STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

JOSEPH LAMAR BROWN, JR.,

Appellant

Appellate Case No. 2019-000781.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Was it an error for the trial court to deny Appellant's motion to dismiss his armed robbery indictment and find that the principles of double jeopardy were not implicated because Appellant's first jury trial resulted in a providently granted mistrial when the jury's final announcement was that it could not reach "a unanimous decision on any of the indictments"?

II. Was it an error for the trial court to suppress Appellant's evidence of third party guilt because Appellant could establish no more than a partial description match of a person who was merely in the vicinity of the crimes hours after they occurred, and therefore could not establish any train of facts and circumstances casting more than a bare suspicion or raising more than a conjectural inference that the third party was involved in the crimes?

III. Was it an error for the trial court to refuse to suppress evidence obtained from a search of Appellant's residence when the affidavit accompanying the search warrant for that residence contained no include false statements or statements made with reckless disregard for the truth, and when the warrant otherwise contained facts sufficient to establish probable cause for the search?

STATEMENT OF THE CASE

The Charleston County Grand Jury indicted Appellant Joseph Lamar Brown, Jr., in July 2017 for the murder, first degree burglary, kidnapping, and armed robbery of John (Johnny) Glenn Pritchard, and for the possession of a weapon during the commission of a violent crime (PWDCVC). (R. pp. *Indictments). Theresa L. Norris and Taylor J. Seman, Esquires, represented Brown on the charges. Deputy Solicitor D. Bruce DuRant prosecuted the case on behalf of the Ninth Circuit Solicitor's Office. (R. p. 1).

In June 2018, Brown proceeded to a jury trial before the Honorable Kristi Harrington on the charges for murder, first degree burglary, armed robbery, and PWDCVC. Brown's jury could not reach a verdict and Judge Harrington declared a mistrial. (R. pp. 1115-22).

Brown proceeded to a second jury trial on the same charges beginning November 5, 2018, before the Honorable J.C. Nicholson, Jr. (R. p. 1). The jury returned on the fifth day and returned the following verdicts: guilty as to murder; guilty as to first degree burglary; not guilty as to armed robbery; guilty as to the lesser included offense of attempted armed robbery; and guilty of PWDCVC. (R. p. 533). Judge Nicholson sentenced Brown to life for the murder, fifty years for the burglary, ten years for the attempted armed robbery, and five years for PWDCVC. (R. p. 543, line 24 – p. 544, line 19).

Brown moved for the court to reconsider his sentence on November 15, 2018. (R. pp. 114-50). After May 8, 2019, hearing on the motion, the court reduced Brown's sentence for the murder from life to fifty-two years and ordered Brown's sentences to run concurrent. (R. pp. 545-66; R. pp. 1151).

This appeal follows with notice being served May 10, 2019. (R. p. 1152-53).

STATEMENT OF FACTS

Two days before Christmas 2016, Johnny Pritchard's front door opened and an intruder confronted him in his living room with a black semiautomatic handgun. The intruder told Johnny to give him the money and Johnny "jumped off the couch and went at the guy." Johnny was shot in the neck right then and there, falling to the floor. The intruder started rifling through Johnny's pockets and then ran out the front door. At the time, Johnny's cousin Hugh Potter Pritchard stood in shock in Johnny's kitchen. He watched through the doorway as these events unfolded. (R. p. 117, line 9 – p. 120, line 2).

Johnny Pritchard died from a gunshot wound to the neck. (R. p. 434, lines 1-9). The gunshot was not delivered at close range. (R. p. 427, lines 1-11). On Johnny's person remained some coins and keys. (R. p. 227, lines 18-24). Police found a note on Johnny's coffee table that looked like an IOU indicating that Trey Colman owed Johnny Pritchard $200. (R. p. 228, lines 4-10). Charleston County Sheriff's Deputies also recovered a Speer .9 millimeter Luger shell casing from Johnny's living room floor (R. p 229, lines 2-5).

As soon as the intruder left Johnny's, Hugh Pritchard ran across the lawn and jumped a fence to get to the neighbor's house. Hugh and the neighbor called 911 together. (R. p. 120, lines 3-24; State's Ex. 78). Hugh Pritchard described the intruder as a black man with a small frame wearing a face covering and dark clothing. (R. p. 121, lines 1-25; R. p. 256, lines 10-13). He said the man was of medium height, like five-eight or five-nine. (R. p. 122, lines 1-3; R. p. 256, lines 10-13). Hugh Pritchard ended up describing what he witnessed to several deputies as law enforcement arrived on scene and began their investigation. He maintained that the intruder was a black man wearing dark clothes and a face covering who came in with a black semiautomatic

handgun, demanded money, and shot Johnny Pritchard. (R. p. 121, line 21 – p. 132, line 25; R. p. 142, line 14 – p. 143, line 25).

Twenty-year-old Celest McBride lived about a hundred yards from Johnny Pritchard. (R. p. 153, line 19; R. p. 165, lines 3-10). Around one in the afternoon on December 23, she heard a boom outside of her house. She looked outside to see what happened and "saw someone running from [her] right to [her] left, which was a little odd because people don't go running around in that neighborhood just because." (R. p. 154, lines 12-23). The runner was headed away from the direction of Johnny Pritchard's house. (R. p. 160 lines 17-23). As the runner passed by the front of her house a black rectangular object fell out of his pocket and landed near a telephone pole. (R. p. 154, lines 23-24; R. p. 156, lines 7-10). The runner dropped a large amount of cash next, but he picked that up and kept on. (R. p. 156, line 24 – p. 157, line 5).

When the runner passed out of sight, McBride told her father what she saw. They went over and picked up the object he left behind. It turned out to be a cell phone. They placed it on their porch for safekeeping in the event the person came back looking for it. (R. p. 158, lines 2-24). The phone had a photograph on the lock screen of a man and a woman. (R. p. 181, lines 6-11). When the police arrived, McBride described the runner as a black male with dreadlocks wearing stone-gray pants and a dark shirt. (R. p. 157, lines 13-19; R. p. 260, lines 2-13). At trial, McBride testified she believed she mistook the runner's hoodie for dreads. (R. p. 164, lines 21-24).

Merit Williams was in his SUV driving in the same direction and on the same street as the runner. Williams believed the runner had dreadlocks. He also noticed that the runner wore red Converse sneakers, black pants, a hoodie with a multicolored number 23 on it, and a skull

cap. Williams saw the runner drop some things and then turn off to the left onto a street he believed was named Brenda B. (R. p. 193, line 18 – p. 195, line 23).

Martin Perez lived at the end of Brenda B. He had a video surveillance system installed on the exterior of his house. (R. p. 206, line 7 – p. 208, line 3). Perez was standing outside his house around one in the afternoon on December 23 when he noticed a car quickly approach his house and park over to the side. The driver got out and started waving at a person and yelling at them to hurry up. (R. p. 208, line 4 – p. 209, line 6). Another person ran to the car, he and the driver got in, and the driver sped off. (R. p. 209, lines 7-15). The driver wore a red and black cap and a black t-shirt. (R. p. 209, lines 22-24). Afterward, Perez went over to his sister's house. When he came home later that day, his street was blocked by police. Perez approached them and shared what he had seen. (R. p. 211, line 18 – p. 212, line 3). Perez also told the officers about his surveillance equipment and invited them in to review footage. Perez ceded his surveillance equipment to the investigation. (R. p. 212, lines 3-12; R. p. 281, lines 18-21). Perez's surveillance footage demonstrated everything Perez testified to witnessing. (R. p. 212, line 13 – p. 215, line 9; R. p. 246, lines 8-13; R. p. 282, lines 8-17).

Charleston County Detective Barry Goldstein headed up the investigation. (R. p. 305, lines 4-6). Goldstein looked to follow any potential lead the dropped cell phone provided. The phone was passcode protected such that its contents could not be retrieved pursuant to a valid search warrant. Goldstein's department could, however, identify Nautica Manigault as the woman in the picture on the cell phone's lock screen, and Goldstein interviewed her. (R. p. 313, line 18 – p. 315, line 19). Manigault verified that she was the woman in the lock screen photo on Appellant's iPhone. (R. p. 268, lines 8-22). Manigault explained that she was aware that Johnny Pritchard was killed. Afterwards, Appellant started using a different phone number. Appellant

told her he lost his phone coming home from work because he heard gunshots and began to run. (R. p. 272, line 2 – p. 273, line 4).

Because Manigault identified Appellant in connection with the cell phone, Goldstein obtained Appellant's DMV records to verify Appellant's identity. He thereafter applied for an arrest warrant and a search warrant for the residence listed on Appellant's driver's license. (R. p. 317, line 2 – p. 318, line 17). The license identified Appellant as a black male, standing at five feet, nine inches and weighing 155 pounds. In other words, Appellant was a black man of medium height and build. (R. p. 318, line 18 – p. 319, line 1). Upon execution of the search warrant, deputies located two boxes of ammunition stored underneath a mattress and box spring. (R. p. 285, line 1 – p. 286, line 7). One box contained some Speer .9 millimeter Luger bullets—the same type and caliber as the shell casing collected from Johnny Pritchard's living room. (R. p. 239, line 1 – p. 241, line 8).

Charleston County Deputies took Appellant into custody on January 3. In an interview, Appellant identified the cell phone as his own and stated he was near the scene of the shooting looking for his phone because he lost it nearby. (R. p. 319, line 2 – p. 320, line 22). Appellant provided different descriptions of what he wore on December 23. (R. p. 322, lines 1-10; R. p. 336, lines 9-13). He told law enforcement he did not know anything about what had gone on at Johnny Pritchard's that day. (R. p. 322, lines 11-13).

Eventually, Charleston County Sheriff's Office obtained access to the contents of Appellant's iPhone. (R. p. 324, lines 7-24). Text messages on the phone showed a conversation between "Joe-Joe" and "Red" which occurred just prior to the shooting. (R. p. 325, line 5 – p. 326, line 11). Nautica Manigault had identified Appellant as going by the name "Joe-Joe." (R. p. 269, lines 5-10). From the contents of the messages, Goldstein suspected that "Red" was Trey

Colman, a person they identified as having been with the victim at the Family Dollar and the liquor store the morning of the shooting, and the person identified in the IOU found on Johnny Pritchard's coffee table. (R. p. 291, line 2 – p. 293, line 22; R. p. 310, line 11 – p. 312, line 9; R. p. 327, lines 1-7). Looking to verify this suspicion, investigators identified a text between Joe-Joe and Red wherein Red responded to Joe-Joe that his Facebook name was "Moneybag Fly." Law enforcement thereafter obtained a search warrant for the subscriber information for the phone number associated with "Red" on Appellant's iPhone, and for the information associated with the Facebook account for "Moneybag Fly." Records obtained pursuant to these warrants verified that Trey Colman, Moneybag Fly, and Red were one in the same. (R. p. 358, line 17 – p. 363, line 13).

The contents of the text messages between Appellant and Colman established a clear timeline of events preceding the shooting. In the early morning hours of December 23, Colman contacted Appellant asking to borrow Appellant's gun. (R. p. 369, line 5 – p. 370, line 25). Appellant responded that he needed his gun "to stay on point." (R. p. 371, lines 1-5). Around the same time, between one and one-thirty that morning, Appellant's iPhone photographed a gun. Red Converse sneakers are visible in the background of the photo. (R. p. 371, line 9 – p. 373, line 19). Another picture on Appellant's phone showed him wearing a black t-shirt, jeans and red-and-white Converse sneakers. (R. p. 389, lines 9-17).

Later, around noon, Colman re-contacted Appellant. He wanted to know where he was. (R. p. 374, lines 1-7). Colman went on to text Appellant "you got to rob dude today." (R. p. 374, lines 8-14). Appellant texted back that Christmas was coming up and he "ain't got shuck for" his people. So, "to make it look real," he planned "to make it look like [he's] robbing both" Colman and another person. (R. p. 375, lines 3-19). In his next text, Appellant appears to withdraw,

stating he will "bum from around the building." (R. p. 375, lines 20-22). But then Appellant re-instigates the plan, texting Colman: "I'll act like you my homeboy and rob you in the yard; he ain't going to think you set him up then because I came to your yard; I'm telling you, Bruh, it's now or never . . . let me eat, Bruh." (R. p. 375, line 23 – p. 376, line 3). Appellant and Colman continued texting back and forth to discuss the plan for the robbery. They would split anything they got fifty-fifty. Colman would text Appellant when he and the victim got to the victim's house and, when the robbery was over, Appellant was to "go to the back of Bell Street or to the circle" near Martin Perez's house. Colman would get Appellant "from there." (R. p. 376, lines 4-25).

At 12:20 that afternoon, Colman described the victim to Appellant and let Appellant know the target did not have a gun at home. (R. p. 377, lines 3-25). Appellant asked Colman where they were. Colman called Appellant at 12:42 for three minutes and thirty-two seconds. He called Appellant again at 12:47, with that call lasting less than a minute. (R. p. 378, line 1 – p. 379, line 3). Appellant's iPhone logged no further activity after that phone call. (R. p. 379, lines 4-6). Police were dispatched to the victim's home at 12:57 and arrived at the scene at 1:03 that afternoon. (R. p. 254, lines 17-20).

At trial, Trey Colman accepted responsibility for setting Appellant up to rob Johnny Pritchard. His testimony corroborated the plan reflected in his texts messages with Appellant (R. p. 441, line 4 – p. 444, line 3; R. p. 452, line 1 – p. 460, line 18). Colman explained that he knew the victim recently came into some money following a car accident. Colman had even gone to the victim to borrow money in the past and the victim had always helped him out. (R. p. 444, line 4 – p. 447, line 19). The victim took Colman to the Family Dollar and the liquor store the day he

was killed. (R. p. 448, line 2 – p. 451, line 4). Ten minutes after they returned from the store, Colman started texting Appellant about the robbery that would transpire. (R. p. 451, lines 13-21).

Yet other cell phone evidence linked Appellant to the shooting at Johnny Pritchard's. Appellant's phone contained other pictures of a black Smith and Wesson semiautomatic handgun. The handgun's serial number was visible in these photographs. (Rr. p. 384, line 7 – p. 386, line 24). A trace on the serial number revealed that the firearm in Appellant's iPhone pictures was a Smith and Wesson MNP 9-C. (R. p. 387, line 1 – p. 3881, line 10). The firearms examiner at SLED concluded that the bullet recovered from the victim at autopsy was consistent with a nine millimeter Luger with five grooves and a right-hand twist. (R. p. 402, line 5 – p. 4031, line 2). She also found the cartridge casing recovered from the victim's living room floor consistent with the fired bullet. It was a Speer nine millimeter Luger casing. (R. p. 403, line 25 – p. 404, line 22; *see* R. p. 237, line 21 – p. 238, line 2).

The firearms examiner further opined that, in her experience, the Smith and Wesson MNP-9C nine millimeter handgun identified by the serial number visible in Appellant's cell phone picture used a teardrop-shaped firing pin. This shape was consistent with the firing pin marking on the cartridge casing she examined. (R. p. 405, line 2 – p. 406, line 19). The lands and grooves and the right-hand twist on the fired bullet she examined were also consistent with the handgun in the photograph. (R. p. 407, lines 2-5). She opined, in fact, that the teardrop-shaped firing pin impression on the spent casing eliminated any other possible brand of firearm having fired the casing and projectile, because the Smith and Wesson MNP-9C nine millimeter pistol was the only pistol in the firearms analysis database that matched all of these specimens' specific characteristics. (R. p. 407, lines 6-25). "Smith and Wesson actually changed the shape of their firing pin for the [most recent version of the] MNP series." (R. p. 416, lines 9-18).

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) (citations omitted).

"'The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion.' An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Cope*, 405 S.C. 317, 334-35, 748 S.E.2d 194, 203 (2013) (quoting *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)).

In Fourth Amendment search and seizure cases, review "is limited to determining whether any evidence supports the trial court's finding." *Id.* The deferential standard applying to Fourth Amendment claims does not bar the appellate court "from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

ARGUMENT

I. Appellant's double jeopardy claim fails as a matter of law because no final verdict was reached as to any charge at Appellant's first trial, rendering the mistrial a manifest necessity when the when the jury's final announcement was that it could not reach "a unanimous decision on any of the indictments," and certifying that Appellant properly faced retrial on all charges as indicted.

Appellant's first trial resulted in a mistrial. The record of that proceeding illustrates that the jury was sent to deliberate and returned with a series of notes. (R. pp. 117-19). Next, the presiding judge issued an *Allen* charge[1] which in relevant part instructed the jurors to "lay aside all outside matters and re-examine the questions before you based upon the law and the evidence in this case." (R. pp. 1120, lines 14-16). Appellant's first jury returned to the courtroom after further deliberations and the Foreperson announced the jury had "just not been able to come to a unanimous decision on any of the indictments." (R. pp. 1122, lines 5-7). The trial court declared a mistrial. (R. pp. 1122, lines 8-10).

Appellant's retrial began five months later. Prior to the jury being sworn, (R. p. 97), Appellant moved to dismiss the armed robbery indictment on the basis that a jury note submitted prior to the *Allen* charge indicated the jury did agree Appellant was not guilty of armed robbery, but were hung as to all the other charges. (R. p. 11, lines 1-7). The trial court denied the motion to dismiss the armed robbery indictment because "the time to have raised that issue was at trial. [I]t was not raised by the court or the Solicitor or the defense counsel," and no verdict or plea was entered or documented by the trial court. Therefore, the court found no "double jeopardy involved" in the armed robbery indictment called to trial before him. (R p. 93, line 22 – p. 94, line 5).

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[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896).

The trial court's conclusion aligns with the limitations the United States Supreme Court has placed on the invocation of double jeopardy. "The Double Jeopardy Clauses of the United States and South Carolina Constitutions operate to protect citizens from being twice placed in jeopardy of life or liberty for the same offense." *State v. Brandt,* 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011); U.S. Const. amend. V; S.C. Const. art. I, § 12. "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense" in successive pleadings. *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999); *State v. Jolly*, 405 S.C. 622, 627, 749 S.E.2d 114, 117 (Ct. App. 2013). "Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct. App. 2005); *State v. Mathis*, 359 S.C. 450, 457, 597 S.E.2d 872, 876 (Ct. App. 2004).

However, "[u]nlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused." *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824 (1978). "Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury's discharge before it reaches a verdict or legal necessity mandates the jury's discharge." *State v. Baum*, 355 S.C. 209, 214, 584 S.E.2d 419, 422 (Ct. App. 2003). A mistrial following a hung jury is one such legal necessity allowing a defendant to face retrial for the same charges. "It is universally recognized that a genuine inability of the jury to reach a unanimous verdict constitutes a manifest necessity for the declaration of a mistrial." *State v. Robinson*, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004) (citing *Oregon v. Kennedy,* 456 U.S. 667, 672, 102 S.Ct. 2083 (1982); 21 Am.Jur.2d *Criminal Law* § 402 (2003)).

Central to Appellant's case is the explicit holding from *Blueford v. Arkansas*, 566 U.S. 599, 132 S.Ct. 2044, 2047 (2012). As Appellant describes, the jury in that case deliberated on a capital murder charge and three lesser-included offenses. After asking the court what would occur if they could not decide on a verdict, the court issued an *Allen* charge. 566 U.S. at 603, 132 S.Ct. at 2049. The jury returned and, upon inquiry by the court, stated they had reached a unanimous verdict of not guilty as to capital murder and as to first degree murder, but were undecided as to the two remaining lesser charges they had been instructed to consider. *Id.* at 603-04; 132 S.Ct. at 2049. The trial court issued yet another *Allen* instruction and, after more deliberation, the jury returned with the foreperson stating "they had not reached a verdict." *Id.* at 604, 132 S.Ct. at 2049. "The court declared a mistrial and discharged the jury." *Id.*

Like Appellant, Blueford moved prior to retrial to dismiss the charges that his first jury reported they had unanimously voted to acquit him of. *Id.* The United States Supreme Court reviewed the Arkansas Supreme Court's finding that "the foreperson's report had no effect on the State's ability to retry Blueford [on all charges], because the foreperson 'was not making a formal announcement of acquittal' when she disclosed the jury's votes." *Id.* at 604-05, 132 S.Ct. at 2050 (quoting *Blueford v. State*, 2011 Ark. 8, 9, 370 S.W.3d 496, 501 (Ark. 2012)). The *Blueford* court resolved that "[t]he foreperson's report was not a final resolution of anything" because Blueford's "jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report." *Id.* at 606, 132 S.Ct. at 2050. "When they emerged a half hour later, the foreperson stated only that they were unable to reach a verdict. . . . The fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal[.]" *Id.*; *see also Ramos v. Louisiana*, ___ S.Ct. ___, No. 18-5924, 2020 WL 1906545, at *6 (U.S. Apr. 20, 2020) (concluding that the Sixth Amendment right to a jury trial,

as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense), *overruling Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972).

The United States Supreme Court has resolved that jeopardy indeed did not attach to any charge deliberated upon at the first trial, regardless of any interim report from the jury. 566 U.S. at 606, 132 S.Ct. 2050. And Blueford's case is indistinguishable from Appellant's. As in *Blueford*, nothing in the *Allen* charge received by Appellant's first jury prohibited that jury from reconsidering such a vote.[2] *Id.* at 607, 132 S.Ct. at 2051. Appellant's first jury was instructed to "lay aside all outside matters and re-examine the questions before [them] based upon the law and the evidence in this case." (R. pp. 1120, lines 14-16). The jury was thus encouraged to re-examine all of the charges before them. (*Id.*). After an additional deliberation period, the foreperson then announced the jury had "just not been able to come to a unanimous decision on any of the indictments," and the court declared a mistrial. (R. pp. 1122, lines 5-10). As the *Blueford* Court hypothesized in its Opinion, once one or more jurors begins to reconsider the facts and circumstances before them, then one or more jurors may change their mind as to guilt on any offense for which he or she has already voted. 566 U.S. at 607-08, 132 S.Ct. at 2051. The plain language of *Blueford* is broad enough that it must apply to any additional deliberation by the jury and therefore encompasses Appellant's gamut of charges.

Appellant's argument, like Blueford's, assumes "that the votes reported by the foreperson did not change, even though the jury deliberated further after that report. That assumption is

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[2] Appellant's affidavits carry no weight at this juncture. Rule 606(b), SCRE; *Wertz v. State*, 349 S.C. 291, 296, 562 S.E.2d 654, 657 (2002) ("If a party believes there is confusion in the wording of a jury's verdict, that party should call it to the attention of the trial court at the time the verdict is rendered so that any confusion in the verdict's language can be easily cleared up.").

unjustified, because the reported votes were, for the reasons noted, not final." *Id.* at 608, 132 S.Ct. at 2052. No court has ever "required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict." *Id.* at 609, 132 S.Ct. at 2052 (citing *Renico v. Lett*, 559 U.S. 766, 774, 130 S.Ct. 1855, 1863-1864 (2010)). Therefore, as the *Blueford* Court concluded, Appellant's jury

> did not convict [him] of any offense, but it did not acquit him of any either. When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. As a consequence, the Double Jeopardy Clause does not stand in the way of a second trial on the same offenses.

Id. at 610, 132 S.Ct. at 2053. Accordingly, Appellant's second trial court did not err in denying the motion to dismiss the armed robbery indictment. *See Wertz v. State*, *infra* at n.2.

II. Appellant's proffered evidence of third party guilt was appropriately excluded from trial because Appellant could establish no more than a partial description match of a person who was merely in the vicinity of the crimes hours after they occurred, and therefore could not establish any train of facts and circumstances casting more than a bare suspicion or raising more than a conjectural inference that the third party was involved in the crimes.

The State moved to suppress Appellant's proffered introduction of third-party guilt because any evidence regarding the third party, David Felder, raised only a mere suspicion or conjectural inference that he committed the crimes. (R. p. 76, line 12 – p. 80, line 4). The court offered another conclusion supported by the evidence proffered: "there was nothing to verify that [Felder] was responsible, so they didn't charge him." (R. p. 73, lines 20-25). The court suppressed the evidence of third party guilt. (R. p. 92, lines 7-25).

A criminal defendant's right to present evidence in furtherance of his defense "is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261 (1998). "The exclusion of witness testimony does not violate a defendant's constitutional right to present evidence so long as the evidence rules are 'not arbitrary or disproportionate to the purposes they are designed to serve.'" *State v. Burgess*, 391 S.C. 15, 22, 703 S.E.2d 512, 516 (Ct. App. 2010) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704 (1987)). In order to be admissible, facts offered in support of a third-party guilt defense must "raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) (quoting 16 C.J., Criminal Law § 1085 (1918)) (also citing 22 C.J.S., Criminal Law, § 622); *see also Holmes v. South Carolina*, 547 U.S. 319, 330, 126 S. Ct. 1727, 1734 (2006) (approving South Carolina's use of the *Gregory* rule).

The evidence proffered in furtherance of third-party guilt must result in a "train of facts and circumstances" that "tends to clearly point out such other person as the guilty party." *Id.* (quoting 20 Am.Jur., Evidence § 265 (1939)). When the proffered evidence offers no reliable proof that the third party was involved, the court should exclude it. *State v. Swafford*, 375 S.C. 637, 642, 654 S.E.2d 297, 300 (Ct. App. 2007). A defendant's Sixth Amendment right is not broad enough to permit him "to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty." *State v. Gregory*, *supra* (quoting 20 Am.Jur., Evidence, *supra*).

Appellant relied upon the following in his motion to introduce evidence of Felder's third party guilt:

a. There was no evidence that Appellant and Felder acted together, making Felder's guilt inconsistent with Appellant's (R. p. 68, lines 11-24);

b. Felder met "a lot" of the description one or more witnesses provided law enforcement such that law enforcement approached Felder when they canvassed the area following the crimes because Felder was wearing a jacket with a "23" on the back (R. p. 69, line 1 – p. 70, line 23);

c. Felder's dreadlocks matched the hairstyle described by two witnesses (R. p. 72, line 15 – p. 73, line 6);

d. Felder's jacket had gunshot residue on one sleeve (R. p. 70, line 21 – p. 71, line 14);

e. Officers located Felder less than one thousand feet from the incident location and he lived nearby as well (R. p. 73, lines 15-19); and

f. Felder went "back and forth" about whether he attended court on December 23 as his alibi alluded (R. p. 74, line 2 – p. 75, line 1).

However, vicinity alone does not establish a train of facts and circumstances meeting the standard for the introduction of third party guilt. Another person's being in the same vicinity as the crimes is not in and of itself inconsistent with the defendant's guilt. *State v. Williams*, 321 S.C. 327, 335, 468 S.E.2d 626, 631 (1996); *see also State v. Tindall*, 379 S.C. 304, 313, 665 S.E.2d 188, 193 (Ct. App. 2008), *rev'd on other grounds*, 388 S.C. 518, 698 S.E.2d 203 (2010) (evidence that someone other than the defendant was responsible for the crimes deserved only a jury instruction on mere presence, as the evidence raised merely a conjectural inference not meeting the *Gregory* standard). Nor does a partial match to a general physical description given by a witness. *Miller v. State*, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008). Such evidence, even when paired with confirmation that the person matching the general physical description was also at home in the same vicinity "on the day in question," casts nothing more than "a mere bare suspicion" of third party guilt. *State v. Mansfield*, 343 S.C. 66, 85-86, 538 S.E.2d 257, 267 (Ct. App. 2000) (also collecting cases); *contra Miller v. State*, *supra* at 116-17, 665 S.E.2d at 600 (counsel found ineffective for failing to present evidence of third party guilt that included a description match *and* testimony that the third party admitted to committing three crimes in the same area and with the same car as the defendant, to whom third party was related).

The State argued, and the testimony proffered before the trial court showed, that the evidence regarding Felder failed to establish any reliable proof of a "train of facts and circumstances" tending to clearly point to Felder as a guilty party. As proffered:

a. The eyewitness to the shooting described the assailant as a black male five-foot-eight to five-foot-ten, "wearing all black clothing, about 170 pounds, with facial cover" of some type. He fled after the shooting. (R. p. 26, lines 1-11).

b. A neighbor, Celest McBride, observed a person running away from the direction of where the shooting took place and she observed the runner drop a cell phone[3] and some money. The runner picked up the money. The neighbor described the runner as "a black male, stone-gray pants, dreads, five-ten to six foot, with medium build." (R. p. 26, line 15 – p. 28, line 18; R. p. 41, line 5 – p. 42, line 11; R. p. 55, lines 2-25).

c. Another person, Merit Williams, witnessed a man running in a direction away from the victim's home. The witness described that person as "a young black male, dark skin, black hoodie with the number 23 on the back of it." The "23" had different coloring than the black hooded part of the article of clothing. The runner's shoes were "red Converse" sneakers, which Williams, a former shoe salesman, confidently identified. The runner's pants were "black warm-up pants." The runner also had a "skully cap." (R. p. 29, line 4 – p. 30, line 16; R. p. 43, lines 6-8; R. p. 62, line 16 – p. 65, line 17).

d. Canvassing the area in which Williams said he saw the runner head, law enforcement noticed "an individual that had dreads, wearing a red-

[3] Law enforcement recovered the dropped cell phone and learned it had Appellant's photo on the lock screen. (R. p. 28, lines 1-14).

and-black jacket with a 23 on the back" of a "leather-type jacket." This person wore red pants. This person's shoes were red but they were not Converse sneakers. (R. p. 31, lines 5-25; R. p. 33, lines 4-25; Court's Ex. 5-9).

e. When he agreed to come in for questioning, the person wearing the red pants, red shoes, and red-and-black jacket offered an alibi which found two women could corroborate. This was David Felder. Felder had been to visit his attorney in Saint George at one in the afternoon on December 23, initially at the Dorchester County Courthouse. The attorney was not at the courthouse so they rescheduled the meeting and then Felder traveled to Cordesville before returning to Lincolnville where the incident occurred. His girlfriend and another female took him to the meeting and to Cordesville and they did not return to Lincolnville until three or four in the afternoon. These women verified the alibi. They had just returned to Lincolnville when the detective noticed Felder, and he was, at that time, seen with the females he traveled with. (R. p. 32, lines 1-10; R. p. 86, line 34 – p. 36, line 14).

f. Law enforcement did not arrest Felder because his alibi checked out. Felder was cooperative. Most importantly, there was no evidence that Felder committed the crimes. (R. p. 36, line 20 – p. 37, line 10).

g. The witnesses who had seen a person running from the direction of the crimes stated that photographs of Felder did not match their description of the runner they saw. In fact, Merit Williams knew

Felder because they lived in the same area for about fifteen years, and Williams knew that Felder was not the person he saw running. (R. p. 56, lines 1-13; R. p. 63, line 13 – p. 64, line 20).

h. Felder's jacket sleeve tested positive for gunshot residue, yet it was tested after officers initially approached Felder. During this initial approach, as the officers were standing within a foot of Felder, a dog aggressively approached them and one officer drew and fired his service weapon into the ground. After the weapon fired, the officers frisked Felder before cuffing him to take him to the station for questioning. During this exchange, the officer who had just fired the gun ran his hand down Felder's jacket sleeve. (R. p. 49, lines 18-23; R. p. 50, line 22 – p. 52, line 13; Court's Ex. 11).

Based upon the totality of the evidence presented at the proffer, the trial court did not err in suppressing Appellant's evidence of third party guilt. As distinguished by the trial court, Felder did not actually match the description made by the witnesses when officers located him in the neighborhood hours after the shooting. (R. p. 69, line 12 – p. 70, line 11). First, Felder had on a leather bomber or varsity-style jacket, and not a hoodie. Each person who witnessed the runner described also Felder's clothing as black or dark. Yet, as exemplified in the still frames of Felder incorporated into the record of this hearing, Felder's patterned jacket in no way resembles a dark hooded sweatshirt. (R. pp. Court's Exhibits 5-7). Though Felder's jacket had a "23" on the back as others witnessed, Felder's jacket stands out. It does not resemble any clothing described by any witness. Moreover, the detective described Felder as wearing nearly all red from head to toe, including sneakers that were decidedly not the red Converse the former shoe salesman had

earlier described. (R. pp. Court's Exhibits 8-9).

The stark difference in Felder's appearance from the clothing descriptions provided by those that witnessed the runner raises only a mere suspicion of Felder's involvement as the trial court ruled. (R. p. 92, lines 7-24). Appellant's counsel even agreed but argued that the witnesses gave "widely varying descriptions" that no person could match. (R. p. 69, line 18 – p. 70, line 20). However, the descriptions do not vary "wildly" in favor of connecting Felder to the crimes by any chain of facts and circumstances. Even though the descriptions by the witnesses vary, they do not discuss a head-to-toe red outfit or a leather, multicolored jacket with a vivid, allover graphic design. Rather, they consistently stated that the runner wore dark clothing. The fact that Felder has dreads and wore a jacket with a large "23" on the back and no hood does not clearly point to him as a guilty party. And crucially, when given the opportunity, no witness identified Felder as the subject they observed running away from the scene of the crime. To the contrary, Williams, who had been familiar with Felder for fifteen years, stated with certainty that Felder was not the runner. (R. p. 56, lines 1-13; R. p. 63, line 13 – p. 64, line 20).

This inquiry does not conclude with the descriptive divergence. Additional proffered evidence demonstrates that Felder can only be linked to the crimes with pure conjecture. Most basically, Felder had a verifiable alibi wherein he was scheduled to meet with his attorney and went to the courthouse in Saint George to do so, thereafter leaving for Cordesville. He was not in Lincolnville at the time of the crimes and returned hours after the shooting. (R. p. 32, lines 1-10; R. p. 34, line 15 – p. 36, line 14). And though Appellant relies upon gunshot residue identified on Felder's jacket sleeve as proof of connection to the crimes, Appellant could offer no better evidence connecting Felder to the use of a gun that day. (R. p. 70 line 21 – p. 71, line 6). The proffered testimony further rejects any conceivable connection between that gunshot residue and

Felder's being involved in the crimes. Not only did Felder have a verified alibi, but the gunshot residue on Felder's sleeve is easily attributable to the series of events immediately preceding his being taken into custody for questioning. An officer discharged his service weapon within a foot of Felder and then frisked and handcuffed him. This action necessitated that the officer run his hands down Felder's jacket sleeves. (R. p. 49, lines 18-23; R. p. 50, line 22 – p. 52, line 13; Court's Ex. 11). Basic gunshot residue principles dictate that such actions are accompanied by a likelihood that gunshot residue would come to rest on that jacket sleeve. Again, as the trial court ruled, that gunshot residue provided only mere suspicion as to Felder's involvement in the shooting that day. (R. p. 92, lines 7-11).

Given the foregoing, the fact that officers detained Felder and executed a search warrant on his residence is not persuasive as Appellant contends. Again, as the trial court pointed out, law enforcement located no evidence at Felder's residence which related him to the crimes. (R. p. 70, line 15 – p. 72, line 4; R. p. 73, lines 20-25). Felder was merely in the vicinity of the crimes a few hours after they occurred. Where, as here, there exists no evidence tending to clearly point out that the third party is guilty, the defendant's intent to present such evidence is prohibited. *State v. Mansfield, supra*; *see also State v. Cooper*, 334 S.C. 540, 549-50, 514 S.E.2d 584, 589 (1999) (lack of credible evidence linking third party to crime mandates suppression of third party guilt evidence). There simply are no connecting facts and circumstances tending to point to Felder as the guilty party. *State v. Gregory, supra.*

III. Appellant's motion to suppress evidence derived from the search of Appellant's apartment must fail because the warrant affidavit did not include false statements or statements made with reckless disregard for the truth, and because the warrant otherwise contained facts sufficient to establish probable cause for the search.

Appellant moved to suppress the bullets recovered from Appellant's bedroom on the basis that they were obtained with a search warrant flawed by a lack of probable cause. (R. p. 82, line 1 – p. 88, line 15). Appellant contends that because the affidavit in support of the search warrant did not particularize, by witness, the description that each of three witness gave of the assailant and/or person they saw running away from the direction of the victim's home, that the warrant lacks facts sufficient to support probable cause. Appellant further contends that because the affidavit gave only a conclusory description of the link between the cell phone dropped by a person running from the direction of the shooting, its contents are further insufficient for a warrant to issue. Together, Appellant argues the affidavit in support of the warrant is disingenuous such that the fruits of the warrant demand suppression in accord with *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). The trial court denied the motion after reviewing the affidavit in support of probable cause. (R p. 91, lines 20-22; *see* R. pp. 1131-32). Appellant's argument fails given this record's support for the issuance of a valid search warrant.

"A search warrant may issue only upon a finding of probable cause." *State v. Weston*, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). Facts sufficient to support a finding of probable cause must be present in a sworn affidavit and may be supplemented by sworn oral testimony before the magistrate to whom the affidavit is offered. *Id.* The United States Supreme Court has adopted a totality of the circumstances test where veracity and basis of knowledge are relevant to, but not inflexible requirements of, a probable cause determination. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1987). Ultimately, a search warrant should not issue unless the

affiant appearing before the magistrate offers enough facts to support a "practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched." *State v. Dupree*, 354 S.C. 676, 685, 583 S.E.2d 437, 442 (Ct. App. 2003).

In certain circumstances, the Fourth and Fourteenth Amendments to the United States Constitution permit a criminal defendant to challenge the veracity of a search warrant affidavit after its issuance and execution. *Franks v. Delaware*, *supra* at 155-56, 98 S.Ct. at 2676. "The *Franks* test applies in cases when officers include false information in a warrant affidavit and cases when officers omit potentially exculpatory information." *State v. Porch*, 417 S.C. 619, 626, 790 S.E.2d 440, 444 (Ct. App. 2016). However, 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." *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 329, 397 (1999) (footnote omitted).

In order to make this showing, the defendant bears the heavy burden of demonstrating the officer acted with the requisite ill intent and "that the omitted material was such that its inclusion in the affidavit would defeat probable cause." *State v. Lynch*, 412 S.C. 156, 179-80, 771 S.E.2d 346, 358-59 (Ct. App. 2015). Most critically, "[t]here will be no *Franks* violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." *State v. Missouri*, *supra.* Only when a defendant makes this preliminary showing is he entitled to a *Franks* hearing, where he then must prove the allegations by a preponderance of the evidence. *State v. Lynch*, *supra* at 180, 771 S.E.2d at 359 (quoting *United States v. Shorter*, 328 F.3d 167, 170 (4th Cir. 2003)).

Appellant cannot meet the required preliminary showing. With and without the "omitted" material, the affidavit includes sufficient information to establish probable cause such that the trial court did not error in denying the motion to suppress. A *Franks* hearing was not warranted. The affidavit reviewed by the trial court read:

> That on 12/23/16 at approximately 13:00hrs, the victim John Glenn Pritchard W/M/ DOB [redacted] was shot and killed during the commission of an armed robbery, burglary at [redacted] Lincolnville, S.C. **That the subject documented above Joseph Lamar Brown Jr. is believed to be the assailant in this incident though the affiant's investigation.** At the time of the robbery the defendant was armed with a 9mm firearm. Recovered at the crime scene was one 9mm spent casing within proximity of the deceased inside the residence. **The assailant was wearing running pants or some type of trouser, stone washed with a shirt of some type with the number 23 on it, and a pair of red sneakers. These descriptions are listed in various statements of witnesses in the area of the homicide who spoke with detectives from the CCSO. A short distance away from the scene of the homicide a witness gave an audio statement that the assailant was dropping cash and his cellphone from his pant pocket onto E. Owens St. Lincolnville, S.C. as he was running away from the residence. The cellphone was taken as evidence by the CCSO, and during the investigation it was determined that the above subject Joseph Lamar Brown Jr. is the owner. The driver's license and other records reflect that the subject Joseph Lamar Brown Jr. also fits the physical description of the person fleeing the scene, dropping the cellphone as stated above in this affidavit.** The affiant believes that the above evidence is at Joseph Lamar Brown Jr.'s listed above, that is also on his SCDL and is in the proximity of the homicide.

(R. pp. 1131-32 (emphasis added); *see* R. p. 90, line 3 – p. 91, line 19).

To recap the information proffered as having been garnered in the early stages of the investigation, a shooting occurred inside a residence by an unknown intruder. Another occupant of that residence, Hugh Potter Pritchard, had an opportunity to view the assailant. Pritchard described the assailant as a black male who fled after the shooting. He stood at five-foot-eight to five-foot-ten, was "wearing all black clothing, [and was] about 170 pounds, with facial cover" of some type. (R. p. 26, lines 1-11). He could not tell how old the assailant was but he was not "an

old man" and he was not "a teenager." (R. p. 40, lines 14-20). Neighbor Celest McBride heard a boom and observed a person running away from the direction of where the shooting took place. She watched the runner drop a cell phone and some money, but he left the cell phone behind. McBride described the runner as "a black male, stone-gray pants, dreads, five-ten to six foot, with medium build." (R. p. 26, line 15 – p. 28, line 18; R. p. 41, line 5 – p. 42, line 11; R. p. 54, line 12 – p. 55, line 25). Another witness, Merit Williams, was driving along when he witnessed a man running in a direction away from the victim's home. Williams described that person as a young black male with dark skin wearing a black hoodie with a differently colored "23" on the back, black warm-up pants, and red Converse sneakers. The runner also had a "skully cap." (R. p. 29, line 4 – p. 30, line 16; R. p. 43, lines 6-8; R. p. 62, line 16 – p. 65, line 17). Law enforcement recovered the cell phone that the black male left behind and, based upon the lock screen photo, learned that the phone belonged to Appellant. When he brought Appellant in for questioning, Appellant identified the phone as his own and claimed he lost it in that location right about the time that the crimes took place. (R. p. 27, line 17 – p. 28, line 14).

As-is, the warrant affidavit contains accurate facts adequate to establish a finding a probable cause. *State v. Porch*, 417 S.C. at 630, 790 S.E.2d at 445 (finding defendant failed to show officer intentionally or recklessly omitted potentially exculpatory information, and finding that "even including the potentially exculpatory information, the affidavit was still sufficient to support a finding of probable cause to secure an arrest warrant"). The information in the affidavit is not incorrect.[4] As stated in the affidavit, witnesses described a black male wearing "running"

[4] A *Franks* issue may also be resolved by excluding "false information" appearing in the affidavit while inserting additional exculpatory information to determine if a substantial showing remains upon which a magistrate could find the existence of probable cause, *State v. Missouri*, 337 S.C. at 555, 524 S.E.2d at 397; however, the affidavit does not portend that Appellant

or "warm-up" pants "or some type of trouser" – not jeans. As stated in the affidavit, witnesses described a black male wearing "a shirt of some type with the number 23 on it, and a pair of red sneakers." This person was quite reasonably seen "fleeing the scene" as he was seen running in the direction away from the victim's home right after a neighbor heard a boom which reasonably equated with the shooting. As he ran he dropped cash and a cell phone, leaving the phone behind. Law enforcement obtained the cell phone and were able to identify the runner who dropped it from investigating information gleaned from its lock screen photo. To confirm the identity, officers obtained the DMV records of the runner who dropped the phone and learned that his "driver's license and other records reflect that the subject [Appellant] also **fits** the physical description of the person fleeing the scene, dropping the cell phone." (R. pp. 1131-32 (emphasis added)). That is, a consistent description of a black male of medium height and build which also resembled the photograph in the lock screen photo and the DMV records obtained during the investigation.

Probable cause exists in the affidavit as-is. "'The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit.'" *State v. Porch*, 417 S.C. at 627, 790 S.E.2d at 444 (quoting *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987) (also quoted in *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990)). Omissions do not *per se* invalidate a warrant and negligence in recording the facts relevant to the probable cause determination is not enough to establish reckless disregard or mal-intent on the part of the affiant officer. *Id.* at 627-28, 790 S.E.2d at 444 (citing *State v. Gore*, 408 S.C. 237, 244, 758 S.E.2d 717, 720 (Ct. App. 2014)). Courts must remember that affidavits in support of probable

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matched the clothing descriptions as Appellant appears to argue. (Br. of App. at 31-32; R. pp. 1131-32).

cause "are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion." *State v. Dupree*, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for . . . conclud[ing] that probable cause existed." *Illinois v. Gates*, *supra* at 238-39, 103 S.Ct. at 2332. Given the common sense link between Appellant, who officers independently verified as being the person photographed on the cell phone lock screen, and the connecting with the "physical" witness descriptions of the person who ran from the direction of the victim's house and dropped that same cell phone, there existed a fair probability that officers would find contraband or evidence of a crime in the particular place to be searched. Appellant may quite reasonably have harbored a gun or other evidence connected to the shooting at his residence, which is where Appellant presumably returned at some point after dropping his cell phone as he ran away from the direction of the victim's house just moments after the shooting.

Even if the information Appellant contends the officer omitted was injected into the affidavit, it still meets the threshold for probable cause such that suppression is not a suitable remedy. *State v. Missouri*, *supra* (applying *Franks v. Delaware*, *supra*). "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *State v. Weston*, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997); *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014) ("Where there is no misconduct, and thus no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction."). Appellant argues the affidavit was insufficient because it omitted a statement that the witnesses provided varying descriptions; and it omitted that some, but not all, of the witnesses stated the runner had dreadlocks; and it

omitted mention of an interview with the female photographed on the cell phone lock screen photo wherein she identified Appellant as the person who dropped the phone. (Br. of App. at 31-32). But quite plainly, the descriptors alleged to have been omitted are not necessary to the probable cause determination for reasons discussed. Moreover, their addition certainly does not defeat probable cause. *State v. Lynch*, *supra.* None of this extra information alters the common-sense conclusion that the affiant reached given the combined facts, which linked Appellant's identity to the cell phone dropped by the person seen running away from the direction of the victim's house right after the neighbor heard the boom. *See State v. Porch*, *supra.* This common-sense chain of facts gleaned from the investigation do appear in the warrant as written. (R. pp. 1131-32). Appellant's alleged omissions are simply immaterial to the probable cause determination.

"Unless the 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." *United States v. Colkley*, 899 F.2d at 303. Appellant fails to make any showing that the affidavit includes knowing and intended false statements or statements made with reckless disregard for the truth. Thus, Appellant fails to establish facts necessary to meet the burden *Franks* requires of him, and the affidavit otherwise entails facts sufficient "to ensure that the magistrate had a 'substantial basis' for . . . conclud[ing] that probable cause existed." *Illinois v. Gates*, *supra* at 238-39, 103 S.Ct. at 2332. The trial court properly refused to suppress evidence obtained from that warrant.

CONCLUSION

For all of the foregoing reasons, Respondent submits that this Court affirm Appellant's convictions and sentence for murder, first degree burglary, attempted armed robbery, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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June 10, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

JOSEPH LAMAR BROWN, JR.,

Appellant

Appellate Case No. 2019-000781.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This10th day of June, 2020.

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