expert come and testify
12 on your behalf?

13 A. Yes, last week.

14 Q. Now, going back to your July 2nd statement, that's what
15 I'm going to call it from now on, okay? You want this jury
16 to believe no flirtation, no longing stares, no hand
17 holding, no nothing inappropriate between you and Nakia
18 Mallory the whole year, or so, that you knew her, but on
19 this particular night you get over there and the romance
20 just pops off? I mean, it happens automatically, correct?

21 A. It happens. Like I said, we were there for a little
22 while talking. It happened. I can't sit here and just go
23 into detail how everything started, how it was initiated.

24 Q. It's kind of funny how you can remember things right
25 off the top of your head on certain things, but when we need

1 to know exactly how it started, you can't remember. Is that
2 what you are telling this jury?

3 A. That I can't remember how the kissing started?

4 Q. Yeah.

5 A. Yes.

6 Q. Did you sweet talk her?

7 A. Did I sweet talk her into kissing me?

8 Q. Yes.

9 A. Is that what you are asking me?

10 Q. Yes.

11 A. I have already said I don't remember how it started.

12 Q. Because it never happened, did it? You tried and she
13 rebuffed your advances, isn't that the truth?

14 A. No, what I said in that statement is the truth.

15 Q. Now, how long was this intimate time that you had with
16 Nakia Mallory going on before Justin Mallory got there?

17 A. I don't know. Like I said prior, I wasn't paying much
18 attention to time. I couldn't tell you the exact time of
19 when everything happened or how long it was.

20 Q. Didn't you testify --

21 Well, you sure did remember when you were asked on
22 direct examination that from the time Justin Mallory got
23 home to the time you left was less than five minutes, didn't
24 you?

25 A. That's an approximation. If that's what I testified

1 to, I mean, then that's what it is. As of right now I don't
2 remember. This happened how long ago, seven, almost eight
3 years ago?

4 Q. You don't find it funny that you can remember things
5 that are helpful to your testimony, but you can't remember
6 other details? You don't find that odd?

7 A. Do I find it odd or funny?

8 Q. Yeah.

9 A. No.

10 Q. I mean, I'm trying to think in my head how you remember
11 it's five minutes by the time Justin gets home, but you
12 can't tell this jury or give them any idea how long you were
13 at the Mallory residence with Nakia Mallory.

14 A. I don't understand what you are trying to say.

15 Q. Of course not.

16 Well, let me ask you this. You said it was under five
17 minutes, correct, on direct examination?

18 A. If that's what it says in the statement.

19 Q. I'm asking about what you just testified to this jury.

20 When your attorney asked you how long were you there --
21 or how long was it by the time Justin came home and the time
22 that you left, what was your response?

23 A. A few minutes.

24 Q. You could remember that, but you can't remember how
25 long you were there in general?

1 A. From the time I got there until the time I left, no.

2 Q. What?

3 A. No.

4 Q. And you don't -- my question to you is don't find it
5 odd that you remember the things that help you in your case
6 and you don't remember other things?

7 A. I don't see how any of that would help me.

8 Q. You know -- you sat here in this trial, correct, and
9 listened to all the testimony?

10 A. Yes.

11 Q. And you knew -- I don't know what you knew by the of
12 the trials, I'm sure that you did, but you at least for this
13 trial you know that the timeline and the opportunity for
14 Justin Mallory to supposedly have committed this crime is a
15 very tight window, isn't it?

16 A. That's what they said.

17 Q. So your testimony of it happened in less than five
18 minutes, or in a few minutes, is very helpful to fit that
19 timeline, isn't it?

20 A. Helpful for who?

21 Q. For you, if you want this jury to believe the story
22 that Mr. Mallory is the one that killed her.

23 A. Oh, you mean the truth?

24 Q. Is it helpful for your story?

25 A. I guess.

1 Q. It matches perfectly, don't it?

2 A. I -- I don't know.

3 Q. You don't know?

4 If you say it happened within a few minutes and you

5 know that there is a very tight window that only shows

6 possibly a few minutes for Mr. Mallory to have done this,

7 you don't know if that's helpful to your case?

8 A. Yes.

9 Q. Let's go to the altercation itself.

10 You said Mallory comes home and finds you there. You

11 don't know what time of the morning this, I'm assuming,

12 correct?

13 A. That's correct.

14 Q. A man alone with his wife is your testimony, correct?

15 That's what he finds when he gets there?

16 A. Yes.

17 Q. Did he ever exchange words with you?

18 A. No. He had asked me a question once, but he -- I never

19 was able to answer. Me and him never had any words. Nakia

20 stopped him from doing so.

21 Q. You don't find it odd that he didn't have problem with

22 you being at his home alone with his wife that late in the

23 day?

24 A. His wife was confronting him the entire time. He

25 didn't have much of an option but to pay attention to her.

1 As I had said earlier, she was relentless. She was not
2 letting him go anywhere.

3 Q. And not one time did Mr. Mallory come to you and say
4 "hey, what are you doing here?"

5 A. No, not one time.

6 Q. Now, where were you at when they went to the kitchen?

7 A. I was still sitting on the couch in their living room,
8 the one closest to the door.

9 Q. And it was your testimony that it's one o'clock -- or
10 you don't know what time. It's the early morning hours,
11 correct?

12 A. Yes.

13 Q. It's your testimony before this jury here today that
14 you didn't want to -- you didn't leave because you seen
15 things die down between them, correct?

16 A. Yes, I have seen them argue before. This wasn't the
17 first time.

18 Q. If it was late, and even when they first started
19 arguing, why didn't you just leave then, just bow out, and
20 say "I got to go, it's late?"

21 A. I think if I just hopped up and start running out, the
22 first thing he would probably think is suspect me of doing
23 something.

24 Q. You didn't think he was going to expect that already?

25 A. He didn't see anything.

1 Q. Do what?

2 A. He didn't see anything. When he had first came in, we
3 weren't doing anything when he walked in.

4 Q. But you are still alone there with his wife in the
5 early morning hours by yourself. You know that's going to
6 run through his head, Mr. Porch, don't you?

7 A. You should probably ask him. I don't know what he
8 thinks.

9 Q. I'm asking you. If you came home and found a man in
10 your house with Persia, wouldn't you think something?

11 A. I have. Him, to be exact.

12 Q. Now, describe this fight for me. It goes in the
13 kitchen. Where does it go next?

14 A. It comes back in the living room.

15 Q. And you say at this point in time you see the object in
16 Justin's hand?

17 A. Yes, I saw a object in his hand.

18 Q. And where is he at in relation to you?

19 A. I'm still sitting on the couch, so they are right there
20 in the -- by the front door area.

21 Q. And what happens next?

22 A. He strikes her.

23 Q. Describe it to the jury. How does he strike her?

24 A. He hits her. I don't --

25 Q. Where at?

1 A. In the face area, up here.

2 Q. I mean --

3 A. Everything is happening quickly. It's not as if they
4 are just standing still. He's exchanging blows with one
5 another. Everything is moving, everything is happening
6 quickly.

7 My first thing -- my first reaction was to get up and
8 get between them and try to stop this, not how he was
9 striking her or where.

10 Q. Is she taking it? I mean, is she fighting back?

11 A. Well, like I said, she's confronting him the whole
12 time. She was pushing him. Once he started hitting her,
13 there is not much of her fighting back any more. And,
14 besides, I had gotten between them.

15 Q. When she -- when you are in between them, she's
16 swinging at him? Is he swinging at her? I mean, what's
17 going on?

18 A. No, once I got between them, he was no longer able to
19 hit her. He actually had struck me once in my hand.

20 Q. And that's when you get cut on your hand?

21 A. Yes.

22 Q. And what hand was cut?

23 A. My left hand I believe was the one that was cut.

24 Q. Where is -- describe what you are do. Where is Nakia
25 Mallory when you get in between them?

- 1 A. She is behind me now.
- 2 Q. She's behind you?
- 3 A. Yes.
- 4 Q. So you are facing who?
- 5 A. Justin.
- 6 Q. And you get cut, is your testimony?
- 7 A. That's correct.
- 8 Q. And then you immediately go to clean it up?
- 9 A. No.
- 10 Q. What happened?
- 11 A. After I get cut, I go into the kitchen looking for the
- 12 paper towels.
- 13 Q. That's what I just asked you. You get cut and you
- 14 immediately go to clean up, correct?
- 15 A. You are talking about wrapping up my hand, because
- 16 that's what I went to get paper towels for.
- 17 Q. You wiped up the floor too, didn't you?
- 18 A. Yes, I wiped up a couple of drops of blood before I
- 19 left.
- 20 Q. So after you get cut, you immediately go to get the
- 21 paper towels to clean up your hand, correct?
- 22 A. Yes.
- 23 Q. Thank you.
- 24 And you say that you immediately leave?
- 25 A. Yes.

1 Q. Did you ever see Justin Mallory stab Nakia Mallory in
2 the neck?

3 A. Like I told you, I don't know what was in his hand. I
4 know he struck her. I know when I left that I saw some
5 blood on her, not nearly as much of what they were showing
6 me in those pictures, and I left. I didn't stop to examine
7 how badly hurt she was, or where he was, or what object he
8 used to strike her with.

9 Q. Well, you said you saw her -- you saw him strike her in
10 the face. You didn't say anything about the neck.

11 I'm asking you, did you see Justin Mallory stab her in
12 the neck?

13 A. No.

14 Q. Now, you said that when you went to the kitchen,
15 correct? That's where you went to get the paper towels?

16 A. Yes.

17 Q. Did you normally know where they kept the paper towels
18 at?

19 A. I suppose.

20 Q. What do you mean you suppose? You have been over there
21 before, didn't you?

22 A. Yes, about seven years ago.

23 Q. Didn't you testify in previous trials that you knew
24 where they kept their paper towels at? That's why you knew
25 to go underneath the sink?

- 1 A. Is that what it says in the transcript?
- 2 Q. I don't know. You don't remember that either, huh?
- 3 A. Do what?
- 4 Q. You don't remember testifying to that twice?
- 5 A. If that's what it says in the transcript, then that's
- 6 what I said.
- 7 Q. Okay. Well, what do you remember now? Do you remember
- 8 where their paper towels were kept?
- 9 A. I remember getting paper towels off the counter.
- 10 Q. You went first underneath the sink. Why did you go
- 11 underneath the sink?
- 12 A. I was looking for paper towels.
- 13 Q. But you said that you found them on the counter?
- 14 A. Yes.
- 15 Q. So where were they, under the sink, or on the counter?
- 16 A. I said I had looked under the sink for paper towels. I
- 17 did not see any, so I got them off the counter.
- 18 Q. You are saying all this because you have to explain the
- 19 existence of your blood underneath the sink, correct?
- 20 A. I didn't know my blood was under the sink.
- 21 Q. But you knew you went under there to get the paper
- 22 towels, to cover your bases, right?
- 23 A. I just told the truth.
- 24 Q. You said that you cleaned up. How fast did you clean
- 25 up?

1 A. It took a second for me to wipe off a -- wipe up a
2 couple drops of blood.

3 Q. Where at?

4 A. On the floor.

5 Q. What about on the counter? Did you ever clean up
6 there?

7 A. No, not that I remember.

8 Q. How many wipes did you use on the floor?

9 A. I -- I don't know.

10 Q. Think back. Can you remember?

11 A. You are asking me how many times did I wipe the floor?

12 Q. Yeah.

13 A. I don't know. I know I wiped the floor.

14 Q. Do you remember testifying on cross-examination when
15 you were questioned by Justin Mallory's attorney Jerry
16 Finney that it was couple of quick wipes?

17 A. You said do I remember? No.

18 Q. Okay. You don't remember?

19 A. If a that's what I said -- if that's what it says in
20 those transcripts, then that's what I said in those first
21 two trials.

22 Q. Okay. Again, so you knew law enforcement was going to
23 find all that, so you had to explain it away, didn't you?

24 A. No, I didn't know what law enforcement had found or
25 what they were going to find.

1 Q. That doesn't look like a couple of quick swipes, does
2 it?

3 MR. LUKE SHEALEY: Objection, Your Honor.

4 A. I don't even know.

5 MR. LUKE SHEALEY: He's being asked to -- this is
6 the talk about what law enforcement used to cleaning
7 chemical, how is he supposed to speculate as to that?

8 THE COURT: I'm going to overrule.

9 He can answer what he believes, based upon what he
10 sees.

11 A. Repeat the question.

12 BY MR. GOINGS:

13 Q. It's more than a couple of quick wipes, is it not?

14 A. I don't know. It shows up that the floor was wiped.
15 It doesn't tell me how many times.

16 Q. Okay. You could see the outline of those wipe marks,
17 can't you?

18 A. And you can tell me how many times that floor is wiped
19 by looking at that?

20 Q. I can tell you it's more than just that, don't you
21 agree? A couple quick swipes is like that. That's way
22 more, correct?

23 A. So you can tell how many swipes that is?

24 Q. Answer my question. My question is to you.

25 A. It's how many times that is? I told you I don't --

1 Q. That appears to be more than just a couple of quick
2 swipes is my question, correct?

3 A. Yes.

4 Q. Okay. Like someone is trying to cover up their blood
5 on the scene of a murder, does it not?

6 A. No. There's still plenty of other drops of blood all
7 over the floor, which is mine, which I told them so.

8 Q. Because you missed it, isn't that right?

9 A. Because I wasn't trying to clean them.

10 Q. You missed the blood under the counter too, isn't that
11 right?

12 A. I never cleaned under the counter.

13 Q. You want this jury to believe that you took the time to
14 clean up your hand during this violent attack that was
15 happening between Nakia Mallory and Justin Mallory; that you
16 took the time to find paper towels to clean up the floor,
17 clean up the counter, wrap your hand up, all while this
18 violent attack that you described in your statement was
19 going on? That's what you want this jury to believe?

20 A. This violent attack had stopped, as I testified.

21 Q. Well, let's talk about that. You said when you left
22 Nakia Mallory was where?

23 A. On the couch.

24 Q. And you testified that you seen the injuries,
25 supposedly shown to you by law enforcement over in

1 California, correct?

2 A. Yes.

3 Q. You have seen these photos, haven't you?

4 A. Yes.

5 Q. It's a lot of blood?

6 A. It is.

7 Q. Everywhere?

8 A. Yes, it is.

9 Q. All right. It's on the TV, on the floor, on the couch,

10 on the wall, by the door. It's everywhere, isn't it?

11 A. Yes, it is.

12 Q. And you have seen these injuries from Nakia Mallory,

13 correct?

14 A. Yes.

15 Q. Stab wound to the neck, cut on her eye, abrasions on

16 her chin?

17 A. Yes.

18 Q. You were shown these, right?

19 And you want this jury to believe that when you left

20 that apartment you ain't seen any of that?

21 A. I didn't see any of that blood, and I did not see those

22 injuries.

23 When I left, the only side of her that was I was able

24 to see was the left side.

25 Q. There is blood by the door, blood on the wall, blood on

1 the TV, everywhere, and you didn't see that?

2 A. When I left that blood that's all over the wall, all
3 over the furniture, all over the TV was not there.

4 Q. Convenient, ain't it?

5 You didn't see that?

6 A. No.

7 Q. And if you would have, you would have called law
8 enforcement, right?

9 A. Had I known how serious her injuries were, yes, I would
10 have called 911.

11 Q. Now, you went to great lengths to cover your tracks,
12 didn't you?

13 A. No. No, I didn't.

14 Q. You testified against an innocent man twice to send him
15 to jail for something that you did, didn't you?

16 A. I testified against the killer, yes, I did.

17 Q. On July 9th, 2009, Justin Mallory wasn't the killer,
18 according to you, was he?

19 A. No, he was not.

20 Q. You told law enforcement that Justin wasn't even there,
21 didn't you?

22 A. I didn't have a choice.

23 Q. You didn't have a choice.

24 A. Had I not told them that, then my wife and my brother
25 would have been arrested.

1 Q. Oh, they threatened you, didn't they? Is that what
2 your testimony is?

3 A. They threatened my family, yeah.

4 Q. Well, let's talk about when you first -- when they
5 first get to you, you were asked several questions about
6 what you had done that day and you said -- you testified
7 that y'all had gotten some movies and you were going to go
8 back home and watch those movies, right?

9 A. Yes.

10 Q. And you were with your sister and she wanted to go get
11 some snacks, so that's why y'all went to the Walgreen's, is
12 that right?

13 A. Yes.

14 THE COURT: Mr. Goings?

15 MR. GOINS: Yes, ma'am.

16 THE COURT: This would be a good time to take a
17 morning break.

18 Ladies and gentlemen, let's take our morning
19 break.

20 I'm going to remind you of the instructions I have
21 given to you; that is, not to begin discuss this matter, as
22 you still have not heard all the evidence that has to be
23 presented.

24 Let's take a break and then we will come back.

25 (The following takes place outside the presence of

1 the jury panel)

2 THE COURT: Mr. Porch, I'll remind you that during
3 this break you show not discuss your testimony with anyone.
4 You have not concluded it, so it would be inappropriate to
5 discuss it with anyone, including your attorneys.

6 You may step down from the witness stand at this
7 time.

8 Is there anything we need to take up before we
9 take a break?

10 MR. LUKE SHEALEY: I don't believe so, judge.

11 MR. GOINGS: Nothing from the State, Your Honor.

12 THE COURT: Let's take a break and then we will
13 come back.

14 (Whereupon, proceedings were recessed)

15 (Whereupon, proceedings were reconvened)

16 THE COURT: Is there anything we need to take up
17 before we bring the jury in?

18 MR. LUKE SHEALEY: I don't believe so, judge.

19 MR. GOINGS: Your Honor, the only think I needed
20 was we are trying to get our I.T. guy to try to turn on the
21 computer, because I was going to play just a portion of the
22 videotape, just some -- it won't boot up for me. I don't
23 know what the problem is with it, so we have asked him to
24 come in to look at it.

25 THE COURT: So it won't turn on at all?

1 MR. GOINGS: No. I mean, it turns on, but it says
2 no -- it says we need a password for a boot min. I mean,
3 this is Richland solicitor's office stuff, so --

4 THE COURT: So have you called them, or what?

5 MR. GOINGS: We have called them, Your Honor.

6 We can go forward. I can just -- I can make do
7 without it, if they don't get here in time.

8 THE COURT: All right. Someone from the
9 solicitor's office?

10 MR. GOINGS: Ma'am?

11 THE COURT: Is it someone in the solicitor's
12 office?

13 MR. GOINGS: Yeah, the I.T. guy that's been in and
14 out of the courtroom last week with us and we were trying to
15 locate him.

16 THE COURT: Well, you can go forward without him.
17 We can call the jury in.

18 You can ask them to come in.

19 (The following takes place in the presence of the
20 jury panel)

21 THE BAILIFF: The jury is seated, Your Honor.

22 THE COURT: Yes, sir, you may continue.

23 MR. GOINGS: Thank you, Your Honor.

24 If it please the court.

25 BY MR. GOINGS:

1 Q. Mr. Porch, we were about to get into your statements in
2 California before we broke, but I want to backtrack for just
3 one second, okay?

4 Now, I asked you several questions about the fact that
5 you are telling this jury that all the blood on the scene,
6 on the TV, on the X-Box, on the couch, all of these -- all
7 this blood, you didn't see it?

8 A. All that blood wasn't there when I left.

9 Q. But a violent struggle is what you witnessed between
10 Nakia Mallory and Justin Mallory, correct?

11 A. That's correct.

12 Q. How long had you known Nakia, again?

13 A. A little over a year.

14 Q. A friendly relationship y'all had?

15 A. With both of them, Justin and Nakia.

16 Q. Okay. Is it fair to say that you were friends with
17 Nakia?

18 A. Yes.

19 Q. Knowing that this violent altercation took place,
20 according to your words, between her husband and Nakia,
21 witness her getting struck by Mr. Mallory is what you
22 testified to, correct?

23 A. Yes.

24 Q. Knowing that she was slouched on the couch holding her
25 neck, after you finished cleaning up your hand, is what your

1 testimony is, correct?

2 A. That's what I said.

3 Q. Okay. You were walking out the door, not one time do
4 you think about saying, "hey, Nakia, are you okay?" That
5 didn't cross your mind at all?

6 A. No. Like I said, I was scared. My first priority was
7 just trying to get away from there.

8 Q. You were scared that you were going to get caught
9 because you just stabbed her, isn't that right?

10 A. No.

11 Q. Let's go to the California statements.

12 You admit that you were given your advise of rights, is
13 that correct?

14 A. You mean I was mirandized?

15 Q. Yes.

16 A. Yes, eventually I was mirandized.

17 Q. I'm trying to locate --

18 Before we get there, you said that y'all were getting
19 movies, or you were going to go back and watch, and that's
20 when law enforcement from South Carolina approached you in
21 the Walgreen's, is that correct?

22 A. Yes, that's when McDaniels arrested me inside
23 Walgreen's.

24 Q. So it wasn't your plan to go home and go to bed, was
25 it?

1 A. No, I had planned on watching probably about one movie
2 before going to bed.

3 Q. Okay. It's convenient that that's your testimony that
4 you were going to only watch one movie, but you bought
5 three, is that not correct?

6 A. Yes, I had rented three. I didn't know it was a
7 requirement to watch all three once you get them.

8 Q. You wasn't tired in the early morning hours of July the
9 9th, 2009, were you?

10 A. I was tired.

11 Q. Did you ever tell law enforcement that you were tired?

12 A. No. Like I said, I don't think it would have mattered
13 whether I was tired, or hungry, or anything. My family was
14 in jeopardy.

15 Q. Are you saying law enforcement starved you?

16 A. Are you saying they starved me?

17 Q. They didn't offer you food?

18 A. No, they did not withheld food from me.

19 Q. They didn't, or they did?

20 A. They did not.

21 Q. All right. So they fed you?

22 A. No, I didn't eat. I told them that on the tape as well
23 "I can't eat."

24 Q. Did they offer food to you?

25 A. Yes, and I told them I could not eat.

1 Q. Did they offer drinks to you?

2 A. Yes.

3 Q. Did they offer you bathroom breaks?

4 A. Yes, I was able to use the restroom.

5 Q. Okay. And you said that you were advised of your
6 rights, correct?

7 A. Yes, eventually they did mirandize me.

8 Q. At 1:12 a.m., Pacific Time, on July 9th of 2009, they
9 went over this form with you, isn't that right?

10 A. Yes.

11 Q. That's your signature?

12 A. That is my signature.

13 Q. I mean, you are not denying that you signed this,
14 correct?

15 A. No.

16 Q. And your testimony, what you want this jury to believe,
17 is that they threatened your family, so you had to tell them
18 what you thought they wanted to hear, correct?

19 A. There threatened my family, so I told them what they
20 told me. The scenarios and everything that they -- they
21 were giving all that to me. The information, how the wounds
22 were caused, the scenarios I think could possibly have
23 happened, they give me one. And something wouldn't add up,
24 they would come back and give me another. Then something
25 wouldn't add up. That's why they keep bringing up this 20

1 pieces.

2 Q. What did they threaten Persia with?

3 A. They said that they were going to arrest Persia and my
4 brother-in-law, had I not cooperated with them.

5 Q. What did Persia do wrong?

6 A. I know she gave statements in the first -- well, not in
7 the first two trials, but she had given law enforcement
8 statements prior.

9 What she did wrong, I don't know. I'm not a police
10 officer. I just know that they said they were going to
11 arrest her. I thought that was a genuine threat.

12 Q. You didn't bother asking them for what?

13 A. No.

14 Q. What were they going to arrest your brother-in-law for?

15 A. My car. He never spoke with law enforcement, but he
16 was the one who cleaned my jeep. I never did. That's why I
17 admitted to doing that as well, to protect him. I admitted
18 to everything to protect my family.

19 Q. Did he ever clean your car for you?

20 A. You said has he ever cleaned my car for me?

21 Q. Did he ever clean your car for you after the murder?

22 A. Yes.

23 Q. So he did?

24 A. Yes.

25 Q. He cleaned out the blood that you got in your car?

1 A. Yes.

2 Q. So that part is not a lie from your statements in
3 California?

4 A. Did he ever clean out my car, that part is not a lie?

5 Q. You just testified that, yes, your brother-in-law
6 cleaned out your car.

7 You just testified that, yes, your brother-in-law
8 cleaned out the car after the murder took place, correct?

9 A. Yes, he did clean out my car. That's what I testified
10 to. In California I told them that I cleaned out the car.

11 Q. So you are admitting to the jury that Robert Brown
12 cleaned out your car after the murder?

13 A. He cleaned my car a couple of days after it had
14 happened. It wasn't like I went home and then immediately
15 went to him to have him clean my car. But, yes, he did
16 eventually clean my car.

17 Q. So your admissions today in this courtroom is that
18 Robert Brown cleaned out your car upon your request after
19 the murder?

20 A. No, not upon my request at all. I have never asked him
21 to clean out that car.

22 My testimony is my brother-in-law cleaned out my car a
23 couple of days after the incident between Justin and Nakia
24 had happened.

25 Q. Why?

1 A. You would have to ask him that.

2 I'm pretty sure law enforcement would have done an
3 investigation. McDaniels said that he spoke with him. I
4 figured he would know.

5 Q. It's your car, it not? Is it your car?

6 A. Yes.

7 Q. You don't know why Robert Brown is cleaning out your
8 car two days after the murder?

9 A. No, you would have to ask him why he would do certain
10 things. I can't answer for other people.

11 Q. How did he get your car?

12 A. We lived next door to each other..

13 Q. So you are telling this jury it's common for Robert
14 Brown just to clean out your car?

15 A. To clean my car?

16 Q. Yes.

17 A. He's done it before. But if he does it on a regular
18 basis, then, no, he does not.

19 Q. We know, by your testimony here today, he did it two
20 days after the murder, correct?

21 A. Yes, that is correct, he did it two days after.

22 Q. And you don't know why?

23 A. You should ask him. I can't speak for Robert Brown.

24 Q. It's your car, though, correct?

25 A. Yes, we have established it's my car, but I cannot tell

1 you why he did it. I can't speak for anyone else.

2 Q. My question to you --

3 A. Sergeant McDaniels spoke with him.

4 Q. My question to you is you are going to sit here and

5 tell this jury that two days after the murder of Nakia

6 Mallory, Robert Brown, your brother-in-law, cleaned out your

7 car and you don't know why?

8 A. I did not ask him to clean out the car. I did not talk

9 to him about why he cleaned out the car.

10 Q. So that part of your statement in California, that you

11 are claiming now is untruth and coerced by law enforcement,

12 is, in fact, true? Robert Brown did clean out your car?

13 A. In California I told the investigators, after they had

14 another implied threat to my family, that I cleaned out the

15 car.

16 Now, if you are asking me if the truth is my

17 brother-in-law cleaned out the car, then, yes, he did.

18 Q. But you don't know why?

19 A. I never asked him why.

20 Q. Two days after the murder?

21 A. I did not ask him why.

22 Q. You don't think that's odd?

23 A. For a family member to clean out my car?

24 Q. Two days after a murder?

25 A. I don't think it's odd for a family member to clean out

1 a car for you, period. I don't see how it matters when.

2 Q. Okay. Now, you are telling law enforcement that they
3 threatened you and that's why you felt it imperative that
4 you cooperate, no matter what?

5 A. It wasn't a matter of what I felt. I had to, or else
6 actions would be taken against my family. They would have
7 been arrested.

8 Q. And you wanted to protect your family?

9 A. Yes.

10 Q. You would do anything that you could to make sure that
11 they wasn't going to jail?

12 A. Yes.

13 Q. Even though Persia hadn't done anything wrong?

14 A. In the law's eyes I don't know if she did or did not.
15 I took their threat as genuine.

16 Q. And this threat, that you never asked what she's going
17 to be charged with, correct? That's what you just told this
18 jury. You didn't bother to inquire as to what they were
19 going to threaten Persia with?

20 A. No, I'm not used to being interrogated for long hours.

21 Q. Not used to it? You went through it back in 2007,
22 didn't you?

23 A. Those weren't interrogations. They were questioning
24 me. I was never in police custody. I was never served a
25 warrant. I was never taken against my will, and I was never

1 threatened.

2 Q. And how did you feel about law enforcement when they
3 made this threat to you?

4 A. You say how did I feel about them?

5 Q. Yeah.

6 A. At that particular time my only concern was protecting
7 my family. It wasn't about whether I liked the people who
8 arrested me or not, if that's what you are asking.

9 Q. Well, when somebody makes a threat against your family,
10 are you going to tell this jury that you are going to like
11 that person from then on?

12 A. Am I going to like that person from then on?

13 Q. Yeah.

14 If they threatened your family, are you still going to
15 like the person?

16 A. I guess not.

17 I mean, if you are asking me if I like McDaniels, then
18 I have no ill will towards him, but he's not somebody I'm
19 going to hang out when I -- when this is over.

20 Q. A man had just threatened to send your wife to jail,
21 you don't have any problems with it?

22 A. No, I don't harbor any ill will towards him, or
23 anybody.

24 Q. After he threatens your wife?

25 A. I'm speaking about now.

1 Back then, like I said, I wasn't thinking about how
2 much I liked them or how much I disliked them. My only
3 concern is protecting my family.

4 Q. But he threatened your wife, correct?

5 A. And my brother-in-law, yes.

6 Q. And you are going to tell this jury back then you
7 didn't have any --

8 A. I said now.

9 Q. -- any feelings toward him, back then?

10 A. Back then, no, I'm not --

11 Q. When he makes the threat, you don't like, "hey, man,
12 you can't threaten my wife like that?"

13 A. The only person I was thinking about was my wife and my
14 brother-in-law. I'm not thinking about how much I like
15 McDaniels or how much I dislike McDaniels.

16 Q. It never crossed your mind that when he supposedly
17 makes this threats against your wife and your
18 brother-in-law --

19 MR. LUKE SHEALEY: Your Honor, I think we have
20 covered this ground at this point. He's answered the
21 question. It's about the third question.

22 THE COURT: Overrule.

23 Let him answer the question.

24 BY MR. GOINGS:

25 Q. It never crossed your mind? You never had any inkling

1 of bad will towards Sergeant McDaniels right after he
2 threatened your family?

3 A. No, I still don't have any ill will towards him.

4 Like I said, at the time I wasn't sitting here thinking
5 about how much I liked him or how much I disliked him. My
6 only concern is keeping my family out of jail.

7 Q. Your testimony here today is you still don't have any
8 personal feelings to Sergeant McDaniels and Sergeant Godfrey
9 after they supposedly coerced you into making these
10 confessions?

11 A. I don't have any ill will towards anyone. If someone
12 does me wrong, it does not mean I need to hate them for the
13 rest of my life or hold a grudge. The only person that's
14 going to hurt is me in the long run.

15 Q. Even when they are trying to use those supposedly false
16 confessions, as you just stated, to send you to prison --

17 A. And like I said --

18 Q. -- you don't hate them?

19 A. And what good would me hating them do? My personal
20 feelings don't come into play here.

21 Q. All right. Let's move on.

22 You made a statement that night, correct, or that
23 morning?

24 A. Yes.

25 Q. A ten page statement. Do you remember that?

1 A. Yes, and I signed all ten pages, I believe, for a total
2 for twenty times.

3 And like I testified earlier, I would have signed it a
4 thousand times if, it meant keeping my wife and my
5 brother-in-law out of jail.

6 Q. And you remember reading on each page of this statement
7 "I have made the foregoing statement free and voluntary,
8 without fear, threat, promise, or reward, or hope of reward
9 of any kind?"

10 A. Yes. Had I not signed those papers, my family would
11 have been arrested. If I did not cooperate, my family would
12 have been arrested.

13 Q. You didn't even ask law enforcement what Persia was
14 going to get arrested for.

15 A. I don't see how that would even matter. I would
16 believe law enforcement when they say something. To serve
17 and protect is not what they give an oath to?

18 Q. Ten times you signed that statement, correct?

19 A. No, I signed ten pages. I signed it twenty times.

20 Q. Okay. Well, that statement appears on the bottom of
21 each sheet, does it not?

22 A. Yes. And like I said prior, I will sign that a
23 thousand times if it means protecting my family.

24 Q. And your testimony here today is that you wasn't tired
25 when you were giving this statement, were you?

1 A. You said my testimony was I wasn't tired?

2 Q. Were you falling asleep during the interview, or the
3 interrogation as you want to call it?

4 A. No, not initially. When they would walk out, I would
5 put my head on the table. But like I said, it's not like I
6 could go to sleep. They wouldn't leave me alone. They
7 testified to that themselves. They were not going to let me
8 go to sleep any ways.

9 Q. You understood their questions to you, right?

10 A. Yes.

11 Q. You understood the answers that you were giving, right?

12 A. Yes.

13 Q. But you are saying everything contained within this
14 statement is false, coerced out of you?

15 A. Yes. They had threatened my wife and my
16 brother-in-law. That is the only reason why I signed those
17 papers.

18 It's -- once again, it does not matter what I did or
19 what I said, I'm going to jail. The only decision was if
20 I'm going to jail by myself.

21 Q. You said that you didn't give law enforcement what they
22 wanted, they were going to jail, correct?

23 A. They were going to arrest Persia and Robert, yes.

24 Q. You know law enforcement didn't even think that your
25 last statement was the whole truth, right?

1 A. You mean when I testified that Justin Mallory?

2 Q. No, I'm talking about after December 10th -- I mean --
3 not December.

4 July 10th rolls around, the videotaped statement where
5 you admit to taking the knife after the murder and disposing
6 of it in the trash can, combined with your other two
7 statements where you admit that on that night there is an
8 altercation between you and Nakia Mallory, they didn't
9 believe that that's exactly how it went down?

10 A. No, they did not. Each time they would come and speak
11 to me. They would leave, and I don't know if they spoke to
12 somebody or what the deal was, but I know they would come
13 back expecting me to confess to more things to better suit
14 their purposes.

15 Q. But you didn't, did you?

16 A. I didn't what?

17 Q. You didn't give them a final version that they wanted,
18 did you?

19 A. Eventually I did. I believe it's on the July 10th is
20 when I -- on that tape was the final version that they were
21 happy with.

22 Q. They were still asking for more pieces of the puzzle,
23 according to you, right?

24 A. Yes, throughout the entire interrogation.

25 Q. And you wouldn't give it to them, would you?

1 A. No, I was reluctant.

2 Q. But you wasn't reluctant at the very beginning?

3 A. I gave them everything that they needed at the very
4 beginning to try to keep my family out of it.

5 Now, when each time they came back was and threatened
6 that my family would be arrested, I would give more. I did
7 not want to give them more, but I'm going to if it means
8 protecting my family.

9 Q. You finally called it quits, didn't you?

10 A. No, I never once told them I'm done talking. They
11 called it quits. They said they were done with me.

12 Q. But you didn't give them a final --

13 A. I believe on the video I asked them was there anything
14 else.

15 Q. You didn't give them that final piece that they wanted,
16 did you?

17 A. I did. They wanted me to admit to taking the knife and
18 throwing it away, and I gave them that.

19 Q. They wanted you to admit to the truth, in fact that you
20 stabbed Nakia Mallory that night, not in self-defense?

21 A. The truth is that Justin Mallory killed Nakia.

22 Q. They wanted you to tell them the truth, that you went
23 over there, tried to make advances on Nakia Mallory. She
24 rebuffed you and you lost it. You couldn't let your wife
25 find out. You couldn't let Justin find out what went on

1 that night between you and Nakia Mallory, so you got the
2 knife and you stabbed her. That's what law enforcement
3 wanted, is it not?

4 A. Yes, that's a lie. Law enforcement wanted me to tell
5 was that I got the knife from Nakia, that I stabbed her,
6 that I was the aggressor, that she pushed me away. That's
7 the lie that they wanted me to tell, yes.

8 Q. You didn't tell them that, did you?

9 A. No.

10 I did confess to everything else, taking the knife,
11 throwing it away, to killing her. I completely implicated
12 myself from this crime. I changed everything that I said.

13 Q. So you want this jury to believe that you gave all that
14 information, but you wouldn't take that last leap and give
15 law enforcement exactly what they wanted, which was the
16 truth, because you were worried about your wife and your
17 brother-in-law?

18 A. I made those statements because my wife and
19 brother-in-law, to protect them.

20 Q. You didn't give them the full truth of what they
21 wanted.

22 A. The full truth of what they wanted? I gave them pretty
23 much everything that they wanted. They wanted a confession.
24 They wanted me to take responsibility for the death of this.

25 I even explained to them how this could have happened,

1 with the scenarios that they were giving me. I even
2 admitted to taking the supposed murder weapon and throwing
3 that away as well.

4 I admitted to basically everything that they wanted me
5 to.

6 Q. But not everything, correct, because your last version
7 even suggested that there was some type of struggle over the
8 knife and she accidentally got stabbed, correct?

9 A. Yes, I did say that.

10 Q. Law enforcement wanted the truth out of you, the whole
11 true?

12 A. And I had told the truth when I testified in those two
13 trials.

14 Now, if you are referring to these lies that they
15 threatened to get -- threatened me to get out of me --

16 Q. They wanted more?

17 A. Yes, and I gave them more. I cooperated with them.

18 Now, when they stopped the interview, not me. They
19 stopped it. They had finally realized they had gotten
20 enough from me. They was supposed to bring me back here.
21 They made a big deal out of it, put me in the news and --

22 Q. So you are telling this jury that if they kept on
23 pushing you, you would have finally come over and told them
24 what they wanted to hear, the exact thing they wanted to
25 hear?

1 A. I gave them exactly what they wanted to hear.

2 Q. Well, you just testified that they wanted for you to
3 say that you were the aggressor, that you stabbed Nakia, and
4 then you left her for dead. That's not exactly what you
5 told them.

6 A. If it wasn't enough for the law enforcement, then they
7 would have came back and tried to get more information out
8 of me. They are the ones who stopped -- they are the ones
9 that stopped the interview, not me.

10 Q. And based on your testimony here today, it appears as
11 if they came back to you and threatened you some more,
12 supposedly, that you would have gave them that information?

13 A. Yes, I would have gave them whatever was necessary to
14 protect my family.

15 Like I said, the only decision I had to make up was if
16 I was coming to jail by myself. I decided I'm going to come
17 here by myself, that I would fight this later.

18 I did not kill Nakia Mallory. I even testified to who
19 did.

20 Q. And if you would have finally gave up that information,
21 it would have been the truth, wouldn't it? The fact, you
22 went over there, you were the aggressor. You made the
23 moves. You got shot down and then you couldn't let your
24 wife find out. You couldn't let Justin find out, so you
25 stabbed her.

1 While she was bleeding to death on the couch, you went
2 in there, cleaned up your hands, and then left. You picked
3 up the knife and left her to bleed to death in that
4 apartment. That's the truth, isn't it?

5 A. What I testified to in the first two trials is the
6 truth.

7 Q. And everything that you told law enforcement in
8 California was based on these alleged threats made by these
9 two officers who came to you the night of January -- or July
10 9th, 2009, is that correct?

11 A. And the scenarios they supplied me with, yes.

12 Q. And they were feeding this information to you?

13 A. Yes, they said that in the tape as well, "we showed you
14 everything. We told you everything."

15 Q. You already knew everything, because you killed her on
16 May 14th, 2006, isn't that right?

17 A. No. Like I testified, I didn't know anything until law
18 enforcement showed it to me.

19 Q. You didn't need the pictures to know where you hit her,
20 did you?

21 A. I never struck her. I never stabbed her. I didn't
22 kill her. I saw the man who killed her. I testified to
23 that fact twice.

24 Q. You didn't know -- you didn't need to know that she
25 bled out from the stab wound to her neck, because you gave

1 her that stab wound, didn't you?

2 A. No.

3 Q. You didn't need to tell them -- or for them to tell you
4 that the murder weapon wasn't found, because you knew you
5 had took that murder weapon, didn't you?

6 A. I don't know what Justin did with it.

7 Q. Now, these threats that you say were made, you are
8 saying that you harbor no ill will towards these officers
9 who allegedly threatened to take your wife and
10 brother-in-law to jail to get you to confess to something
11 you didn't do, supposedly, and you have no problems with
12 them?

13 A. I'm not one to hold grudges. I don't harbor any ill
14 will towards them, or anyone else.

15 Q. And back then when they are supposedly allegedly making
16 these threats on a day in and day out basis, you just like
17 "okay, you are still good guys." That's what you are
18 telling this jury?

19 A. I'm saying that they are good guys?

20 Q. Yeah.

21 They are threatening your wife for nothing, for -- she
22 didn't do anything, right?

23 A. They are doing what they need to to get a conviction.

24 Q. They are threatening your wife, are they not?

25 A. Yes, and my brother-in-law.

1 Q. She didn't do anything, did she?

2 A. No, she didn't do anything wrong, to my knowledge.

3 Q. Your brother-in-law, even though he cleaned your car
4 out two days after the murder, didn't do anything wrong?

5 A. No.

6 Q. And they are threatening to put these two people in
7 jail if you don't falsely confess to something that you
8 didn't do, and you have no problems with them? That's what
9 you want these people to believe?

10 A. That's the truth.

11 Like I said, it would only hurt me to sit here and try
12 to hold onto hate or hate somebody. It doesn't do anything
13 to them whatsoever.

14 MR. GOINGS: Beg the court's indulgence.

15 (Off the record)

16 (Back on the record)

17 MR. GOINGS: Your Honor, I don't know where that
18 exhibit I'm looking for is.

19 Your Honor, may we approach?

20 THE COURT: Yes, sir.

21 (Whereupon, the lawyers approached the bench for
22 an off-the-record discussion).

23 THE COURT: One more time, counsel.

24 (Whereupon, the lawyers approached the bench for
25 an off-the-record discussion)

1 BY MR. GOINGS:

2 Q. Again, no hard feelings about two officers threatening
3 your wife and your brother-in-law for things they didn't do,
4 and you are just fine with that?

5 A. You said I'm just fine with it?

6 Q. Uh-huh.

7 Back then were you just fine with them making threats
8 against your wife?

9 A. It wouldn't -- they did. It wouldn't have mattered how
10 I felt about it.

11 Q. You didn't harbor any ill will against them?

12 A. None. I still don't, or Justin Mallory, for that
13 matter.

14 Q. You think it's respectful for officers to threaten an
15 innocent wife, an innocent brother-in-law, to try to get you
16 to coerce -- or try to coerce a confession out of you?

17 A. There was no try. They did. And I do think it's
18 unfortunate, but it's not up -- it's not for me to judge
19 them on what they do, to judge their character.

20 Q. That's very big of you not to try to judge somebody's
21 character, when they are trying to coerce a false confession
22 out of you? You want this jury to believe that you are just
23 okay with it?

24 A. Okay with it? I wouldn't say that, but I honestly
25 don't care anything about their character. I'm more

1 concerned about my family than anything.

2 Q. Do you remember making this video, or being in this
3 video?

4 A. Yes, I do.

5 (Whereupon, the videotaped was started)

6 (Whereupon, the videotape was stopped)

7 BY MR. GOINGS:

8 Q. Did you make those statements?

9 A. Yes, that's me making those statements.

10 Q. Nothing but respect is how they treated you in
11 California, correct?

12 A. Yes, that's what I said.

13 Q. But you want this jury to believe that even though you
14 made that statement on July 10th, 2009, that these two
15 officers came to you, threatened your wife, threatened your
16 brother, wanted you to confess to something that you didn't
17 do, to send you prison, and that's treating you with
18 respect?

19 A. Those things are not, but at that point I had been up
20 for three days. I'm just agreeing and saying whatever they
21 want me to at this time.

22 Q. They didn't ask you --

23 A. I'm just saying whatever they want me to, what I think
24 they want me to say.

25 Q. Okay.

1 MR. GOINGS: No further questions, Your Honor.

2 MR. LUKE SHEALEY: Brief redirect.

3 THE COURT: Yes, sir.

4 REDIRECT EXAMINATION BY MR. LUKE SHEALEY:

5 Q. Josh, on that, and you have been asked extensively, and
6 you have told the jury, why again did you sign those
7 statements and say what you said?

8 A. I signed those statements to keep my family out of
9 jail. I said those things to do the same exact thing. I'm
10 going to do whatever is necessary to protect my family.

11 Q. Did you believe that the threats that they made on day
12 one of that interrogation were real and credible?

13 A. Yes. I still believe those threats they made on day
14 one are real and credible.

15 Q. Okay. So when they are asking you and they are
16 bolstering themselves up and saying "we have treated you
17 with nothing but respect, right," are you going to say "hey,
18 you have been a real jerk," or do they still hold the keys
19 over your wife's freedom?

20 A. I'm just going to say "yeah, you have treated me with
21 nothing but respect. I wish we could have met under
22 different circumstances." I'm going to say whatever it is
23 they need me to say in order to protect my family.

24 Q. And is what you said there in saying whatever it is
25 they need you to say, is that the way all three days went?

1 A. All three days.

2 MR. LUKE SHEALEY: Nothing further.

3 THE COURT: You may step down.

4 Any further witnesses from the defense?

5 MR. LUKE SHEALEY: Your Honor, at this time the
6 defense rests.

7 THE COURT: Any rebuttal witnesses?

8 MR. GOINGS: No, Your Honor.

9 THE COURT: I'm sorry?

10 MR. GOINGS: No, Your Honor.

11 THE COURT: Ladies and gentlemen, at this time we
12 have some legal issues which we need to take up outside of
13 your presence. I'm going to ask that you retire to the jury
14 room, not to begin any discussions among yourselves. Even
15 though you may have heard all the evidence, you are still
16 not in the position to be able to determine the facts and
17 make a decision in this case until you hear my instructions
18 to you as to the law.

19 I asked the lunch to arrive about this time, so
20 hopefully it has arrived, and I will bring you back in as
21 soon as possible.

22 We will ask that you take a lunch break and I'll
23 give you some time to walk around outside to get some fresh
24 air. And when you leave, if you will notify the bailiffs
25 that you are leaving to go take a walk around and come back,

1 I'm going to ask that you come back by 1:30 at the latest.

2 Thank you.

3 (The following takes place outside the presence of
4 the jury panel)

5 THE COURT: Are there any motions at this time?

6 MR. LUKE SHEALEY: Yes, ma'am.

7 Your Honor, at this time the defense would again
8 move for a directed verdict.

9 I have set forth the standard already. As you
10 know, it's any direct evidence, or any substantial
11 circumstantial evidence.

12 What you have presented again by the State and
13 throughout our case is the situation of self-defense, the
14 situation of accident. And I again would cite State v.
15 Dickey, which I have passed up and we discussed earlier in
16 the week.

17 You know, it's defense counsel's position that the
18 State has to disprove self-defense for this case to get to a
19 jury.

20 You have three statements are the only evidence,
21 per the State's theory, in the light most favorable to them,
22 of how this thing played out.

23 One, the first one, you know, is she came onto
24 him. There was some kind of issue after that, after he
25 stopped her advances. She gets the knife, comes at him.

1 THE COURT: Anything from the defense?

2 MR. LUKE SHEALEY: No, ma'am.

3 THE COURT: This note is from my juror who needs a
4 work excuse.

5 You may ask the jury to come in.

6 (Whereupon, at 9:25 p.m., the jury panel returned
7 to open court to report its verdict)

8 THE BAILIFF: The jury is seated, Your Honor.

9 THE COURT: Mr. Foreman, I understand that you all
10 have reached a verdict, is that correct?

11 JURY FOREMAN: Yes, we have.

12 THE COURT: Would you please pass it to the
13 bailiff?

14 Madam Clerk, would you please publish the verdict?

15 THE CLERK: In the Court of General Sessions,
16 Fifth Judicial Circuit, The State of South Carolina, County
17 of Richland, in the matter of the State of South Carolina
18 versus Joshua Porch, Indictment Number 2011-GS-40-3359, we,
19 the jury, unanimously find Joshua Porch guilty of murder.

20 Signed by the foreperson and dated 11-25-13.

21 Mr. Foreman, is this your verdict and the verdict
22 of the entire jury?

23 JURY FOREMAN: Yes, ma'am.

24 THE CLERK: Thank you.

25 THE COURT: Do the parties wish to poll the

1 jurors?

2 MR. LUKE SHEALEY: Yes, ma'am.

3 THE COURT: Ladies and gentlemen, the clerk will
4 call your name or your juror number. She will ask you two
5 questions. Those questions will be: Was this your verdict
6 and is it still your verdict. And I ask that you answer
7 according to your conscience.

8 THE CLERK: Demond June, Number 139, was this your
9 verdict?

10 JUROR NUMBER 139: Yes, ma'am.

11 THE CLERK: Is it still your verdict?

12 JUROR NUMBER 139: Yes, ma'am.

13 THE CLERK: Dexter Smith, Number 248, was this
14 your verdict?

15 JUROR NUMBER 248: Yes, ma'am.

16 THE CLERK: Is it still your verdict?

17 JUROR NUMBER 248: Yes, ma'am.

18 THE CLERK: Errick Bethel, number 20, was this
19 your verdict?

20 JUROR NUMBER 20: Yes, ma'am.

21 THE CLERK: Is the still your verdict?

22 JUROR NUMBER 20: Yes, ma'am.

23 THE CLERK: Rosa Washington, number 277, was this
24 your verdict?

25 JUROR NUMBER 277: Yes, it was.

1 THE CLERK: Is it still your verdict?

2 JUROR NUMBER 277: Yes, it is.

3 THE CLERK: Patrick McMahon, number 171, was this
4 your verdict?

5 JUROR NUMBER 171: Yes, ma'am.

6 THE CLERK: Is it still your verdict?

7 JUROR NUMBER 171: Yes, ma'am.

8 THE CLERK: Carly Perry, number 203, was this your
9 verdict?

10 JUROR NUMBER 203: Yes, ma'am.

11 THE CLERK: Is it still your verdict?

12 JUROR NUMBER 203: Yes, ma'am.

13 THE CLERK: Vanessa White, number 286, was this
14 your verdict?

15 JUROR NUMBER 286: That's correct.

16 THE CLERK: Is it still your verdict?

17 JUROR NUMBER 286: That is correct.

18 THE CLERK: Toni Odom, number 193, was this your
19 verdict?

20 JUROR NUMBER 193: Yes, it was.

21 THE CLERK: Is it still your verdict?

22 JUROR NUMBER 193: Yes, it is.

23 THE CLERK: Patrick Mcelderry, number 169, was
24 this your verdict?

25 JUROR NUMBER 169: Yes.

1 THE CLERK: Is it still your verdict?

2 JUROR NUMBER 169: Yes.

3 THE CLERK: Richard Smith, number 251, was this
4 your verdict?

5 JUROR NUMBER 251: Yes.

6 THE CLERK: Is it still your verdict?

7 JUROR NUMBER 251: Yes.

8 THE CLERK: Shannon Purvis, number 211, was this
9 your verdict?

10 JUROR NUMBER 211: Yes, ma'am.

11 THE CLERK: Is it still your verdict?

12 JUROR NUMBER 211: Yes, ma'am.

13 THE CLERK: James Ferreira, number 86, was this
14 your verdict?

15 JUROR NUMBER 86: Yes, ma'am.

16 THE CLERK: Is it still your verdict?

17 JUROR NUMBER 86: Yes, ma'am.

18 THE CLERK: The jury is polled.

19 THE COURT: Ladies and gentlemen, the court is not
20 concerned with the verdict that you reached so much as I'm
21 concerned with the process by which you reach your verdict.
22 You listened to the evidence as it was presented throughout
23 the course of this trial and you have made the decision as
24 to what the evidence showed in terms of the facts. You also
25 listened to my instructions as to the law and applied that

1 law to the facts as determined by you. And having done so
2 you arrived at your individual, and no one can complain
3 about the verdict that you have reached and you have fully
4 discharged your duty and your responsibility as jurors in
5 this particular matter.

6 On behalf of the State I would like to thank you
7 and the county I would like to thank you very much for your
8 services last weekend, this week. Your jury service, of
9 course, is concluded. I ask that you return to the jury
10 room for your work forms, return to work forms. There will
11 be checks sent to you in the mail for your service for
12 today, unless you have them.

13 THE CLERK: No.

14 THE COURT: If you will, please leave with us the
15 plastic portion of your badge. The white portion is your
16 souvenir for jury service. Thank you very much for your
17 service and have a good Thanksgiving.

18 (Whereupon, at 9:28 p.m., the jury panel was
19 discharged)

20 (Off the record)

21 (Back on the record)

22 THE COURT: Are there any motions at this time?

23 MR. LUKE SHEALEY: Yes, ma'am, at this time the
24 defense would make a motion for a new trial, considering all
25 the objections, motions, the denial to the directed verdict

1 that we made; considering the barely three hours the jury
2 had to consider a case that took well over a week, two
3 investigations.

4 You could see specifically that juror, Ms. Purvis,
5 sitting there crying, you know, almost as if it wasn't her
6 verdict. She did acknowledge it.

7 I asked us for not to be working past nine, but we
8 ended up doing that.

9 I would specifically cite some of the motions. I
10 renew all of them in regard to mistrials regarding Mr.
11 Goings mischaracterization of expert opinion in closing; the
12 mistrial motion regarding the gay/sexual commentary that was
13 allowed to be introduced into evidence that unfairly
14 prejudiced the jury; the mistrial motion based on the drug
15 commentary, which was played in front of the jury about our
16 client, what drugs he did or didn't do, which was solicited
17 by law enforcement; the fact that that video was even
18 allowed to be played without Investigator Cohen being here
19 from California; the fact we were limited by not having
20 Andelyn Rodriguez allowed to testify to her specific threat
21 that she wrote in a little statement to law enforcement of
22 Mr. Mallory choking Nakia Mallory and threatening to kill
23 her in the past, but that limited our right to present a
24 complete and full defense; as well as limited Joshua Porch
25 and his testimony, limited Joshua Porch concerning to what

1 he could say regarding the six and a half interrogation with
2 Ms. Cohen, and typically because she didn't come, he was not
3 allowed to go into that. It was almost as if it had never
4 existed.

5 We would -- we simply would object and renew our
6 motion to allow us to discuss further with Sergeant Strange
7 the Andelyn Rodriguez incident. We were only allowed to say
8 a threat in the past had occurred. We felt that was further
9 prevented our right to present a complete and full defense.

10 We object to your prior ruling saying the
11 pathologist could be testified in the way it was, even
12 though he was dead, his pathology report was ruled to be not
13 testimonial in nature.

14 We object to and would seek a new trial based on
15 the failure to give a jury charge on not letting someone get
16 the drop on you.

17 And one of our original motions in March when Mr.
18 Aiken argued regarding judicial estoppel.

19 Those are all the ones I can think of right now,
20 but if I haven't listed any other objections or motions or
21 mistrial motions, I would renew those as well, so we would
22 ask for that new trial at this time.

23 THE COURT: Any response from the State?

24 MR. GOINGS: Just briefly, Your Honor.

25 The State would reiterate all the arguments it's

1 made to all the mistrial motions, all the pretrial motions,
2 and everything that has been ruled upon before.

3 As to the length of deliberations, the jury at no
4 time appeared or stated they wanted to go home. They
5 weren't directed to deliberate that long. It was like they
6 came to a conclusion. Everybody was polled. Even if she,
7 Ms. Purvis, was upset, she did acknowledge her verdict.

8 THE COURT: Considering all the motions that have
9 been made and all the reasons cited for the motion, I will
10 deny the request of the defense. I think I gave ample
11 reasons and sufficient legal reasons for the rulings that
12 were made, particularly with respect to the presentation of
13 the evidence.

14 And as it relates to the pretrial motions, I think
15 the reasons for those were stated at the hearing.

16 I don't recall any renewal related to the
17 estoppel, other than the general renewal motions, and I
18 believe I ruled on the estoppel issue at the hearing in
19 March of this year.

20 As it relates to the juror, all of the jurors did,
21 in fact, when they were polled, affirmed their verdict. And
22 while there was one juror who was crying, the other jurors
23 certainly displayed some type of -- well, the other jurors,
24 when I shook their hand and said -- you know, were visibly
25 moved by whatever verdict that they reached, they still all

1 affirmed that it was their verdict and still their verdict
2 at the time that they were polled.

3 The length of time relating to the deliberations,
4 you know, we never know what the jury considers at the time
5 that they reviewed the evidence. Certainly over the course
6 of a week they heard information about the statements over
7 and over and over again. They heard about the circumstances
8 over and over and over again, and so -- the recap in closing
9 arguments certainly brought to the forefront issues for them
10 to consider. I think that they had -- each juror was able
11 to consider those factors. And the length of time that they
12 deliberate is not directly in correlation to whether or not
13 they had sufficient time, based upon all the evidence that
14 was presented. I think over the course of the week they had
15 enough time to consider as the testimony came in and in
16 considering it and in considering the closing arguments of
17 the attorneys. So I'll deny your motion on those basis.

18 Are we ready to go forward with the sentencing?

19 MR. GOINGS: The State is ready, Your Honor.

20 MR. LUKE SHEALEY: Unless Your Honor ruled
21 otherwise.

22 THE COURT: We can go forward.

23 Yes, sir, Mr. Goings.

24 MR. GOINGS: Thank you, Your Honor.

25 If it pleases the court, obviously the jury

1 the minimum, just 30 years, which I think it's a substantial
2 sentence day for day.

3 And if co-counsel at all would like to speak,
4 that's fine. If not, we will just leave it at that.

5 I don't think Mr. Porch wants to speak. Maybe he
6 will.

7 THE COURT: Mr. Shealey, Mr. Aiken?

8 MR. AIKEN: No, ma'am.

9 MR. BRIAN SHEALEY: I have nothing, judge.

10 THE COURT: Mr. Porch, you have had excellent
11 legal counsel to represent you throughout the course of this
12 trial, and you have had attorneys who take very seriously
13 their responsibility and their duty to defend someone who
14 has been charged with an offense and to give them your full
15 attention and to pursue every defense available, as well as
16 to protect all of your Constitutional Rights, and they have
17 done that in this case.

18 I have had the opportunity over the past six or
19 seven months to learn a lot about this particular matter.
20 There were times that I have heard the pretrial motions in
21 March, and there were a number of them throughout the course
22 of them preparing your defense and in conjunction with the
23 trial this last week and today. I have learned more about
24 this case than what is revealed just in statements and I had
25 the opportunity to consider it during pretrial. There were

1 a number of statements that were provided. Those were
2 presented here in court.

3 The defenses that were raised were considered,
4 both the defense of accident, the defense of self-defense,
5 as well as the issues about prosecution and how they chose
6 to prosecute Mr. Mallory and then came to prosecute you, and
7 those were all factors that were important to you and to
8 your attorneys in presenting that evidence to the court and
9 to the jury, and that was done in this particular case.

10 While there may have been some people who were
11 convinced of your guilt, this has always been a case in
12 which there are questions that may have been arisen as to
13 your guilt or your innocence and I think they were all
14 presented to the jury for their consideration, and
15 ultimately it became a jury of twelve people to make that
16 decision. So this is not a decision made by one person.
17 It's not a decision made by just a few people. They heard
18 it. They were individual people selected by you and your
19 attorneys and by the State to hear fairly and impartially
20 the evidence that had to be presented.

21 And certainly while there was a lot of evidence,
22 I'm sure that there was additional evidence that both sides
23 would have liked to have had to present to the jury, but
24 based upon the evidence that was presented to them, they
25 made a decision that you were guilty of this particular

1 offense, even taking into consideration the defenses that
2 were raised by you and your attorneys.

3 It's hard to imagine what has been going through
4 everyone's mind since May 14th of 2006. We have heard
5 little snippets from Justin Mallory, from Nakia's parents.
6 We have heard snippets from you, from your statements and
7 during your testimony. We've heard certainly quite a bit
8 from law enforcement on what they did and why they did what
9 they did. And we've heard the conflicting evidence that was
10 presented about whether Mr. Mallory was guilty of this
11 offense or whether you were guilty of the offense.
12 Obviously there is no way to go back to that date and take
13 back what occurred.

14 I heard statements made by you in the course of
15 reading the statements that were made in California after
16 your arrest about you being sorry for the circumstances in
17 putting the family through the events, and, you know, there
18 is no way to take away the pain that they have all endured
19 for the last seven years. They wanted to know what happened
20 and who committed the offense and who committed the crime
21 and who took Nakia from them.

22 And while there may be some dispute in terms of
23 what you believe as to whether or not the right person has
24 been convicted of the offense, certainly the twelve jurors
25 came to that conclusion.

1 I don't -- the only thing that I think will ease
2 the pain associated with that and for them is closure as it
3 relates to this particular chapter, but also passage of
4 time. And I understand that there may be some family
5 members that harbor some ill will, I'm hoping that through
6 the passage of time, the closure as it relates to this
7 particular matter, and perhaps with some counseling and
8 prayer that their pain will be eased over the years, but it
9 becomes my duty, based upon the conviction, to impose a
10 sentence.

11 I have heard the State and family members ask for
12 a life sentence. I have heard your attorneys ask for the
13 minimum of 30 years.

14 I have had the opportunity to look at the crime
15 scene photos in terms of how this place, how the apartment
16 looked. I have had the opportunity to read the autopsy
17 report. I have had the opportunity to see the photographs
18 of her injuries. I can't say that I understand what
19 occurred. I'm not sure that I ever will understand what
20 occurred.

21 I don't think that this is a sentence that would
22 warrant the minimum, based upon the injuries that were
23 suffered, the manner in which she died, the attempts to
24 conceal what occurred. And even though that may not have
25 been something to consider in terms of your guilt or your

1 innocence, it's certainly relevant to what sentence should
2 be imposed.

3 There are -- there are factual situations that
4 are -- that are much worse than this one. There are people
5 who have committed offenses more severe in the manner in
6 which the death occurred and circumstances, and so I have
7 always believed that I should consider the facts and
8 circumstances surrounding the death and view that with the
9 idea of imposing the appropriate penalty. And with no --
10 certainly no disrespect to the family at all, because
11 this -- I mean, this -- this was a death which was uncalled
12 for. It was tragic. It obviously caused her to -- even
13 though it might have been a relatively short time period
14 between the time that she was stabbed and the time that she
15 died, it wasn't a slow death in terms of time, but in terms
16 of the fact that the blood was oozing from her body and
17 leaving her body to become a lifeless body, that's a factor
18 that I consider too, but it is not the most heinous crime
19 that I have read of or heard of committed by somebody in
20 South Carolina. And so for that reason I do not think that
21 life would be appropriate. And, again, that's with no
22 disrespect at all to the family, to what the family is
23 feeling.

24 Ms. Riley is correct that they will spend the rest
25 of their lives in wanting it, and their children will

1 spending the rest of their lives wanting to know what was
2 their mother like, and, you know, tell me about her, and the
3 times and the occasions that they have missed together, so
4 I'm mindful of that as well, but I think under the
5 circumstances that a sentence of 50 years would be
6 appropriate.

7 And so, Mr. Porch, I will sentence you to the
8 Department of Corrections for a period of 50 years.

9 I understand that you have been incarcerated since
10 July the 8th or 9th of 2009. I'll give you credit for the
11 time that you have served.

12 I understand the impact of your actions affects
13 not only the Mallory family and the Riley family and the
14 Gibson family, but it also impacts your family as well. It
15 impacts your children and that they will not have the
16 opportunity to spend time with you outside prison walls;
17 that you will also, in fact, miss all of the same
18 circumstances and same events that Nakia Mallory and her
19 children would miss, and -- and what occurred in this case
20 is a real tragedy. It's a real tragedy, because it didn't
21 have to occur. And I hope that over the next years that all
22 of the families will be able to get some closure, may be
23 able -- perhaps able to understand what occurred, perhaps be
24 able to find the opportunity to forgive and to give thanks
25 for the opportunities and the times that they did have with

State of South Carolina)) S.S.
County of Richland)

Q: Justina, you previously were interviewed regarding the murder of Naki Mallory. Is that correct?

A: Yes.

Q: You had told the detective you had been at the Mallory apt earlier that Saturday (before Mother's Day), is that right?

A: Yes

Q: Did you injure yourself in any way while there?

Ans Yes.

Q1. Can you describe how?

A - I asked Justin if I could have an apple. I was there with my (then) two-year old daughter Genesis, and she was due to eat. I was also sort

This statement was made in the presence of Captain Stan Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 29 day of June 2007

Signed: Arthur W. French

Witness: _____

Witness: _____

Notary Public for South Carolina
My commission expires 2-15-10

Page 1

STATE'S EXHIBIT

39

STATEMENT OF

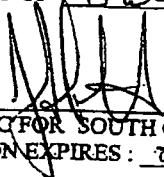
Joshua Arch
(continued)DATE: 6-27-07TIME: 1055

of hungry. Justin told me to go ahead. I used a small Kitchen Knife that I found in the Kitchen to cut up the apple. while I was cutting the apple I cut my right index finger right on the tip. It started dripping blood. I was trying to look for paper towels. The cut more than likely dripped some as I was looking for the towels. I washed my finger off @ the sink and then looked under the sink for a roll of paper towels. The roll was in the back of the cabinet, so when I reached in I knocked over a can of air freshener that was there. I got a towel off of the roll and wrapped my finger up. It was right then that Justin came in and said he had to leave. I then got my daughter and left too.

This statement was made in the presence of _____
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 27 DAY OF JUNE 2007



NOTARY PUBLIC FOR SOUTH CAROLINA.
MY COMMISSION EXPIRES: 2-15-10

SIGNED: Joshua W. Arch

WITNESS: _____

WITNESS: _____

(2)

STATEMENT OF

Joshua Parch

(continued)

DATE: 6-27-07

TIME: 1055

Q: Did you ever tell anyone about the cut on your finger?

A: When the detective came the next day I told him that I cut my finger while there that Saturday. I also told my wife and her family. I knew that if they found my blood, that I may become a suspect, and I didn't want to be involved.

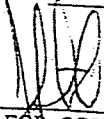
Q: Where did you go that Saturday night?

A: I went to my friend Marcus' apt off of Parklane. I knew him from working together @ Thomas & Howard. This apt complex is off of that road right beside the Texaco on Parklane Rd. I left there between 11:00 PM and midnight. I then went home to our apt @ Meredith Square. I stayed in the rest of the night.

This statement was made in the presence of _____
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 27 DAY OF June 2007



NOTARY PUBLIC FOR SOUTH CAROLINA.
MY COMMISSION EXPIRES: 2-15-10

SIGNED: Joshua W. Parch

WITNESS: _____

WITNESS: _____

(3)

Statement

State of South Carolina)
) S.S.
County of Richland)

Personally appeared before me this 22 day of June, 2007 at 645 hours, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one Joshua Birch of 124 Sun Gray Rd.
Day time telephone number _____ Night time telephone number _____
Who makes the following statement under oath to wit:

Q: Joshua, this Am I look a statement from you regarding the fact that you accidentally cut your finger at the Mallory apt on the day before her murder is that correct?

A: Yes.

Q: In that statement you told me that you told the Detective the next day, is that correct?

A: Yes.

Q: Are you sure you told the Detective about the accident?

A: I am not sure, but I thought I had. I do know I told my wife Pessia after the Detective left because I was worried about it.

This statement was made in the presence of Captain Stan Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me this 22 day of June 2007

[Signature]

Notary Public for South Carolina
My commission expires 2-15-10

Signed: Joshua Birch

Witness: _____

Witness: _____

STATEMENT OF

Joshua Rich

(continued)

DATE: 6-27-07 TIME: 1645

Q: Again, why were you worried?

A: Because I didn't want them to think I was a suspect, or to consider me a suspect.

Q: Why had you thought you had told the Detective about the cut?

A: I do remember telling him about going to their apt on that Saturday, and I figured I probably had told him about the cut. I now know I may not have told him.

Q: Did Justin know that you had cut yourself that day?

A: Yeah, cause I asked him where the paper towels were. He saw that I had cut myself.

Q: Did you try to clean up blood drops all of the kitchen floor as well?

A: Yeah, I used some of the paper towels to try to wipe up the blood.

This statement was made in the presence of _____
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 27 DAY OF June 2007

SIGNED: Joshua W. Rich

WITNESS: _____

WITNESS: _____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2-15-10

Statement

State of South Carolina) W.S.
County of Richland)

Personally appeared before me this 2nd day of July, 2007, at 1409 hours, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one Joshua Porch [REDACTED] of 124 Dan Gray Rd. Day time telephone number 404-9250. Night time telephone number same.

Who makes the following statement under oath to wit:

Q: Joshua, you have given a couple of statements (last week) regarding the Nakia Mallory homicide. is that correct?

A: Yes.

Q: Were those statements true?

A: No, not completely.

Q: What have you now told us regarding the Nakia Mallory murder?

A: I went by their apartment on my way to Marcus' between 10:00 PM and 11:00 PM. Nakia was home alone and invited me in. I wanted to buy some Vodka from her, but all she had on hand belonged to Justin, and she wouldn't sell it. I stayed for maybe ten minutes and then went to Marcus'. I stayed over at Marcus' until after midnight, but I am not exactly sure what time I left. I then went back by Nakia's and Justin's house. I did go by my apartment at Meredith Square first to simply see if Persia was still up. I believe the lights were still on, but I didn't stop. I didn't feel like going home, because I didn't want to go home and simply go to bed. I wasn't tired. When I got to their apartment Nakia was alone. She let me in and we sat and drank some. We were alone for maybe an hour or something like that, but I wasn't paying attention to the time. It could have been longer than that. We were both sitting on the sofa at one point and we were just talking back

This statement was made in the presence of Captain J. S. Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 2 day of July 2007.

Signed:

Witness:

Witness:

Notary Public for South Carolina

My commission expires 7-15-10.

Page 1

STATE'S EXHIBIT

4.

Statement

State of South Carolina)

) W.S.

County of Richland)

and forth. I am not sure how it initiated, it just happened. We started to kiss and fondle one another, as well as grinding some against each other. We never did actually take our clothes off and had actual sex, but I think it would have gotten to that point. All of the sudden Justin came in. Justin got mad at Nakia, wanting to know why I was there. Nakia then responded by asking Justin where he had been. It escalated from there. The argument eventually ended up in the kitchen. I was still in the living room. The gist of the argument was that she was upset, thinking that he was cheating on her. He kept denying it. He kept getting more and more angry. They both were cursing. At one point they were coming out of the kitchen and the argument turned physical. Nakia pushed Justin. He got upset, and that was when I noticed he had something in his hand. He pushed her back. She got right back in his face and she pushed him more. I saw Justin's hand as he swung at her. I saw something in his hand. I then stepped in front of him to calm him down, and to keep him from going after her any further. I then got cut by the object (knife or whatever it was), which Justin had in his hand. That was when I realized what it was I had seen in his hand moments earlier. I didn't know at that time that he had also cut Nakia prior to me stepping in between the two of them. I realized that moments later. I went to the kitchen to get a paper towel because I was bleeding from the cut on my hand. I knew where they kept the paper towels from when I had been over there before. I reached under the sink and got the paper towel. At that time I also cleaned up some blood which I had dripped on the floor of the kitchen. It was then that I decided to leave because things had gotten out of hand and I didn't want to be involved in it any further. As I was leaving I looked at Nakia. She was slouched back on the couch, and I noticed she was bleeding. I didn't remember seeing Justin at that point. I am not sure where he was, as I was just concentrating on getting out at that point. When I got home Persia was asleep. In order to explain the wound on my hand, I told her I had slipped at Marcus' house and got cut on a nail that was sticking out of a rail. The next day the detective came by and told us that Nakia was dead. He also told us that Justin was under arrest for her murder. I decided then not to tell the detective what I had seen while I was there because I was afraid of being charged. I was afraid of being charged because I had been there when she was cut. I never have told anyone what I saw all this past year.

Q: The story about the apple was a lie?

A: Yes.

Q: The story about her teasing you about your hair and flicking her fingers through you hair, was it a lie too?

A: No, she did do that when I was there earlier that afternoon.

This statement was made in the presence of Captain J. S. Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 2 day of July 2007.



Notary Public for South Carolina

My commission expires 2-15-10.

Signed: John W. Jacob

Witness: J. H. G.

Witness: _____

Statement

State of South Carolina) W.S.
County of Richland)

Q: When the two of you were getting intimately physical with one another, did you exchange any bodily fluids?

A: No.

Q: There was no sexual penetration whatsoever?

A: No.

Q: Describe the nature of the contact once again...

A: Pretty much fooling around and grinding some.

Q: Did she touch you a lot during that time frame?

A: Yeah.

Q: Is that the first time that kind of thing had happened between the two of you?

A: Yes.

Q: Did you actually see Justin cut Nakia?

A: I saw him swipe at her with the object in his hand. It was a metal object, but I don't know if it was a knife or what. I didn't realize until I was leaving that he had actually cut her.

Q: Why didn't you call 911?

A: I didn't think she was going to die because it didn't look bad. There wasn't blood everywhere, she just had some blood.

Q: You didn't talk to Justin afterwards?

A: No, I haven't seen or heard from him since then. He didn't know where we had moved to and my phone was shut off. I don't know if he tried to contact me or not.

Q: When Justin came in the front door did he have his keys to open the door?

A: I believe the door was unlocked.

Q: Where was your car parked in relation to Justin's van?

A: My car was parked on the opposite side of the lot in front of the buildings, across from their apartment. Justin's van was parked right in front of their apartment.

This statement was made in the presence of Captain J. S. Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 2 day of July 2007.

Signed:

Witness:

Witness:

Notary Public for South Carolina
My commission expires

Statement

State of South Carolina)
County of Richland) W.S.

Q: What words/phrases do you specifically recall Nakia and/or Justin using or saying during the argument?

A: I heard Justin say, "Oh shit, look what you made me do". That was after he swung the metal object at her. I didn't know then that he had cut her. I heard Justin call Nakia a "bitch". I know Nakia asked him numerous times where he had been, and if he was cheating on her. At one time I heard her ask, "Who is she"? That was all she was pretty much was asking him. She might have called him a couple of names, but I can't specifically recall them. I know they were both upset.

Q: Did he ever accuse you and Nakia of having an affair or sex with one another?
A: No.

Q: From the time Justin got home, until the time you left, how much time elapsed?
A: Ten to maybe fifteen minutes.

Q: What was Justin doing when you were leaving?

A: I didn't see him, but I heard him talking on the cell phone. He was somewhere in the apartment, but I wasn't staying to look for him.

Q: He wasn't in the den area?

A: I didn't see him in there.

Q: So, you saw Nakia go from being an angry and vocal wife, to being slumped over on the couch quiet and still?

A: Yes.

Q: Did you realize then she was hurt bad?

A: No.

Q: After you saw Justin make the swiping motion at Nakia, and then heard the phrase, "Look what you made me do", did that end the argument? Was it quiet then?

A: It was quiet then, but I wasn't there much after that. It took only seconds for me to leave.

Q: Where was Nakia bleeding from?

A: I didn't see the cut I just know blood was trickling down from her face, neck, and head area.

This statement was made in the presence of Captain J. S. Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 2 day of July 2007.

Signed:

Witness:

Witness:

Notary Public for South Carolina

My commission expires 2-15-60

Statement

State of South Carolina)) W.S.
County of Richland)

Q: Do you recall which side of her neck or head she was bleeding from?

A: No.

Q: What did you do when you left their apartment?

A: Went straight home.

Q: Which hand were you cut on?

A: My left hand.

Q: How long was the cut on your hand?

A: About like that. (Demonstrates about an inch long cut).

Q: Did you see the object that Justin cut you with?

A: No.

Q: What was the position of your hands when you got cut?

A: Like this. (Demonstrates approximately at his breast line area).

Q: When Justin cut you what did he say?

A: He wasn't really saying anything.

Q: Did you hear any of Justin's call when he called someone?

A: I didn't hear what he was saying. He was just talking to someone.

Q: Had you ever heard Justin say anything about the deterioration of his relationship/marriage with Nakia?

A: I know they were having problems and I know he was cheating on her. Earlier that same afternoon (when I was at their house) Justin told me he was getting tired of her. He said he hated her ass, and wished she would go away.

Q: After Nakia was stabbed (or cut) did Justin ask you do assist him in any way?

A: No.

This statement was made in the presence of Captain J. S. Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 2 day of July 2007.

Notary Public for South Carolina
My commission expires 2-15-10

Signed:

Witness:

Witness:

Statement

State of South Carolina)
County of Richland) W.S.

Q: Did you have any further conversation with Justin from that point?

A: No.

Q: What was your cell phone number at the time of this incident?

A: 760-7766. It was a Verizon account. It was in my wife's name.

Q: What did you drink from while in the apartment?

A: I believe it was a cup, but I am not sure. I don't remember if we were drinking beer or liquor.

Q: What made you believe you could calm things down by stepping between them, particularly after Justin had just gotten home and said something about you being there?

A: I don't know. I wasn't thinking too much about it, I was just trying to get between them to get them to stop for a minute to maybe calm things down.

Q: Is there anything else that you now have not told us (held back) regarding this matter?

A: That is all I can think of.

Q: Please explain why you lied once again...

A: From fear. I was afraid I would be charged as an accomplice, or accused of actually doing it. I was also afraid my wife would find out about me and Nakia getting involved that morning.

This statement was made in the presence of Captain J. S. Smith of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 2 day of July 2007.

Signed:

Witness:

Witness:

Notary Public for South Carolina
My commission expires 2-15-10.

STATE'S
EXHIBIT

47

Statement of

Joshua W. Porch DOB 9/17/87
640 Elm Avenue Apt#2
Long Beach, C.A. 90802

Columbia, South Carolina, this 9th day of July, 2009 at 0300 hours, in the presence of Sgt. McDaniels and/or Inv. Godfrey of the Richland County Sheriff's Department. Made at (Pacific)

I, Joshua W. Porch, understand that I have the right to remain silent. Anything I say can be used against me in court. I have the right to talk to a lawyer for advice before you ask me any questions, and to have a lawyer with me during any questioning. If I cannot afford a lawyer, one will be appointed for me before any questioning, if I wish. If I decide to answer questions now, without a lawyer present, I still have the right to stop answering at any time. I also have the right to stop answering at any time until I talk to a lawyer.
Do make the following statement:

Q: Sgt. Shawn McDaniels

A: Joshua William Porch (DOB [REDACTED])

Q: What can you tell me about the incident that took place at 1103 Pinelane Rd Apt#311-C on 5.14.06?

A: Persia wasn't lying when she said that she thought I was home. I usually come home and stay up for a while and make myself something

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: [Signature]

Signed: Joshua W. Porch

Witness: _____

This is to certify that I have read or have read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

Sworn to and subscribed before me
This 9th day of July, 2009

Signed: Joshua W. Porch

[Signature]
Notary Public for South Carolina
My commission expires 05.30.11

STATEMENT OF

J.W. PorchDATE: 7/9/09 TIME: 0300hrs
(CONTINUED)

to eat, I did go home And just sat in the car, I turned the head lights off and just wasn't ready to go home. After that I left and went to Justin and Nakia's apartment. Once I got there I knocked on the door, and Nakia was there and she answered. She let me inside & told me that Justin wasn't home. After that I asked when or if she thought that he would be home soon, and then she said "I think he should be home soon". I said "Alright is it okay if I sit here and wait?" She said "Yeah" We were just sitting there talking and she offered me a drink. We were drinking and talking for a while. It was late. The more we are sitting there talking she started moving closer. She wasn't trying to rape me or nothing, she was more like leaning in for a kiss. I backed away from her and basically told her NO. After that she got upset, went into the kitchen and grabbed a knife. Like I said

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

WITNESS: [Signature]SIGNED: J.W. Porch

WITNESS: _____

Page 2 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED: J.W. Porch

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 6/30/11

STATEMENT OF

J. W. PorchDATE: 7/9/09 TIME: 0800 hrs

(CONTINUED)

I do not think that she was trying to kill me or nothing. When she had the knife she came walking toward me. I was sitting on the couch in the living room. I was closer to the T.V. when she first came in the living room. I stood up when she was walking towards me with the knife. She was real upset and she was kind of swinging the knife, and as I walked toward her... I was just trying to get her to calm down, or put the knife down, and that is when I came up to her and got nicked on my hand. It was a cut on my left hand. I don't think that she realized that she cut me ... and I didn't realize it either... not at first. That is when I grabbed her and tried to get the knife from her... to kind of stop her from swinging. Once I grabbed her we end up losing our balance and fell over onto the couch. After we fell over she

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS: [Signature]SIGNED: [Signature]

WITNESS: _____

Page 3 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED: [Signature]

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 6/30/11

STATEMENT OF

J. W. Porch

(CONTINUED)
DATE: 7/9/09 TIME: 0300hrs

Wasn't yelling ... I don't think she was saying anything at all. I got up and that is when I went to the kitchen. I noticed my hand and I started rinsing it off in the sink. Then after that I noticed that she wasn't on the couch ... she was on the floor. She looked as if she was trying to get up. Then I walked out the door and went to my car and went home.

Q: Where is the knife that was used to cut Nakia?

A: I have no idea

Q: Describe the knife to me.

A: It was a regular size knife with a black handle.

Q: How long was the blade?

A: About 4-5 inches.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS: [Signature]

SIGNED: [Signature]

WITNESS: _____

Page 4 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED: [Signature]

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 6/30/11

STATEMENT OF

J. W. Porch

(CONTINUED)

DATE: 7/9/09 TIME: 0300hrs

Q: Why didn't you call 911?

A: I didn't think that she was dying.

Q: Did you believe that she was coming after you with the knife?

A: No... I think that it was more of her trying to scare me. That is what I think looking back on it.

Q: At what point did you try to clean up the kitchen and why?

A: I don't remember trying to clean up the kitchen. I remember I dropped a couple of drops of my blood on the floor, because when I was in there to rinse my hand off, I had also gotten some paper towels. When I saw the couple of drops I wiped it up and put the paper towels on my hand.

->

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS:

SIGNED:

WITNESS:

Page 5 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED:

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 053011

STATEMENT OF

J. W. Porch

(CONTINUED)
DATE: 7/9/09 TIME: 0300hrs

Q: Did you hear Nikia say anything after she was stabbed?

A: No.

Q: Tell me again how Nikia ended up being stabbed and where was she stabbed at?

A: I was grabbing her to stop her from swinging the knife, and we ended up losing our balance. I fell on top of her and she was stabbed I think in the neck.

Q: Did you have your hand on the knife?

A: ^{No} I grabbed her arm & I was just trying to make her stop swinging the knife.

Q: Tell me the truth as it pertains to why you would lie to the investigators that interviewed you before today?

A: The very first time that they came over there, they already said that they had more than enough evidence to convict Justin. When they brought me in to give a statement they would ask me questions

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS: [Signature]

SIGNED: X. Porch

WITNESS: [Signature]

Page 6 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED: X. Porch

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 6/5/14

STATEMENT OF

J.W. Porch

DATE: 7/9/09 TIME: 0300hrs

(CONTINUED)

or sometimes give a certain scenario ... kind of like "This could've happened this way" or ...

Q: Why didn't you do the right thing and correct them?

A: I really didn't want to get involved ... I was scared.

Q: Why did you lie on Justin Mallory?

A: Cause the police already had him in jail, plus they had already told me that they had enough evidence to convict him. This was the day after the incident with Natalia. I don't know the detective's name, but he was shorter than me, Caucasian, with brown hair, sort of on the thick side. It was only one.

Q: Was Justin Mallory present when Natalia was stabbed?

A: No

Q: Did you ever see Justin before, during or

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS:

SIGNED:

WITNESS:

Page 7 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July 2009

SIGNED:

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 05304

STATEMENT OF

J.W. Purch

(CONTINUED)
DATE: 7/9/09 TIME: 0300hrs

after the stabbing incident?

t. Before ... earlier that day when I went there with my daughter, him and Natica were there.

Q: Did you see him after that on 5/14/06?

A: No

Q: Outside of trial have you seen him since 5/14/06?

A: No.

Q: Have you ever told anyone the truth about the stabbing incident and if so ... who?

A: No.

Q: Did you have any blood on you after you left Natica's house on 5/14/06?

A: From my hand. I believe it was just mine.

Q: Did you ever discuss cleaning your car b/c there may have been blood inside or on it?

t. No.

Q: Is there anything that you would like to add, or subtract from this statement?

A: I would like to add something. I want to

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS: [Signature]

SIGNED: J.W. Purch

WITNESS: _____

Page 8 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED: J.W. Purch

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 0530K

STATEMENT OF

J. W. Porch

(CONTINUED)
DATE: 7/14/09 TIME: 0300hrs

Apologize to Nakia's family. I'm sorry that they lost loved one and also that I never told the truth before ... and that they had to wait all this time to find out what really happened. Also I need to apologize to Justin McIlroy for lying on him, and taking away a chunk of his life from him. I also want to apologize to the officers involved in this case. They shouldn't have to suffer because of my cowardice. That's all.

Q: In retrospect is there anything that you would have done differently on 5/14/06?

A: I would've never went over there. None of this would've happened. If I did go over there, knowing now how badly injured she was I would've called the police and told the truth in the beginning.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS: _____

SIGNED: X Joshua W Porch

WITNESS: _____

Page 9 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED: X Joshua W Porch

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 6/30/14

STATEMENT OF

J. W. Porch

(CONTINUED)

DATE: 7/9/09 TIME: 0200hrs

Q: Is this statement the whole truth?

A: Yes.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS: [Signature]

SIGNED: J. W. Porch

WITNESS: [Signature]

Page 10 of 10 Pages

This is to certify that I have read or have had read to me the foregoing statement consisting of 10 pages and a true copy has been given to me this 9th day of July, 2009.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF July, 2009.

SIGNED: J. W. Porch

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 0530h

STATE'S
EXHIBIT

49

Statement of

Joshua William Porch
640 Elm Ave. Apt 2
Long Beach, CA 90802
562-495-4128

Made at

Columbia, South Carolina, this 9 day of July, 2009, at 1539 (Pacific)/1839 (EST) hours, in the presence of Investigator Brian Godfrey and Sgt. McDaniels of the Richland County Sheriff's Department.

I, Joshua William Porch, understand that I have the right to remain silent. Anything I say can be used against me in court. I have the right to talk to a lawyer for advice before you ask me any questions, and to have a lawyer with me during any questioning. If I cannot afford a lawyer, one will be appointed for me before any questioning, if I wish. If I decide to answer questions now, without a lawyer present, I still have the right to stop answering at any time. I also have the right to stop answering at any time until I talk to a lawyer.

Do make the following statement:

Q=Investigator Godfrey/McDaniels A= Joshua William Porch

Q: Have you been advised of your rights?
A: Yes.

Q: Are there additional facts about the incident that occurred on May 14, 2006 during the altercation between you and Nakia Mallory that you would like to add to your statement?
A: Yes.

Q: Can you tell us once again what occurred during the early morning hours on May 14, 2006 at Nakia Mallory's apartment?

A: I came over to her apartment when it was late. I can't give you an exact time. I came over there to see Justin. I knocked on the door and Nakia answered. I asked her if Justin was home and she said no. I asked if she knew when or if he would be home and she stated that he would be home soon. I asked if it was okay if I stayed and waited for Justin. She stated that I could.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: Sgt. W. McDaniel

Signed: Joshua W. Porch

Witness: _____

This is to certify that I have read or have read to me the foregoing statement consisting of 3 pages and a true copy has been given to me this 9 day of July, 2009.

Sworn to and subscribed before me
This 9 day of July, 2009

Signed: Joshua W. Porch

[Signature]
Notary Public for South Carolina
My commission expires January 15, 2015.

She invited me in. We both sat down on the same couch. I sat closest to the television and she sat closest to the door. There was space between us. She sat on one end and I sat on the other. She offered me a drink. She got me the drink and we were both sitting on the couch drinking and talking. We were just having small talk about our kids and work. As we were talking she was gradually getting closer. I took that as if she wanted something more sexually. We kissed. Looking back I guess you could say that I initiated it. I leaned in and kissed her. The initial kiss felt awkward and I wasn't really sure if she was okay with me kissing her. She put her hand on my side and I attempted to touch her breast and she stopped me. She stopped me by moving her hand from my side to against the front of me. She never said stop, it was just understood by her motions that she wanted me to stop. I asked her why she wanted to stop. She stated that she couldn't do this because she was married to Justin and they had kids together. That is when I told her that Justin was probably doing the exact thing right then and that he does it all the time. I kept talking to her telling her things like Justin didn't care about her or the kids. That she was acting kind of stupid and that she was acting like a bitch. She said "Excuse me" and I repeated what I said. I asked her why would she even start if she didn't want to finish referring to the physical contact we had just moments prior. Nakia got up and went to the kitchen. I was still sitting on the couch. I didn't know why she got up. I thought she got up to get another drink or something. Nakia came out of the kitchen with a knife in her hand and I got up and went towards her. Nakia was saying something, but I do not remember what she was saying. I was more focused on the knife. She did say, "You don't talk to me like that". As she was coming in the living room and I was coming towards her I struck her three times in the forehead with my palms. Then I grabbed her arm in an attempt to get her stop swinging the knife and at some point I got cut. I didn't realize I was cut at the time. I was able to grab her arm and was trying to get the knife away from her and during that I struck her in the right side of her head with my left elbow. And while we were still struggling I was trying to position her arm and the knife ended up slicing her on her eyebrow. We were still struggling and we she started falling over. I ended up falling with her. We landed on the couch. I landed on top of her. She was on her back and I was facing her on top. She was still holding on to the knife and the knife stuck her in the neck. She stopped struggling then and I got up and went into the kitchen. I rinsed my hand off in the sink and was getting some paper towels. I noticed that there were a couple of drops on the floor so I cleaned them up. Then I wrapped up my hand with paper towels. As I was getting ready to leave I noticed Nakia on the floor in the living room in front of the couch. She appeared as if she was trying to get up. I left.

Q: After she was stuck in her neck with the knife did she say anything else to you?

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: Sgt W. Marshall

Signed: Joshua W. Pouch

Witness: _____

This is to certify that I have read or have read to me the foregoing statement consisting of 3 pages and a true copy has been given to me this 9 day of July, 2009.

Sworn to and subscribed before me
This 9 day of July, 2009

Signed Joshua W. Pouch


Notary Public for South Carolina
My commission expires January 15, 2015.

Page 2

A: No.

Q: Why didn't you tell us the truth about the reason that the altercation occurred prior?

A: I was just scared. This whole situation, not sure what exactly is going to happen. Sometimes I just do not know what to do.

Q: Do you think that you were mistaken when assuming that Nakia was making advances on you by moving closer to you on the couch?

A: Yes, it is possible for me to be mistaken.

Q: Did Nakia's actions that night frustrate you?

A: Do you mean when she wanted to stop? (Inv. Godfrey: Yes.) Yeah a little bit.

Q: Describe the force behind the palm strikes that you gave to Nakia's head?

A: They were quick strikes without a lot of power behind them.

Q: Did you at anytime conspire or consult with your brother-in-law, Robert Brown, about this incident?

A: No.

Q: Does that include about cleaning up the vehicle you were driving the night of this incident?

A: Yes.

Q: In fact, you stated that you never attempted to clean up your vehicle?

A: That's right.

Q: What did you tell Pershia occurred during this incident?

A: She thinks what occurred is the last statement that I gave Capt. Smith.

Q: Is everything that you told me today the truth?

A: Yes.

Q: Is there anything that you would like to add to this statement?

A: No.

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: Sgt W. M. C. J.

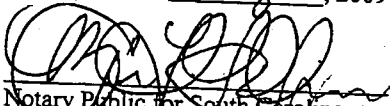
Signed: J. Joshua W. Pouch

Witness: _____

This is to certify that I have read or have read to me the foregoing statement consisting of 3 pages and a true copy has been given to me this 9 day of July, 2009.

Sworn to and subscribed before me
This 9 day of July, 2009

Signed J. Joshua W. Pouch


Notary Public for South Carolina
My commission expires January 15, 2015.

State's Exhibit 50

DVD

**DEFENDANT'S
EXHIBIT** 10
PC 1141813

Personally appeared before me this 14 day of May, 2006, at 800 hours, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one Justin Mallory of 1103 Pinelane Dr apt: 311-C. Day time telephone number 463-3515. Night time telephone number 699-7057 (brother Chris Wright).
Who makes the following statement under oath to wit:

I went and picked Rickie up from the apartment that I showed you. I was wearing the same clothes that you have now; I put the clothes on after I got up after my nap. I got there at about 10 pm. We went to Apple B's on Beltline by Midland's Tee; we got there at about 11 pm. We ate and went back to her sister's house. I paid for dinner, and we were talking about who was going to pay for the hotel room. She said that she was not going to pay for the hotel room because it was her birthday. I dropped her off and then decided that I would go ahead and pay for the hotel room. I called her back and asked if she was ready. I picked her back up about 4-5 minutes after I dropped her off. We went to the Economy Inn on Broad River Road. We got a room (227). This was around 1:45 am when we got the hotel room. We stayed there until about 3:15 am when I took her to her sister's house after I left the Exxon. I stopped at the Exxon across from the Economy Inn and got a Yahoo and a peach white owl. I dropped Rickie off at her sister's apartment and went home.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Signed:

Witness:

Page :

Statement

State of South Carolina)

) S.S.

County of Richland)

I got home at about 3:45 am. I noticed that a light was on. The blinds are messed up and at night we keep a sheet over them so that you can't see in. I went to the sliding door and I saw Nekia on the living room floor. I could see that the back of her head had blood all over. I ran in the front door. It was unlocked and not shut all the way. I was closed but not pushed in all the way. I walked in and started screaming. I tried to turn Nekia over; she was so bloody that I put her back. She looked dead. I beat Shaeed's door to get his help while I called 911. I ran back in the house. Shaeed came out and I told him that some one killed my wife. He grabbed her feet. I grabbed her upper body. She was too slippery. I picked her back up and carried her to the van. I told Shaeed to get my kids. I took off and went to the hospital. I told them that I was going to Providence North East. I pulled up in the front of the hospital and carried her inside. I called my family and hers.

Q. Did you have anything to do with Nekia's death?

R. Not a thing, the last time I saw her she was alive and well.

Q. Did Rickie know about Nekia?

R. No. I told Rickie that I had a baby's mother in Texas. I met Rickie about a month and a half ago.

Q. Did Nekia have any problems with anyone?

R. No not that I know of.

Q. Did you and Nekia have an argument today?

R. No. Everything was great. She was my high school sweet heart. We have been married about 10-11 months and have two kids.

Q. Is there anything that you would like to add or change about your statement?

R. No.

This statement was made in the presence of Inv. T. Hoidorf of the Richland County Sheriff's Department.

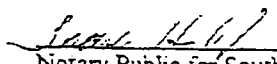
I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 14 day of MAY 2006.

Signed: 

Witness: _____

Witness: _____


Notary Public for South Carolina
My commission expires 12.07.2006

ARREST WARRANT

I-977265

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE RCSO 08051299-14

against

Justin Mallory

Address: 1103 Pinelane Rd. Apt. 311C

Columbia, SC 29223-

Phone: SSN: [REDACTED]

Sex: M Race: B Height: 6 1 Weight: 260

DL State: SC DL #: [REDACTED]

DOB: [REDACTED] Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: Travis Holdorf

Offense: Murder / Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

dealt with according to the law

(I.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant

on

Signature of Constable/Law Enforcement Officer

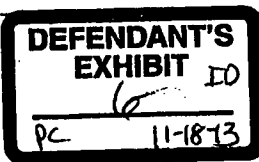
RETURN WARRANT TO:

Richland General Sessions

1701 Main Street

P.O. Box 192

Columbia, SC 29202



ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant Travis Holdorf

being duly sworn deposes and says that defendant Justin Mallory

did within this county and state on 05/14/2006

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

Richland Bond Court

in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on 05/14/2006 while at 1103 Pinelane Rd. Apt. 311C in the Dentsville Magisterial District of Richland County, one Justin Mallory did commit the crime of Murder in that he did with malice and aforethought stab and beat the victim, Nakia Mallory, his wife. Moments before the victim's death a witness heard a female call out from the incident location. The witness observed a subject run from the scene to the defendant's van and get into the van. The defendant has given a written statement that places him at the scene at the time of the incident. RCSO case no. 06051299-14. Affiant and others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone: (803) 576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 5/14/2006 defendant Justin Mallory

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland Bond Court

as set forth below:

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 05/15/2006

(I.S.)

Signature of Issuing Judge

Kirby D Shealy Jr

Judge Code: 5019

Judge's Address 1400 Huger Street

Columbia, SC 29202

Judge's Telephone: (803) 748-4745

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

STATE'S
EXHIBIT

§

WITNESSES
Sgt. Shawn McDaniels
Richland County Sheriff's Office

ARREST WARRANT NUMBER

Warrant No.: I-918184

ACTION OF GRAND JURY

TRUE BILL

Mena H. Gardiner

Foreperson of Grand Jury

Date:

JUN 16 2011

VERDICT

Foreperson of Petit Jury

Date:

Docket Number 2011-GS-40 - 03359

The State of South Carolina
County of Richland

COURT OF GENERAL SESSIONS

June 2011 Term

THE STATE

vs.

JOSHUA PORCH

DEFENDANT

INDICTMENT FOR

MURDER

S.C. CODE §16-3-0010

CDR Code: 0116

FELONY (Exempt)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I, _____
hereby appear in my own proper person
and plead guilty to the within indictment
or to

Defendant

Witness:

C.C.C. Pls. And G.S.

RECEIVED
OFFICE OF THE CLERK
C.C.C. Pls. And G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on June 15, 2011, the Grand Jurors of Richland County present upon their oath:

MURDER

That Joshua Porch, did in Richland County on or about May 14, 2006, feloniously, wilfully and with malice aforethought, kill one Nakia Mallory, by stabbing the victim in neck, and that the said victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, THE CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

Alan Wilson
ALAN WILSON (CNG) *by J.M.*
SOUTH CAROLINA ATTORNEY GENERAL

Richland County Warrant Worksheet

COPY

RCSD Case # 605129914

On View Arrest ☐ Yes ☒ No

Porch
Last Name
124 Dan Gray Rd
Street Address

536-15-3020
Phone# SSN

David Y Wilson
Prosecuting Agency/Officer

Prosecuting Business/Affiant
Nakia Mallory
Victim

Joshua
First Name
Apt/Lot #
City

male black 6'1" 179
Sex Race Height Weight

5623 Two Notch RD
Address

Address
1103 Pinelane Rd
Address

William
Middle
DOB
SC 29061
State ZIP

DL State DL Number

576-3133
Phone #

Phone #
788-6426
Phone #

Cell Phone# Work #

Alternate victim contact person

Alternate address

Phone #

Victim Notified of Arrest: ☐ Yes ☒ No Victim transported to ☐ Hospital / ☐ Shelter / ☒ No

Victim Notified of Bond Hearing: ☐ Yes ☒ No Victim ☐ will / ☐ will not be present

Victim notified to be present at: ☐ 9:00 AM (M-F); ☐ 2:30 PM (M-F); ☐ 8:00 PM (M-F); or ☐ 11:00 PM (M-F)

☐ 9:00 AM (S-S); ☐ 2:30 PM (S-S) Date to Appear: _____

If unable to be present, does the victim request any special conditions of bond?

- ☐ No contact by the defendant
☐ Defendant not to return to the incident location
☐ Other: _____

Are there any other victims associated with this case? ☐ Yes ☒ No If yes, list on them and the responses to the questions above for each victim on a separate sheet. Send it in with this worksheet.

AFFIDAVIT

That on or about 05/14/2006 while at 1103 Pinelane Rd Apt 311-C in the Dentsville Magisterial
Date Address where the incident occurred

District of Richland County, one Joshua Porch did commit the crime of Murder /
Statute Number _____

It is believed the defendant committed the crime because The 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.

Does the Investigating Officer have evidence to submit at trial? ☒ Yes / ☐ No

Affiant/Business to appear at Bond Court to sign warrant at _____ (Date) _____ (Time)

-209 David Y Wilson 07/06/2009 (Date) 1620 (Time)
Officer badge # Person signing warrant

Warrant Detention Center/ Magistrate William Affiant Richland Victim / Affiant/Business

ARREST WARRANT

1-918184

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Dentville Magistrate

THE STATE 605129914
against

Joshua William Porch

Address: 124 Dan Gray Rd
Hopkins, SC 29061-8727

Phone: SSN: [REDACTED]
Sex: M Race: B Height: 6 Weight: 197
DL State: SC DL #: [REDACTED]
DOB: [REDACTED] Agency ORI #: 04000
Prosecuting Agency: Richland County Sheriff Department
Prosecuting Officer: David Wilson - 209
Offense: Murder / Murder

Offense Code: 0116
Code/Ordinance Sec: 16-03-0010; 0020

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Joshua William Porch
on 05/14/2006

(Signature)
Signature of Special Agent for Enforcement Officer

RETURN WARRANT TO:

Dentville Magistrate
2500 Decker Blvd Suite B-1 Box 10
Columbia, SC 29206

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
Richland / Dentville Magistrate)

AFFIDAVIT

Personally appeared before me the affiant David Wilson who
being duly sworn deposes and says that defendant Joshua William Porch
did within this county and state on or about 05/14/2006 violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Richland / Dentville Magistrate)
in the following particulars:

DESCRIPTION OF OFFENSE Murder / Murder

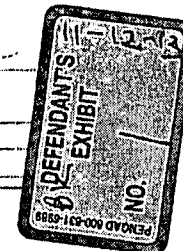
I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

That on 5/14/2006 while at 1103 Pinehollow Road Apt 311 C in the Dentville Magisterial District of Richland County, one Joshua
Porch did commit the crime of Murder in that he 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.

Signature of Affiant

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
Richland / Dentville Magistrate

Affiant's Address 5623 Two Notch Road
Columbia, SC 29223
Affiant's Telephone (803)576-3000



ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on or about 5/14/2006 defendant Joshua William Porch
did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of Richland / Dentville Magistrate) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me

on 07/07/2009 (L.S.)
Signature of Issuing Judge
Phillip P. Hewson
Judge Code: 5014

Judge's Address 2500 Decker Blvd
Columbia, SC 29206-2323
Judge's Telephone (803)576-2360
Issuing Court ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

PROPOSED AFFIDAVIT EXCLUDING
MISREPRESENTATIONS AND INCLUDING
EXCULPATORY EVIDENCE

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 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 hand 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 this 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.

10, 12, 14

Richland County Sheriff's Department
Criminal Investigative Division
Investigative Report

Case Number: 06051299-14
Offense Date: 05-14-06

Victim's Name: Mallory, Nakia
Victim's Address: 1103 Pinelane Rd Apt. 311C

Location of Offense: 1103 Pinelane Rd Apt 311C
Type of Offense: Homicide

I/O was instructed to review this case by the Sheriff after the acquittal of the victim's husband after his second trial. During a review of the case the following points were developed;

1. Justin Mallory was implicated in the murder of his wife based mainly on a witness statement made by a neighbor who hears an argument and then observes Mallory's van in the parking lot. She then sees Mallory carrying the victim and place her in his van and drive off. Mallory behavior and statements made while at the hospital tend to implicate him in the murder of his wife. Mallory was polygraphed several hours after the murder in an attempt to break his story and obtain a confession.
2. Prior to the first trial it is determined that there is a male DNA profile in blood found in the kitchen that does not match Justin Mallory. The investigators obtained samples from the maintenance man and Joshua Porch and the DNA matched Joshua Porch. They interviewed Porch and he changes his story several times.
3. Porch is polygraphed twice as he is interviewed over two days and fails the polygraph both times. He was polygraphed on his involvement in the murder. During the second test Lt. White noted on the biographical form that Porch is left handed.
4. The stab wounds to the victim were on the right neck and right forehead which would be consistent with a left handed assailant.

I/O met with Justin Mallory and the victim's mother, Michelle Steele. Inv Travis Holdorf was also present. During the meeting Justin Mallory maintained his innocence and at times became argumentative and accusatory. During the interview I/O asked Mallory to sign his name on a notepad several times. He signed using his right hand and indicated he has always been right handed. I/O compared his signature to his signature on his original statement they were consistent and very similar. I/O asked Justin Mallory to take a polygraph at SLED. I/O explained to Mallory that I needed something to take to the solicitor's office to help prove his innocence. He agreed but stated that he wanted his attorney present. Justin Mallory called I/O back several days later and refused to take the test. He stated that his lawyer advised against it.

Contact number for Michelle Steele. Nakia's mother is 834-7263. Nakia's father Randy Gibson's numbers are 828-505-1768 or 828-298-7911 ext. 15419 or 15491.

I/O met with John Barron and reviewed the DNA on the case. We also went over the crime scene photos and the autopsy report. I/O requested Barron to test the victim's shirt for DNA.

I/O was notified by John Barron that he had tested the DNA and that Porch's DNA was found in blood stains off of the front right side of the victim's shirt. This contradicted Porch's final story to investigators. Porch stated that Mallory had come home and argued with Nakia. Porch stated that he got between them facing Justin Mallory and Mallory cut him on the left hand. He then went in to the kitchen and cleaned up his hand.

I/O spent five hours reviewing the file again and constructing a time line. The time line indicated that Justin Mallory would have had only ten minutes to come home argue with Nakia, murder Nakia and go next door for help without getting blood on his clothes if he was the murderer. The witness from next door did not see any blood on Justin Mallory when he came to the door for help.

I/O met with Lt. Elsey, John Barron, Inv. Holdorf, and Capt. Smith concerning the case. After going over the case it was decided that all scissors would be tested for DNA as possible murder weapons. It was also decided to check for DNA on the broken beer bottles which may have been used to inflict the wounds to the victim's head. The latent prints lifted off of the beer bottles could not be compared due to a lack of ridge detail.

I/O briefed the Sheriff who instructed this officer to do what ever was needed to follow-up on the case.

I/O met with Capt. Smith and Sol. Meadows both believe that Porch is holding back information but do not believe that Porch killed Nakia.

Went by Persia Porch's address with Sean McDaniels. She was not home. We left a card with her sister.

Met with Sean McDaniels and Brian Godfrey and discussed the case. I/O gave McDaniels Porch's information so that he could do background on Porch and determine if he was still in California. See attachment "Joshua Porch" for P/C for murder warrant.

I/O obtained murder warrant on Joshua Porch. Met with Godfrey and McDaniels and discussed plans to send them to California to interview Porch and arrest him.

I/O met with Travis Holdorf and requested that he re-interview Shaheed Hargrove, Mallory's neighbor he went to for help and Porch's friend that he stated he visited the night of the murder.

I/O received a call from Holdorf that he had interviewed Porph's supervisor at Thomas and Howard where Porph worked at the time of the murder. He stated that the supervisor had overheard a conversation between Porph and his brother-in-law, Robert Brown talking about cleaning blood out of Porph's car. They talked about blood being on the driver's door, seat, and floorboard. They also talked about taking the carpet out of the Jeep Cherokee that Porph drove at the time of the murder.

I/O received a call from Godfrey and McDaniels who were in California. They had successfully arrested and interviewed Porph and he had confessed to the murder of Nakia stating it was self defense. He exonerated Justin Mallory. I/O asked them to polygraph Porph and to re-interview him if he failed the test. They did and he changed his story again taking more responsibility for Nakia's murder.

I/O asked Lt. Amaro to assist us in tracing the Jeep Cherokee that Porph had sold a few months after the murder. He located the Jeep in Anderson County. I/O had Inv. Holdorf locate the Jeep and make contact with the owner. The Jeep was towed back to RCSD and processed by our lab. See lab reports. They believe that they found blood in the seams of the seat but were unable to extract DNA from the samples taken out of the Jeep. After processing the Jeep was taken to Lonnie Robert to be repaired and was then given back to the owner.

Statement

State of South Carolina;
County of Richland

Personally appeared before me this 16 day of May, 2006, at 1725 hours, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one Sherrv Tribble of 400 Lincolnshire Blvd. Day time telephone number 920-4388. Night time telephone number 545-4914.

Who makes the following statement under oath to wit:

I was over at my boyfriend's apartment. He stays at apartment 314 B his name Dennis. I know that it was after 2:18am was the last time I looked at the clock. We were up talking to bed about a half hour-45 minutes later I heard a females voice. At first I could not tell what it was. Then after listening I could hear a female crying, she was hysterical. She was asking why and how could you. She kept asking it over and over again. She was crying and sobbing and mumbling something else that I could not make out. I thought that it was a domestic and that they were arguing. It sounded like some one was cheating. She was asking questions and no one was answering at first. Then I heard a male's voice. I could not make out what he was saying but you could tell it was a man's voice. I looked outside and saw a white van parked in front of the apartment building across from us. It was parked to the right side of the breezeway. After that it was quiet for about 5-10 minutes. Then all of a sudden it was a man's voice he was talking. I figured that they were arguing again and I went to the window. He was saying why, and look what you made, and see what you did, he was not finishing his statements. He was crying and all worked up. At first she was worked up and now he was worked up. I did not hear her say anything. I was about to go outside and tell them to be quiet. I looked out again. I saw that the van had been moved. The guy was hunched over like someone hit him in his stomach. He was jogging to the van. The van was already turned catty corner and the doors were open. The apartment was dark. As he is running to the van. He stops and says something to someone in the van. I did not see anyone in the van except for him. He did the jog thing over to the passenger's side and then went to the driver's side and they took off. As soon as he leaves I saw the lights come on in the apartment.

Q. From the time that you first see the white van to the time that the van pulled off how much time had passed.

R. About ten minutes.

Q. About how much time had passed from when you first hear the female's voice to when the van leaves?

R. The whole thing was no more than half an hour.

This statement was made in the presence of Inv. T. Holdorf of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth. 2

Sworn to and subscribed before me
this _____ day of _____ 2006.

Signed:

Witness:

Witness:

Notary Public for South Carolina
My commission expires

Statement

State of South Carolina)

) S.S.

County of Richland)

Q. What did the van look like?

R. It was all white and square in the back. It large size van not small and rounded like a family van.

Q. Did you call the police?

R. No, we were about to get up and see what was going. Right after that I saw the van leave. At first I thought that he was getting kicked out or just leaving. It was not until the next day that I found out what happened.

Q. Have you seen the van at the apartment before?

R. Yes, I have seen a lot of vehicles there before. I don't know who lives in the apartment. I know that I see a lot of people there hanging out on the porch or at their cars.

Q. Is there anything that you would like to add or change about your statement?

R. No.

This statement was made in the presence of Inv. T. Holdorf of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this ____ day of _____ 2006.

Signed: _____

Witness: _____

Witness: _____

Notary Public for South Carolina
My commission expires _____

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Alison Renee Lee, Circuit Court Judge

Case No: 2011-GS-40-03359

The State,.....Respondent,

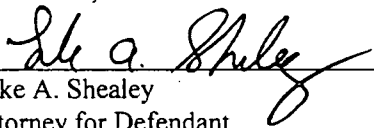
v.

Joshua William Porch,.....Appellant.

NOTICE OF APPEAL

Joshua William Porch appeals his conviction for murder and sentence in this case. The sentence was imposed by the Honorable Alison Renee Lee on November 25th, 2013.

December 2, 2013



Luke A. Shealey
Attorney for Defendant
2008 Lincoln Street
Columbia, SC 29201
803-929-0008

Other Counsel of Record:

Assistant Attorney General Cary Goings
Office of the Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

RECORDED

DEC 02 2013

SC COURT OF APPEALS

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. 2011-GS-4003359

Appellate Case No. 2013-002531

The State, ... Respondent,

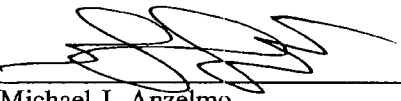
v.

Joshua William Porch, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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

Mervin Ashley Alexander Garry
SC Bar No. 100088
E-Mail: ashley.garry@nelsonmullins.com
101 Constitution Avenue, NW / Suite 900
Washington, DC 20001
202.712.2800

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
November 18, 2015

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

RECEIVED

NOV 18 2015

SC Court of Appeals

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

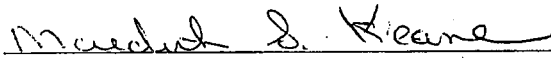
Proof of Service

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Joshua William Porch, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document Served: **Record on Appeal Volumes I-III**

Counsel Served:

Anthony Mabry
Assistant Attorney General
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549


Meredith S. Keane
Paralegal

November 18, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-40-03359

Appellate Case No. 2013-002531

RECEIVED
DEC 08 2015
SC Court of Appeals

State of South Carolina, Respondent,

v.

Joshua William Porch, Appellant.

FINAL BRIEF OF APPELLANT

Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Mervin Ashley Alexander Garry
NELSON MULLINS RILEY & SCARBOROUGH LLP
101 Constitution Avenue, NW / Suite 900
Washington, DC 20001
(202) 545-2927

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

Counsel for Joshua William Porch, Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
FACTS.....	1
STATEMENT OF ISSUES	4
STANDARD OF REVIEW	5
ARGUMENT	5
I. The trial court erred in failing to void the State's arrest warrant under <i>Franks v. Delaware</i>	5
II. The trial court erred and violated Porch's rights under the Confrontation Clause by limiting Porch's testimony based on the unavailability of a State witness	13
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	13, 14, 17
<i>Davis v. Washington</i> , 547 U.S. 813 (2006).....	14
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978).....	4, 5, 6, 11, 12, 13, 20
<i>Horton v. City of Columbia</i> , 408 S.C. 27, 757 S.E.2d 537 (Ct. App. 2014).....	6
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	12
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964).....	16
<i>State v. Amerson</i> , 311 S.C. 316, 428 S.E.2d 871 (1993)	5
<i>State v. Baccus</i> , 367 S.C. 41, 625 S.E.2d 216 (2006)	5
<i>State v. Graham</i> , 314 S.C. 383, 444 S.E.2d 525 (1994)	5, 17, 18, 19
<i>State v. Lewis</i> , 324 S.C. 539, 478 S.E.2d 861 (Ct. App. 1996).....	5
<i>State v. Missouri</i> , 337 S.C. 548, 524 S.E.2d 394 (1999)	6, 7, 8, 12
<i>State v. Missouri</i> , 361 S.C. 107, 603 S.E.2d 594 (2004)	8
<i>State v. Pittman</i> , 373 S.C. 527, 647 S.E.2d 144 (2007)	5
<i>State v. Samuel</i> , No. 27498, 2015 S.C. Lexis 85 (S.C. Feb. 25, 2015)	16

<i>State v. Silver</i> , 307 S.C. 326, 414 S.E.2d 813 (Ct. App. 1992).....	16
<i>State v. Stokes</i> , 381 S.C. 390, 673 S.E.2d 434 (2009)	13, 14
<i>Thompson v. Smith</i> , 289 S.C. 334, 345 S.E.2d 500 (1986)	13
<i>United States v. Ayala</i> , 469 F. Supp. 2d 357 (4th Cir. 2007)	14, 15
<i>United States v. Colkley</i> , 899 F.2d 297 (4th Cir. 1990)	11, 12, 13
<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	13
<i>United States v. Ventresca</i> , 380 U.S. 102 (1965).....	11

STATEMENT OF THE CASE

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF ISSUES

- I. Whether the trial court erred in failing to void the State's arrest warrant under *Franks v. Delaware*.
- II. Whether the trial court erred, and violated Porch's rights under the Confrontation Clause, in limiting Porch's testimony based on the unavailability of a State witness.

STANDARD OF REVIEW

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

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

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

ARGUMENT

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

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

In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held the Fourth and Fourteenth Amendments to the United States Constitution afforded

criminal defendants the right to challenge the veracity of a warrant affidavit following the warrant's execution. *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). In *Franks*, the Supreme Court provided a two-part test:

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

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

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

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

identified, are manufacturing and distributing crack cocaine. . . .

The confidential source of information, who from here forward will be referred to as CSI, stated that for the past two months he has purchased a total of two kilograms of cocaine from Victor Missouri. He would receive this in half kilo quantities every two weeks.

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

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

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

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

The *Missouri* court held that the lead detective "at least acted recklessly in making the false statement and in omitting the exculpatory information." *Id.* at 555, 524 S.E.2d at 397. Following this conclusion, the court then looked to whether excluding the false information and inserting the exculpatory statement, there remained "a substantial basis upon which the magistrate could have found probable cause to issue the warrant." *Id.* The court held that a substantial basis did not exist, as the omitted information struck at the "very heart of the affidavit's purpose" which was to establish probable cause for a search of Sibert's apartment for crack cocaine. *Id.* at 556, 524 S.E.2d at 398.²

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

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

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

and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. . . .

The defendant has admitted to being at the scene of the crime during the assault and stabbing . . . and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene.

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

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

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

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

Richland County, one Joshua Porch did commit the crime of murder, in that he did with malice aforethought, assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory.

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

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

(*Id.* at 23–24; R. 0041–42).

During the evidentiary hearing, Porch's trial counsel presented testimony from Officer David Wilson of the RCSD and the magistrate that issued the arrest warrant, Judge Phil Newsom. Officer Wilson confirmed that previous RCSD investigators relied on Porch as an eye witness in two previous trials for Nakia Mallory's murder. (*Id.* at 41–42; R. 0059–60). According to Officer Wilson, the information in the affidavit was sufficient for a finding of probable cause because of prior inconsistent statements attributed to Porch and the newly discovered blood evidence on Nakia Mallory's clothing that matched to Porch. (*Id.* at 53, 64–65; R. 0071, 0082–83).

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

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

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

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

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

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

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

Third, the trial court erred by adding Officer Wilson's testimony regarding probable cause to the defective arrest warrant, and relying on Officer Wilson's analysis of certain evidence in determining whether probable cause existed. Such a ruling constitutes a misapplication of *Franks*. The trial court had to examine the magistrate's analysis of the information presented by police, not the government's description of what it would include in the affidavit if granted a mulligan. *See Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999) ("Thus, the primary issue before this Court is whether excluding the false information and inserting the exculpatory statement, there remains a substantial basis upon which the magistrate could have found probable cause to issue the warrant.").

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

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

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

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

The Sixth Amendment’s Confrontation Clause provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause bars the admission of testimonial statements of a witness who does not testify at trial unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

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

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

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

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

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

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

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

In a pre-trial *Jackson v. Denno* hearing, the central concern is the voluntariness or involuntariness of a defendant's confession. That case provides that a defendant in a criminal case is entitled to an evidentiary hearing on the voluntariness of statements made by the defendant prior to submission of such statements to the jury. *See State v. Samuel*, No. 27498, 2015 S.C. Lexis 85, at *2 (S.C. Feb. 25, 2015) (citing *Jackson*, *supra*); *see also State v. Silver*, 307 S.C. 326, 331, 414 S.E.2d 813, 815 (Ct. App. 1992) ("The test of admissibility of a statement is voluntariness.").

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

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability". . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.* The Clause thus reflects a judgment, not only about the desirability of

³ 378 U.S. 368 (1964).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

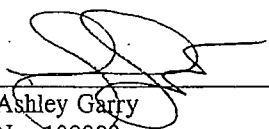
The trial court collapsed two distinctly different constitutional guarantees and in the process violated Porch's rights under the Confrontation Clause. Porch did not have the opportunity for an adequate cross-examination of Cohen and because of this the trial court should not have entertained the possibility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

CONCLUSION

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

[Signature Page Follows]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Mervin Ashley Garry
SC Bar No. 100088
E-Mail: ashley.garry@nelsonmullins.com
101 Constitution Avenue, NW / Suite 900
Washington, DC 20001
(202) 545-2927

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 Appellant

Columbia, South Carolina
December 8, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison R. Lee, Circuit Court Judge

RECEIVED

DEC 08 2015

SC Court of Appeals

Case No. 2011-GS-40-03359

Appellate Case No. 2013-002531

State of South Carolina, ... Respondent,

v.

Joshua William Porch, ... Appellant.

CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Mervin Ashley Alexander Garry

SC Bar No. 100088

E-Mail: ashley.garry@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP

101 Constitution Avenue, NW / Suite 900

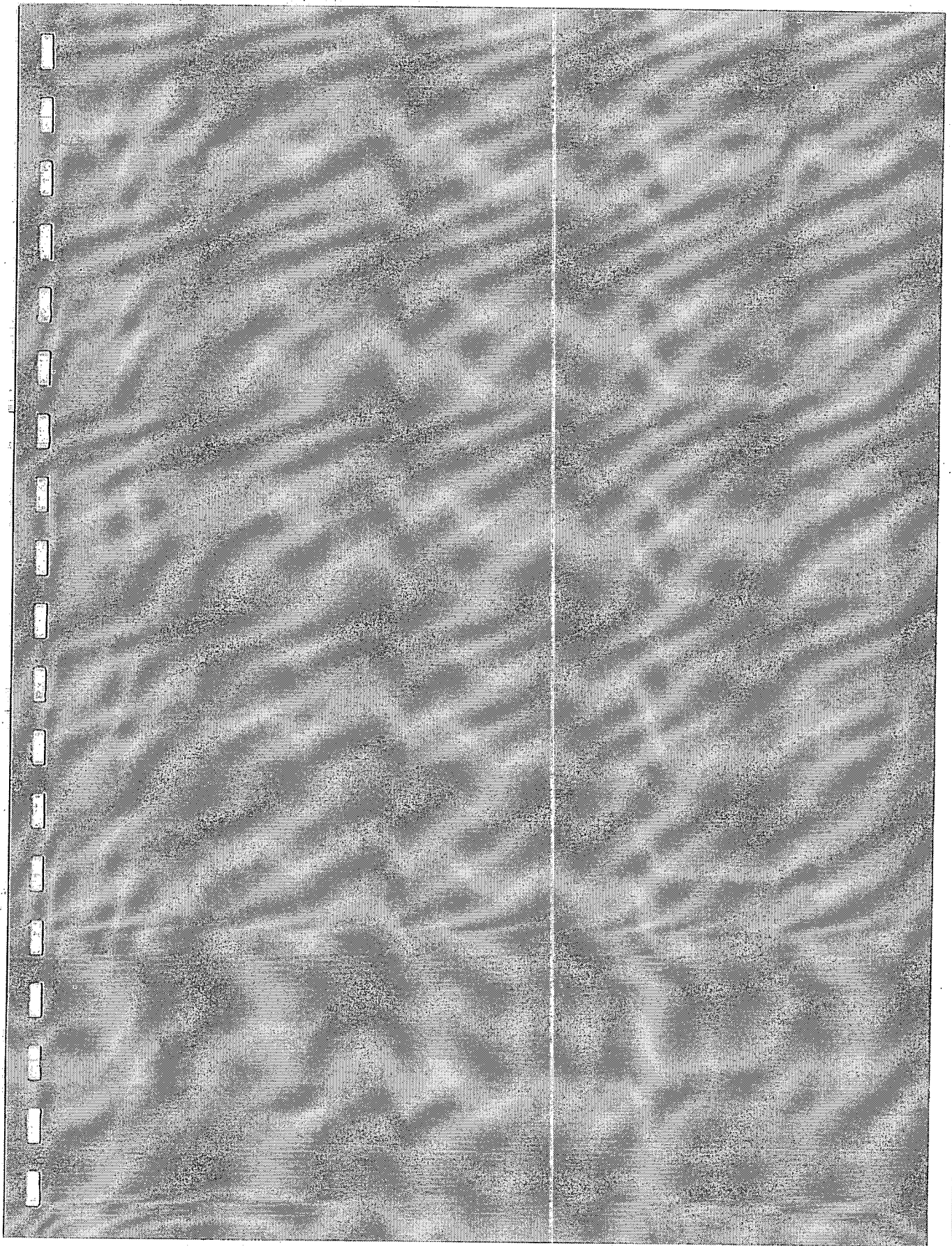
Washington, DC 20001

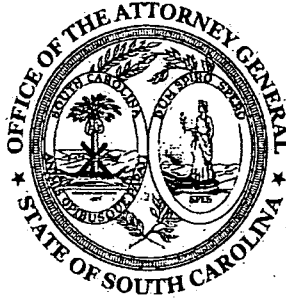
202.712.2800

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
December 8, 2015





ALAN WILSON
ATTORNEY GENERAL

December 4, 2015

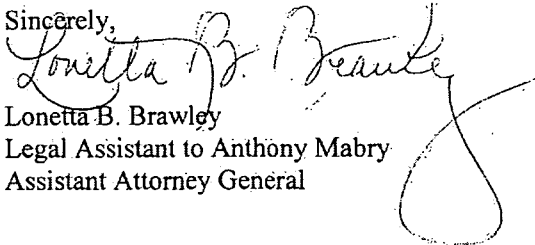
Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Joshua William Porch
Appellate Case No. 2013-002531

Dear Ms. Kitchings:

Enclosed please find the original and fourteen (14) copies of the Final Brief of Respondent in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosures

cc: Michael J. Anzelmo, Esquire
Mervin Ashley Alexander Garry
Robert M. Dudek, Esquire
Daniel E. Johnson, Solicitor
Trisha Allen, Victims Assistance

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Allison R. Lee, Circuit Court Judge
Appeal Case No. 2013-012531

THE STATE

Respondent,

v

JOSHUA WILLIAM PORCH,

Appellant

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ANTHONY MARRY
Assistant Attorney General
No. 11973
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
APPELLANT'S STATEMENT OF ISSUES ON APPEAL.....	xi
STATEMENT OF THE CASE.....	1
RESPONDENT'S STATEMENT OF THE FACTS.....	2
ARGUMENT I.	7
ARGUMENT II.	26
CONCLUSION.....	34
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Beck v. Ohio,</u> 379 U.S. 89, 85 S.Ct. 223 (1964).....	10
<u>Brady v. Maryland,</u> 373 U.S. 83, 83 S.Ct. 1194 (1963).....	16
<u>Brinegar v. United States,</u> 338 U.S. 160, 69 S.Ct. 1302, (1949).....	11
<u>Delaware v. Van Arsdall,</u> 475 U.S. 673, 106 S.Ct. 1431 (1986).....	33, 35
<u>Franks v. Delaware,</u> 438 U.S. 154, 98 S.Ct. 2674 (1978).....	6, 14, 15, 16, 17, 18
<u>Illinois v. Gates,</u> 462 U.S. 213, 103 S.Ct. 2317 (1983).....	10, 11, 16
<u>Jackson v. Denno,</u> 378 U.S. 368, 84 S.Ct. 1774(1964).....	6
<u>Maryland v. Pringle,</u> 540 U.S. 366, 124 S.Ct. 795 (2003).....	10
<u>Pointer v. Texas,</u> 380 U.S. 400, 85 S.Ct. 1065 (1965).....	29
<u>Richardson v. March,</u> 481 U.S. 200, 107 S.Ct. 1702 (1987).....	29
<u>Schneble v. Florida,</u> 405 U.S. 427, 92 S.Ct. 1056, (1972).....	33
<u>Texas v. Brown,</u> 460 U.S. 730, 103 S.Ct. 1535 (1983).....	10, 11, 19
<u>United States v. Blauvelt,</u> 638 F.3d 281 (4th Cir. 2011)	16

<u>United States v. Brignoni-Ponce,</u> 422 U.S. 873, 95 S.Ct. 2574 (1975).....	7
<u>United States v. Clenney,</u> 631 F.3d 658 (4th Cir. 2011)	16, 17
<u>United States v. Colkley,</u> 899 F.2d 297 (4th Cir. 1990)	16, 17, 18
<u>United States v. Mendenhall,</u> 446 U.S. 544 (1980).....	7
<u>United States v. Moody,</u> 762 F.Supp. 1491 (N.D. Ga. 1991).....	20
<u>United States v. Shorter,</u> 328 F.2d 167 (4th Cir. 2003)	18
<u>United States v. Tate,</u> 524 F.3d 449 (4th Cir. 2008).....	15, 16, 17, 18
<u>United States v. Ventresca,</u> 380 U.S. 102, 85 S.Ct. 741 (1965).....	11, 16, 19
<u>Ybarra v. Illinois,</u> 444 U.S. 85, 100 S.Ct. 338 (1979).....	10, 19

STATE CASES

<u>City of Spartanburg v. Wortman,</u> 310 S.C. 1, 425 S.E.2d 18 (1992)	9, 19
<u>Designer Showrooms, Inc. v. Kelley,</u> 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991).....	28, 34
<u>Durlach v. Durlach,</u> 359 S.C. 64, 596 S.E.2d 908 (2004)	28
<u>Glover v. County of Charleston,</u> 361 S.C. 634, 606 S.E.2d 773 (2004)	28

<u>State v. Anderson,</u>	
304 S.C. 551, 406 S.E.2d 152 (1991)	28, 34
<u>State v. Asbury,</u>	
328 S.C. 187, 493 S.E.2d 349 (1997)	8
<u>State v. Baccus,</u>	
367 S.C. 41, 625 S.E.2d 216 (2006)	7, 10, 19
<u>State v. Beam,</u>	
336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999)	32
<u>State v. Beckham,</u>	
334 S.C. 302, 513 S.E.2d 606 (1999)	31
<u>State v. Bell,</u>	
263 S.C. 239, 209 S.E.2d 890 (1974)	31
<u>State v. Bell,</u>	
302 S.C. 18, 393 S.E.2d 362 (1990)	34
<u>State v. Bellamy,</u>	
336 S.C. 140, 519 S.E.2d 347 (1999)	11
<u>State v. Bennett,</u>	
256 S.C. 234, 182 S.E.2d 291 (1971)	10
<u>State v. Benton,</u>	
338 S.C. 151, 526 S.E.2d 228 (2000)	29
<u>State v. Bowie,</u>	
360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004)	11, 19
<u>State v. Bridges,</u>	
278 S.C. 447, 298 S.E.2d 212 (1982)	7
<u>State v. Brock,</u>	
130 S.C. 252, 126 S.E.2d 28 (1924)	33
<u>State v. Brockman,</u>	
339 S.C. 57, 528 S.E.2d 661 (2000)	8
<u>State v. Browder,</u>	
183 S.C. 447, 191 S.E.2d 302 (1937)	32

<u>State v. Brown,</u>	
401 S.C. 82, 736 S.E.2d 263 (2012)	8
<u>State v. Bryant,</u>	
356 S.C. 485, 589 S.E.2d 775 (Ct. App. 2003), ...	32
<u>State v. Burton,</u>	
111 S.C. 526, 98 S.E. 856 (1919)	33
<u>State v. Campbell,</u>	
259 S.C. 339, 191 S.E.2d 770 (1972)	32
<u>State v. Cheeks,</u>	
400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012).....	8
<u>State v. Cheeseboro,</u>	
346 S.C. 526, 552 S.E.2d 300 (2001)	31
<u>State v. Covert,</u>	
382 S.C. 205, 675 S.E.2d 740 (2009)	9
<u>State v. Crowe,</u>	
258 S.C. 258, 188 S.E.2d 379 (1972)	31
<u>State v. Culbreath,</u>	
377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008).....	32
<u>State v. Curtis,</u>	
356 S.C. 622, 591 S.E.2d 600 (2004)	32
<u>State v. Davis,</u>	
371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2007).....	8
<u>State v. Dean,</u>	
282 S.C. 155, 317 S.E.2d 746 (1984)	10, 19
<u>State v. Dinkins,</u>	
345 S.C. 412, 548 S.E.2d 217 (2001)	33
<u>State v. Dinkins,</u>	
339 S.C. 597, 529 S.E.2d 557 (Ct. App. 2000).....	35
<u>State v. Dixon,</u>	
284 S.C. 526, 328 S.E.2d 89 (Ct. App. 1985).....	31

<u>State v. Driggers.</u>	
322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996).....	9
<u>State v. DuBose.</u>	
288 S.C. 226, 341 S.E.2d 785 (1986)	31
<u>State v. Dupree.</u>	
319 S.C. 454, 462 S.E.2d 279 (1995)	11
<u>State v. Dupree.</u>	
354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003).....	9, 11, 19
<u>State v. Durden.</u>	
264 S.C. 86, 212 S.E.2d 587 (1975).....	33
<u>State v. Foster.</u>	
354 S.C. 614, 582 S.E.2d 426 (2003)	32
<u>State v. Good.</u>	
308 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992).....	30
<u>State v. Groome.</u>	
274 S.C. 189, 262 S.E.2d 31 (1980)	31
<u>State v. Hambright.</u>	
310 S.C. 382, 426 S.E.2d 806 (Ct. App. 1992).....	30
<u>State v. Harmon.</u>	
79 S.C. 80, 60 S.E. 230 (1908).....	33
<u>State v. Herring.</u>	
387 S.C. 201, 692 S.E.2d 490 (2009)	9
<u>State v. Hightower.</u>	
221 S.C. 91, 69 S.E.2d 363 (1952)	31
<u>State v. Jenkins.</u>	
322 S.C. 360, 474 S.E.2d 812 (Ct. App. 1996).....	34
<u>State v. Jenkins.</u>	
398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012).....	8
<u>State v. Johnson.</u>	
196 S.C. 497, 14 S.E.2d 24 (1941).....	32

<u>State v. Jones,</u>	
342 S.C. 121, 536 S.E.2d 675 (2000)	8, 9
<u>State v. Khingratsaipon,</u>	
352 S.C. 62, 572 S.E.2d 456 (2002)	7, 8
<u>State v. Kinloch,</u>	
410 S.C. 612, 767 S.E.2d 253 (2014)	8, 9
<u>State v. Lynch,</u>	
412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015)	15, 17, 20, 22, 23
<u>State v. Martin,</u>	
347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001)	9, 11
<u>State v. Mathews,</u>	
296 S.C. 379, 373 S.E.2d 587 (1988)	31
<u>State v. McCray,</u>	
332 S.C. 536, 506 S.E.2d 301 (1998)	29
<u>State v. McDaniel,</u>	
68 S.C. 304, 47 S.E. 384 (1904)	31
<u>State v. McDonald,</u>	
412 S.C. 133, 771 S.E.2d 840 (2015)	29, 33, 35
<u>State v. McEachern,</u>	
399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012)	32
<u>State v. Mekler,</u>	
368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005)	32
<u>State v. Mercado,</u>	
263 S.C. 304, 210 S.E.2d 459 (1974)	31
<u>State v. Miller,</u>	
260 S.C. 1, 193 S.E.2d 802 (1973)	31
<u>State v. Miller,</u>	
262 S.C. 369, 204 S.E.2d 738 (1974)	31
<u>State v. Missouri,</u>	
337 S.C. 548, 524 S.E.2d 394 (1999)	15, 16, 22

<u>State v. Moody.</u>	
94 S.C. 26, 78 S.E. 737 (1913)	32
<u>State v. Morris.</u>	
411 S.C. 571, 769 S.E.2d 854 (2015)	8
<u>State v. Myers.</u>	
344 S.C. 344, 544 S.E.2d 851 (Ct. App. 2001).....	29
<u>State v. Owens.</u>	
378 S.C. 636, 664 S.E.2d 80 (2008)	28
<u>State v. Pagan.</u>	
369 S.C. 201, 631 S.E.2d 262 (2006)	7
<u>State v. Page.</u>	
378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008).....	32
<u>State v. Peters.</u>	
271 S.C. 498, 248 S.E.2d 475 (1978)	10, 19
<u>State v. Pittman.</u>	
137 S.C. 75, 134 S.E.515 (1926)	30
<u>State v. Plyler.</u>	
275 S.C. 291, 270 S.E.2d 126 (1980)	30
<u>State v. Powers.</u>	
331 S.C. 37, 501 S.E.2d 116 (1998)	28
<u>State v. Pruitt.</u>	
260 S.C. 396, 196 S.E.2d 107 (1973)	10
<u>State v. Rice.</u>	
375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007).....	32
<u>State v. Sachs.</u>	
264 S.C. 541, 216 S.E.2d 501 (1975)	9
<u>State v. Shorter.</u>	
85 S.C. 170, 67 S.E. 131 (1910)	30
<u>State v. Silver.</u>	
314 S.C. 483, 431 S.E.2d 250 (1993)	28

<u>State v. Singleton,</u>	
258 S.C. 125, 187 S.E.2d 518 (1972)	10
<u>State v. Smith,</u>	
227 S.C. 400, 88 S.E.2d 345 (1955)	31
<u>State v. South,</u>	
285 S.C. 529, 311 S.E.2d 775 (1985)	31
<u>State v. Spears,</u>	
393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011).....	9
<u>State v. St. Louis,</u>	
128 Conn. App. 703, 18 A.3d 648 (2011), ...	21
<u>State v. Stewart,</u>	
283 S.C. 104, 320 S.E.2d 447 (1984)	31
<u>State v. Stroman,</u>	
281 S.C. 508, 316 S.E.2 395 (1984)	32
<u>State v. Sullivan,</u>	
267 S.C. 610, 230 S.E.2d 621 (1976)	8, 11, 19
<u>State v. Summer,</u>	
55 S.C. 32, 32 S.E. 771 (1899).....	33
<u>State v. Taylor,</u>	
33 S.C. 159, 508 S.E.2d 870 (1998)	32
<u>State v. Taylor,</u>	
401 S.C. 104, 736 S.E.2d 663 (2013)	8
<u>State v. Thompson,</u>	
363 S.C. 192, 609 S.E.2d 556 (Ct. App. 2005).....	8
<u>State v. Tindall,</u>	
388 S.C. 518, 698 S.E.2d 203 (2010)	8
<u>State v. Todd,</u>	
290 S.C. 212, 349 S.E.2d 339 (1986)	31
<u>State v. Turner,</u>	
117 S.C. 470, 109 S.E. 119 (1921)	30

<u>State v. Tynes,</u> 402 S.C. 211, 740 S.E.2d 512 (Ct. App. 2013).....	8
<u>State v. Varvil,</u> 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000).....	28
<u>State v. Viard,</u> 276 S.C. 147, 276 S.E.2d 531 (1981)	11, 19
<u>State v. Watson,</u> 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003).....	33
<u>State v. Weston,</u> 329 S.C. 287, 494 S.E.2d 801 (1997)	8, 9
<u>State v. Williams,</u> 262 S.C. 186, 203 S.E.2d 436 (1974)	10, 19
<u>State v. Williams,</u> 409 S.C. 455, 761 S.E.2d 770 (Ct. App. 2014).....	31
<u>State v. Wooten,</u> 92 S.C. 61, 75 S.E. 212 (1912).....	33
<u>State v. Young,</u> 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2005).....	32
<u>TNS Mills, Inc. v. South Carolina Dep't of Revenue,</u> 331 S.C. 611, 503 S.E.2d 471 (1998)	29

CONSTITUTIONAL AND STATUORY PROVISIONS

U.S. Const. amend. VI	29

RULES

Rule 1001(1) & (2), SCRE.....	32

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

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 Porph ("Porch"), who had testified in the husband's trials claiming he, Porph, 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 Porph as a result of the husband's [Justin's] statement given the night of the victim's murder. Porph 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 Porph, because they each had been in his apartment recently. Police approached Porph the day after the victim's murder. In his 1st statement to police, Porph denied being present at the scene at the time of the crime and claimed he knew nothing about the murder. Porph's wife, Persia Porph, also told police at that time that Porph 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. Porph was contacted again by police in an attempt to identify this unknown male DNA. At that time, Porph 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. Porph was polygraphed on this statement and failed the polygraph. Upon further questioning, Porph 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 Porph] was cut on his hand while intervening. Porph claimed he was facing the husband when this occurred. Porph admitted he bled in the kitchen of the home, and before leaving the apartment attempted to clean up the blood. This was the version Porph 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).

³ Porph's wife changed her statement at Porph'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

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 (1973); 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:

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 Pineland 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:

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 Clenney:

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.

Clenney, 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. Clenney, 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 F.3d at 454. “[M]ere [] neglig[en]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

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 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 (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 inculcating 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 hand [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

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.

ALAN WILSON
Attorney General

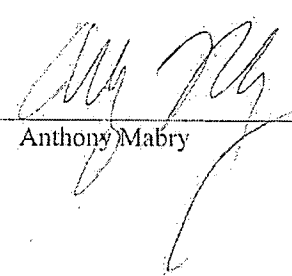
JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ANTHONY MABRY
Assistant Attorney General
No. 11973
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT

By: 

Anthony Mabry

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,

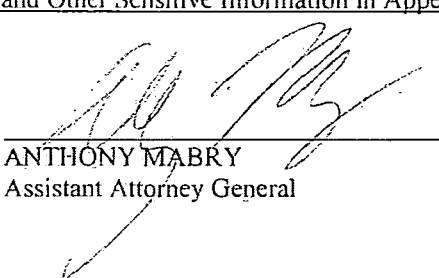
v.

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.”



ANTHONY MABRY
Assistant Attorney General

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:

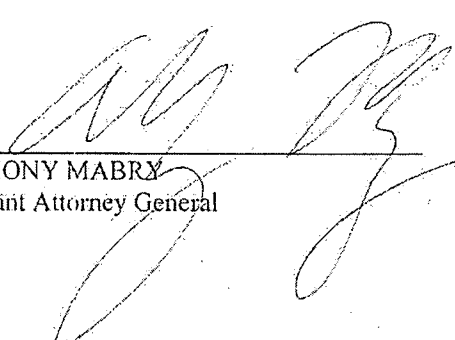
Michael J. Anzelmo, Esquire
Nelson Mullins Riley & Scarborough, LLP
P. O. Box 11070
Columbia, SC 29211-1070

Mervin Ashley Alexander Garry, Esquire
Nelson Mullins Riley & Scarborough, LLP
101 Constitution Avenue, NW/Suite 900
Washington, DC 20001

and by InterAgency Mail to:

Robert M. Dudek
Chief Appellate Defender
SCCID/Division of Appellate Defense
1330 Lady Street, Suite #401
Columbia, South Carolina 29201

This 4th day of December, 2015.



ANTHONY MABRY
Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

DEC 08 2015

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

SC Court of Appeals

The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-40-03359

Appellate Case No. 2013-002531

State of South Carolina, ... Respondent,

v.

Joshua William Porch, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201

Mervin Ashley Alexander Garry
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201

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

Counsel for Joshua William Porch, Appellant

TABLE OF CONTENTS

Table of Authorities	ii
SUMMARY OF ARGUMENT/RELEVANT FACTS	1
ARGUMENT	2
I. The State's argument misapprehends <i>Franks v. Delaware</i>	2
II. The Trial Court's Limitation of Porch's Testimony Violated The Confrontation Clause.	8
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	10
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	2, 3
<i>State v. Brannon</i> , 388 S.C. 498, 697 S.E.2d 593 (2010)	9
<i>State v. Douglas</i> , 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014)	9
<i>State v. Dunbar</i> , 356 S.C. 138, 587 S.E.2d 691 (2003)	9
<i>State v. Gamble</i> , 405 S.C. 409, 747 S.E.2d 784 (2013)	9
<i>State v. Lynch</i> , 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015)	7
<i>State v. Missouri</i> , 337 S.C. 548, 524 S.E.2d 394 (1999)	4, 6
<i>State v. Stokes</i> , 381 S.C. 390, 673 S.E.2d 434 (2009)	9
<i>State v. Turner</i> , 373 S.C. 121, 644 S.E.2d 693 (2007)	11
<i>Texas v. Brown</i> , 460 U.S. 730 (1983)	7
<i>United States v. Colkley</i> , 899 F.2d 297 (4th Cir. 1990)	3, 4
<i>United States v. Moody</i> , 762 F. Supp. 1491 (N.D. Ga. 1991)	5

SUMMARY OF ARGUMENT/RELEVANT FACTS

The trial court committed reversible error in two regards in this matter. First, the trial court failed to void the State's arrest warrant under *Franks v. Delaware*. Second, the trial court improperly limited Porch's testimony and, in so doing, violated his rights under the Confrontation Clause. The trial court's errors constitute reversible error. This Court should vacate Porch's conviction.

On July 7, 2009, the Richland County Sheriff's Department ("RCSD") obtained a warrant for Porch's arrest for the murder of Nakia Mallory. (Trans Dated 11/21/13 at 1057-59; R. 0843-0845). The RCSD did not inform the magistrate that Porch previously testified for the State as an eyewitness to the crime. (Trans. Dated 11/25/13 at 1521-23; R.1092-1094). Instead, the RCSD explained only that Porch's statements placed him at the scene of the crime and that newly tested blood evidence matched blood left at the scene by Porch. (Trans. Dated 11/12/13 at 7-10, 54-56; R. 0025-0028, 0072-0074).

Notably, the RCSD did not inform the magistrate that, in the two prior trials for Mallory's murder, the State presented testimony *from Porch* (1) that he witnessed an altercation between Nakia and her husband, Justin Mallory, (2) that Porch intervened in the dispute, and (3) that Porch suffered an injury himself during the altercation that caused his blood to be left at the scene. (Trans. Dated 11/25/13 at 1521-23; R. 1092-1094). The RCSD omitted this exculpatory information that directly touched on the warrant's essential purposes. The omission of this exculpatory information led to the issuance of the warrant and to Porch's arrest. Thus, the trial court erred in failing to

void that arrest warrant and any resulting evidence under *Franks v. Delaware*, 438 U.S. 154 (1978).

Moreover, the trial court violated Porch's rights under the Confrontation Clause. Members of the RCSD and the Los Angeles County Sheriff's Office ("LASD" or "the LASD") interrogated Porch following his arrest. (Trans. Dated 11/18/13 at 171; R. 0201; Trans. Dated 11/21/2013 at 1065-69; R. 0851-0855). Some of these interrogations were video recorded, including portions involving RCSD and a separate six-hour interrogation and polygraph examination conducted by Roberta Cohen, an investigator with the LASD. However, Cohen refused to testify at Porch's trial despite a *subpoena from the State*. (Trans. Dated 11/18/13 at 171-73; R. 0201-0203). Consequently, the State entered into evidence only the portion of the video showing the interrogation by members of the RCSD. (Trans. Dated 11/18/13 at 173-74, 191, 199-200; Trans. Dated 11/21/13 at 1106-07; R. 0203-0204, 0221, 0229-30, 0892-93).

The trial court ruled, over an objection from Porch's trial counsel, that Porch could not discuss Cohen's interrogation as part of his own defense or the court would permit the State to introduce those portions of the interrogation video even in Cohen's absence. (Trans. dated 11/25/13 at 1498-1500; R. 1069-1071). This ruling violated Porch's rights under the Confrontation Clause.

ARGUMENT

I. The State's argument misapprehends *Franks v. Delaware*.

The State's arguments on this point simply restate black letter law without specifically addressing the flaws in the RCSD affidavit used to obtain the warrant. The

fact of this matter is that the trial court erred in failing to void the State's arrest warrant under *Franks v. Delaware*. This Court should reverse.

Franks protects against omissions "designed to mislead" or that were made in "reckless disregard" of whether such omissions would mislead the magistrate in the issuance of the warrant. *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). The State's reliance on *Colkley* is misplaced. *Colkley* is factually distinct and actually supports reversal of the trial court.

In *Colkley*, the Fourth Circuit found that a *Franks* hearing was not required where the omitted information was not material to the probable cause determination. *Colkley*, 899 F.2d at 301. There, the defendant challenged the affidavit used to support his arrest for armed robbery. Defendant claimed the affidavit failed to note that numerous witnesses did not identify him in a photographic spread and because police based the composite height description on the testimony of a single witness and disregarded testimony from other witnesses who claimed the robber was shorter. *Id.* at 299. Defendant received a *Franks* hearing and the trial court held that, even with including the omitted information, probable cause existed for issuing the warrant. *Id.* The court also found that the police did not intentionally misrepresent defendant's height and that discrepancies in height descriptions were common and immaterial. *Id.*

The Fourth Circuit based its ruling, in part, on the amount of other incriminating information contained in the affidavit. *Id.* at 302. For instance, a car that a co-defendant purchased with cash after the robbery was located outside of defendant's home. *Id.* Defendant participated in cash purchases of two cars within a month of the robbery. *Id.* The affidavit also recited an informant's tip to the police

that defendant admitted committing a robbery that bore a “remarkable resemblance” to the one under investigation. *Id.*

The facts in *Colkley* are markedly different from the affidavit in the instant case. The facts here demonstrate that the trial court erred in failing to void the warrant. The *Colkley* court would have done so under these facts. Here, the affidavit contained this uncontested language: “The defendant has admitted to being at the scene of the crime during the assault and stabbing.” (Trans. Dated 11/12/13 at 5; R. 0023). The affidavit did not inform the Court that Porch admitted to being at the scene of the crime as part of his service as the State’s eyewitness in two trials for this same crime. *Id.* The affidavit also stated that Porch had been further implicated “by DNA testing of blood found at the scene.” *Id.* The affidavit did not explain that Porch previously explained that he left blood at the scene of the crime because he intervened in a violent altercation between the victim and her husband – the man the State prosecuted twice for the crime.

The “very heart of the affidavit’s purpose” was to establish probable cause for Porch’s arrest in connection with Nakia Mallory’s murder, yet the affidavit did not include key context regarding how the RCSD collected the supporting information. That was improper. *See State v. Missouri*, 337 S.C. 548, 556, 524 S.E.2d 394, 398 (1999) (finding that a substantial basis for probable cause did not exist where omitted information was directly related to the affidavit’s purpose).

Moreover, the RCSD’s intentional omission is not a case of requiring law enforcement to disclose “all” potentially exculpatory information or placing an onerous burden of “elaborate specificity” on the drafters of warrant affidavits, as argued by the State. Resp. Br. at 18–19 (citations omitted). Instead, this is a case where the RCSD

deliberately withheld exculpatory information and information critical to the magistrate's probable cause determination. Disclosure of such information is already required by well-settled law. Porch does not seek to alter or expand the settled requirements. Application of those settled principles leads to the inescapable conclusion that the trial court erred.

To support its erroneous view of *Franks*, the State relies on *United States v. Moody*, 762 F. Supp. 1491 (N.D. Ga. 1991). There, a federal judge and a lawyer were assassinated by mail bombs. *Id.* at 1493-94. The defendant claimed that in failing to disclose evidence implicating another individual, the government recklessly omitted material information. *Id.* at 1500. The court explained that whatever evidence the government marshaled regarding another individual did not "begin to exonerate" the defendant, but "at most" indicated that the defendant and another individual may have conspired to commit the crimes charged. *Id.*

Moody is not a helpful lens for analyzing the instant case. For one, the RCSD affidavit did not include facts related to an "investigation" but instead only contained selected facts related to *two* prior trials for the same exact crime. Second, the information RCSD omitted *does* begin to exonerate Porch as it is information which the State relied on to prosecute another individual for the same crime. As the *Moody* court acknowledged, the government may pursue multiple lines of investigation "so long as the government establishes probable cause as to each prior to the issuance of any warrant." *Id.* In this appeal, the RCSD "established" probable cause by hiding information critical to the magistrate's probable cause analysis.

Given the lack of authority supporting its view of *Franks*, the State then turns to the curious tactic of undercutting Porch's service as a State witness. The State speciously claims that, "[a]lthough, [Porch] attempted to place the blame for the murder on husband, neither a jury or circuit judge accepted his testimony." Resp. Br. at 21 (alteration added). This is a misleading depiction of Porch's testimony. Porch testified in two trials in which he was not the defendant and where he had no motivation to try and "place the blame" on anyone. Instead, Porch agreed to testify as to what he observed on the night of Nakia Mallory's death. Whether a judge or jury believed Porch's testimony in his trial is irrelevant to what the State had to disclose in obtaining the affidavit. The State's argument misapprehends this distinction. In fact, the State's argument on this point actually affirms how critical Porch's testimony was to the State's case and strengthens the argument that this crucial information should not have been excluded from the warrant affidavit.

The State also claims that if the RCSD included exculpatory information in the affidavit then the RCSD would have included other incriminating information in the affidavit. This argument makes the same mistake as the trial court in analyzing the RCSD's description of what it would have or could have included in the affidavit. That is not the focus. Instead, the focus of the magistrate's analysis of the information was what was actually included in the affidavit. See *Missouri*, 337 S.C. at 555, 524 S.E.2d at 397 ("Thus, the primary issue before this Court is whether excluding the false information and inserting the exculpatory statement, there remains a substantial basis upon which the magistrate could have found probable cause to issue the warrant.").

As the State notes, probable-cause is a flexible, common-sense standard. Resp. Br. at 10 (citing *Texas v. Brown*, 460 U.S. 730 (1983)). It is common-sense that an affidavit that states that a suspect admits to being at the scene of a crime should also state that the suspect admitted to being at the scene of that crime through his participation as an eye-witness for the state in two prior trials for the same crime.

In *State v. Lynch*, this Court found the defendant failed to show a *Franks*' violation where the information the defendant claimed police failed to relay to the magistrate was not actually known to police at the time of the warrant. 412 S.C. 156, 182-83, 771 S.E.2d 346, 360 (Ct. App. 2015). This is not the case here. Unfortunately for the State, the RCSD did not draft this affidavit in the haste of a criminal investigation. Instead, the RCSD produced this affidavit after an investigation spanning several years and significant litigation. The critical information the RCSD chose not to include in its affidavit was safely within their grasp and was neither technical nor elaborate. Testimony from the magistrate demonstrates that the RCSD did not take the opportunity to properly supplement the affidavit with sworn oral testimony explaining the facts contained in the affidavit. *Id.* at 184, 771 S.E.2d at 361.

The RCSD intentionally and recklessly omitted exculpatory information necessary for a sufficient probable cause determination. The trial court erred in its analysis. This Court should reverse.

II. The Trial Court's Limitation of Porch's Testimony Violated The Confrontation Clause.

The State incorrectly claims that the issue is not preserved for appellate review. According to the State, "Porch raised no objection below. Further, Porch did not object at any point under the Confrontation Clause." Resp. Br. at 28. This is erroneous.

As explained in Porch's Initial Brief, counsel preserved this issue for appeal. Over an objection from Porch's trial counsel, the trial court ruled that Porch could not discuss Cohen's interrogation during his testimony or the court would allow the State to introduce those portions of the interrogation even in Cohen's absence. (Trans. Dated 11/25/2013 at 1498-1500; R. 1069-1071). The conversation that takes place during this portion of the proceedings was an extension of an earlier discussion regarding Cohen's absence and Confrontation Clause concerns. (Trans. Dated 11/18/13 at 182-85; R. 0212-15). In that earlier discussion, Porch's trial counsel explained that Cohen's absence negatively impacted Porch's rights under the Confrontation Clause. (*Id.* at 184.) ("I can't stress how limited this confrontation was compared to what it would be in front of a jury. I guarantee Mr. Goings is [sic] cross-examining Mr. Porch isn't going to be the same as it will be when Mr. Porch testifies."). As part of that discussion, the State acknowledged that it was not "seeking to introduce the full interview of Ms. Cohen," and only wanted to introduce the statements the RCSD investigators received from Porch. (*Id.* at 189-90.)

This tactic by the State naturally required the later colloquy regarding what portions of the video recordings Porch could testify about and which he could not. (Trans. Dated 11/25/13 at 1498). During this discussion, the State explained that if

Porch testified about specific occurrences within the over six hour interview with Cohen, "it opens the door for the possibility of playing portions of that video as well."

Id. The court agreed, and Porch's trial counsel objected, stating "I disagree with that ruling completely. I disagree with that position, because he has right the [sic] testify."

Id. at 1499.

It is well-settled that error preservation rules do not require a party to use the exact name of a legal doctrine to preserve an issue for appellate review. *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); *State v. Douglas*, 411 S.C. 307, 323, 768 S.E.2d 232, 241 (Ct. App. 2014). Instead, a litigant is required only to fairly raise the issue to the trial court, giving it an opportunity to rule on the issue. *Brandon*, 388 S.C. at 502, 697 S.E.2d at 595.

Porch properly preserved the Confrontation Clause issue as shown above. It was raised, perhaps inartfully, but nonetheless ruled upon by the trial court. Thus, Porch's Confrontation Clause argument is preserved for this Court's review. *See State v. Gamble*, 405 S.C. 409, 416 n.3, 747 S.E.2d 784, 787 n.3 (2013) ("While defense counsel could have articulated his objection more clearly, his objection adequately preserved the issue for this Court's review.").

Contrary to the State's assertions, the Confrontation Clause applies. Statements taken by police officers in interrogations are testimonial. *State v. Stokes*, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009). This clear authority renders the State's gymnastics regarding whether the video recording is the statement of a witness or Porch's response to an investigator's questioning a nullity. It is undisputed that the

video recording depicts an interrogation of Porch, conducted by Cohen, and that Cohen was unavailable to testify.¹

The State then asserts that Porch was not prevented from testifying, but instead, “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.” Resp. Br. at 31. This argument lacks merit. Perjury was not the concern. The State did not seek to admit the video tape only if Porch perjured himself. Rather, the State sought and obtained a ruling that if Porch testified *in any manner* regarding the interview then the State would be allowed to admit the entire video interview. Thus, the State’s perjury argument is irrelevant and incorrect.

Next, the State urges this Court to collapse the *Denno* and Confrontation Clause guarantees into one analysis. Resp. Br. at 33. This argument simply invites the Court to replicate the trial court’s error. The central concern in a *Denno* proceeding is the voluntariness of a defendant’s confession. This is separate and distinct from the Confrontation Clause inquiry which commands, “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

Finally, the Confrontation Clause error was not harmless. It simply cannot be said that Porch’s inability to discuss the events which gave rise to his false confession were so insignificant that it did not affect the verdict or that the record contains overwhelming evidence of Porch’s guilt. This position is only strengthened by the State trying another defendant, twice, using similar evidence. The trial court’s Confrontation

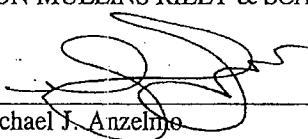
¹ At no time during the trial did the State assert that the Confrontation Clause simply did not apply and that is because it does.

Clause error prejudiced Porch in frustrating his ability to present a full and complete defense. *See State v. Turner*, 373 S.C. 121, 131, 644 S.E.2d 693, 698 (2007) (noting it is reversible error if the defendant establishes that he was unfairly prejudiced).

CONCLUSION

For the foregoing reasons, Porch's conviction and sentence must be reversed and vacated.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Mervin Ashley Alexander Garry
SC Bar No. 100088
E-Mail: ashley.garry@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH LLP
101 Constitution Avenue, NW / Suite 900
Washington, DC 20001
202.712.2800

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
December 8, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

The Honorable Alison R. Lee, Circuit Court Judge

RECEIVED

DEC 08 2015

SC Court of Appeals

Case No. 2011-GS-40-03359

Appellate Case No. 2013-002531

State of South Carolina, ... Respondent,

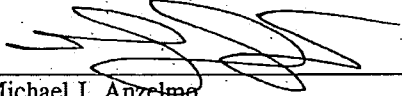
v.

Joshua William Porch, ... Appellant.

CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Mervin Ashley Alexander Garry

SC Bar No. 100088

E-Mail: ashley.garry@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP

101 Constitution Avenue, NW / Suite 900

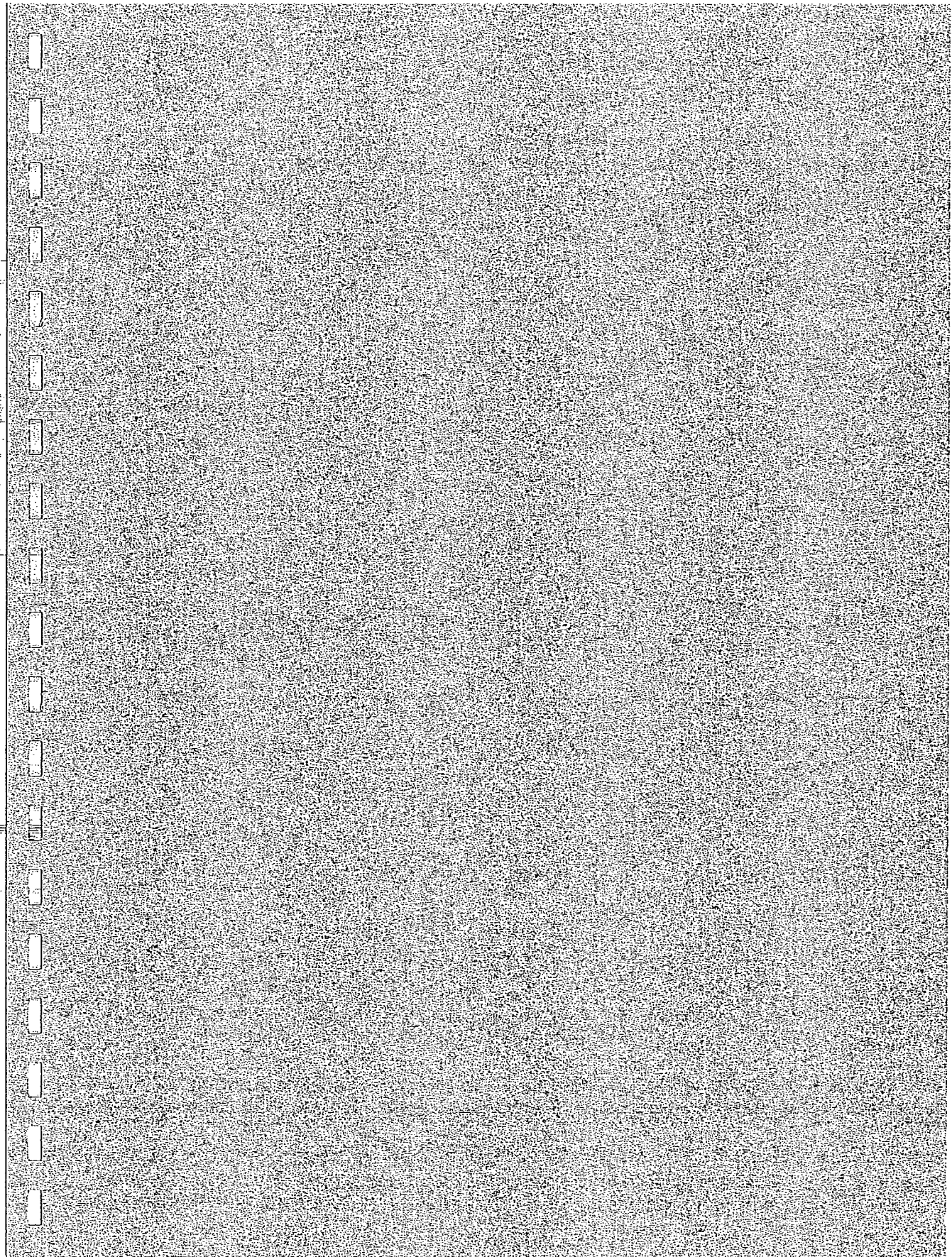
Washington, DC 20001

202.712.2800

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
December 8, 2015





The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 3, 2016

Michael J. Anzelmo, Esquire
1320 Main Street, 17Th Flr. (29201)
PO Box 11070
Columbia SC 29211

Mr. J. Anthony Mabry, Esquire
PO Box 11549
S.C. Attorney General's Office
Columbia SC 29211

Mr. Daniel Edward Johnson, Esquire
1701 Main Street
3Rd Floor
Columbia SC 29201

Matthew A. Abee, Esquire
1320 Main Street, 17Th Flr. (29201)
PO Box 11070
Columbia SC 29211

Re: The State v. Joshua W. Porch
Appellate Case No. 2013-002531

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings/87

CLERK

cc: Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
John W. McIntosh, Esquire
The Honorable Alison Renee Lee

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Joshua William Porch, Appellant.

Appellate Case No. 2013-002531

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5435
Heard May 3, 2016 – Filed August 3, 2016

AFFIRMED

Michael J. Anzelmo and Matthew A. Abee, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

HUFF, J.: Joshua William Porch appeals his conviction for murder, arguing the trial court erred in failing to void the State's arrest warrant pursuant to *Franks v.*

Delaware.¹ Porch also argues the trial court erred by limiting Porch's testimony in violation of the Confrontation Clause. We affirm.

FACTUAL/PROCEDURAL HISTORY

In the early morning hours of May 13, 2006, Justin Mallory (Mallory) found his wife, Nikea Mallory (Victim), dead in the family's apartment in Richland County. Victim suffered blunt force trauma to the head, a bruise on her neck, a stab wound on the right side of her neck, and a stab wound on her right eyebrow. The stab wound to Victim's neck was the fatal injury. Hours after discovering Victim's body, Mallory was charged with Victim's murder.

During the murder investigation, Mallory told officers they should talk to Joshua Porch, who lived near Mallory. Investigator Randy Strange interviewed Porch and his wife. Porch told Investigator Strange he was not in the Victim's apartment the night of the murder.

Police interviewed Porch again on June 27, 2007, after they discovered unidentified male DNA at the crime scene. Porch agreed to provide officers with a DNA sample and told them that he was in the Victim's apartment the day before the murder. Porch stated he cut himself while he was peeling or cutting an apple for his child and he attempted to clean up the blood with paper towels in the kitchen. Porch then signed a written statement of his version of events. In that statement, Porch also indicated he told this version of events to the investigators that interviewed him after the murder.

Following the second interview, Major James Smith contacted Investigator Strange to confirm Porch's story. Investigator Strange told Major Smith he could not recall Porch telling him he cut himself in the Victim's apartment the day before the murder. Major Smith returned to Porch's home that same day and asked Porch about his story. Porch told Major Smith he could not recall whether he told Investigator Strange about the cut. Porch stated he was scared to tell the police about the cut because he did not want to be considered a suspect.

On July 2, 2007, Captain James White and Major Smith interviewed Porch again. Porch told the officers he was present at Victim's apartment during the early

¹ 438 U.S. 154 (1978) (allowing defendants to challenge a probable cause determination after the issuance of a search warrant in limited circumstances).

morning hours of May 13, 2006. Porch stated he and Victim were drinking together that night and started kissing and fondling one another. According to Porch, Mallory arrived at the apartment and became angry. Mallory and Victim started arguing in front of Porch but later went to the kitchen to continue arguing. Porch stated he saw Victim push Mallory and Mallory "swung at her" with an unidentified item in his hand. Porch told the officers he stepped in between Mallory and the Victim to stop them from fighting and Mallory cut him. Porch then went to the kitchen to wrap his hand with paper towels and clean up the blood. According to Porch, Victim was "slouched" on the couch when he left, but he did not think she was badly injured. Porch explained he made inconsistent statements to police because he "was afraid [he] would be charged as an accomplice, or accused of actually doing it. [He] was also afraid [his] wife would find out about [him] and [Victim] getting involved that morning." During the interview, Captain White noticed Porch was left handed.

Mallory was tried twice for Victim's murder. Porch testified consistent with his July 2, 2007 statement in each of those proceedings. The first trial ended in a hung jury. Mallory then elected to proceed to a bench trial and was acquitted. Following his acquittal, Mallory contacted the Richland County Sheriff's Department (RCSD) and requested they reopen the investigation into his wife's murder. Deputy Chief David Wilson was assigned to investigate the case. Chief Wilson reviewed the investigation file and noticed several inconsistencies. Chief Wilson was bothered by Porch's shifting statements to police. Chief Wilson noted the stab wounds were to the Victim's right side, which led him to suspect the assailant was left-handed. Chief Wilson learned Porch was left-handed. Finally, Chief Wilson reviewed DNA evidence from the crime scene, which revealed further inconsistencies relating to Porch's version of events. Specifically, investigators found Porch's blood not only in the kitchen, but also on Victim's shirt.

Chief Wilson interviewed several other witnesses and secured a warrant for Porch's arrest. Officers learned Porch had moved from South Carolina back to his home town in California. On July 8, 2009, RCSD officers arrested Porch in a store in California and transported him to the Long Beach Police Department for questioning. Investigators Shawn McDaniel and Brian Godfrey notified Porch of his Miranda rights around 1:00 a.m. on July 9, 2009. That morning, Porch admitted he stabbed Victim but claimed it was an accident.

Investigators McDaniel and Godfrey reviewed the case file to determine if the evidence supported Porch's accident claim. The investigators then interviewed

Porch again on July 10, 2009. At that time, Porch told the investigators he initiated intimate contact with Victim and she attacked him with the knife. Porch told officers he hit Victim in the head with his palms and once on the right side of her head with his left elbow.

Investigators McDaniel and Godfrey then took Porch to the Los Angeles County Sheriff's Department for a third interview, which was recorded. Initially, Investigator Cohen from the Los Angeles County Sheriff's Office interviewed Porch for six and a half hours. Investigators McDaniel and Godfrey then interviewed Porch. Subsequently, investigators brought Porch back to South Carolina for trial.

Prior to trial, Porch challenged the sufficiency of the evidence to support probable cause for his arrest warrant. Porch argued Chief Wilson intentionally or recklessly omitted information from his arrest warrant affidavit and any evidence gathered as a result of his arrest should be suppressed. The trial court granted Porch a pretrial hearing to determine if the arrest warrant was valid but declined to suppress the evidence gathered as a result of Porch's arrest.

Porch also made a motion in limine to exclude the entire recorded interrogation from California because Investigator Cohen was unavailable to testify. Porch argued he would not be able to cross-examine her because the California state court declined to enforce the South Carolina subpoena sent by the State. The trial court found Porch had an opportunity to cross-examine Investigator Cohen regarding the video at a pretrial *Jackson v. Denno*² hearing. The trial court believed that opportunity to cross-examine was all that is necessary under *Crawford v. Washington*³ but took the matter under advisement. The next morning, prior to trial, the court ruled the portion of the interview conducted by Investigator Cohen was inadmissible but the portion of the interview conducted by Investigators McDaniel and Godfrey was admissible.

During the trial, Porch testified on his own behalf. Prior to his testimony, Porch inquired whether he would be allowed to discuss what he was told in the six-and-a-half-hour interview the court determined was not admissible because of Investigator Cohen's absence. The State argued, "[I]f Mr. Porch testifies about specific occurrences within that six and a half hour interview with Investigator

² 378 U.S. 368 (1964).

³ 541 U.S. 36 (2004):

Cohen, . . . it opens the door for the possibility of us playing portions of that video as well." The trial court indicated it was troubled by Investigator Cohen's absence but agreed that Porch's testifying about Investigator Cohen's interview could potentially open the door for the video of the interview to be admitted into evidence. Porch decided not to testify about any statements from the recorded interview in order to ensure the State would not have an opportunity to rebut his testimony with the video.

The jury found Porch guilty of Victim's murder. The trial court sentenced Porch to fifty years' imprisonment. This appeal followed.

LAW/ANALYSIS

I. *Franks v. Delaware*

Porch argues the RCSD omitted critical exculpatory information from the arrest warrant. Porch asserts in light of the omitted information, no probable cause existed to support his arrest warrant. Therefore, Porch requests this court void the arrest warrant and suppress any evidence resulting from Porch's arrest.

"In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). 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). The *Franks* test applies in cases when officers include false information in a warrant affidavit and cases when officers omit potentially exculpatory information. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. While we commend the trial court in this case for holding a *Franks* hearing out of an abundance of caution, we find Porch failed to overcome his heavy burden to establish he was entitled to such a hearing. Furthermore, we take this opportunity to clarify the proper standard trial courts should apply in cases in which the defendant challenges the *omission* of evidence from the arrest affidavit.

"To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that 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." *Id.* "There will be no *Franks* violation if the affidavit,

including the omitted data, still contains sufficient information to establish probable cause." *Id.* (emphasis added).

The defendant has the burden of proving the officer acted with the requisite intent. *State v. Gore*, 408 S.C. 237, 244, 758 S.E.2d 717, 721 (Ct. App. 2014). "A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof." *State v. Lynch*, 412 S.C. 156, 179, 771 S.E.2d 346, 358 (Ct. App. 2015). "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." *Id.* at 180, 771 S.E.2d at 358-59 (emphasis added) (quoting *United States v. Shorter*, 328 F.3d 167, 170 (4th Cir. 2003)). "Upon making this two-part preliminary showing, a defendant is entitled to a hearing, at which he bears the burden of proving the allegations by a preponderance of the evidence." *Id.* at 180, 771 S.E.2d at 359 (quoting *Shorter*, 328 F.3d at 170). "If a *Franks* hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant 'must be voided' and evidence or testimony gathered pursuant to it must be excluded." *Id.* (quoting *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990)).

"The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." *Colkley*, 899 F.2d at 301 (quoting *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987)). "'[M]ere[] neligen[ce] in . . . recording the facts relevant to a probable cause determination' is not enough." *Id.* (alterations in original) (quoting *Franks*, 438 U.S. at 170). An omission does not per se invalidate the arrest warrant. *Gore*, 408 S.C. at 245, 758 S.E.2d at 721. The Fourth Circuit has expressed "doubts about the validity of inferring bad motive under *Franks* from the fact of omission alone, for such an inference collapses into a single inquiry the two elements—'intentionality' and 'materiality'—which *Franks* states are independently necessary." *Colkley*, 899 F.2d at 301.

"Probable cause is a 'commonsense, nontechnical conception [] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *State v. Morris*, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

Porch asserted *Franks* requires the trial court excise any offending information from an arrest warrant affidavit, then analyze the affidavit to determine if probable

cause still exists to support the warrant. However, Porch conflates the test for the inclusion of false information in a warrant affidavit with the test for omission of potentially exculpatory information. If a defendant carries his heavy burden of demonstrating information was intentionally or recklessly omitted from the affidavit, the trial court must then include the potentially exculpatory information and determine if probable cause exists.

We find Porch failed to overcome his burden to show Chief Wilson intentionally or recklessly omitted potentially exculpatory information from his warrant affidavit. In the affidavit, Chief Wilson stated:

That on 05/14/2006 while at 1103 Pinelane Rd. Apt. 331C in the Dentsville Magisterial District of Richland County, one Joshua Porch did commit the crime of Murder in that he 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.

Chief Wilson stated he faxed the warrant to Judge Phil Newsom and personally appeared before the magistrate to discuss the case. Neither Chief Wilson nor Judge Newsom remembered the specific details they discussed prior to Judge Newsom signing the warrant. Judge Newsom agreed with Chief Wilson probable cause existed to believe Porch committed the murder and authorized the arrest warrant.

Judge Newsom also testified he never signs a warrant before the officer requesting the warrant physically appears before him. Judge Newsom was "sure" Chief Wilson told him some background on this case, but he could not recall anything in particular and he stated warrant proceedings are not recorded. Finally, Judge Newsom stated he did not remember Chief Wilson telling him Porch admitted being at the crime scene because Porch witnessed the Victim's husband stab her.

During the pretrial hearing, Chief Wilson testified he did not include some information in the affidavit. Specifically, Wilson admitted he did not include (1)

information from an eye witness from the first two trials who testified she heard a "domestic argument" coming from the apartment and saw a black male running toward a white van; (2) information from a security guard at the hospital Mallory took Victim to who testified he heard Mallory say, "Bitch bled all over my van, my walls, my Playstation" and saw Mallory remove something from his van while it was at the hospital; (3) Mallory had "plenty of time" to commit this murder; (4) Porch's statements regarding how his blood came to be at the scene of the crime; (5) information that Mallory had been tried twice for this crime and Porch testified for the State in both instances; and (6) information that the situation during the argument was "fluid" and the blood could have gotten on Victim's shirt during her fight with Mallory. However, Chief Wilson testified none of the information he included in the affidavit was false, and he believed the totality of the circumstances established probable cause to arrest Porch for Victim's murder.

Chief Wilson admitted he omitted some information from the warrant affidavit, but we find the content of the omissions alone is insufficient evidence to demonstrate Chief Wilson acted intentionally or with reckless disregard of whether the omissions would make the affidavit misleading. There is no evidence Chief Wilson intentionally omitted the statements regarding Mallory's involvement in his wife's death. Furthermore, including the statements from all four versions of Porch's story was unnecessary because those statements were not credible. Accordingly, we find Porch failed to make a sufficient showing to entitle him to a *Franks* hearing.

While we find Porch failed to demonstrate Chief Wilson intentionally or recklessly omitted potentially exculpatory information, we also find, 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. Porch admitted he was present at the murder scene and his blood was found in the same area where Victim's body was found.

Although Porch testified for the State in Mallory's murder trial, his story continued to change throughout the investigation. If all of this information were included in the affidavit presented to the magistrate, we find probable cause would have supported an arrest warrant for Porch. Accordingly, we affirm the trial court's decision not to suppress the evidence discovered as a result of Porch's arrest.

II. Confrontation Clause

Porch argues the trial court erred by "threatening Porch with the introduction of a videotape displaying [Porch's] interrogation" in violation of the Confrontation Clause. Porch also asserts the trial court's decision to allow the State to rebut his testimony using the video limited his ability to present a full and complete defense.⁴

"As a general rule, if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal." *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 28 (Ct. App. 2006). "[A] proffer of testimony is required to preserve the issue of whether the testimony was properly excluded by the trial [court], and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been." *Id.* at 163, 634 S.E.2d at 29.

We find this issue is not preserved for this court's review. The trial court indicated the State may have been able to rebut Porch's testimony by introducing the video if Porch opened the door by testifying about the California interrogation. However, Porch failed to proffer what his testimony would have been if he were allowed to testify about the interrogation without opening the door. Therefore, we decline to address Porch's Confrontation Clause argument.

CONCLUSION

Based on the foregoing, Porch's conviction is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

⁴ Porch also argues the trial court erred in finding he had an opportunity to cross-examine Investigator Cohen during the *Jackson v. Denno* hearing. However, Porch admits the State only submitted that portion of the interview conducted by Investigators McDaniels and Godfrey. Because the State did not seek to admit any portion of the interview conducted by Investigator Cohen, we find this argument is without merit.

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. 2011-GS-4003359

Appellate Case No. 2013-002531

RECEIVED
AUG 17 2016
SC Court of Appeals

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

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

RECEIVED
AUG 17 2016
SC Court of Appeals

The State, ... Respondent,

v.

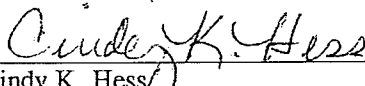
Joshua William Porch, ... Appellant.

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

The South Carolina Court of Appeals

The State, Respondent,

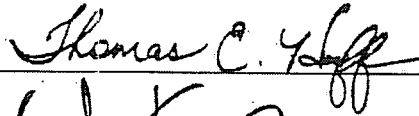
v.

Joshua William Porch, Appellant.

Appellate Case No. 2013-002531

ORDER

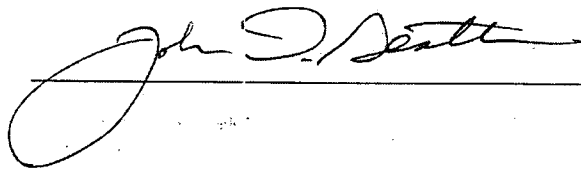
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc: Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Michael J. Anzelmo, Esquire
J. Anthony Mabry, Esquire
John W. McIntosh, Esquire
Daniel Edward Johnson, Esquire

FILED

September 20, 2016

Matthew A. Abee, Esquire