THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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J.C. NICHOLSON JR., Circuit Court Judge

Case No. 2016-CP-10-03542
Appellate Case No.: 2017-002532

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Bryan Okeith Seabrook, Appellant,

v.

Town of Mount Pleasant and Rae Wooten, in her Official Capacity as Coroner of Charleston County, Defendants,

Of which Town of Mount Pleasant is the Respondent.

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# FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I. Did Appellant show the arrest warrant affidavit was defective under the two prong standard of Franks v. Delaware, 428 U.S. 154 (1978) where the Appellant failed to show material falsity of an alleged omission and failed to show intent or reckless disregard to mislead the court issuing the arrest warrant.

II. Does the South Carolina Tort Claims Act provided immunity to police officers making an arrest pursuant to a valid warrant where a magistrate subsequently found probable cause Seabrook committed Homicide by Child Abuse at a preliminary hearing and a Grand Jury found probable cause Seabrook committed Homicide by Child Abuse.

III. Did Appellant fail to file his complaint within the two year statute of limitations under the South Carolina Tort Claims Act where Seabrook had notice of restraint against his person resulting from the alleged acts or omissions of the police since the date of arrest.

## STATEMENT OF THE CASE

The above captioned matter comes before this Court on appeal from the trial court's order of December 5, 2017 granting summary judgment to Respondent (Town of Mount Pleasant) on Appellant's (Seabrook) causes of action for false arrest, negligence/gross negligence, and malicious prosecution. Town of Mount Pleasant's motion for summary judgment was granted on the following grounds: (1) the two year statute of limitations under the South Carolina Tort Claims Act expired prior to Seabrook's filing of his complaint; (2) Town of Mount Pleasant had probable cause at the time they sought and obtained an arrest warrant for the arrest of Seabrook; and (3) Town of Mount Pleasant is immune from suit under the South Carolina Tort Claims Act because the application for and execution of an arrest warrant is a judicial or quasi-judicial process. Seabrook did not appeal the trial court's order granting summary judgment to Charleston County Coroner Wooten.

On May 9, 2013, Seabrook was arrested and charged with violation of the offense of Homicide by Child Abuse in connection with the death of Elijah Washington (victim), and subsequently indicted by the grand jury for the same on October 8, 2013. (R. pp. 413-14). On September 11, 2015, the Office of the Solicitor for the Ninth Judicial Circuit declined to prosecute Seabrook. On July 12, 2016 through July 13, 2016, Charleston County Coroner Rae H. Wooten conducted a Coroner's Inquest into the cause of death of the victim that resulted in a jury verdict finding the victim's death was due to homicide by the hands of another and that Bryan Seabrook was the principal and Marty Dixon was an accessory. (Case No. 2013M00860). Seabrook filed this civil suit on July 8, 2016, pursuant to the South Carolina Tort Claims Act (SCTCA), asserting the following causes of action against Town of Mount Pleasant: (1) false arrest, (2) negligence/gross negligence, and (3) malicious prosecution. (R. pp. 160-61).[1]

Seabrook's allegations against Town of Mount Pleasant involve an investigation by the Town of Mount Pleasant Police Department (MPPD) into the death of Elijah Washington, a two year-old child. On March 19, 2013, Seabrook arrived at East Cooper Hospital at approximately 6:23 pm with the victim who was not breathing and non-responsive. (R. p. 149, ¶ 3; R. p. 29, lines 1-3). "Hospital employees contacted Consolidated Dispatch and Mount Pleasant Police responded." (R. p. 149, ¶ 3). MPPD Corporal Daniel Eckert (Eckert), off duty at the time, was notified by the MPPD patrol supervisor that a two year old infant was brought into East Cooper Hospital and ultimately died. (R. p. 60, lines 1-8). Eckert notified MPPD Detective Andrew DeCamp

[1] Seabrook filed an amended complaint on September 8, 2016 asserting additional causes of action against defendant Rae Wooten. (R. pp. 163-80).

(DeCamp), and MPPD Sergeant Justin Hembree (Hembree) of the death. (R. p. 60, lines 16-18; R. p. 61, lines 3-6).

Eckert proceeded to East Cooper Hospital where he became aware the victim was brought to the hospital in a private vehicle by Seabrook, not by ambulance. (R. p. 61, lines 8-12; R. p. 60, lines 22-24). While at the hospital, Eckert personally observed the trauma to the deceased victim's body. (R. p. 61, lines 12-17). Eckert also met with Seabrook and Marty Dixon (Dixon), the victim's grandmother, both of whom agreed to go to the Mount Pleasant Police Department to discuss the events surrounding the victim's death. (R. p. 61, line 24-p. 62, line 3; R. p. 63, line 19-p. 64, line 2). Knowing Seabrook, Dixon, and the victim had been involved in a prior investigation by the Department of Social Services (DSS), Eckert notified Detective Adam Willis who had been following on that DSS case. (R. p. 62, lines 12-25).

That same day, Hembree had arrived at the police department at approximately 7:00 pm, and had already been briefed by Eckert regarding the bruising on the victim's body, the suspiciousness of the victim's death, and that Seabrook and Dixon had been transported to the police department. (R. p. 42, lines 5-22). Hembree began his interview with Seabrook by advising Seabrook of his Miranda rights and providing Seabrook with a written Advisement of Rights form. (R. p. 43, line 17-p. 44, line 2). Seabrook initialed the Advisement form acknowledging his understanding, but did not waive his rights, and therefore Hembree ended the interview. (R. p. 44, lines 2-12). Around the same time as the interview, Hembree spoke with Deputy Coroner Scott Ramsey (Ramsey) on the phone. (R. p. 44, lines 13-17). Ramsey informed Hembree there was fresh bruising on the victim. (R. p. 44, lines 16-19). Hembree requested

Dixon's cell phone and Dixon consented. (R. p. 45, lines 16-20). Hembree also ensured that search warrants were being prepared to search Seabrook's vehicle that was used to transport the victim to the hospital and to search the house where the victim had been located immediately prior to being transported to the hospital. (R. p. 46, lines 6-12).

DeCamp was the on-call detective that same day, and upon being notified of the victim's death, DeCamp responded to the police department. (R. p. 19, lines 11-20). DeCamp was briefed and "based upon the victims injuries reported by medical staff and also observed by the coroner's office and Police Department investigators at the hospital, as well as the timeline of events provided by Mr. Bryan Seabrook, Ms. Marty Dixon, and Ms. Brittany Hartwell at the hospital" there were concerns of physical abuse contributing to the victim's death. (R. p. 19, lines 5-13). Additionally, DeCamp was provided with search warrants for Seabrook's vehicle and residence, along with warrants to seize Seabrook's clothing, his cell phone in his possession, and for the completion of a suspect forensic evidence kit on Mr. Seabrook's person." (R. p. 20, lines 3-6).

DeCamp was informed the victim's sisters (N.W. and G.W.), ages three and four, were taken into emergency custody by the Child Protective Services (CPS) emergency on-call case manager who transported the girls from the hospital to a licensed foster home. (R. pp. 150-51, ¶ 13). DeCamp was also informed that during the drive from the hospital, the girls told the CPS employee they had a "secret they were not allowed to talk about" but ultimately revealed that Bryan Seabrook had 'popped' the victim, that the victim went to sleep, and went to heaven." (R. pp. 150-51, ¶ 13). The girls further

stated that Seabrook had said they must keep a secret about the event. G.W. also told the CPS worker multiple times Seabrook popped the victim and the victim hit the wall. (R. pp. 150-51, ¶ 13). Additionally, both girls told the CPS worker their grandmother (Dixon) was working and their mother (Hartwell) was at school when their brother had to be taken to the hospital. (R. p. 150-51, ¶13).

The day after the victim's death, March 20, 2013, DeCamp attended an autopsy of the victim that was performed at MUSC and learned the victim "displayed older injuries indicating previous physical trauma, as well as acute injuries and hemorrhaging." (R. p. 23, lines 7-9). DeCamp was informed Brittany Hartwell (Hartwell), the victim's mother, initially lied about where she was on the date of the incident, however, the time she was last present with the victim was corroborated to be approximately 12:20pm when she left the residence. (R. p. 23, lines 18-25). The timeframe of Hartwell's whereabouts was corroborated through the victim's biological father, security footage from Harris Teeter, and taxi cab records. (R. p. 24, lines 8-16). DeCamp was informed Dixon told hospital staff the victim was acting normal and eating Doritos around 4:00pm in the care of Seabrook and she had returned to work by approximately 4:30pm. (R. 28, lines 8-15). Dixon's whereabouts on the date of the incident were corroborated through customers at Dixon's hair salon who informed police Dixon was present at her hair salon from approximately 4:30pm through 6:30pm. (R. p. 25, lines 9-15).

Investigation of text messages stored on the phones of Seabrook and Dixon additionally corroborated Hartwell's whereabouts during March 19, 2013 and that she was last present with the victim at the victim's residence at approximately 12:20pm that

day. (R. p. 27, line 17-p. 28, line 1). The text messages also indicated that Seabrook sent Dixon a text message at approximately 5:12pm stating "[the victim] just made himself throw up. I'm over this shit." (R. p. 28, lines 16-19). Hospital footage shows Seabrook arriving at the hospital with the victim at approximately 6:23pm. (R. p. 29, lines 1-3).

Dr. Donald Elsey, a child forensic interviewer at Dee Norton Lowcountry Children's Center, interviewed the victim's two minor siblings, N.W. and G.W. on three separate occasions: March 20, 2013; March 25, 2013; and April 3, 2013. (R. p. 98, line 25-p. 100, line 22). N.W. disclosed "Bryan [Seabrook] was in the house with them, and [the victim] had disobeyed and got a pop, to use her word, and then there kind of was -- she was kind of moved away in what was going on, and then she said he was – [the victim] was asleep with Jesus, which she did say that several times." (R. p. 101, line 25-p. 102, line 5). N.W. also demonstrated a "pop" during the interview by "forcefully striking a chair in the interview room with her hand." (R. p. 151, ¶ 14). G.W. disclosed Seabrook was "the one who was there shoveling out the pops." (R. p. 108, lines 4-5). Additionally, both N.W. and G.W. discussed Seabrook hitting the victim, the victim going to sleep and going to heaven. (R. p. 151, ¶ 14). Dr. Elsey testified "a consistent theme, even with [G.W.], who was much younger, was they were told it was a secret, and they were told not to tell. So that came across from both of their -- both of these young ladies on several times." (R. p. 102, lines 12-17). Dr. Elsey further testified that [N.W. and G.W.] said "they would get a pop, too, if they told the secret, so they took it -- it seemed to me they took that secret very seriously." (R. p. 104, line 23-p. 105, line 1).

Dr. Elsey explained that although it is not his job to determine if a child is telling the truth, based in part on what children say and how they say it, it is his opinion that ". . . [N.W. and G.W.] certainly provided information that sounded like something they had experienced." (R. p. 103, line 16-p.104, line 12). Additionally, Dr. Elsey testified that in response to the question of who N.W. lived with, N.W. "went right to this thing that happened, so in my opinion, that kind of time stamped what she was talking about without having to say this was yesterday and X number of -- because children that age normally can't do that type of time frame." (R. p. 106, lines 16-21). DeCamp reviewed the videotape of the first interviews and personally attended the second and third interviews. (R. p. 151, ¶ 14).

On or about May 6, 2013, DeCamp and Hembree met with the medical examiner at MUSC, Dr. Cynthia Schandl, who performed the autopsy of the victim. (R. p. 151, ¶ 15). DeCamp was informed at that meeting the victim had old injuries and new injuries, and "the immediate cause of death was acute blunt force trauma to the torso/abdomen." (R. p. 151, ¶ 15). DeCamp also learned "an acute injury by definition is one in the last 24 hours, but that this was an injury that likely happened in the last four hours in this case." (R. p. 151, ¶ 15). Additionally, DeCamp was informed "the amount of force necessary to create the injury was such that the 3 and 4 year old siblings would not be responsible for inflicting the injury." (R. p. 151, ¶ 15). Finally, DeCamp learned the type of injury sustained by the victim would have been painful, most likely preventing the victim from acting normal, and the child "would be in extreme discomfort, you know, crying, in distress . . . ." (R. p. 151, ¶ 15; R. p. 39, lines 10-18).

Based on the investigation including, but not limited to, the aforementioned facts, on May 9, 2013, DeCamp and other Mount Pleasant Police Department officers met with the Ninth Circuit Solicitor and other assistant solicitors to review the facts of the investigation. (R. pp. 151-52, ¶ 17). During that meeting it was decided based on the investigation, the totality of the circumstances, and recommendation of the Solicitor's Office, an arrest warrant should be drafted for the arrest of Seabrook. (R. p. 151-52, ¶ 17).

DeCamp signed the affidavit to seek the arrest warrant, met and spoke with Mount Pleasant Municipal Judge Larry Duffy. (R. p. 152, ¶¶ 19-20; R. p. 154). DeCamp's practice in applying for arrest warrants is to explain the background of the case to the judge, and in his experience Judge Duffy is not one who just signs a warrant without some discussion. (R. p. 152, ¶ 21). After discussing the case with Judge Duffy and presenting him the warrant, Judge Duffy determined probable cause existed to arrest Seabrook for Homicide by Child Abuse and signed the arrest warrant on May 9, 2013. (R. p. 152, ¶¶ 20-21; R. p. 154). Seabrook was arrested that same day. (R. p. 152, ¶ 22). A preliminary hearing was held on June 5, 2013, and the court determined there was sufficient probable cause for the criminal charge to proceed. (R. p. 152, ¶ 23). A Grand Jury found probable cause that Seabrook committed the offense of Homicide by Child Abuse, and returned a true bill indictment on October 8, 2013. (R. pp. 413-14).

## ARGUMENT

### I. THE ARREST WARRANT WAS VALID WHERE THERE WAS NO FALSITY, NO MATERIAL OMMISSION THAT WOULD NEGATE PROBABLE CAUSE, AND NO SHOWING OF INTENTION OR RECKLESS DISREGARD TO MISLEAD THE MAGISTRATE.

Seabrook contends the arrest warrant submitted by Mount Pleasant Police fails under the standard of Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978), as adopted by South Carolina in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999),[2] and that civil liability should attach to the police for procuring an invalid warrant. (App. Brief at 9). Seabrook concedes if the affidavit does not fail under Franks, "no civil liability lies against the officer." (App. Brief at 9). Seabrook disputes four of seven sentences in the arrest warrant---not on the basis they are actually false, but rather because he contends there are material omissions which would rise to the level of negating probable cause. Mount Pleasant disputes there are any material omissions or false statements and certainly none of which rise to the level of negating probable cause under Franks. Furthermore, Appellant's argument fails to put forth any evidence the alleged omissions from the affidavit were made with the intent to mislead the court issuing the warrant. Therefore, the arrest warrant was valid, was issued on probable cause, and no action exists for false arrest, malicious prosecution, or negligence/gross negligence.

Probable cause exists if "the facts and circumstances within the officer's knowledge [] are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing,

[2] Missouri (1999) was an appeal of a Court of Appeals unpublished opinion in which the Court found "the *Franks* test also applies to acts of omission in which exculpatory material is left out of the affidavit." Id. at 554, 524 S.E.2d at 397 (emphasis added).

or is about to commit an offense." Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 2632 (1979). The Court explained the validity of an arrest is not dependent upon "whether the suspect actually committed a crime[, and] the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." Id. at 36, 99 S. Ct. at 2631. "We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest." Id. The quanta of evidence required to establish probable cause is "less than [the quanta of] evidence which would justify" a conviction and "may rest upon evidence which is not legally competent in a criminal trial." United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 745 (1965).

A court reviewing the existence of probable cause is limited to "only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered." Law v. S.C. Dep't of Corr., 368 S.C. 424, 436, 629 S.E.2d 642, 649 (2006) (quoting Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965)) (quotations omitted). The court must view the facts "from the point of view of the party prosecuting; the question is not what the actual facts were, but what he honestly believed them to be." Id. at 436, 629 S.E.2d at 649 (quoting Eaves v. Broad River Electric Cooperative, Inc., 277 S.C. 475, 478, 289 S.E.2d 414, 415-16 (1982)) (quotations omitted). Probable cause by its very name does not require absolute certainty, it is a "flexible, common-sense standard . . . found somewhere between suspicion and sufficient evidence to convict." Valentine v. State, 377 S.C. 244, 250, 659 S.E.2d 227, 230 (Ct. App. 2008) (citing Brown v. State, 372 S.C. 611, 643 S.E.2d 118 (Ct. App. 2007)). Furthermore, a reasonable officer is not required

to "exhaust every potentially exculpatory lead or resolve every doubt about a suspect's guilt before probable cause is established." Torchinsky v. Siwinski, 942 F.2d 257, 264 (4th Cir. 1991). "An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation." United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990). As the Supreme Court of South Carolina has explained:

> The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence and caution to believe that the offense has been committed.

State v. Bennett, 256 S.C. 234, 240, 182 S.E.2d 291, 294 (1971) (quoting 79 C.J.S. Searches and Seizures § 74 (1952) (emphasis added)). "South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution." Law, 368 S.C. at 436, 629 S.E.2d at 649. To prove the absence of probable cause, the challenging party "must allege a set of facts which made it unjustifiable for a reasonable officer to conclude" the arrestee was involved in the charged offense. Brown v. Gilmore, 278 F.3d 362, 368 (4th Cir. 2002).

Franks outlined a two-part test to challenge the veracity of statements included in a warrant affidavit, but "also applies in an instance in which exculpatory material is left out of the warrant." State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003). In cases of alleged omissions of information from an affidavit, "the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." Id. Under the first prong, the party challenging an arrest warrant affidavit must make a substantial showing of "deliberate falsehood or of reckless

disregard for the truth, and those allegations must be accompanied by an offer of proof." Frank v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, (1978). Mere "[a]llegations of negligence or innocent mistake are insufficient." Id.[3] The Fourth Circuit explained that "every decision not to include certain information in the affidavit is "intentional" insofar as it is made knowingly . . . [but] *Franks* clearly requires defendants to allege more than "intentional" omission in this weak sense." United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990). "The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." Id. (quoting United States v. Burnes, 816 F.2d 1354, 1358 (9th Cir. 1987)) (quotations omitted). "*Franks* protects against omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." Id.

If the first prong is satisfied, a court will consider "if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003). Critical to the two-part analysis are the warnings from the South Carolina Courts and Fourth Circuit that "[i]nferring bad motives from an officer's omission of information collapses into a single inquiry the two elements – "intentionality" and "materiality" – which *Franks* states are independently necessary." Horton v. City of Columbia, 408 S.C. 27, 36, 757 S.E.2d 537, 541 (Ct. App. 2014) (quoting Colkley, 899 F.2d at 301).

[3] Appellant contends under the South Carolina Tort Claims Act, that a gross negligence standards apply. "Appellant asserts gross negligence pursuant to the SCTCA against the respondent . . . for exercising their duty in a grossly negligent manner by omitting relevant material including false and misleading information in the affidavit to the arrest warrant . . ." (Appellant's Brief p. 17-18.) Gross negligence is the failure to exercise even the slightest care. Solanki v. Wal-Mart Store #2806, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014).

South Carolina's Courts and the Fourth Circuit Court of Appeals have also acknowledged the increased difficulty for a party challenging an omission:

> While omissions 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 for endless rounds of *Franks* hearings to contest facially sufficient warrants is readily apparent.

State v. Lynch, 412 S.C. 156, 179, 771 S.E.2d 346, 358 (Ct. App. 2015) (quoting Colkley, 889 F.2d at 301). Importantly, our courts have recognized an affiant's failure to "list every conceivable conclusion does not taint the validity of the affidavit." State v. Porch, 417 S.C. 619, 627, 790 S.E.2d 440, 444 (Ct. App. 2016) (quoting Colkley, 899 F.2d at 297). As the Franks Court explained, truthfulness does not even require every fact be correct, may include hearsay and informant tips, "as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." Franks v. Delaware, 438 U.S. 154, 164, 98 S. Ct. 2674, 2681 (1978). Additionally, "[a]ffidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation[, and] [a]n 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. The essential requirement of an affiant is "that the information put forth is believed or appropriately accepted by the affiant as true." Franks, 438 U.S. at 165, 98 S. Ct. at 2681.

The cases set forth below illustrate the heavy burden a party challenging an omission from a warrant affidavit carries, as our courts have acknowledged, perhaps heavier than a situation in which an included statement is shown to be deliberately false, specifically in presenting proof to satisfy the intentionality prong.

The case of Horton v. City of Columbia, 408 S.C. 27, 30, 757 S.E.2d 537, 538 (Ct. App. 2014) is illustrative of the very high standard that must be met by a challenging party in a false arrest/malicious prosecution case premised on a warrant. In Horton, a police officer had recovered a partial finger print from an attempted break-in, the AFIS report indicated "twenty possible matches, with the fingerprint of Horton identified as the most probable match." Id. at 30, 757 S.E.2d at 538 (Ct. App. 2014). After it was determined Horton's AFIS fingerprint matched the fingerprint recovered at the crime scene, an officer spoke with Horton's probation officer. The probation officer had reservations about Horton's involvement in the break-in because Horton lacked transportation and had recently given birth to her third child. The facts recited by the affiant in seeking an arrest warrant did not include any of the potentially exculpatory information received from the probation officer. Id. at 31, 757 S.E.2d at 538-39.

Horton subsequently filed suit alleging, inter alia, false arrest and malicious prosecution. The trial court granted summary judgment against Horton's false arrest and malicious prosecution causes of action. Id. at 31-32, 757 S.E.2d at 539. The court of appeals affirmed the trial court's grant of summary judgment citing Franks and finding "Horton offered no evidence Officer Tyler omitted [the probation officer's] statements with the intent to mislead the ministerial recorder." Id. at 36-37, 757 S.E.2d at 541-42. Additionally, the court acknowledged the heavy burden of proof required to invalidate a warrant under Franks. Id.

The reasoning of the court in State v. Porch, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016) also makes clear the intent prong must be satisfied in addition to materiality, and similarly important, the apparent materiality of the asserted omissions cannot be

used to infer intent. Porch testified for the State in the trials of Justin Mallory for the murder of his wife, for which he was tried twice. After Mallory's acquittal, the Richland County Sheriff's Department reopened the investigation and subsequently secured an arrest warrant for Porch. "Prior to trial, Porch challenged the sufficiency of the evidence to support probable cause for his arrest warrant [, and] argued Chief Wilson intentionally or recklessly omitted information from his arrest warrant affidavit . . . ." Id. at 625, 790 S.E.2d at 443.

The court found Porch had failed to meet his burden to show the affiant "intentionally or recklessly omitted potentially exculpatory information from his warrant affidavit." Id. at 628, 790 S.E.2d at 445. The affiant stated as follows:

> That on 05/14/2006 while at 1103 Pinelane Rd. Apt. 331C in the Dentsville Magisterial District of Richland County, one Joshua Porch did commit the crime of Murder in that he did with malice and aforethought assault and stab Nakia Mallory in the neck which resulted in the death of Nakia Mallory. The defendant has admitted to being at the scene of the crime during the assault and stabbing and has been further implicated in the crime by DNA testing of blood found at the scene that puts the defendant at the scene and implicates the defendant in the assault at the time of the murder.

Id. The affiant met with the Judge and discussed the case, though neither could remember the details of that discussion. Additionally, the Judge could not remember whether the affiant had told him that Porch admitted being at the crime scene because Porch claimed he witnessed the victim's husband stab her. Id. At the pretrial hearing the affiant testified no information in the affidavit was false and he believed that based on the totality of the circumstances, he had probable cause to arrest Porch for the murder.

The affiant also testified he chose not to omit the following information from the arrest warrant affidavit:

> (1) information from an eye witness from the first two trials who testified she heard a "domestic argument" coming from the apartment and saw a black male running toward a white van; (2) information from a security guard at the hospital Mallory took Victim to who testified he heard Mallory say, "Bitch bled all over my van, my walls, my Playstation" and saw Mallory remove something from his van while it was at the hospital; (3) Mallory had "plenty of time" to commit this murder; (4) Porch's statements regarding how his blood came to be at the scene of the crime; (5) information that Mallory had been tried twice for this crime and Porch testified for the State in both instances; and (6) information that the situation during the argument was "fluid" and the blood could have gotten on Victim's shirt during her fight with Mallory.

Id. at 629, 790 S.E.2d at 445. Importantly, as Franks requires, the court found "the content of the omissions alone is insufficient evidence to demonstrate Chief Wilson acted intentionally or with reckless disregard of whether the omissions would make the affidavit misleading." Id. The court added "[t]here is no evidence Chief Wilson intentionally omitted the statements regarding Mallory's involvement in his wife's death." Id. at 629-30, 790 S.E.2d at 445. As such, the court determined "Porch failed to make a sufficient showing." Id. at 630, 790 S.E.2d at 445.

Seabrook relies upon the Court of Appeals decision in Missouri[4] to support the proposition law enforcement in the case before this Court, "at least acted recklessly in making the false statement and in omitting the exculpatory information." State v. Missouri, 337 S.C. 548, 555, 524 S.E.2d 394, 397 (1999). However, in Missouri the officer "testified unequivocally that the statement was false, and his informant had, in fact, made a statement to the contrary[,]" and based on the same, the Court found the falsity and intentionality prongs were satisfied. Id. Even after acknowledging the

[4] (later reversed without further comment as to the Franks issue in State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004)).

officer's "deliberate falsehood," the Court still found "this case presents a close call on the probable cause determination." Id. at 556, 524 S.E.2d at 398. Missouri is hardly comparable to Seabrook's case where there are no allegations of deliberate falsehood. Seabrook has failed to put forth any showing, much less a "substantial showing" that Officer DeCamp omitted exculpatory evidence from the warrant affidavit with a deliberate falsehood or of reckless disregard for the truth to mislead Judge Duffy who made the determination that probable cause existed for issuance of the arrest warrant.

The case before this Court is analogous to Porch and Horton in that Seabrook too has failed to put forth evidence satisfying the intent prong of Franks. Not being able to include his entire investigative file in the warrant affidavit, Officer DeCamp included information in the arrest warrant affidavit he had reason to believe to be true, that information was supported by corroboration from multiple sources including Seabrook himself, that information was reviewed by the Ninth Circuit Solicitor, and based on his training and experience, and the totality of the circumstances, provided him with probable cause to arrest Seabrook for Homicide by Child Abuse.

It may be helpful to consider the alleged "material omissions" Appellant contends exist.

Sentence Three:

> Through investigation, it was learned that the victim was in the custodial care of the defendant on March 19, 2013, and that the victim was entrusted to the sole custodial care of the defendant on March 19, 2013 from approximately 1600 hours to the time of the victim's hospital admittance.

Seabrook does not contend this sentence is false, except that Seabrook was not technically a defendant until after the warrant was signed and that is certainly not a

basis to invalidate a warrant where it is clear the allegations refer to Mr. Seabrook. Instead, the Appellant claims the material omission "misleads the reader to believe Appellant was the only caregiver for victim the entire day of March 19, 2013, and more specifically for the two and a half hours before decedent became unresponsive." (App. brief at 11). Appellant believes the more accurate statement would be "that the victim was in the custodial care of at least three adult caretakers on March 19, 2013, including the victim's mother, grandmother, and grandmother's boyfriend [Seabrook] and that the victim was entrusted to the sole custodial care of the grandmother's boyfriend [Seabrook] from approximately 1630 hours to the time of the victim's hospital admittance." (App. Brief at 11).

First, it is in no way misleading by way of omission to have not explicitly stated the victim was with other adults earlier in the day. In fact, it is reasonably inferable by reading the affidavit the two year old victim was likely in the presence of one or more other adults prior to 4:00pm. The language of the affidavit clearly indicates it was not until approximately 4:00pm that Seabrook had sole custody. The time of approximately 1600 hours (4:00pm) is fundamentally true and not misleading. The investigation corroborated through multiple sources, Hartwell, the victim's mother, was last present with the victim at approximately 12:20pm when she left the residence. (R. p. 23, lines 18-25). Similarly, police were informed Dixon told hospital staff the victim was acting normal and eating Doritos around 4:00pm in the care of Seabrook and Dixon had returned to work by approximately 4:30pm. (R. p. 28, lines 8-15). Additionally, Mount Pleasant Police corroborated Dixon's whereabouts on the date of the incident through interviews with Dixon's customers at Dixon's hair salon who informed police Dixon was

present at her hair salon from approximately 4:30pm through 6:30pm. (R. p. 25, lines 9-15). Thus the approximately 1600 hours reference was not incorrect at all.

That other persons were with the child earlier in the day is not essential to the police's theory of probable cause. This case is not a case which pins the crime on Seabrook under the theory medical testimony would prove the injury must have happened within those two hours between 4 p.m. and being rushed to the hospital a little after 6 p.m.[5] Indeed, DeCamp admits per the medical examiner, the time frame for injury was acute, meaning during the last 24 hours, with four hours being most likely. (R. p. 151, ¶ 15). DeCamp's understanding was the four hours was more of an investigative tool and not set in stone as the time of the injury causing death. (R. p. 35, line 8-p. 36, line 9). While the timeline cannot prove Seabrook was the exclusive person with Seabrook during the last 24 hours or even four hours of the child's life, the timeline in the affidavit does place Seabrook alone with the victim during a time frame that makes Seabrook a possible suspect/assailant. Even if the timeline were expanded to 48 hours, the important point is that Seabrook was with the child during that window of time. However, there is additional evidence which goes to probable cause against Mr. Seabrook that supports the warrant.

Of critical importance, investigators had evidence the child was not in distress and was eating Doritos normally at 4:00pm. (R. p. 28, lines 8-15). And the type of injury sustained by the victim would have been painful, most likely preventing the victim

[5] Board Certified Pediatric Surgeon, Dr. Robert Cina, testified at the Coroner's Inquest that a substantial trauma akin to a forceful adult punch or throwing of the child against a stationary object was required to cause the tearing of the mesentery. (The mesentery is the network of tissues and blood vessels attaching the abdominal organs to the back wall of the abdomen.) And the resulting substantial blood loss and trauma would have very quickly made the child very uncomfortable such that he could not be eating Doritos and acting normally very quickly after the trauma. (R. pp. 80-97) Thus, if the evidence showed the victim was acting normally around 4 pm., it would be reasonable to infer the fatal trauma had not yet been inflicted at that point.

from acting normal. (R. p. 151, ¶ 15). DeCamp testified an important part of the case was "the behavioral aspects of the child," specifically a child with those injuries would not "be normal in eating chips and everything before that is a very, very big, strong indicator that the trauma had not yet occurred." (R. 37, line 18-p. 38, line 11). DeCamp's understanding from Dr. Schandl was a child with injuries of the type sustained by the victim in this case, "would be in extreme discomfort, you know, crying, in distress . . . ." (R. p. 39, lines 10-18). Furthermore, the injury would not have been inflicted by the other children. (R. p. 151, ¶15).

There was also evidence the other two children were eyewitnesses to Seabrook "popping" Elijah, a "pop" being equivalent to a forceful striking of a chair, and that Elijah then "went to heaven." (R. p. 150, ¶ 13-p. 151, ¶14). And that the children were being required by Seabrook to keep a secret about this event. (R. p. 150, ¶ 13-p. 151, ¶14). This eyewitness testimony was first disclosed to the emergency CPS case manager who informed police the victim's siblings made these statements upon being transported from the hospital to DSS foster care. (R. pp. 150-51, ¶13).

Furthermore, police had a text from Seabrook expressing some degree of anger towards the two year old victim, Elijah Washington. Seabrook texted his girlfriend and the child's grandmother, Ms. Dixon at 5:12 p.m. on the date of the child's death stating Elijah "made himself throw up. I'm over this shit." (emphasis added) (R. p. 28, lines 16-19). This provides some evidence Seabrook was angry or frustrated with Elijah at 5:12 p.m. and frustrated in his role as caregiver for the children, providing some reason why Seabrook might forcefully strike the two year old victim at or near that time.

Sentence Five:

> That autopsy results indicate that the victim sustained fatal acute abdominal injuries, resulting from blunt force trauma.

Once again, this is entirely true. Plaintiff requests the sentence instead read "the Autopsy Final Report written by Dr. Schandl listed the cause of death as blunt trauma to the torso with the date of injury being March 19, 2013 at an unknown place and time." (App. Brief at 11). The suggested "unknown time and location" clause proposed by the Appellant is actually itself misleading. There was not an effort by the medical examiner to determine the geographic location of injury at all. Nor was there an effort to precisely determine the time of the forceful blow via a calculation. Instead, the injury was simply categorized as acute which is 24 hours with the last four hours being the most probable. The identification of the injury as acute is accurate.

The difference between the words abdomen and torso are not material at all. The abdomen is part of the torso. The human torso also includes the upper chest area which is not the abdomen. But there is no question the coroner was stating the cause of injury to be trauma to the abdomen which would make the affidavit technically correct when it states there was a blunt injury to the torso. There is also no difference between the words blunt force trauma and blunt trauma. Any blunt trauma (i.e. not a piercing injury like a knife) creates injury via force. The terms blunt trauma and blunt force trauma are used interchangeably. Nor would anyone reading the facts of this case think that abdomen versus torso would make any difference to whether there was sufficient evidence to believe that Seabrook committed a forceful hit to the torso which resulted in internal bleeding and death.

Sentence Six:

That eyewitnesses reported that the defendant struck the victim shortly before the victim became unresponsive.

This is accurate. The Appellant would request a complicated revision of this statement to include the ages of the eyewitnesses---ages 3 and 4---as well as a disputed position of what would likely be eventual cross examination of Dr. Donald Elsey related to the reliability of the children's statements due to children at that age having difficulty accurately sequencing events and the younger of the two children being unable to demonstrate the "pop" like the four year old sister had done.

The facts show the victim's sisters (N.W. and G.W.), ages three and four, were taken into emergency custody by the Child Protective Services (CPS) emergency on-call case manager who transported the girls from the hospital to a licensed foster home, and during the drive from the hospital, the girls told the CPS employee they had a secret they were not allowed to talk about but ultimately revealed that Bryan Seabrook had 'popped' the victim, that the victim went to sleep, and went to heaven. (R. pp. 150-51, ¶ 13). The girls further stated Seabrook had said they must keep the secret about the event. (R. pp. 150-51, ¶ 13). G.W. also told the CPS worker multiple times Seabrook popped the victim and the victim hit the wall. (R. pp. 150-51, ¶ 13). This alone gives support to the statement and, as noted above probable cause may be based on hearsay information and other information which is not strictly speaking admissible.

During forensic interviews of the children, both children discussed Seabrook hitting the victim, the victim going to sleep and going to heaven. (R. p. 151, ¶ 14). The older girl demonstrated a "pop" by hitting a chair forcefully during the interview. The

younger child could not demonstrate this. Dr. Elsey explained it is not his job to determine if a child is telling the truth, based in part on what children say and how they say it, it is his opinion that "[N.W. and G.W.] certainly provided information that sounded like something they had experienced." (R. p. 103, line 16-p. 104, line12). Dr. Elsey further explained while children of N.W. and G.W.'s age normally don't express time frames, "it was interesting that I was just asking [N.W.] who she lived with, and she went right to this thing that happened, so in my opinion, that kind of time stamped what she was talking about . . . ." (R. p. 106, lines 15-18). Dr. Elsey testified "[t]he other thing that was a consistent theme, even with [G.W.], who was much younger, was they were told it was a secret, and they were told not to tell. So that came across from both of their -- both of these young ladies on several times." (R. p. 102, lines 12-17). Dr. Elsey further testified that [N.W. and G.W.] said "they would get a pop, too, if they told the secret, so they took it -- it seemed to me they took that secret very seriously." (R. p. 104, line 23-p. 105, line 1).

Although these were young eyewitnesses, the testimony of young children is frequently allowed in trials involving child abuse and neglect. Rule 601 of the South Carolina Rules of Evidence provides a very low bar even at the trial stage to establish witness competency. In the present case, the facts demonstrate the children made their initial disclosure within hours of their brother's death to the CPS employee driving them away from the hospital and made subsequent disclosures during the forensic interviews. Undermining the ability of a child to sequence events or to testify as to times may be reasonable areas of cross examination, but such arguments do not invalidate an arrest warrant. It should be noted that there will almost always be potential grounds to

undermine any witness testimony---the witness is biased, or was too far away, or was distracted, or was under the influence of drugs or alcohol, or is attempting to curry favor with prosecutors to dismiss other charges. All of these potentially go to the competency of the witness to testify or to the weight of the testimony. They do not invalidate a warrant.

Sentence Seven:

> That the defendant did cause the death of the two year old victim while committing child abuse, and the death occurred under circumstances manifesting an extreme indifference to human life.

This is admittedly a conclusory statement which itself does not support or diminish probable cause. The presence of a conclusory sentence in a warrant does not render the rest of the affidavit defective.

Finally as it relates to all these points, the police had a good faith reasonable position that was based on hours of investigation by multiple officers and included information corroborated by multiple sources. There is zero evidence of knowing falsity, reckless disregard for the truth, gross negligence, or intent to mislead the magistrate. The evidence suggests probable cause existed, that probable cause was fairly reflected in the affidavit for the warrant, and probable cause is a complete defense to this action. Of course, this same body of evidence led to a determination of probable cause at the preliminary hearing and a true bill indictment by the grand jury. (R. pp. 413-14; R. p. 152, ¶ 23).

## II. TOWN OF MOUNT PLEASANT POLICE DEPARTMENT WAS NOT GROSSLY NEGLIGENT IN APPLYING FOR AND EXECTUING AN ARREST ON SEABROOK WHERE THE SAME WAS PERFOMED PURSUANT TO A VALID WARRANT, THE GRAND JURY RETURNED A TRUE BILL INDICTMENT, AND THE SOUTH CAROLINA TORT CLAIMS ACT PROVIDES IMMUNITY TO THE RESPONDENT.

Appellant Seabrook asserts law enforcement was grossly negligent, not for the discretionary or ministerial act, but for exercising its duty in a grossly negligent manner in applying for an arrest warrant with the alleged omissions in the warrant affidavit discussed *supra* Part I which Seabrook asserts defeats probable cause and makes his arrest unlawful. (App. Brief at 17-18). Seabrook asserts the Town was grossly negligent by failing to exercise even the slightest care in its application for an arrest warrant for Seabrook. (App. Brief 16). Seabrook does not assert or argue any false or misleading evidence was present during the Grand Jury proceedings which resulted in a finding of probable cause and returned a true bill indictment.

Seabrook cites Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999) for the proposition that law enforcement is not shielded from civil liability under the South Carolina Tort Claims Act (TCA) in situations where probable cause for arrest is lacking. (App. Brief at 16-18). Gist is distinguishable from the facts before this Court. The arrest warrant in Gist was not facially valid. "[T]he Sheriff's Department conceded at oral argument, the affidavit, standing alone, was insufficient to establish probable cause." Id. at 616, 521 S.E.2d at 166 (Ct. App. 1999). Importantly, unlike the case before this Court, Gist was never indicted and the case was dismissed once fingerprint analysis cleared Gist.

The Town of Mount Pleasant is not suggesting immunity under the TCA covers all acts or omissions of police officers related to officers obtaining arrest warrants or

arresting persons without warrants. However, if a facially valid arrest warrant is obtained and the warrant is not defective under Franks, then a cause of action for false arrest should not exist because the arrest was lawful. The arrest warrant becomes an order of the court and no officer or department should be liable for arresting the defendant pursuant to a valid warrant. Whether this is under common law immunity, Tort Claims Act immunity or just under the principle that false arrest requires an arrest that is unlawful. Furthermore, here it was not the Town of Mount Pleasant's arrest affidavit that held the defendant past the preliminary hearing and Grand Jury indictment.

Law enforcement making arrests pursuant to a facially valid warrant should be immune from suit under the Tort Claims Act as they are executing an order of the court and enforcing compliance with the law, and should not be subjected to lawsuits for actually making the arrest they were compelled to make by the Judge. A government entity is not liable for loss resulting from "the execution, enforcement, or implementation of the orders of any court or execution, enforcement or lawful implementation of any process. S.C. Code Ann. § 15-78-60(3). The Mount Pleasant officers who actually took Mr. Seabrook into custody are simply following the order of a Judge. They Town may be liable for the misconduct of its officers who violate the rights of persons, but there is no cause of action if there is a valid warrant that cannot be undone under Franks.

Even though it was a municipal judge who issued the warrant, the judge is immune. And clearly the Town should also be immune for his judicial actions. Given that issuing a warrant is clearly a judicial function, the Tort Claims Act provides

immunity to the governmental entities that employ the judges. Similarly, a prosecutor is immune from suit for malicious prosecution under the TCA.

Likewise, the police and the government entities that employ them should not be sued for presenting evidence they in good faith believed to be truthful and valid during a preliminary hearing or grand jury proceeding. They should not be sued for an alleged incorrect decision of the preliminary hearing judge (not a Town employed judge). The police and Mount Pleasant should not be liable for an alleged incorrect finding of probable cause by the grand jury. They should not be sued for the actions of the Solicitor which has discretion to pursue or dismiss a charge. Solicitors, judges and grand juries are all immune themselves, so persons who are arrested frequently try to sue the police department for the decisions of those persons or entities. The Town and its police officers have no vote in the decisions of those persons or entities.

On the facts of this case, the police participated in an extensive investigation, met with solicitors, and based on the evidence in good faith sought an arrest warrant. If the plaintiff is to have a cause of action, it should have to be based on the misconduct of the police officer obtaining a warrant without probable case.

## III. APPELLANT SEABROOK FAILED TO FILE HIS COMPLAINT WITHIN THE TWO YEAR STATUTE OF LIMITATIONS UNDER THE SOUTH CAROLINA TORT CLAIMS ACT WHERE SEABROOK HAD NOTICE OF THE RESTRAINT AGAINST HIS PERSON SINCE THE DATE OF ARREST.

Appellant Seabrook's causes of action against Respondent Town of Mount Pleasant are asserted pursuant to the South Carolina Tort Claims Act (TCA). Seabrook argues "restraint is paramount" to all three of his causes of action. (App. Brief at 15). The TCA forever bars actions "unless commenced within two years after the date the

loss was or should have been discovered;" S.C. Code Ann. § 15-78-110 (emphasis added).

Our appellate courts have made clear, under the discovery rule, the statute of limitations begins to run "when the *injury* resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence." McClain v. Jarrard, 354 S.C. 218, 220, 580 S.E.2d 763, 764 (Ct. App. 2003). Interpreting the discovery rule, our Court explained:

> some promptness where the facts and circumstances of the injury would put a person of common knowledge on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery is developed.

Strong v. Univ. of S.C. Sch. of Med., 316 S.C. 189, 190-91, 447 S.E.2d 850, 851-52 (1994) (emphasis added). Additionally, "the fact that the injured party may not comprehend the full extent of the damage is immaterial." Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). The crucial point is notice of a violation of rights or a potential claim, as the court in Tanyel v. Osborne explained "notice triggered the statute of limitations, rather than the discovery of evidence actually supporting the potential claim." Tanyel v. Osborne, 312 S.C. 473, 476, 441 S.E.2d 329, 331 (Ct. App. 1994).

Seabrook was arrested on May 9, 2013 for the offense of Homicide by Child Abuse pursuant to a valid arrest warrant. Seabrook received a preliminary hearing on June 5, 2013, and upon a finding of probable by the magistrate, was bound over to general sessions, and remained incarcerated. On October 8, 2013, a Grand Jury

returned a true bill indictment against Seabrook finding probable cause he was guilty of the crime of Homicide by Child Abuse. (R. pp. 413-14).

Assuming arguendo, probable cause for the arrest of Seabrook for the crime of Homicide by Child Abuse did not exist at the time of his arrest. The restraint accompanied by an arrest certainly puts a person of common knowledge on notice that some right of his may have been invaded. The restraint resulting from a magistrate's ruling requiring a person to remain incarcerated certainly puts a person of common knowledge on notice that some right of his may have been invaded.

Seabrook filed this lawsuit on July 8, 2016, over three years after the date of arrest on May 9, 2013, when he first had notice of the restraint against his person. Clearly, on the date of his arrest, if Seabrook were innocent of the crime charged, he would have had notice that some right of his was invaded. Seabrook should be required to bring his suit within two years of being arrested. Therefore, the trial court properly found Seabrook failed to commence the instant action within the statute of limitations as it relates to the allegations made against the Town of Mount Pleasant.

## CONCLUSION

This Court should affirm the decision of the lower court.

[SIGNATURE PAGE TO FOLLOW]

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Charleston, South Carolina
July 25, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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J.C. NICHOLSON JR., Circuit Court Judge

Case No. 2016-CP-10-03542
Appellate Case No.: 2017-002532

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Bryan O'Keith Seabrook, Appellant,

v.

Town of Mount Pleasant, Respondent

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**CERTIFICATE OF COUNSEL**

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

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