ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
The Honorable Alison R. Lee, Circuit Court Judge
Appellate Case No. 2016-002146

THE STATE

Respondent,

V.

JOSHUA WILLIAM PORCH,

Petitioner

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES

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

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

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STATEMENT OF THE CASE

On May 14, 2006, Appellant Joshua Porch murdered Nakia Mallory in Richland County. Appellant was arrested on July 8, 2009 in Long Beach, CA; and, Appellant subsequently confessed to the killing. Appellant was returned to South Carolina and indicted for the murder by the Richland County grand jury. (*Ind. # 2011-GS-40-03359*). The case was prosecuted by the Attorney General's Office.[1] Appellant was tried by a jury before Circuit Court Judge Alison Rene Lee from November 18-25, 2013 and found guilty of Nakia Mallory's murder and sentenced to fifty (50) years. Appellant appealed raising 2 issues. The Court of Appeals unanimously affirmed. State v. Porch, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016).[2] A Petition for Rehearing was denied. A Petition for Writ of Certioari was then filed by Appellant. Respondent filed a Return to the Petition for Writ of Certiorari. This Court granted certiorari and ordered briefing. Appellant filed his Brief of Appellant. This is the Brief of Respondent.

1 As will become apparent, the 5th Circuit Solicitor's Office had a conflict and as a result this case was prosecuted by the Attorney General's Office.

2 Judge Huff authored the Opinion which was concurred in by Judges Geathers and Konduros.

RESPONDENT'S STATEMENT OF FACTS

Nakia Mallory ("the victim"), the mother of 2 small children, was murdered in the early morning hours of May 14, 2006 in her apartment in Richland County. The victim was stabbed to death. She had 1 stab wound to *her right* neck and 1 stab wound over *her right* eye.[3] She had also been beaten about the head, struck 6 times total to the back, sides, and front of the head, and had a bruise to her neck. The knife wound to the neck was fatal. A large amount of blood was found in the den of her home *and* a small amount in the kitchen. 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 cleaner under the kitchen counter. The murder weapon, a knife, was never found, nor was the cloth used to wipe up the blood. (R. 155-96, 260-464, 480-557, 730-52; App. 159-200, 264-468, 488-565, 738-60).

The victim's husband, Justin Mallory ("Justin" or "husband"), came home to the couple's apartment at approximately 3:30 a.m. on May 14th and found the victim in the above described condition on their den floor. Blood was everywhere in the den. Justin flew into a panic, checked on the couples' 2 small children asleep in a bedroom, and immediately sought assistance from neighbors by banging on their doors.[4] 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, placed her in his van and drove her to the hospital. The victim was pronounced dead there. Justin got his wife's blood on him when he carried her to the van and into the hospital. (R. 155-96, 260-338, 339-351, 431-64, 546-57; App. 159-200, 264-342, 343-55, 435-68, 554-65).

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3 Appellant Porch is left handed.

4 The neighbor, Shareed Hargraves, testified when victim's husband came banging on his door for assistance, the husband did not have any blood on his person. (R. 546-57; App. 554-65).

Justin cooperated fully with police including informing them of his whereabouts on the night of the murder, giving a written statement to the same, signing consents to search all of his property, and submitting a DNA sample. Justin admitted he had been with another woman romantically prior to finding his wife, had taken the woman to dinner, had been 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, sought assistance from neighbors, called 911, heard gurgling sounds coming from his wife, picked her up and placed her in his van, and drove her immediately to the hospital. (R. 155-96, 260-338, 351-94, 431-64, 753-87; App. 159-200, 264-342, 355-98, 435-68, 761-95).

The husband was initially charged with the murder the morning following Nakia's death by the Richland County Sheriff's Office and indicted. The 5th Circuit Solicitor's Office prosecuted the case. The husband was tried twice resulting in a hung jury and then an acquittal. (R. 155-96, 260-338; App. 159-200, 264-342).

The week following his acquittal, Justin contacted the Sheriff's Office and Sheriff Leon Lott and informed them he was not involved in his wife's murder and asked that they re-open the investigation. As a result, the Sheriff's Office assigned Chief Deputy David Wilson to review the case to determine if the wrong person was charged. The investigation focused on Appellant, Joshua Porch ("**Porch**"), who had testified in Justin's trials claiming he, **Porch**, was an eyewitness to the murder. (R. 155-96, 260-338, 787-840; App. 159-200, 264-342, 795-848).

Police had originally first approached **Porch** the morning after the victim's murder, May 14, 2006, as a result of the husband's statement given the night of the victim's murder. Justin told police the only persons who could possibly have killed his wife were the maintenance man

at the apartment complex where he and his wife lived *or* **Porch**, who was a former neighbor, because each man had been in his apartment recently. (R. 575-86; App. 583-94).

Porch's 1st Statement

In his 1st statement to police, given at his residence on May 14, 2006 to Sgt. Randy Strange, **Porch** denied being present at the crime scene at the time of the crime and claimed he knew nothing about the murder. **Porch** stated he was at home with his wife all night. Porch's wife also told Sgt. Strange at that time that **Porch** was with her the entire night of the victim's murder.[5] (R. 575-88; App. 583-94).

After Sgt. Strange left Porch's apartment, Porch's wife noticed **Porch** had a cut on his hand. She also noticed blood on the driver's door handle of Porch's car. **Porch** told his wife he had cut his hand at a friend Marcus' residence the night before. Porch's wife did not question him further about the cut on his hand at that time. (R. 558-74; App. 566-82).

Porch's 2nd Statement

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 home. This DNA did not match the victim's husband. There were drops of blood on the kitchen floor, blood in the sink, and a spot of blood under the kitchen counter on some cleaning fluid. Someone had also attempted to wipe or clean up this blood from the kitchen floor. (R. 619-26; App. 627-34).

Porch was contacted again at his apartment on June 17, 2007 by Major James Smith in an attempt to identify this unknown male DNA. At that time, **Porch** admitted being present at

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5 Porch's wife changed her statement at Porch's trial testifying **Porch** left their apartment during the night of the victim's murder and returned some time later in the night or morning. At the time of Porch's trial, **Porch** and his wife were separated. She still lived here in Richland County. **Porch** had moved to California after the husband's acquittal. (R. 558-74; App. 566-82).

the crime scene [the victim's home] earlier in the evening of the murder and cutting his hand while slicing an apple for his child. **Porch** admitted he had bled in the kitchen and in the sink, and attempted to clean up the blood with a paper towel. **Porch** agreed to provide a DNA sample. At this time, **Porch** informed Smith he had told both the police officer who initially interviewed him [Sgt. Strange] and his wife and her family that he had cut his hand in the victim's home the afternoon or evening before the victim's murder. A written statement was taken from **Porch** detailing these facts. (R. 619-32; App. 627-40; State's Ex. 39, R. 1214-16; App. 1226-28).

Porch's wife testified at Porch's trial **Porch** had not told her this version of events before. He had told her he cut his hand on a bannister at his friend Marcus' residence. The first time she heard this version was when **Porch** told Major Smith at their home. (R. 558-74; App. 566-82).

Porch's 3rd Statement

After leaving Porch's residence on June 27, 2007, Major Smith contacted the officer who interviewed **Porch** the morning after the murder. Sgt. Strange informed Smith that **Porch** had not told him about cutting his hand at the victim's residence the afternoon or evening before the murder. Major Smith immediately returned to Porch's residence and questioned **Porch** again. At this time, **Porch** stated he thought he informed the officer who interviewed him the morning after the murder that he cut his hand at the victim's residence the evening before the murder but was now sure that he did not tell him that. **Porch** stated he was scared to tell the police about the cut because he did not want to be considered a suspect. Another written statement was taken from **Porch**. (R. 631-35; App. 639-44; State's Ex. 40, R. 1217-18; App. 1229-30).

Porch's 4th Statement

On June 28, 2007, **Porch** was interviewed at the Solicitor's Office regarding the story he had told June 27th at his residence. **Porch** gave virtually the same statement about cutting his hand while cutting an apple at the victim's home the evening before her murder. **Porch** was later polygraphed at the Richland County Sheriff's Office on his 2nd and 3rd statements and failed the polygraph. (R. 612-18, 636-52, 1249-50; App. 620-26, 644-60, 1261-62; State's Ex. 50).

Porch's 5th Statement

On July 2, 2007, upon further questioning at the Richland County Sheriff's Office, **Porch** gave a **3rd version** of what occurred the night of the victim's murder. This was actually **Porch's** fifth (5th) statement to police or prosecutors.

Porch 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 victim with an object, and he [**Porch**] was cut on his hand while intervening. **Porch** claimed he was facing the victim's husband [Justin] when this occurred. **Porch** admitted he bled in the kitchen of the home, and before leaving the apartment attempted to clean up the blood. **Porch** stated when he left the victim's apartment, the victim was curled up on the couch and still [motionless] and bleeding from her face and neck. **Porch** claimed he left the apartment but admitted he did not call 911 or report what he had seen. **Porch** admitted the "apple cutting" version he had told the police before was a lie. Another written statement, this time to this version, was taken from **Porch** at the Sheriff's Office. **Porch** was polygraphed on this statement and failed the polygraph. (R. 575-96, 603-11, 558-74, 612-57, 666-729, 787-96; App. 583-604, 611-19, 566-82, 620-65, 674-737, 795-804; State's Ex. 41; R. 1219-24; App. 1231-36; State's Ex. 50; R. 1249-50; App. 1261-62).

This was the version **Porch** testified to at the husband's 2 trials. As stated, the husband's 1st trial resulted in a hung jury and the 2nd trial in the husband's acquittal. (R. 575-96, 603-11, 558-74, 612-57, 666-729, 787-96; App. 583-604, 611-19, 566-82, 620-65, 674-737, 795-804).

After re-opening the case after the husband's acquittal and at the husband's request, Chief Deputy Wilson realized **Porch** had given inconsistent versions of the event, including stating on 1 occasion he cut his right hand and on another he cut his left hand. **Porch** had also admitted he had attempted to clean up the crime scene [the kitchen] where he had bled. Wilson requested additional D.N.A. testing. It revealed **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 previously been found under the victim's fingernails and **Porch's** blood [DNA] was found on the kitchen floor of the crime scene. The husband's DNA was not 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 was right-handed. The re-investigation of the case determined **Porch** murdered the victim, and an arrest warrant for murder was obtained on July 7, 2009 from a Richland County magistrate. (R. 431-64, 800-40; App. 435-68, 808-848).

Richland County investigators Shawn McDaniels and Brian Godfrey traveled to California on July 8, 2009 because **Porch** now resided in Long Beach, CA. **Porch** was arrested at a Walgreens late that night for the victim's murder and transported to the Long Beach Police Department. (R. 977-1012, 841-93; App. 989-1024, 849-901).

Porch's 1st Confession in California

Porch was read his Miranda rights and executed a Waiver of Rights form and 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. Importantly, **Porch admitted the husband was not present when the victim was killed, i.e. Porch had perjured himself in the husband's 2 trials.** At the end of this statement, **Porch** was asked if there was anything else that he would like to add or subtract from his statement. **Porch** responded as follows:

> A: I would like to add something. I want to apologize to Nakia's family. I'm sorry that they lost their 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 Mallory 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.

(State's Ex. 47, R. 1233-34; App. 1245-46). This statement was reduced to writing which **Porch** signed on each page as voluntary and as true and correct. This statement was admitted in evidence before the jury in Porch's trial. (R. 796-98, 841-93, 907-64, 975-1067, 1225-35, State's 47; App. 804-06, 849-901, 915-72, 983-1079, 1237-47).

Porch's 2nd Confession in California

Investigators McDaniels and Godfrey reviewed the case file to determine if the evidence supported **Porch's** accident claim. Because it did not, later that day, July 9th, after being read his Miranda rights again and after again signing a Waiver of Rights form, **Porch** was questioned again by the investigators. In this statement, **Porch** claimed the victim "came on to him;" he responded; she changed her mind; he called her "a bitch;" she became angry and got a knife; there was a struggle over the knife; he [**Porch**] ended up hitting her several times in the forehead with the palm of his hand and in the head with his elbow; and, **Porch** and the victim eventually

fell onto the den couch and the victim was stabbed in the neck. This was partially consistent with the autopsy results. This statement was also reduced to writing and **Porch** signed the statement as voluntary and true and correct. (R. 841-93, 907-64, 975-1067, 1236-39, State's 49; App. 849-901, 915-72, 983-1079, 1248-51).

Porch's 3rd Confession in California

After conferring by phone with Chief Deputy Wilson, McDaniels and Godfrey decided to question **Porch** again this time on video and with the assistance of a polygraph operator, Investigator Roberta Cohen from the Los Angeles County Sheriff's Department ("LACSD").

The following day, July 10th, **Porch** was transported from the Long Beach P.D. to the LACSD for a third interview which was video-recorded in its entirety.[6] After again being read his Miranda rights and waiving them, **Porch** made further incriminating statements implicating himself in the victim's murder. Initially, Inv. Cohen conducted a pre-polygraph interview, a polygraph test, and a post-polygraph interview which all lasted a total of about 6 ½ hours. This portion of the 3rd interview in California was monitored by 2 Richland County detectives from an adjoining room. McDaniels and Godfrey then interviewed **Porch** for about 1 hour. In this final statement, **Porch** admitted **he** "came on" to the victim; she rejected **him**, and **he** [**Porch**] ended up killing her [stabbing her] while the 2 were standing. **Porch** still claimed the victim had the knife but he grasped her hand and turned the knife around and thrust it into her neck. He admitted he did not fall on her. **Porch** admitted **he** attempted to clean up the crime-scene; he

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6 Cohen appeared and testified at the Jackson v. Denno, 378 U.S. (1964), hearing before Judge Lee in March of 2013; however, a California Superior Court ruled she did not have to return to South Carolina for the actual trial in November of 2013 even though the State submitted a proper out-of-state witness subpoena request. Cohen refused to voluntarily return for the trial and was therefore unavailable. (R. 108, App. 112).

knew the victim was seriously injured but did not assist her, and carried the murder weapon with **him** and disposed of it by throwing it in a dumpster. **Porch** also admitted he got the victim's blood on his clothing, washed his clothes, and cleaned out his car with Clorox a few days later to remove blood stains.[7] After hearing all of the evidence, including **Porch's** confessions [the final 1 on video], the jury found **Porch** guilty of the victim's murder. (R. 841-93, 907-64, 975-1067, 1199-1202, 1240, State's Ex. 50; App. 849-901, 915-72, 983-1079, 1211-14, 1252).

ARGUMENT I.

The Court of Appeals correctly affirmed on the Franks issue.

Pre-trial, Porch moved to suppress all evidence flowing from his arrest. Porch alleged the arrest warrant contained false information and omitted exculpatory material; therefore, his confessions should be suppressed pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Judge Lee conducted a Franks hearing, out of an abundance of caution, regarding the circumstances of the issuance of the arrest warrant and whether the warrant was supported by probable cause. (R. 19-114, 1243; App. 23-118, 1255). At its conclusion, 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 under the totality of the circumstances; therefore, Porch's motion to suppress was denied. (R. 103-08, 116-28; App. 107-112, 120-32).

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7 In a strange but appropriate twist of fate, the victim's husband also testified at **Porch's trial** helping establish it was in fact **Porch** who murdered the victim. Justin accounted for his whereabouts up until just moments before he discovered the body, began banging on neighbors doors, and called 911. This included phone records and cell tower information showing Justin coming from dropping off his paramour and headed toward the home where he and his wife lived while talking to friends on his cell phone. (R. 155-96, 759-73, 799; App. 159-200, 767-81, 807).

Porch conceded on appeal to the Court of Appeals that the affidavit for the arrest warrant contained no false information and argued instead only that it improperly excluded exculpatory material. **(FBOA, pp. 5-13)**. Porch alleged Judge Lee erred in upholding the arrest warrant when including his alleged exculpatory material. **(FBOA).**

The Court of Appeals unanimously affirmed. State v. Porch, 417 S.C. 619, 622-30, 790 S.E.2d 440, 441-46 (2016). It found Porch had failed to meet his burden to show Chief Wilson intentionally omitted potential exculpatory material from his warrant affidavit with the intent to mislead the magistrate or did so with reckless disregard of whether it made the affidavit misleading to the issuing judge. Id. at 626-30, 790 S.E.2d at 443-46. The Court of Appeals also found even including the potentially exculpatory information Porch contended should have been in the affidavit presented to the magistrate, the affidavit still contained probable cause to issue the arrest warrant for Porch so there was no Franks violation. Id. at 630, 790 S.E.2d at 445-46.

Porch now alleges the Court of Appeals erred. Porch is wrong, and this Court should affirm the Court of Appeals.

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

The 4th 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 4th Amendment. United States v. Mendenhall, 446 U.S. 544 (1980). The standard of review of 4th 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).

(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, this 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). When determining the propriety of the issuance of a warrant, the duty of this Court is simply to determine whether the magistrate had a substantial basis for concluding probable cause existed. *See* State v. Kinloch, 410 S.C. 612, 767 S.E.2d 253 (2014). In making such a decision, this Court considers the totality of the circumstances. Jones, (under the totality of the circumstances test, this Court considers all circumstances, including the status, basis of knowledge, and veracity of the informant, when determining whether or not probable cause existed).

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). 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).

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).[8]

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). 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.[9] South Carolina has adopted the Gates "totality of the circumstances" test in determining whether sufficient probable cause exists to issue a warrant. State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999).

As the Court recognized in Gates, 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, and should therefore be viewed in a common sense and realistic fashion. United States v. Ventresca, 380 U.S. 102 (1965); Bowie, *citing* Sullivan. 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).

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8 Stated another 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). Or, 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).

9 Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). It is a fluid concept-turning on the assessment of probabilities in a particular factual context–not readily, or even usefully, reduced to a neat set of legal rules. Pringle; 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. Id.; Gates. 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 (1949); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995).

The Franks hearing

Judge Lee, out of an abundance of caution, conducted a Franks hearing regarding the circumstances surrounding the issuance of the arrest warrant for Porch. In fact, Judge Lee stated several times that this was a "close case" whether a Franks hearing should be granted, but she would "rather err on the side of caution" and have the hearing than mistakenly not have a Franks hearing. (R. 42, 43, 122; App. 46, 47, 126).

At the hearing, Porch called 2 witnesses [Chief Deputy Wilson and the Magistrate] and introduced documentary exhibits including the arrest warrant, investigative reports, a witness statement, and a Proposed Affidavit Excluding Misrepresentations and Including Exculpatory Evidence in an attempt to meet his burden. (R. 43-93, 1247-55; App. 47-97, 1259-67).

Chief Deputy Wilson (hereinafter "Wilson") testified regarding his re-investigation of the murder of Nakia Mallory and how he ultimately came to seek a warrant for Porch's arrest. (R. 43-87; App. 47-91). Wilson was asked to re-open the previous investigation by Sheriff Lott after Justin Mallory was acquitted. Wilson discovered there were several inconsistencies in Porch's statements to police. Obviously, Porch had given at least 3 inconsistent versions claiming; (1) he was not at the scene on the night of the crime, (2) he was there earlier with his child and cut his hand cutting an apple, and (3) he was present at the scene but alleging he was stabbed by Justin during a domestic altercation. Importantly, to Wilson, Porch admitted in this final statement he attempted to clean up blood he had dripped on the kitchen floor before the leaving the scene. Wilson noted it made no sense to him Porch would intervene in a domestic altercation between Justin and victim and suffer a stab wound, and then clean up the kitchen while Justin was still attacking the wife in the den of the apartment. It also seemed strange that Porch did not call police or EMS after leaving the kitchen and discovering victim's body near the couch. Wilson

was also aware of the husband's [Justin'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. And, Wilson was aware a neighbor had informed police that when Justin came to his apartment asking for assistance, there was no blood on Justin. (R. 43-87; App. 47-91).

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 crime scene, where someone had attempted to wipe up the blood, and DNA consistent with Porch's DNA and inconsistent with the husband's DNA was found under the victim's fingernails. The subsequent testing requested by Wilson revealed a drop of Porch's blood at the bottom right of the victim's blouse. This was significant to Wilson. Porch had also told police on 1 occasion it was his left hand that was cut and testified at Justin's trials his left hand was cut.[10] In his statement to police placing himself at the scene at the time Justin supposedly attacked the wife, Porch claimed he was facing Justin when he [Porch] was stabbed or cut, and victim was standing behind Porch. Wilson believed it was highly unlikely if Porch's left hand had been cut, he would have dripped or gotten blood on the bottom right of victim's shirt when she was standing behind him. Wilson also noted in reviewing the file the victim was stabbed in what would be her right neck area. Porch was left-handed. The husband was right handed. It was more consistent with the assault on the victim that she was stabbed by a left handed perpetrator. This would also be consistent with the drop of Porch's blood found on the bottom right of victim's blouse. As a result of all of the evidence in the case, Wilson believed there was probable cause to arrest Porch for the murder; he believed Porch actually committed

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

the murder; and, he sought and obtained an arrest warrant from Magistrate Phil Newsome charging Porch with Nakia Mallory's murder (R. 43-87, 87-93; App. 47-91, 91-97).

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

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

(R. 1243; App. 1255, Def.'s Ex. 6).

Both Wilson and Magistrate Newsome testified at the Franks hearing that 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 Wilson nor the Magistrate could remember what they discussed. (R. 43-93; App. 47-97).

At the Franks hearing before Judge Lee, Porch submitted the following affidavit arguing the following exculpatory information is what should have been submitted to the magistrate when the arrest warrant was requested (R. 40, ll. 14-22; App. 44, ll. 14-22):

> On 5/14/2006 at 1103 Pineland Rd Apt 331C in the Dentsville Magisterial District of Richland County one Nekia Mallory died as a result of a stab wound to her neck. Her husband, Justin Mallory, was originally arrested and charged with the crime of murder. This arrest was based on an eye witness and neighbor placing Mallory on the scene at the exact time she heard a domestic fight occurring in the victim's apartment. She was awakened to the argument hearing a woman's voice scream, "how could you" and later observed a black male running out to a white van, later identified as Mallory's, saying "look what you made me do." This witness observed this male at his van with another individual and speed off. Later this van was witnessed arriving at a local hospital with Mallory bringing in the body of Nekia Mallory. Hospital security guard witness observed the demeanor and behavior of Mallory as being inconsistent with genuine grief over the death of his wife, saying things like "bitch bled all over my walls, couch, and PlayStation!" The

same witness also observed him enlisting the aid of another man in removing what looked to be a gun from the van. Mallory was arrested and provided a statement placing himself at the crime scene, although denying the murder. Mallory failed a polygraph test regarding killing his wife. Further investigation using Mallory's statement and cell phone records showed that Mallory had ample time to commit the crime after coming home from a date he was on that night. The Defendant, Joshua Porch, was interviewed and ultimately ended up testifying twice as an eye [witness] during prosecutions of Mallory. His testimony was that he was a friend of the Mallory's and came over late the night of the incident to visit. Mallory was not home and he and Nekia began kissing and fondling. At some point they stop, and shortly thereafter Mallory arrives home and he and Nekia began a violent confrontation regarding cheating. Porch observes Mallory striking at Nekia with an object in his hand. Porch attempts to intervene and while standing between the two gets cut on his hand. He testified that he went to the kitchen to find a paper towel for his wound, and in the process bled in the kitchen and attempted to wipe up blood as he bled. When Porch came back out of the kitchen the fight was over, Nekia was sitting against the couch and Mallory was on the phone somewhere in the back of the apartment. Porch left, not notifying law enforcement of what he witnessed and denied being at the scene when questioned the following day. Over a year later when law enforcement finalized preparations for trial Porch was re-interviewed about his DNA possibly being at the crime scene. He gave several inconsistent statements to law enforcement in the weeks before trial before finally admitting to being injured while witnessing the stabbing of the victim by Mallory. He was polygraphed twice regarding whether he stabbed the victim, denying involvement, but failing both polygraphs. Per Major Smith's report he was advised by the polygraph examiner that Porch may not be a good candidate for polygraphs. Lead investigators and the Deputy Solicitor were satisfied with the veracity of his account and called him as a witness during both trials. He explained at trial that fear of being implicated in the crime and also his wife discovering his infidelity was why he did not come forward and was not initially truthful about the event. After the acquittal of Mallory following the second bench trial, this affiant was asked by the Sheriff to investigate this case further. Upon reviewing the written statement given by Porch on 6/27/07 stating he cut his right index finger, and then reviewing his statement on 7/2/07 stating he cut his left hand, this affiant decided testing of the victim's shirt was necessary, as it was not deemed relevant for testing by the initial investigators. This showed that a small amount of Porch's blood was located on the bottom right part of the victim's shirt. Although Porch has provided different accounts regarding whether his right or left had [sic] was cut, his trial testimony was that his left hand was cut while intervening in the fight between Mallory and the victim. In this affiant's opinion the left hand being cut is inconsistent with his blood being on the right bottom portion of the victim's shirt. Further, Porch is noted to be left handed by the polygraph examiner, while Mallory is right handed. Although Porch denies the killing, it is the affiant's opinion that the right sided wound to the victim's neck is more consistent with a left handed assailant; however, a right handed assailant cannot be ruled out as well.

(R. 1249-50; App. 1261-62). In fact, Judge Lee specifically asked Porch if this is what he contended should have been submitted to the magistrate for the probable cause determination:

> THE COURT: As well as a proposed affidavit, excluding misrepresentations and including exculpatory evidence. [Court listing documents submitted at Franks hearing].
>
> MR. L. SHEALEY: Yes, ma'am.
>
> THE COURT: Okay. And I assume it is - - it is this last document which the defense proposes should be the information that should have been contained within the warrant for consideration by the magistrate in determining whether or not probable cause existed.
>
> MR. L. SHEALEY: Yes, ma'am.
>
> (R. 40, ll. 14-22; App. 44, ll. 14-22).

The Lack of Merit of Porch's Argument

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:

> 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 admitted under oath at 2 different trials and in a prior statement to police he was present at the crime scene 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: (1) Porch's blood on the kitchen floor and someone had attempted to wipe up that blood before leaving the crime scene; (2) DNA consistent with Porch's DNA and inconsistent with the husband's DNA was found under the victim's fingernails; and (3) Porch's blood [DNA] was found on the bottom right 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. (R. 123, ll. 1-9; App. 127, ll. 6-9). Porch conceded this issue in the Court of Appeals; there was nothing false in the affidavit; and, argued instead *the omission of exculpatory material.* **(FBOA, 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, 771 S.E.2d 346 (Ct. App. 2015), *cert. denied.* 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). "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); Tate, 524 F.3d at 454.

Merely identifying factual omissions is insufficient. United States v. Tate, 524 F.3d 449, 454-55 (4th Cir. 2008). "The mere fact that the affiant did not list every conceivable conclusion

does not taint the validity of the affidavit." United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990)(*quoting* United States v. Barnes, 8816 F.2d 1354, 1358 (9th Cir. 1987)). "'[M]ere negligen[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. State v. Gore, 408 S.C. 237, 245, 758 S.E.2d 717 (Ct. App. 2014).

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 has the burden of proving the officer acted with the requisite intent. Gore, 408 S.C. at 244, 758 S.E.2d 721. The defendant must also show the omissions were material, meaning their "inclusion in the affidavit would defeat probable cause." Clenney, 631 F.3d at 664; Colkley, 899 F.2d at 301. Entitlement to a Franks hearing is a matter of law subject to *de novo* review. Tate, 524 F.3d at 455.

To prevail at the Franks 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.

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.'" Ventresca, 380 U.S. at 108. As the 4th Circuit stated in Clenny:

> If we 'desire to encourage use of the warrant process by police officers,' Illinois v. Gates, 462 U.S. 213, 237, n. 10, 103 S.Ct. 2317 (1983), the worst course of action would be to pick apart warrant affidavits from the pristine perch of hindsight or to penalize officers for securing what the law requires. Obtaining a warrant is a

> process overseen by a neutral magistrate. Magistrates make an independent judgment about the sufficiency of the warrant affidavit. They are free to reject warrant applications that provide scant or insufficient evidence. Indeed, an important rationale for the Franks ruling was respect for the warrant process and the capabilities of magistrates. Franks, 438 U.S. at 166-67.

Clenny, 631 F.3d at 665.

The protections of Brady v. Maryland, 373 U.S. 83 (1963) do not apply to warrant application proceedings. Clenny, 631 F.3d at 665; Colkley, 899 F.2d at 302-03. "The Supreme Court has shown no inclination to impart the panoply of trial protections into the warrant application process with all the attendant burdens and delays such a step would entail." Id. at 665; *See* Franks, 438 U.S. at 166-72. The process of preparing a warrant affidavit requires affiants to exercise discretion by selecting certain facts for inclusion and others for omission. Tate, 524 F.2d at 454-55. "An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation." Colkley, 899 F.2d at 300.

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

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

> 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.

Colkley, 899 F.2d at 301; Lynch, (*quoting* Colkley). As this Court stated in Missouri:

> We begin with the presumption that the Fourth Amendment does not require an affiant to include all potentially exculpatory evidence in the affidavit. *See* Colkley, *supra*. A presumption to the contrary "would perforce result in perniciously prolix affidavits that would distract police officers from more important duties and render the magistrate's determination of probable cause unnecessarily burdensome." Colkley 899 F.2d at 303.

Missouri, 337 S.C. at 555-56, 524 S.E.2d at 397-98. "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." Colkley.

"[T]he omission must be 'designed to mislead' or must be made 'in reckless disregard of whether [it] would mislead.'" Tate, 524 F.3d at 455. "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).

In this case, Porch offered no evidence Wilson omitted information with the intent to make, or in reckless disregard of whether it made, the affidavit misleading. Judge Lee found everthing in the affidavit was true. (R. 123, ll. 6-9; App. 127, 6-9). And, Porch conceded this issue on appeal. (BOA). Judge Lee did not find Wilson omitted exculpatory information with the intent to deceive the magistrate intentionally or did so recklessly. In fact, she found Wilson had omitted both **inculpatory** and exculpatory information from the affidavit. (R. 123-26; App. 127-30). And, **even including the exculpatory material Porch alleged was omitted**, there is still sufficient probable cause to support the issuance of the arrest warrant. (R. 103-08; 116-28).

The facts elicited during the Franks hearing show Wilson did not intend to mislead the magistrate. The victim's husband had been acquitted and cleared by Wilson's re-investigation.

Colkley makes clear the 4th 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. As the Court of Appeals correctly found, Porch was not entitled to a Franks hearing, and has not made a sufficient showing to include his alleged exculpatory evidence. Shorter, 328 F.2d at 170 (defendant must show intentionality and 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. She stated several times this was a "close case" on whether a hearing should be granted, but granted the hearing out of "an abundance of caution." She pointed out the affidavit omitted **both** inculpatory and exculpatory information. As a result, she did not find Wilson omitted information with the intent to deceive the magistrate whether intentionally or recklessly. As the Court of Appeals correctly found, Porch failed meet his burden to show Wilson intentionally omitted potentially exculpatory material with the intent to deceive or mislead the magistrate or did so with reckless disregard of whether it made the affidavit misleading.

Further, the affidavit supplied ample probable cause for the issuance of the warrant. Porch has never claimed the affidavit "on its face" did not contain probable cause. "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." Wortman, 310 S.C. at 4, 425 S.E.2d at 20. 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, *supra*.[11] 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." Baccus, 367 S.C. at 49, 625 S.E.2d at 220.

As Gates recognized, and as here, affidavits are normally drafted by an officer 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. Ventresca; Bowie. Affidavits must be judged on the facts presented not the precise wording used. Viard. The Affidavit here supplies sufficient probable cause to issue the arrest warrant charging Porch with murder. Lynch, 412 S.C. at 179-84, 771 S.E.2d 346.

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 defendant despite his claim a search warrant affidavit omitted facts suggesting another suspect in the crime. In that case, a judge and lawyer were assassinated by mail bombs. The investigation first focused on 1 person, but a search of his property proved fruitless. The investigation then shifted to the defendant for whom police obtained search warrants. The defendant moved to suppress evidence seized pursuant to those warrants and contended the affidavits failed to disclose evidence implicating the 1st suspect. The Court, however, found the defendant failed to demonstrate the omitted information concerning the investigation of the other suspect, if included in the affidavit, would have defeated probable cause. In addition, the Court emphasized to satisfy the 4th Amendment's probable-cause requirement, the government need not demonstrate a person is the

11 Probable cause does not mean absolute certainty. Dean; Peters; Williams. Probable cause is a flexible, common-sense standard. Brown. Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Bowie, *quoting* Brown, 460 U.S. at 742.

chief suspect in a criminal investigation. Rather, implicit within the concept of probable cause is the notion police may pursue multiple, perhaps even divergent, lines of investigation so long as police establish probable cause as to each prior to the issuance of any warrant. In Moody, the evidence marshaled by police against the 1st suspect did not exonerate the defendant. At most, the evidence indicated the defendant and the 1st suspect may have conspired to commit the crimes charged. Accordingly, the Court found the defendant's allegations were insufficient to raise issues worthy of a Franks hearing. Moody, *supra.*

Similarly, in State v. St. Louis, 18 A.3d 648 (Conn. App. 2011), *certification denied*, 302 Conn. 945 (2011), the Court held the warrant to search the defendant's property for the victim's body was supported by probable cause notwithstanding the supporting *affidavit's allegedly improper omission of the defendant's statements inculpating another person* as the statements suggested 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 the defendant admitted murdering and burying the victim. Id.

Here, Porch had testified at 2 different trials of the husband and given a written statement that he was present at the scene of the crime when the victim was stabbed. Although, he attempted to place the blame for the murder on Justin, neither a jury or circuit judge accepted his testimony. The husband had been acquitted and the re-investigation determined the husband did not commit the crime. 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 crime scene, 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 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 the arrest warrant.

Further, and more importantly, 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. Missouri, 337 S.C. at 554, 524 S.E.2d at 397; Lynch, 412 S.C. 156, 771 S.E.2d 346. Porch submitted the following affidavit to Judge Lee arguing this is the exculpatory material that should have been submitted to the magistrate. (R. 40, ll. 14-22; App. 44, ll. 14-22):

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

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

(R. 1249-50; App. 1261-62). In fact, Judge Lee specifically asked Porch if this is what he contended should have been submitted to the magistrate for the probable cause determination and Porch said: "Yes, Ma'am." (R. 40, ll. 14-22; App. 44, ll. 14-22). Porch failed to mention this fact to the Court of Appeals and to this Court. (BOA; Petitioner's Brief). However, Respondent informed the Court of Appeals of this fact and informs this Court. (FBOR).

Porch now argues and argued to the Court of Appeals that Judge Lee improperly considered information not presented to the Magistrate at the time the arrest warrant was sought.

However, that is exactly what Porch asked Judge Lee to consider at the Franks hearing. (R. 40, ll. 14-22, 1249-50; App. 44, ll. 14-22, 1261-62).[12] And, that is exactly what Judge Lee is required to do under the case law. Missouri, 337 S.C. at 554, 524 S.E.2d at 397 (if including the allegedly omitted exculpatory material, there is still sufficient probable cause to issue the warrant, there is no Franks violation); Lynch, 412 S.C. 156, 771 S.E.2d 346 (same); Clenney, 631 F.3d at 664. Even including the alleged exculpatory material Porch alleged should have been included, **exactly as submitted by Porch** before Judge Lee at the Franks hearing, there was still probable cause to issue the arrest warrant charging Porch with the victim's murder. (R. 40, App. 44, R. 1249-50, App. 1261-62). Missouri; Lynch; Clenney. Judge Lee's upholding the arrest warrant is supported by the evidence.

Regardless of what Judge Lee considered or found, the Court of Appeals correctly found: "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, 417 S.C. at 630, 790 S.E.2d at 445, 446. (App. at 1376). As a result, the Court of Appeals must be affirmed. Missouri, 337 S.C. at 554, 524 S.E.2d at 397 (if including the allegedly omitted exculpatory material, there is still sufficient probable cause to issue the warrant, there is no Franks violation); Lynch, 412 S.C. 156, 771 S.E.2d 346 (same); Clenney, 631 F.3d at 664.

Further, Porch omits incriminating or inculpatory information against him developed during the investigation that would have come with the exculpatory information had Wilson drafted the affidavit the way Porch argues it should have been drafted.

Justin informed police on the night of his wife's murder that he came home after a date

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12 Any alleged error by Judge Lee in considering any facts or information set forth in Porch's proposed affidavit would be invited error by Porch, and he would not be entitled to any relief. State v. Sawyer, 409 S.C. 475, n. 2, 763 S.E.2d 183 (2014); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004).

with another woman and found his wife collapsed on the apartment floor. Blood was everywhere. No one was in the apartment but his children who were asleep in a bedroom. After checking on his children, he immediately ran next door, began banging on the door, and sought assistance. The neighbor, who answered the cry for help, informed police Justin had no blood on him. The police investigation revealed Justin had been exactly where he claimed to have been on the night of the murder, including corroboration by the girlfriend, her sister, restaurant records, gas station surveillance video, hotel records, and phone records. Phone records and cell tower records showed Justin would have arrived home at approximately 3:30 a.m., leaving little time for the murder to have been committed by him, and Justin called 911 at approximately 3:35 a.m. The eyewitness neighbor ***described in Porch's affidavit above*** testified at Justin'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 was much longer under oath making it impossible for Justin to be the assailant given his location approaching the apartment complex as confirmed by **cell-phone towers** and his phone records. (R. 83-84, 480-528; App. 488-535, 87-88).[13] Justin's phone calls during this time period approaching the apartment were also confirmed by his friends who spoke with him. The husband [Justin] 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 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 1st officer who questioned him that he cut his hand in the

13 This witness' husband, who was also present with this witness at the same time, described what he heard completely differently. He first heard someone banging on apartment doors and yelling for help, and then saw a vehicle drive by their window leaving the apartment complex. (R. 529-44; App. 537-52). Porch fails to mention this in his proposed affidavit.

apartment. Finally, he admitted he was present in victim's home when she 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 Justin, and away from the victim when his left hand was cut. Porch's DNA was found on the kitchen floor of victim's apartment. DNA consistent with Porch's DNA, and inconsistent with the husbands' was found *under the victim's fingernails*. Neither a jury nor a circuit judge believed Porch's final statement or testimony in 2 different trials of Justin. Based on his investigation, Wilson was convinced Porch killed Nakia.

As a result, there is no merit to Porch's argument. Even had Wilson prepared the affidavit differently including all of the details of the investigation, there was probable cause to arrest Porch for the murder of the victim when the affidavit and arrest warrant was presented to the magistrate *in 2009*. As a result, Porch's admissions to police in California that; victim's husband was not present during the murder, he [Porch] lied in the husband's 2 trials, and 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. Morris, *supra*. Furthermore, based on this record, the Court of Appeals correctly affirmed. Id. Therefore, Porch's conviction and sentence must be affirmed.

ARGUMENT II.

The Court of Appeals correctly found the issue raised to it was not preserved for appellate review; and, the new issue now raised to this Court in Appellant's Brief, was not even raised to the Court of Appeals; and, even if the issue raised to the Court of Appeals was preserved, there was no Confrontation Clause violation; and even if there was, the violation was harmless beyond a reasonable doubt.

What Occurred Below

(Background)

Prior to trial, a Jackson v. Denno, 378 U.S. 368 (1964), hearing was held before Judge

Lee in March of 2013. Among other witnesses, the State called the 2 Richland County investigators who questioned Porch in Calfornia [McDaniels and Godfrey] and the Los Angeles County investigator who polygraphed/interviewed Porch [Cohen] prior to Porch's final statement [the 3rd confession in California]. The entire polygraph/interview of Porch by Cohen was video-recorded and also monitored from an adjoining room by McDaniels and Godfrey. The entire 3rd interview, including that porton conducted by McDaniels and Godfrey was video-recorded as well. At the Denno hearing, Porch had the opportunity to and did cross-examine each of the investigators on the voluntariness of Porch's statements, including Cohen. Cohen testified to the circumstances surrounding her interview of Porch; the making of the video of the entire 3rd interview; and how it was copied on CD/DVD by her and provided to McDaniels and Godfrey. At the hearing's conclusion, Porch moved to exclude all of the statements Porch made including those in California. Judge Lee found the statements were knowingly, voluntarily, and intelligently made by a preponderance of the evidence and would be admissible at trial. (R. 143-54; 92-93, 130-32, 138-39, 201-30, 254-59, 664-65, 889-93, 896-905, 911-12, 965-74; App. 147-58, 114-15, 134-36, 142-43, 205-34, 258-63, 672-73, 897-901, 904-13, 919-200, 974-82).

Subsequent to the Denno hearing, the case was scheduled for trial in July of 2013; however, the State had to move for a continuance due to Cohen's unwillingness to appear for the trial due to a previously scheduled vacation. Judge Lee granted the continuance and the case was scheduled for trial in November of 2013. (R. 7, 14, 116; App. 11, 18, 121).

Prior to trial, the State timely sought the issuance of an out-of-state witness subpoena from the State of California for Cohen. Cohen refused to voluntarily return to South Carolina for the trial and contested the issuance of the out-of-state subpoena. Through no fault of the State of South Carolina, the California Superior Court refused to require her to return to South Carolina

for Porch's trial and she would not voluntarily return. As a result, she was unavailable at trial. (R. 108, 112-13, 140, 1067; App. 112, 116-17, 144, 1079).

Judge Lee specifically found several times on the record at trial that the State was not at fault in the failure of Cohen to appear. (R. 213-15, 217-18, 969-70, 1067; App. 217-19, 221-22, 1079, 977-78). Judge Lee found the State had done everything it could to assure her appearance; however, the California court refused to require her to come to South Carolina for trial, and she refused to voluntarily appear. (R. 213-15, 217-19; 969-70, 1067; App. 217-19, 221-22, 977-78, 1079). Defense counsel also conceded this issue several times on the record. (R. 217-18, 969-70, 1067, 1068; App. 221-22, 977-78, 1079, 1080).

At trial, the State introduced Porch's statements made to police here in Richland County before Porch was a suspect. Porch again moved suppress or exclude all of his confessions in California. Judge Lee denied that motion. (R. 130-32, 138-39; App. 134-36, 142-43).

Porch also moved to exclude the Advice of Rights Form administered by Cohen on July 10th and the actual video of her questioning Porch on July 10th. (R. 140-41; App. 144-45). Upon inquiry by the Court, because Cohen was unavailable, the State agreed to only introduce testimony from McDaniels and Godfrey that they witnessed Cohen read Porch his Miranda rights[14] and Porch waived those rights and the last portion of the video-recorded statement [the

14 The State informed Judge Lee it could play before the jury only the very first portion of the video, where Cohen read Porch his Miranda rights and Porch waived them, since she was unavailable *or* have Godfrey and McDaniels testify to their witnessing Cohen read Porch his Miranda rights and Porch waiving them to establish the Miranda waiver on the third day of questioning *or* read Cohen's Denno testimony regarding the same. Porch again objected on the grounds of hearsay and the Confrontation Clause. The State provided the court with legal authority that the reading of Miranda rights to a defendant is not hearsay or a violation of the Confrontation Clause because the State was merely showing the jury Porch was advised of his rights before the 3rd interview began. Bracket v. State, 142 Ga. App. 578, 236 S.E.2d 538 (Ga. App. 1977); State v. McClain, 220 Kan. 80, 81-82, 551 P.2d 806, 807-08 (Kan. 1976); State v. Badado, 257 P.3d 1219, 2011 WL 2611297 (Ct. App. Haw. 2011)(*Unpublished*). *See also*

3rd confession], the portion made to McDaniels and Godfrey. The State agreed to redact any references to a polygraph or administration of the polygraph test. (R.141-42; App. 145-46).[15]

Even though the entire 3rd interview was video-recorded on CD/DVD, and it contained **Porch's responses** to *questioning* by Cohen, McDaniels and Godfrey, Porch objected to admission of **any** of the 3rd interview on Confrontation Clause grounds because Cohen was not present for the trial because the California court declined to enforce the out-of-state subpoena. (R. 140-54, 201-30; App. 144-58, 205-34). As discussed, Judge Lee found Cohen was unavailable through no fault of the State. Judge Lee initially found Porch had the opportunity to cross-examine Cohen at the Denno hearing regarding the reading of Miranda rights, Porch's waiver of the same, and the video itself. Judge Lee believed the opportunity to cross-examine was all that is necessary under Crawford v. Washington, 541 U.S. 36 (2004), but took the matter under advisement. (R. 201-31; 254-59; App. 205-35; 258-63). The next morning Judge Lee ruled the portion of the interview conducted by Cohen [Miranda and waiver] was inadmissible but the portion of the interview conducted by McDaniel and Godfrey was admissible. (R. 254-59; App. 258-63). She reiterated this ruling later. (R. 665; App. 673).

In summary, because of Porch's objection, Judge Lee eventually ruled she would not allow admission of the portion of the video where Porch was Mirandized by Cohen and Porch waived of those rights, because Cohen was not present; however she would admit the video portion of the interview where Porch was questioned by McDaniels and Godfrey and they could testify to Porch's admissions in their portion of the 3rd interview. As a result of Judge Lee's

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Washington v. State, 568 P.2d 301, 308-09 (Okla. Crim. App. 1977)(same). Porch continued to object. After much argument and discussion with the Court, Judge Lee ruled the State could introduce only the last portion of the video where Porch was questioned by Godfrey and McDaniels and rely before the jury on 2 previous Miranda warnings given to Porch on July 9th.

15 Porch concedes in his brief the entire interview with Cohen and McDaniels and Godfrey [the 3rd interview in California] was recorded on video. **(Petitioner's Brief, pp. 2, 4-5, 8, 20, 24).**

ruling on Porch's objection, and the State's agreement because of Porch's objection, the State introduced only the last portion of *the video-recorded confession* of Porch [the 3rd confession, State's Ex. 50] taken on July 10th, where Porch is questioned by McDaniels and Godfrey.

What Occurred Below Relevant to the Issue Raised to the Court of Appeals

After the State rested its case, *in camera*, the following took place:

> MR. LUKE SHEALEY [Defense counsel]: Another issue I was hoping to get some clarification on, since Mr. Porch has decided to testify, you know, we've - - in this very unusual situation we have in this case where Investigator Cohen fought her out-of-state subpoena and chose not to come, through no fault of Mr. Goings, through no fault of this court, but also through no fault of Mr. Porch's, you know, we've kind of fashioned the way to go about it I think in Your Honor's opinion is fair to both sides, where we obviously needed to be able to tell that that was the longest interrogation. He was with her for six and a half hours. Some of that was polygraph, which we can't mention in this court before this jury, so what we have been doing is saying well, he - -after - - on that beginning of that day, on the 10th, he was left with a California detective. He was with her six and a half hours. I think they have been able to say including some breaks and things like that, and then turned over to Godfrey and McDaniels. So when Mr. Porch testifies, you know, is he limited strictly to that, or can he say nothing more about the process of that interrogation, what may have been said to him, what threats may have been made, because I think if he's stricklty limited just to that, that his right to testify is diminished greatly.
>
> So it is an unusual situation that we are placed in, but I just wanted to know the parameters from the court before he testifies so I don't want to defy any potential ruling, but I think that, you know, he should be allowed to discuss, if necessary, anything that happened in there, but for the polygraph. But - - so I - - I've never quite been put in this situation, so I think that any limitation on his testimony as to that situation, other than not being allowed infringes on his right to testify. So I don't know how we deal with it, but I'm bringing it up before we get started.
>
> THE COURT: Mr. Goings?
>
> (Off the record)
> (Back on the record)
>
> MR. GOINGS: Your Honor, we had - - we had limited it. I thought that was the understanding of how we were going to proceed.
>
> The only thing I can think of at this point in time is if Mr. Porch testifies

about specific occurences within that six and a half hour interview with Investigator Cohen, that it opens the door for the possibility of us playing portions of that video as well.

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

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

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

THE COURT: Sure, he does.

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

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

THE COURT: You know, he can present it, but just understand that if he presents it, then they have got the opportunity to rebut it through the use of the video.

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

(R. 1068, ln. 3-1071, ln. 8; App. 1080, ln. 3 – 1083, ln. 8).

As just shown, after the State rested, *in camera*, Porch indicated he was going to testify and inquired whether he could testify about what occurred earlier in this same video interview, i.e. whether he could testify to what occurred during the interview with Cohen including whether

he was threatened or promised anything. As previously noted, Porch had successfully kept from the jury this portion of the 3rd interview video by raising a Confrontation Clause challenge because Cohen was not at trial and the State's agreement to not enter the same. Again, in this portion of the video, Porch was being *questioned/polygraphed* by Cohen. In addition to being video-recorded, this interview was monitored by McDaniels and Godfrey from an adjoining room by closed circuit T.V.

The State responded to Porch's inquiry by stating it had limited what it introduced, based on the court's earlier ruling, and thought there was an understanding or agreement how both sides were going to proceed regarding the 3rd interview. However, if Porch testified about specific occurrences within this earlier portion of the video-recorded 3rd statement, i.e. with Cohen, it would open the door for the possibility of the State playing portions of that part of the video in reply or rebuttal to Porch's testimony. The State did not intend to allow any references to the polygraph test to be admitted in reply or rebuttal and would redact those.

Porch argued he had a right to testify; it was not his fault the witness who interrogated him during this portion of the video was not at trial; and he would not be able to present his complete and full story to the jury if he was not allowed to testify about the earlier interview with Cohen.

Judge Lee informed Porch he could testify to what occurred earlier in this questioning session, i.e. with Cohen, if he wished, but if he did and went too far, it would probably open the door to the State being allowed to introduce portions of the video in reply or rebuttal. Porch stated he did not want the State to rebut using the video when Cohen was not there. He asserted he would not go into any more detail about the Cohen interview. (R. 1068-71; App. 1080-83).

After a break, Porch then testified in his own defense. He was not limited in any way in his testimony by the Court or the State, and he testified to threats and promises he *alleged* were made by Godfrey and McDaniels **and** that similar threats or behavior occurred during his interrogation by Cohen. (R. 1102-16; App. 1114-28, Specifically R. 1113, ll. 14 – 1114, ln. 10 in conjunction with R. 1102-1116). Porch did not seek or ask to play portions of the video of the interview with Cohen to corroborate his claims. Nor did he seek to introduce Cohen's testimony from the Denno hearing to corroborate his claims. After Porch testified, the State **did not play the earlier portion of the video** [that portion with Cohen] in reply or rebuttal. Porch did not proffer any other testimony he would have testified to had Judge Lee not informed him of the possibility of reply or rebuttal with portions of the video. (R. 1068-1198; App. 1080-1210).

Lack of Preservation of the Issue Raised to this Court for the 1st time

Porch now argues for **the first time on appeal** this Court **should reverse because** Judge Lee erred in admitting the last portion of the 3rd interview of Porch in California [with McDaniels and Godfrey] because his Confrontation Clause rights were violated. (Pet.'s Brief, pp. 21-25). This **new issue** is not preserved for appellate review because it was not raised to the Court of Appeals. Rule 226(d)(2), SCACR; Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000). Porch argued **to the Court of Appeals** Judge Lee violated his Confrontation Clause rights by informing him that if he testified about matters occurring in the 1st portion of the video, it may open the door or result in reply from the video itself. (FBOA, p. i & pp. 13-20). Porch did not argue to the Court of Appeals that Judge Lee erred in admitting the last portion of the 3rd interview. This new ground is not preserved for appeal.

Lack of Preservation of the Issue raised on Appeal to the Court of Appeals

Porch argued on appeal to the Court of Appeals that Judge Lee's advising him of the possibility of reply or rebuttal with the video of his interview with Cohen violated his Confrontation Clause rights and as a result limited his testimony. As the Court of Appeals correctly found, this issue was not preserved for appellate review. Porch, *supra*. It was not preserved for appellate review **for several reasons**.

Porch *inquired* of the court whether he could testify about matter which occurred earlier in the 3rd interview video, i.e. with Cohen. He stated if he could not it would infringe on his right to testify. The court informed Porch he could testify to anything he wished including what occurred during the earlier interview with Cohen. However, the court informed him, if he went too far, it would probably open the door to reply or rebuttal evidence from the video itself. Porch argued this impinged on his **right to testify**. He alleged he was not able **to testify fully** and therefore **to present a complete defense**. The court made clear Porch could testify to anything he wanted to, including what occurred in the earlier interview with Cohen, but the State had the opportunity to rebut it through the video. Porch stated he did not want the State to rebut his testimony using the video when Cohen was not there, thus conceding the issue.

Porch actually raised **no objection below to his testimony being limited**. He inquired whether he could go into the earlier interview and *whether* there were specific alleged threats by Cohen and what else was said, and was told that he could. His objection was to Judge Lee's ruling that if Porch went too far into the Cohen interview, it might open the door to the State offering reply evidence from the video itself to rebut his claims. As a result, the issue he raised to the Court of Appeals is not preserved for appellate review.

Further, **Porch did not object at any point under the Confrontation Clause.** He

argued initially if he could not go into the earlier portion of the 3rd interview, his **right to testify** and **present a defense** was being impinged. Again, he was told that he could.

Furthermore, Porch conceded the issue at trial. Once, the Court notified Porch he could testify to what occurred in the interview with Cohen, including whether there were any *alleged* threats and what was said, and of the possiblility of reply or rebuttal with the video, Porch stated he did not want the State to impeach with the video conceding the issue. Porch was looking for guidance from Judge Lee, and once he received that guidance, he decided not to go into whether any *alleged* [possible] specific threats were made or what was said during the earlier interview with Cohen because it could open the door to portions of the video itself [which contained the entire interview with Cohen] coming in to disprove his testimony. This issue was conceded at the trial court level.

Finally, 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. Since Porch was not limited in his testimony or in presenting a defense by the Court; it was incumbent on Porch to establish prejudice by a proffer of what he would have testified to.

The Court of Appeals correctly found this issue was not preserved for appeal. It was not preserved for several reasons. *See* State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008)(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 no exception to issue preservation rule); 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 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 one on appeal); State v. Myers, 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). As a result, the Court of Appeals finding this issue was not preserved for appellate review must be affirmed.

The Lack of Merit of this Issue

Regardless of the lack of preservation of this issue, there is no merit to this ground. This appellate ground is disingenuous at best. Porch concedes in his brief, as he must, the entire 3rd interview in California, including the portion with Cohen, was video-recorded. **(Pet.'s Brief, pp. 2, 4-5, 8, 20, 24).** Prior to testifying, Porch inquired of Judge Lee whether he could go into this earlier portion of the video-recorded interview even though it had been excluded. Porch indicated he intended to testify whether Cohen threatened or coerced him during this portion of the video-recorded interview and what was said during the interview. Judge Lee informed Porch he could testify to any part of the video-recorded interview he wished, including with Cohen, including any alleged threats Cohen made, or what was said, but his testimony could open the door to the State offering portions of the video in reply or rebuttal. There is no merit to this ground because if the State had offered the video of this portion of the interview in reply it would not be hearsay because it would not be offered for the truth of the matter asserted **but to show these alleged threats Porch testified to did not occur**, i.e. something was **not said** that Porch claimed was said. As a result, there was no Confrontation Clause violation. Instead, Porch made

an informed decision not to go into whether there were any specific *alleged* threats or what was said to avoid damaging and proper reply which would show this trial testimony of his was false.

Analysis

"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. Marsh, 481 U.S. 200, 206 (1987)(*quoting* U.S. Const. amend. VI.); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015), (*quoting* Richardson). This constitutional right "include[s] the right to cross-examine those witnesses." Pointer v. Texas, 380 U.S. 400, 401 (1965); McDonald, *supra*.

Porch was not prevented or prohibited from cross-examining any witness against him during his trial. Porch was allowed to cross-examine every witness called by the State. **(ROA).**

And, he cross-examined the Los Angeles' detective [Cohen] at the Denno hearing, and **she did not testify against him at trial**. Further, the portion of the video where she was interviewing him **was not played to the jury** by the State in its case in chief *or* on reply.[16]

Porch cited several cases to the Court of Appeals dealing with the admissibility of statements *of witnesses* who are not present to testify at trial. (See BOA). He continues to argue to this Court similarly. Those cases simply have **no application here**.

In the context raised here, the video was not the statement of *a witness,* **it was the entire interview of Porch with Cohen captured in real time.** It was Porch's statements [a party opponent] made in response to *questioning* or interrogation by Cohen and therefore admissible in

16 Porch was simply informed, when **he inquired** whether he could testify about matters that occurred in this earlier portion of the 3rd interview, that he could, but if he went into matters in his direct testimony regarding what occurred earlier on the video, not shown to the jury, and he went too far, the State could be allowed to play the earlier portions of the video 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 evidence. (R. 1068-74; App. 1080-86).

reply or rebuttal as long as any references to the polygraph test were redacted, which the State agreed to do. 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).[17] Normally, *a question* is not hearsay because it is not assertive. State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996); *Collins, Danny R.*, South Carolina Evidence, 2nd Ed., p. 487 (2000).

Respondent recognizes, in State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) this Court held that in some instances, questions or statements of a police officer in an interrogation setting may be impermissible hearsay when they can have no other purpose but to be offered for the truth of the matter asserted. This case is not Brewer for several reasons. There is no contention Porch invoked his right to remain silent. There is no contention Porch did not answer the questions. Finally, and most importantly, the video was not going to be offered for a hearsay purpose.

In the context raised here, reply or rebuttal of Porch's claims on the stand, the questions asked by Cohen or even her statements are not hearsay and would not violate the Confrontation Clause and were admissible because they would not have been offered to prove the truth of the matter asserted, but to show what actually prompted the party opponent/criminal defendant's [**Porch's**] verbal responses and his eventual 3rd statement, i.e. his answers to Cohen and 3rd confession to McDaniels and Godfrey **were not the result of any threat or coercion**.[18] Porch

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17 *See also* State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980); 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).

18 In Brewer, this Court made clear: "We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial. As recognized by the North Carolina Court of Appeals, however, caution must be exercised in the admission of such evidence to ensure that all out-of-court statements are either 'admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end run around the evidentiary and constitutional proscriptions against the admission of hearsay.'

concedes in his brief the entirety of the interview with Cohen was video-recorded. **(Pet.'s Brief, pp. 2, 4-5, 8, 20, 24).** The video would have been admissible in reply because it would have shown what was **not said by Cohen**, i.e. no threats or coercion. Rule 801(c), SCRE (hearsay is an out of court statement which is offered to prove the truth of the matter asserted); State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). A statement introduced for any purpose other than to prove the truth of the matter asserted is not hearsay and does not violate the Confrontation Clause. United States v. Diaz, 670 F.3d 332, 346 (1st Cir. 2012)(Confrontation Clause not violated by admission of police officer's testimony because admitted for non-hearsay purpose); United States v. Cain, 671 F.3d 271, 300 (2nd Cir. 2012)(same); United States v. Jimenez, 513 F.3d 62, 80-81 (3d Cir. 2008); United States v. Williams, 445 F.3d 724, 736 (4th Cir. 2006).[19]

Further, the earlier portions of the video were never introduced in evidence; there was only the potential those portions would be introduced in reply or rebuttal, depending on what Porch testified to on direct or cross-examination. Additionally, Judge Lee 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.[20] Porch was not prohibited by the Court from testifying or prohibited from testifying about any matter he wished to testify about.

State v. Miller, 197 N.C.App. 78, 676 S.E.2d 546, 556 (2009)." Id. at 407-08, 768 S.E.2d at 659. Here, if Porch testified he was threatened or coerced by Cohen, the entire interview with Cohen [redacting any polygraph references] would be admissible to show *the threats or coercion* **did not actually occur.**

19 *See also* United States v. Armstrong, 619 F.3d 380, 385 (5th Cir. 2010); United States v. Boyd, 640 F.3d 657, 664-65 (6th Cir. 2011); United States v. Gaytan, 649 F.3d 573, 579-80 (7th Cir. 2011); United States v. Cook, 675 F.3d 1153, 1156-57 (8th Cir. 2012); United States v. Mitchell, 502 F.3d 931, 966 (9th Cir. 2007); United States v. Mendez, 514 F.3d 1035, 1045-46 (10th Cir. 2008); United States v. Woods, 684 F.3d 1045, 1061-63 (11th Cir. 2012); United States v. Coumaris, 399 F.3d 349 (D.C. Cir. 2005).

20 Porch had access to the CD/DVD and knew exactly what was on the video-recorded interview with Cohen. (R. 201-02, 1071; App. 205-06, 1083). If Cohen had threatened or coerced Porch during the interview, Porch could have introduced the video to corroborate his

However, if he did testify, Porch could not be allowed to testify falsely about what occurred earlier in the interview, when the video would show the jury exactly what had occurred, i.e. no threats or coercion. *See* Harris v. New York, 401 U.S. 222, 225 (1971)(prosecution is entitled to rebut false impression defendant created by his own testimony including using in reply defendant's statements taken in violation of Miranda as long as the statements were reliable and trustworthy, i.e. voluntary);[21] Walder v. United States, 347 U.S. 62, 65 (1954)(prosecution may use evidence inadmissible in its case in chief to impeach a defendant because the defendant will not be allowed to insulate his perjurous testimony by use of the exclusionary rule); United States v. Havens, 446 U.S. 620 (1980)(similar); Oregon v. Haas, 420 U.S. 714 (1975)(similar); United States v. Leavis, 853 F.2d 215 (4th Cir. 1988)(same).

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." Harris, 401 U.S. at 225, *referencing* United States v. Knox, 396 U.S. 77 (1969); *cf.* Dennis v. United States, 384 U.S. 855 (1966). *See also* State v. Brown, 296 S.C. 191, 371 S.E.2d 523 (1988)(recognizing holding in Harris v. New York and following the same).

The admission of reply testimony is within the sound discretion of the trial judge; and, any evidence which is presented to rebut, contradict, or impeach the case presented by the defense is proper on reply State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999).[22] It cannot seriously be argued that if Porch had

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claims. He did not.

21 Prior to trial, Judge Lee had already conducted a Denno hearing, in which Cohen testified, and Judge Lee had determined Porch's statements, including those to Cohen were voluntarily, knowingly, and intelligently made. Therefore, the video of that interview with Cohen was admissible in reply if Porch testified regarding what he alleged occurred during that interview.

22 *See also* State v. South, 285 S.C. 529, 311 S.E.2d 775 (1985); State v. Williams, 409 S.C. 455, 761 S.E.2d 770 (Ct. App. 2014); State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904).

gone into detail about the interview with Cohen claiming threats or coercion that the State could not impeach or rebut his testimony with the video which contained the entirety of the interview between Cohen and Porch. The video is **the best evidence** of what occurred during Cohen's interview with Porch.

And, such testimony by Porch would have certainly "opened the door" to admission of the video of the interview with Cohen. 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. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008). Whether a person "opens the door" to the admission of evidence is addressed to the sound discretion of the trial court. State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). Cohen had already testified at the Denno hearing to the making of the video-recording of the 3rd interview and providing it to McDaniels and Godfrey and was subject to cross-examination by Porch. (R. 210-20; App. 214-24). The 2 Richland County detectives observed this earlier portion of the 3rd interview from an adjoining room and could also authenticate the authenticity of the video. Rule 1001(1) & (2), SCRE (photos include videos); State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972)(it is sufficient to justify admission of a photo if a person familiar with the scene can say the photo accurately represents the scene). Further, as previously discussed, Porch concedes in his brief the entirety of the interview with Cohen was video-recorded. **(Pet.'s Brief, pp. 2, 4-5, 8, 20, 24)**. Again, the video

was **the best evidence** of what occurred during Cohen's interview with Porch and whether there were any threats or coercion.

Judge Lee was merely truthfully 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, the video could become admissible as reply, rebuttal, or because Porch "opened the door" to its admission. To the extent *he* [Porch] limited his testimony, it was to prevent proper reply or rebuttal evidence.

Additionally, Porch testified about what occurred in each interview, including this earlier interview on the video. During his trial, for several pages of the transcript, Porch testified to threats he alleged Godfrey and McDaniels made against his wife and his brother-in-law. He then stated that what occurred in the interview with Cohen prior to his final interview with Godfrey and McDaniels was: "more of the same." The State did not play the video in reply or rebuttal. This portion of the video was never introduced. **(R. 1074-1198; App. 1086-1198).**

Further, the witness [Cohen] was unavailable and Porch had the opportunity to cross-examine Cohen and did at the Denno hearing. Crawford v. Washington, 541 U.S. 36, 68 (2004) ("the Sixth Amendment demands what common law required: unavailability and a prior opportunity for cross-examination."). (See R. 215-19; App. 219-23).

There is no question the witness was unavailable at trial. Judge Lee found several times the witness was unavailable and unavailable through no fault of the State. Porch also conceded on several occasions the witness was unavailable and unavailable through no fault of the State. *See* Barber v. Page, 390 U.S. 719, 724-25 (1968)(a witness is considered "unavailable" if the government is unable, despite good-faith efforts, to procure witness's attendance at trial); Mancusi v. Stubbs, 408 U.S. 204, 212 (1972)(state must make good-faith effort to compel

presence of witness beyond merely showing witness was outside state); United States v. Johnson, 108 F.3d 919, 922 (8th Cir. 1997)(good-faith effort shown because government moved for continuance to allow time to procure vacationing police officer); Acosta-Huerta v. Estelle, 7 F.3d 139, 143 (9th Cir. 1993)(good-faith effort proven because prosecutor tracked witness to different state, attempted to convince witness to return, and initiated state law procurement proceedings); United States v. Eufracio-Torres, 890 F.2d 266, 270 (10th Cir. 1989)(good-faith effort shown where government served alien witnesses with subpoenas and provided instructions for obtaining travel reimbursement and witness fees, and witnesses stated they would return); United States v. Siddiqui, 235 F.3d 1318, 1324 (11th Cir. 2000)(good-faith effort proven because despite's government's offer to pay witness's expenses of attending trial, witness stated unequivocally he could not travel to U.S.).

And, Porch had the prior **opportunity** to cross-examine the witness and did cross examine her at the Denno hearing. (R. 212-20; App. 216-24). Crawford; State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011)("The Confrontation Clause 'guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.")(emphasis in original); Id. ("Therefore, if a defendant had the opportunity to cross-examine a witness, there is no violation of the Confrontation Clause"); Williams v. Bauman, 759 F.3d 630 (6th Cir. 2014)(defendant had opportunity to cross-examine witness at his own preliminary hearing and prior testimony's admission did not violate confronation clause); Delgadillo v. Woodford, 527 F.3d 919, 926-27 (9th Cir. 2008)(a witness' prior statements, which witness testified to during witness' preliminary examination, did not violate Confrontation Clause where witness was subject to cross-examination regarding the prior statements during the preliminary examination); United States v.

Avants, 367 F.3d 433, 445 (5th Cir. 2004)(Confrontation Clause not violated when deceased codefendant's statements admitted at trial because defendant cross-examined codefendant at preliminary hearing); State v. Crocker, 852 A.2d 762. 784-87 (Conn. App. 2004)(Confrontation Clause not violated by admission of witness' prior testimony at a probable cause hearing because attorney who represented defendant at hearing had opportunity to cross-examine witness under oath and did so); Timimi v. Jackson, 379 Fed. Appx 435 (6th Cir. 2011)(*Unpublished*)(Where petitioner was represented by counsel at preliminary hearing and had opportunity to cross-examine witness, admission of prior testimony from hearing did not violate Confrontation Clause); Strayhorn v. Booker, 718 F.Supp. 2d 846 (E.D. Mich. 2010)(introduction of witness' prior statement did not violate Confrontation Clause because witness was present at preliminary examination where his statement was read into the record, and counsel for petitioner was given opportunity to cross-examine witness at that time). The very purpose of the Denno hearing was to determine the voluntariness of Porch's statements including those to Cohen.[23]

Even if the video had been admitted, Porch had the opportunity to cross-examine the other person in the video beside himself. *If* portions of the tape had been introduced in reply or rebuttal, Porch could have introduced Cohen's Denno testimony in surreply. *See* State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003). And, he could have introduced the entire video, if it contained threats or coercion as he claims, under the rule of completeness. As a result of all of the above, there was no

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23 The appellant has the burden of providing a sufficient record on appeal to support his position. Helms v. Gibson-Wall Company, 363 S.C. 334, 611 S.E.2d 485 (2005); *See* Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983)(the appealing party has the burden of providing a sufficient record to the appellate court). Porch did not request the transcript or designate or include in the Record on Appeal Cohen's Denno hearing testimony or the video of the Cohen/Porch interview (Court's Ex. 7, Denno hearing). However, this Court may pursuant to Rule 212(a), SCACR, call up the Denno hearing testimony or the Cohen/Porch interview (Court's Ex. 7, Denno hearing). Respondent invites this Court to do so.

Confrontation Clause violation. (R. 212-20; App. 216-24)[Specifically R. 218, ln. 6 – 219, ln. 2].

Harmless Error

Even if this somehow constituted a Confrontation Clause violation, it was harmless. Schneble v. Florida, 405 U.S. 427 (1972)(mere finding of Confrontation Clause violation does not automatically require reversal.); State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015). It is subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673 (1986); State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001); State v. Bell, 302 S.C. 18, 393 S.E.2d 362 (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, then admitting he was at the scene during the murder but alleged the husband killed the victim and cut his [Porch's] hand. 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 after being arrested and admitted in his ***multiple statements*** in California the victim's husband was not present when the victim was killed and it was he [Porch] who killed the victim, and **2 of these statements** were before questioning by Cohen. These written statements were admitted in evidence at Porch's trial. Porch signed each as true and correct. Justin testified at Porch's trial that he did not kill his wife and that Porch testified falsely in Justin's trials. Porch eventually admitted in his last statement it was he [Porch] who "came on" to the victim, she resisted, and he eventually killed her. This confession was on video and was admitted in evidence and played for the jury. Porch's blood was found on the right bottom of the victim's shirt. DNA consistent with Porch's DNA, and inconsistent with the husband's, was found under the victim's fingernails. Porch's blood was found in the victim's kitchen and under her sink. Porch admitted he attempted to clean up the blood before leaving the

crime scene and he got rid of the murder weapon. Porch's wife testified Porch was not with her during the time of the victim's murder; Porch lied to her about how he cut his hand; and, Porch then lied again to her and a police officer about how he cut his hand. Porch was not limited in his testimony. To the extent *he* [Porch] limited his testimony, it was to prevent proper reply or rebuttal evidence. And, Porch did not proffer what he would have testified to had the Court not informed him of the possible repercussions of going into earlier portions of the video. Anderson (proffer is to adequately allow the appellate court a chance to determine whether there was prejudice from trial court's ruling); Kelley (similar). Finally, since the entire 3rd interview was video-recorded, including the portion with Cohen, if Porch's claims of threats and coercion were true, Porch could have admitted the video to corroborate his claims; however, he did not. As stated, this claim is disingenuous, at best. Even if there was a Confrontation Clause violation, which there was not, it was harmless beyond any doubt. Van Arsdall; Dinkins; McDonald. Porch's conviction and sentence must be affirmed.

CONCLUSION

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

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November 6, 2017

CERTIFICATE OF SERVICE

I Anthony Mabry, hereby certify that I have served the Return to Petition for Writ of Certiorari in the foregoing action by depositing two copies of same in the United States Mail to:

Michael J. Anzelmo, Esquire
Matthew A. Abee, Esquire
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and by InterAgency Mail to:

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This 6th day of November, 2017.

ANTHONY MABRY
Senior Assistant Attorney General