State of South Carolina

In the Supreme Court

Appeal from Richland County
Court of General Sessions
The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2016-002146

THE STATE,

Respondent,

v.

JOSHUA WILLIAM PORCH,

Petitioner.

PETITIONER'S BRIEF

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STATEMENT OF THE ISSUES

I. A criminal defendant may attack the veracity of factual statements in a warrant affidavit under *Franks v. Delaware* after making a preliminary showing of recklessness in omitting material evidence. If that threshold is met, the trial court must then determine whether probable cause existed to issue the warrant. The first issue presented is whether a trial court may uphold an arrest warrant by considering evidence not presented to the magistrate who determined that probable cause existed?

II. The United States Constitution requires that criminal defendants have a meaningful opportunity to cross examine a witness. The second question presented is whether a trial court may limit a defendant's testimony by threatening him with admission of an absent witness's statements where the defendant has only cross-examined the witness in a limited pretrial hearing and whether South Carolina's error preservation rules require the defendant to proffer testimony that was limited, but not excluded?

SUMMARY OF THE CASE

After twice failing to convict Justin Mallory for the murder of Nakia Mallory, the State turned on its lead eyewitness, Petitioner Joshua William Porch, and sought an arrest warrant for him. When applying for the warrant, the officer failed to advise the magistrate of Porch's prior testimony for the State and other exculpatory evidence. As a result, the warrant was issued, and Porch was arrested in California where he was interrogated on video by a California detective and then South Carolina investigators.

The trial court found under *Franks v. Delaware*, 438 U.S. 154 (1978), that the warrant affidavit improperly omitted exculpatory evidence and granted an evidentiary hearing. After considering evidence not presented to the magistrate, the trial court concluded sufficient probable cause for Porch's arrest existed. The Court of Appeals affirmed in a published opinion, concluding that an evidentiary hearing was not even warranted and then ignoring Porch's argument that the trial court improperly considered evidence not presented to the magistrate.

During trial, Porch objected to the introduction of his videotaped interrogation by the California detective who was not available for trial. The trial court only admitted the portion of the video not involving the California detective and instructed Porch that testifying about what occurred during the omitted portion of the video would open the door for admission of the remaining video. The Court of Appeals rejected Porch's argument that doing so violated his right to confrontation on error preservation grounds.

Porch now seeks reversal on both issues.

STATEMENT OF THE CASE

Early on May 14, 2006, Nakia Mallory was murdered. The State investigated and charged Justin Mallory with the crime. (App. at 199). Mallory's first trial ended with a hung jury. (*Id*). When the State tried him a second time, Mallory opted for a bench trial. (App. at 197–98). The court found Mallory not guilty. (*Id*). Porch testified as the State's lead eyewitness at each trial. (App. at 1104–07). Porch testified that he witnessed an altercation between Mallory and the victim, which resulted in her death. (App. 1134–36). Porch intervened in the dispute and suffered an injury himself, which caused his own blood to be left at the scene. (*Id*).

A. Application for an Arrest Warrant

After failing to convict Justin Mallory twice, the State turned its attention to Porch. (App. at 810–14). The impetus for turning their attention to Porch was allegedly his inconsistent statements—statements which were made during the initial investigation and prior to the State trying Justin Mallory for the murder—and newly discovered blood of the victim's shirt that belonged to Porch. (App. at 71). On July 7, 2009, Chief David Wilson, applied to the magistrate for an arrest warrant for Porch. (App. at 840–42). The warrant included an affidavit stating:

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

> the defendant at the scene and implicates the defendant in the assault at the time of the murder. Affiant and others are witness to prove same.

(App. at 1259). The warrant failed to include that Porch had twice served as the State's lead eyewitness and that he previously testified that his blood was at the scene because he intervened in the altercation between Justin Mallory and the victim. (App. at 80–82, 96–97, 1134–36). The record is silent whether other testimony was presented to the magistrate. (App. at 72–73). The magistrate recounted that the "gist" of what was presented to him was contained in the affidavit. (App. at 95). The record is clear, however, that the officer did not inform the magistrate that Porch had testified—twice—as the State's lead eyewitness. (App. at 80–82, 96–97). Based on the affidavit, the magistrate issued the warrant for Porch's arrest. (App. at 1260).

B. Porch's Arrest and Interrogation in California

After issuance of the warrant, investigators travelled to California and arrested Porch. (App. at 852–53). They interrogated him for approximately 4.5 hours. (App. at 936). During that interrogation, Porch provided statements implicating himself in the victim's death. (App. at 874–76). After a short break, investigators then interrogated Porch for approximately three more hours. (App. at 886–87). During the second interrogation, Porch added details to his statement consistent with evidence law enforcement had collected. (App. at 896). Investigators interrogated Porch for a third time the next day. (App. at 897). Unlike the two previous interrogations, the third interrogation was videotaped. (App. at 898). Although the video begins at 11:00 a.m., the investigators' portion of the interrogation occurs approximately six hours later. (App. at 967). During

the six-hour gap, a California detective interrogated Porch and administered a polygraph examination. (App. at 209).

After investigators returned to South Carolina with Porch, a Richland County Grand Jury indicted him for the murder of Nakia Mallory. (App. at 1258).

C. *Franks v. Delaware* Hearing

Porch moved under *Franks v. Delaware* to void the arrest warrant and suppress his statements to the investigators. Prior to trial, the trial court granted Porch an evidentiary hearing, finding:

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

(App. at 45-46). The trial court stated that it was a close call but required the hearing because the officer failed to include the potential exculpatory evidence. (*Id).* The trial court recognized that "the case law talks about information that's relevant but not dispositive information is not enough . . . to warrant the *Franks* hearing," but concluded that the defense met its burden to require an evidentiary hearing. (App. at 46).

During the *Franks* hearing, Porch presented testimony from the officer who applied for the warrant and the magistrate who issued the warrant. (App. at 47-91, 91-97). The officer confirmed that the State had relied on Porch as an eyewitness in two previous trials for the victim's murder. (App. at 55, 79). The magistrate testified that the

officer did not inform him of that fact, (App. at 96-97), though at that time the officer knew Porch had testified at the two prior trials, (App. at 51-52, 79).

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

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

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

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

> Mr. Shealy: I guess I just - just for the record purposes, I—I would slightly disagree with you . . .
>
> The Court So what you're saying then is—that I can't consider the new information that was presented in making a determination as to probable cause.

> Mr. Shealy: I just—the way I viewed the case law was just that . . . you're the fact—fact finder of this hearing to see what the judge heard . . .

(App. at 110–11). The trial court doubled-down on its expanded inquiry on the first day of trial, again relying on the evidence not presented to the magistrate to determine that probable cause existed. (App. at 127–30). Porch then argued that:

> [T]he crux of our objection to your prior ruling at that hearing went to, respectfully, that we felt that the analysis was not correct, that in our opinion as Joshua Porch's defense counsel, the evidentiary hearing was held to determine if [the magistrate] was given the opportunity, based on what was presented to him or not presented to him by [the officer], for him to make a determination at the time whether there was probable cause, and you, your Honor, as the fact finder of that question . . . it was our opinion for you to decide whether [the magistrate] had that opportunity.

(App. at 130–31). The trial court did not change its ruling, refusing to suppress the evidence and testimony obtained pursuant to the arrest warrant.

D. Porch's Trial and Conviction

From November 18–25, 2013, the State tried its case for the murder of Nakia Mallory for the third time in seven years. While the investigators who interrogated Porch testified, the State did not secure the appearance at trial of the California detective who interrogated Porch for six hours. The State had subpoenaed the detective to testify; however, the detective did not appear and was not available for cross-examination before the jury.[1] (App. at 144)..

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[1] The California detective appeared for the *Jackson v. Denno* hearing eight months earlier, but her testimony was limited to the voluntariness of Porch's statements. Porch did not have a chance to cross-examine the detective on other matters relevant to his defense.

Over Porch's objection, the State also entered into evidence the one-hour portion of the videotaped interrogation that involved the South Carolina investigators. (App. at 207-08, 225, 233-34; App. at 900-01). The State did not introduce the remaining six hours of the video involving the California detective's interrogation of Porch. (App. at 205-06). Porch objected to introducing only a portion of the video because it would take the entire interrogation out of context. (App. at 206). As Porch explained, the only way for him to put the one-hour portion of the video in context would have been to introduce the entire video or to testify on the details of the full interrogation. (App. at 206). The State argued, "if Mr. Porch testifies about specific occurrences within that six and a half hour interview with [the California detective], . . . it opens the door for the possibility of us playing portions of that video as well." (App. at 1081). In response, Porch argued to the trial court that limiting his testimony by conditioning it on the admission of the remaining video would violate his rights under *Crawford v. Washington*, 541 U.S. 36, 62 (2004) because the State could not provide the witness at trial. (App. at 1082-83).

The trial court ruled that Porch could not discuss the remaining portions of the interrogation during his testimony without allowing the State to introduce the remaining portions of the interrogation video, despite the absence of the California detective for cross-examination. (App. at 1081-83). Likewise, the trial court ruled that his right to confront the detective was satisfied because he had previously cross-examined the officer on an unrelated issue when she was present for the preliminary hearing held eight months earlier under *Jackson v. Denno*, 378 U.S. 368 (1964). (App. at 222). Because of the trial court's ruling, Porch did not discuss his interrogation with the absent detective

except to say that it took six and a half hours. (App. at 1125-26). Porch did not proffer any other testimony or evidence.

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

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

Porch timely filed his notice of appeal on December 2, 2013. (App. at 1268). After hearing argument, the Court of Appeals issued its published opinion. (App. at 1369-1377). Regarding his *Franks v. Delaware* argument, the Court of Appeals concluded that the trial court had not needed to hold an evidentiary hearing because Porch failed to overcome his burden to show that the State intentionally or recklessly omitted exculpatory evidence. (App. at 1375). The Court of Appeals also found that "even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause to secure an arrest warrant for Porch." (App. at 1376). The Court of Appeals did not reach Porch's Confrontation Clause challenge, instead ruling that Porch did not preserve the issue because he failed to proffer the testimony he would have given had he been allowed to testify regarding the remaining portions of his videotaped interrogation. (App. at 1377).

Porch petitioned for rehearing, specifically arguing that the Court of Appeals (1) overlooked the trial court's improper reliance on information not presented to the magistrate when the warrant was issued, and (2) misapprehended South Carolina's error preservation rules by rejecting his Confrontation Clause argument. (App. at 1378-83). The Court of Appeals denied his petition on September 20, 2016. (App. at 1385).

Porch timely petitioned this Court for a Writ of Certiorari on October 20, 2016. After return and reply briefs were filed, the Court granted certiorari by order dated August 22, 2017.

STANDARD OF REVIEW

The Court of Appeals, relying on *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008), reviewed *de novo* the trial court's decision to grant an evidentiary hearing under *Franks v. Delaware*. (App. at 1373). However, this Court has not yet established the proper standard of review for that inherently discretionary decision. Consistent with the majority of courts that have entertained the question, the Court should review the trial court's decision to hold an evidentiary hearing for clear error. *See United States v. Brown*, 631 F.3d 638, 642 (3d Cir. 2011) (collecting cases); *cf. State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("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.").

Trial and appellate courts review a magistrate's probable cause determination under the substantial basis standard of review. *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). However, the Court reviews *de novo* the legal question of the proper scope of a trial court's *post hoc* probable cause determination under the second prong of *Franks v. Delaware*. *See State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (reviewing *de novo* questions of law in criminal cases). Likewise, whether the trial court

has violated the defendant's right to confront witnesses against him is a question of law for the court to review *de novo*. *Id.*

ARGUMENT

The Court should reverse because (1) the courts below wrongly considered evidence not presented to the magistrate to determine that probable cause existed to arrest Porch after a properly granted evidentiary hearing under *Franks v. Delaware*; and (2) the trial court violated the Confrontation Clause by threatening Porch with admission of his videotaped interrogation in full despite the absence of the State's witness, an error the Court of Appeals ignored by improperly applying our State's error preservation rules. Reversal is necessary to correct these substantive errors.

I. Though it properly granted Porch a *Franks* hearing, the trial court erred in considering evidence not presented to the magistrate to confirm that probable cause existed.

The trial court properly granted Porch a *Franks* hearing because the officer applying for the warrant omitted exculpatory evidence from the warrant affidavit that strikes at the heart of the warrant affidavit's purpose. The Court of Appeals improperly concluded that a *Franks* evidentiary hearing was unnecessary. It also incorrectly concluded, along with the trial court, that probable cause existed to arrest Porch. These errors necessitate reversal.

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

Where exculpatory evidence is omitted from a warrant affidavit, a defendant may challenge the warrant under *Franks v. Delaware* if he can make a preliminary showing of

intentionality and materiality. *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990). This Court has explained that intentionality is shown by an offer of proof establishing that the evidence "was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). While *Franks* has been said to be concerned with the intentional, rather than the mere negligent, omission of potentially exculpatory information, an omission that amounts to a "reckless disregard for the truth" can still warrant an evidentiary hearing. *Franks*, 438 U.S. at 171. The omitted evidence must also be "such that its inclusion in the affidavit would defeat probable cause." *State v. Lynch*, 412 S.C. 156, 180, 771 S.E.2d 346, 358–59 (Ct. App. 2015). This is because "*Franks* protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." *Colkley*, 899 F.2d at 301.

The trial court correctly explained that "case law talks about information that's relevant but not dispositive information is not enough . . . to warrant the *Franks* hearing," but found that Porch had met his burden to require the evidentiary hearing. (App. at 46). The trial court made a specific finding that the affidavit "lack[ed] information which would have been relevant to making a decision as to probable cause." (App. at 45). The trial court was right.

The warrant affidavit excluded the fact that Porch had served as the State's lead eyewitness in two separate trials where he testified that his DNA was at the scene because he intervened in the fatal altercation between Justin Mallory and the victim. (App. at

1259).[2] The State was sufficiently confident in Porch's testimony to put him on the stand as its lead eyewitness—not once, but twice—yet did not find that information important enough to include in the warrant affidavit.

The Court of Appeals disagreed that an evidentiary hearing was necessary because Porch could not prove the officer acted with the requisite intent. The Court of Appeals relied on the officer's testimony that he "believed the totality of the circumstances established probable cause to arrest Porch" to conclude that the officer did not act with the requisite intent to necessitate a *Franks* hearing. (App. at 1376). It is immaterial whether the officer believed that probable cause existed to arrest Porch for the purpose of the threshold question under *Franks*. An officer who believes that probable cause exists can still mislead a magistrate by omitting exculpatory evidence to ensure he obtains the warrant. Simply relying on the officer's testimony ignores the material nature of the omitted information, especially where that omitted information was available to the officer before he applied for the warrant. (App. at 51-52, 79). Unlike in *State v. Lynch*, where the officer who obtained the warrant was not aware of the omitted evidence when he signed the warrant affidavit, the officer here knew of the State's reliance on Porch in the two separate trials and had read his previous testimony. 412 S.C. 156, 183, 771 S.E.2d 346, 360 (Ct. App. 2015). Instead of focusing on the officer's belief that probable cause for

[2] The warrant affidavit also omitted other potentially exculpatory evidence, such as the possibility of a domestic argument at the apartment not involving Porch and Justin Mallory's callous statements about the victim at the hospital. (App. at 53-55). The Court of Appeals recognized that the officer also omitted this evidence from the affidavit. (App. at 1376).

arrest existed, the Court of Appeals should have focused on whether Porch sufficiently alleged that evidence was omitted "in reckless disregard of whether it made, the affidavit misleading to the issuing judge." *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. The evidence presented to the trial court shows that omitting this material evidence was done in reckless disregard of whether the omission would mislead the magistrate. *See Lynch*, 412 S.C. at 180, 771 S.E.2d at 358–59; *Colkley*, 899 F.2d at 301.

The information the officer omitted bears resemblance to the omitted confidential informant tip omitted from the warrant affidavit in *Missouri*. There, police obtained a warrant to search the defendant's home for drugs. *Missouri*, 337 S.C. at 550, 524 S.E.2d at 395. The warrant affidavit included the statement that a confidential informant had been told that the defendant had the drugs, but was not yet ready to sell them to the confidential informant. *Id.* at 553, 524 S.E.2d at 396. The affidavit failed to explain that the confidential informant had clarified to the officer that, while the defendant had drugs, it was not yet present in his apartment. *Id.* This Court determined that the police "at least acted recklessly in making the false statement and in omitting the exculpatory information." *Id.* at 555, 524 S.E.2d at 397. When the omitted information was included, it created an "affirmative hurdle" which the remaining portions of the affidavit could not overcome, "erod[ing] the basis upon which a magistrate could find probable cause . . ." *Id.* The omitted information struck at the "very heart of the affidavit's purpose," and what remained did not establish "a substantial basis upon which the magistrate could have found probable cause to issue the warrant." *Id.* at 555–56, 524 S.E.2d at 397–98. Like in *Missouri*, the officer's omission of Porch's prior involvement in the case and Porch's

testimony explaining his intervention in the fatal altercation create an affirmative hurdle that the State cannot overcome.

Accordingly, the trial court was correct in granting Porch an evidentiary hearing under *Franks*. The Court of Appeals erred in merely "commend[ing] the trial court in this case for holding a *Franks* hearing out of an abundance of caution," but concluding that such a hearing was unnecessary. (App. at 1373). The Court of Appeals should have deferred to the trial court because, under the proper standard of review, the trial court did not clearly err by conducting an evidentiary hearing. As the trial court properly found, Porch established a sufficient threshold showing to entitle him to a *Franks* hearing, and this Court should reverse the Court of Appeals to the extent that it concludes otherwise.

B. The trial court erred by considering more evidence than was before the magistrate for his initial probable cause determination.

The second prong of *Franks* focuses on whether the omitted evidence will defeat probable cause. *Missouri*, 337 S.C. at 554, 524 S.E.2d at 397. In *Missouri*, this Court focused on whether, after inserting the exculpatory evidence, there remained "a substantial basis upon which the magistrate could have found probable cause to issue the warrant." *Id.*

Here, the trial court concluded that probable cause still existed to arrest Porch, even when the omitted evidence was considered. (App. 107-09). However, the trial did not limit its review to evidence actually presented to the magistrate. As a result, the trial court improperly employed an overbroad review not sanctioned by *Franks* or this Court's precedent. (App. at 110). By relying on evidence not presented to the magistrate to

support the conclusion that probable cause existed to issue the arrest warrant for Porch, the trial court committed reversible error that the Court of Appeals failed to correct.

The proper scope of inquiry in the *post hoc* probable cause analysis 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*, 438 U.S. at 172. While the probable cause determination is reviewed based on the totality of the circumstances, "[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); *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 when the warrant was issued).[3] 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). The inquiry does not include later-discovered evidence or information that has had the benefit of being polished by the State's prosecutors.

Courts from other jurisdictions are in accord that the probable cause review by the trial court is limited to the evidence actually presented to the magistrate. *See, e.g., United States v. Abernathy*, 843 F.3d 243, 249 (6th Cir. 2016) ("When determining whether an

[3] Even the Court of Appeals explained the proper, narrow review under *Franks*: "There will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." (App. at 1373–74 (emphasis omitted)). The Court of Appeals ultimately ignored the trial court's failure to stay true to this standard, though.

affidavit establishes probable cause, we look only to the four corners of the affidavit; information known to the officer but not conveyed to the magistrate is irrelevant."); *United States v. Gladney*, 48 F.3d 309, 312 (8th Cir. 1995) ("'And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed.' [*Illinois v. Gates*, 462 U.S. 213, 238 (1983)]. When the magistrate relied solely on the affidavit presented to him, 'only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause.'" (quoting *United States v. Leichtling*, 684 F.2d 553, 555 (8th Cir. 1982)); *State v. Lilly*, 194 W. Va. 595, 601, 461 S.E.2d 101, 107 (1995) (requiring the reviewing court to "determine whether, either absent the false material or supplemented with the omitted material, the remaining content of the affidavit is sufficient to establish probable cause."); *State v. Witwer*, 642 P.2d 828, 831-32 (Alaska Ct. App. 1982) ("Finally, the review to determine whether probable cause exists must be limited to the record made before the magistrate including the affidavit(s) submitted and any oral testimony presented under oath to the magistrate prior to issuance of the warrant.").

Here, the magistrate had only the warrant affidavit when the warrant was issued. (App. at 95). The main factual information presented to the Magistrate in the warrant affidavit was that (1) Porch had admitted to being at the scene of the crime, and (2) DNA testing of blood found at the scene confirmed Porch was there. (App. at 1259). There is no evidence in the record that the officer told the magistrate that Porch is left-handed, that Porch admitted to intervening in the altercation between the victim and Justin Mallory, or that blood had recently been found on the victim's shirt. (App. at 79, 95-96). It is

uncontroverted that the officer did not tell the magistrate that Porch was the State's lead eyewitness in the two previous trials. (App. at 100-01).

At the conclusion of the *Franks* hearing, the trial court determined that the totality of the evidence presented—including evidence not disclosed to the magistrate—would support probable cause. (App. 107-12; 123-30). Specifically, the trial court stated:

> I think that's what the case law requires, that if in—in considering the omitted information or information that might have been misleading, that if I make the determination that *with the new information* there is probable cause, that would be sufficient.

(App. at 110 (emphasis added)). After Porch argued that the probable cause analysis is not so broad, the Court then agreed to review the applicable case law. (App. at 110-11).

When the trial court revisited the issue on the first day of trial, it still improperly expanded the scope of its review by reaffirming that evidence not presented to the magistrate formed the basis for the trial court's *post hoc* probable cause determination. (App. at 123-30). The trial court specifically referenced three pieces of evidence that the officer did not present to the magistrate in both the *Franks* hearing and in its clarification on the first day of trial: (1) the fact that the suspect and Porch are both left-handed, (2) the newly discovered DNA evidence on the victim's shirt, and (3) Porch's prior inconsistent statements. (App. at 107-08, 128-29).

In doing so, the trial court expanded the scope of the probable cause determination beyond that which is authorized by *Franks* and this Court's guidance. The trial court improperly determined whether probable cause existed with the benefit of hindsight rather than relying only on what was actually presented to the magistrate. The Court of

Appeals ignored this error altogether despite it being briefed, argued, and included in the petition for rehearing. The Court should correct this error by reversing and suppressing the evidence collected after the invalid arrest warrant.

II. Porch preserved his Confrontation Clause argument and the trial court violated his right to confrontation.

The United States Supreme Court has explained that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). Porch objected to the Court's violation of his right to confront the California detective regarding his videotaped interrogation throughout the case. (App. at 144-154, 205-08, 221-22, 227-28, 233-34, 900-01, 1082-83). He specifically referenced *Crawford* and the Confrontation Clause several times. (App. at 147, 150-152, 210, 216, 221-22, 227-28). Yet, the Court of Appeals concluded that he failed to preserve his objection by applying a hyper-technical reading of this Court's issue preservation rules. (App. 1377). The Court of Appeals, like the trial court, erred. Because the error is not harmless, this Court should reverse.

A. The Court of Appeals applied the improper error preservation standard to avoid the merits of Porch's argument.

The Court of Appeals declined to address Porch's Confrontation Clause challenge because he did not proffer any testimony. (App. 1377). This conclusion is incorrect. Because the trial court did not actually exclude Porch's testimony, he was not required to proffer any testimony under South Carolina's error preservation rules. Thus, the Court of Appeals erred by failing to address this issue on the merits.

As this Court has explained, the requirement to proffer testimony or evidence applies to excluded testimony and evidence. *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). Porch does not dispute that a failure to proffer *excluded* testimony prevents appellate review. The Court of Appeals was correct in citing this standard. (App. at 1377). The Court of Appeals erred, however, in applying this error preservation rule here.

Porch was interrogated on video for over seven hours in two shifts. (App. at 898). The California detective conducted the first six hours, and the two South Carolina investigators conducted the remaining hour. (App. at 967). However, the jury only viewed the one-hour portion of the videotape featuring the investigators who were available to testify. (App. at 205). The State did not enter the vast majority of the video because the California detective did not appear at trial. (App. at 1083). Porch objected to the admission of only one hour of the video because it would place his interrogation out of context. (App. at 205-07). When the trial court admitted the one hour portion, Porch sought to testify to explain the other six hours. The trial court warned Porch that testifying about the remaining six hours of his interrogation would open the door for the State to admit the video, notwithstanding his inability to cross-examine the missing California detective in front of the jury. (App. at 1082-84). The trial court's warning presented Porch with a catch-22—either have the full video entered into evidence over his Confrontation Clause objection and testify regarding the missing six hours, or limit his testimony in order to avoid the admission of the full video. By doing so, the Court did not have to

actually exclude any testimony—it was enough to just threaten Porch with the constitutional violation.

By not excluding any of Porch's testimony, Porch did not have to proffer any testimony to preserve the issue for appellate review. The error is in the trial court's decision giving Porch two equally difficult and unacceptable choices. If he picked the first option of explaining the context of the interrogation, he would lose his right to cross-examine the California detective. If he picked the second, the jury would be left with no context for the one hour portion of the interrogation. By giving him this false dilemma, trial court ensured that it did not have to actually exclude Porch's testimony. Thus, Porch never proceeded to the point of proffering testimony because his testimony was never excluded. Accordingly, the error is preserved and the Court of Appeals should have reached the merits of the issue.

B. The trial court's catch-22 violated Porch's right of confrontation.

The State cannot be permitted to gain from its own failure to provide the California detective for cross-examination at trial. Doing so allows the State to make an end-run around the Confrontation Clause.

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." *State v. Thompson*, 420 S.C. 386, 803 S.E.2d 44, 51 (Ct. App. 2017) (quoting U.S. Const. amend. VI). The Confrontation Clause bars the admission of testimonial statements of a witness who is not available for cross-examination. *Bullcoming v. New Mexico*, 564 U.S. 647, 658–59 (2011). The crux of a defendant's confrontation clause right is the ability to have a meaningful opportunity to cross-

examine the witnesses against him. This procedural protection applies in both federal and state prosecutions under the Fourteenth Amendment. *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

By placing Porch in the dilemma of testifying and losing his right of confrontation, the trial court essentially grafted onto the Confrontation Clause an exception for defendants who wish to present a defense when the State fails to procure the availability of a witness to rebut that defense. The problem with such an exception is that, as the United States Supreme Court "stressed in *Crawford*, the text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Nor is it the role of courts to extrapolate from the words of the Confrontation Clause to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Bullcoming*, 564 U.S. at 662 (cleaned up). "If a 'particular guarantee' of the Sixth Amendment is violated," such as Porch's right to confront the California detective in this case, "no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation' complete." *Bullcoming*, 564 U.S. at 663 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006)).

This attempt to manufacture an exception to the Confrontation Clause falls short, as do the reasons the trial court gave on the record for violating Porch's right of confrontation: (1) Porch had already cross-examined the detective at the *Jackson v. Denno* hearing held eight months earlier, and (2) the detective was not present at trial despite

the State's attempt to subpoena her. (App. at 219-22). These reasons do not pass constitutional muster.

While this Court has not yet decided whether a cross-examination at a *Franks* hearing will meet the dictates of the Confrontation Clause, other courts have concluded that cross-examination at a pretrial hearing cannot satisfy a defendant's right of cross-examination. *See, e.g., People v. Fry*, 92 P.3d 970, 978 (Colo. 2004) (en banc) (holding that cross-examination at a preliminary hearing does not satisfy Confrontation Clause requirements); *State v. Stuart*, 279 Wis. 2d 659, 673, 695 N.W.2d 259, 266 (2005) (same); *Sanchez v. State*, 354 S.W.3d 476, 489 (Tex. Crim. App. 2011) (holding that admission of testimony from limited pretrial hearing violated defendant's right of confrontation); *cf. Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."); *State v. Contreras*, 979 So. 2d 896, 911 (Fla. 2008) (concluding that limited criminal deposition could not meet the dictates of the Confrontation Clause).

Like many of the other courts to address the issue, the Court should conclude that cross-examination at a pretrial hearing is insufficient cross-examination for Confrontation Clause purposes because a pretrial hearing has a limited scope with a different burden of proof from the burden of proof at trial. Additionally, testimony at a pretrial hearing does not afford the jury the ability to judge the demeanor of the witness, which is essential to its credibility determination. For example, in a pretrial *Jackson v. Denno* hearing, the focus is the voluntariness or involuntariness of a defendant's

confession. *See State v. Silver*, 307 S.C. 326, 331, 414 S.E.2d 813, 815 (Ct. App. 1992). Even the trial court recognized that *Jackson v. Denno* hearings rarely have the same broad scope as cross-examination in front of a jury. (App. at 219). This is especially true here because, at the time of the *Jackson v. Denno* hearing, Porch did not have the California detective's file, despite a later order that it be produced to the defense. (App. at 9–10). This easily could have led to additional questioning on issues not relevant (or even known to the defense) at the time of the limited hearing.

Second, that the State unsuccessfully tried through proper channels to subpoena the California detective does not immunize the State from violating Porch's right to cross-examine her at trial. The Confrontation Clause has no "best-efforts" exception. Instead, it imposes a procedural protection that requires the State to produce witnesses against a defendant for cross-examination as a prerequisite for introducing that witness's statements. *Crawford*, 541 U.S. at 62. That did not occur here, leaving Porch with no opportunity to cross-examine the California detective about the most critical aspects of this case—statements made during the six-hour portion of his interrogation in California.

The Court should reverse to correct the error leading to the admission of only a portion of the videotaped interrogation out of context due to the State's failure to secure the California detective's attendance at trial.

CONCLUSION

The State has taken irreconcilable positions throughout three trials for the victim's murder. Not once, but twice did the State rely on Porch's testimony to secure a conviction.

When they failed, they turned on Porch. Desperate for an arrest and conviction, the officer seeking to arrest Porch failed to disclose exculpatory evidence to the magistrate. This should have invalidated the warrant—and the evidence obtained following the execution of the warrant—under *Franks v. Delaware*. In refusing to void the arrest warrant, the trial court relied on information not initially presented to the magistrate to do so, improperly expanding the *post hoc* probable cause analysis. The Court of Appeals failed to correct this error. It should have instead reversed the trial court for the officer's reckless disregard for the truth in the warrant affidavit.

The Court of Appeals also should not have avoided Porch's Confrontation Clause argument based on its misinterpretation of our State's issue preservation rules. By not addressing the issue, the Court of Appeals failed to correct the trial court's erroneous conclusion that Porch's limited cross-examination of the absent detective was sufficient under *Crawford v. Washington* in light of the State's half-hearted attempt to secure the detective's attendance at trial.

This Court should reverse on both issues.

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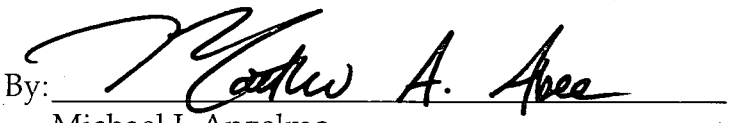
By: 

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October 2, 2017

State of South Carolina
In the Supreme Court

Appeal from Richland County
Court of General Sessions
The Honorable Alison R. Lee, Circuit Court Judge

Case No. 2011-GS-4003359
Appellate Case No. 2016-002146

THE STATE,

Respondent,

v.

JOSHUA WILLIAM PORCH,

Petitioner.

PETITIONER'S BRIEF

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

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THE STATE OF SOUTH CAROLINA
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The Honorable Alison Renee Lee
Circuit Court Judge

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v.

Joshua William Porch, ... Petitioner.

PROOF OF SERVICE

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

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