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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Robert J. Bonds, Circuit Court Judge

HERBERT LEROY HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001369

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

1.

Whether the PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where it was undisputed Petitioner asked counsel to appeal, but counsel erroneously filed a notice of appeal from a guilty plea instead of a trial, which resulted in dismissal of the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, and since the State agreed Petitioner was entitled to a belated direct appeal?

2.

Whether the PCR court erred in denying Petitioner post-conviction relief where it found counsel provided effective representation despite counsel's failure to argue an additional basis to exclude the DNA evidence based on chain of custody, and where the PCR court erroneously concluded a sufficient chain of custody was established at trial, since the State failed to establish chain of custody as far as practicable, where the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled?

STATEMENT

During the May term of 2011, a Dorchester County Grand Jury indicted Petitioner, Herbert Holmes, for first-degree criminal sexual conduct and kidnapping. Petitioner was tried before the Honorable Diane Goodstein and a jury, from April 22 – 25, 2013. Mitchell Farley and Ash Chisholm represented Petitioner. Glenn Justice and Phil Giese prosecuted the case.[1]

Trial

This trial involved a cold case DNA hit from a decades-old rape. On or about October 25, 1984, P.R., the complainant, was working at The Bookbag, a bookstore in Dorchester County. A black man of medium height, who was in his twenties or thirties, and had a "nondescript," "very common face" pointed a gun at Complainant. The man stole money from the cash register, and he forced Complainant into a back room where he raped her. Then the man stole Complainant's wedding ring and ran away.[2]

Law enforcement and Complainant's husband were called. Detective Knight drove Complainant and her husband to the emergency room at MUSC, stopping at Complainant's home along the way so that she could get fresh clothes to wear home from the hospital.[3]

Michelle Aimes Vevon and Lisa Cox Schafer were both nurses working in the trauma unit at MUSC at the time of Complainant's sexual assault examination. Due to the passage of time, neither nurse remembered the Complainant's exam. Vevon explained that the process for a sexual assault examination was for a physician to perform the exam and a nurse to assist and collect

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[1] App. 574 – 577; App. 1.

[2] App. 82, l. 17 – 88, l. 15.

[3] App. 88, l. 23 – 90, l. 22; App. 131, l. 5 – 132, l. 17.

evidence. Nurse Vevon stated her handwriting indicated that she was present during the exam, but she believed Nurse Cox Schafer assisted the doctor. Vevon recognized her handwriting on an envelope of pubic hair combings, and she recognized her handwriting on a checklist of evidence that was turned over to Detective Knight.[4]

State's Exhibit #8 is the checklist and specifies the collected evidence was:

- Clothing: hose, bra, panties, slip, skirt, blouse
- Chux x 2
- Photos: full length
- R & L fingernail scrapings
- Pubic hair combings
- Pubic hair pluckings
- Vaginal washing without fixative
- Vaginal swab for ABO
- Woods lamp + swab
- Filter paper with saliva
- Other evidence: oral washings without fixative, oral ABO, rectal ABO

See App. 582. This evidence would go back and forth from the Dorchester County Sheriff's Office to SLED multiple times over the years in an attempt to solve the crime—in 1985, 1988, 1989, and 2009.

Nurse Cox Schafer explained there was a protocol for sexual assault examinations. Although Cox Schafer did not remember Complainant's exam, Cox Schafer believed she assisted the doctor with the exam because her signature was present on the envelopes or paper bags which contained the evidence collected during the exam.[5]

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[4] App. 99, l. 14 – 109, l. 4; App. 120, ll. 6-24.

[5] App. 120, l. 25 – 127, l. 25.

Of note, Complainant was insistent the rape occurred on October 24, 1984, and not October 25, 1984. However, Nurse Vevon noted the envelope of pubic hair combings was labeled October 25, 1984. Detective Knight also testified the crime occurred on October 25, 1984.[6]

Detective Knight waited outside the hospital room until he was handed the evidence collected during the exam. He received the rape kit, which was a sealed box full of envelopes and samples, and signed State's Exhibit #8, the checklist, that he received the items. Detective Knight was the Sheriff's son. According to Knight, only his father (Sheriff Knight), Captain Ernest Moultrie, and Lieutenant Dale Nevins had keys to the evidence locker. Detective Knight said he kept the evidence until he turned it over to Lieutenant Nevins. Knight said the evidence locker was a storage room with a deadbolt.[7]

Captain Moultrie's testimony about who had keys to the evidence locker was the same—Moultrie said he had a key to the evidence locker along with the Sheriff and Nevins. Lieutenant Nevins's testimony was in agreement—Nevins said he, Moultrie, and the Sheriff had a key to the evidence locker. However, Lieutenant Earl Asbell's testimony about the evidence locker differed. According to Lieutenant Asbell, "Each individual detective—I handled my own evidence. Lieutenant Nevins handled his. My office was separate from his and I had a storage room in there that I locked my evidence in."[8]

Lieutenant Nevins agreed he received the evidence from Knight and put it in the evidence locker. According to Nevins, he personally made two trips to SLED in January of 1985—he took

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[6] App. 107, l. 3 – 109, l. 4; App. 135, ll. 2-14; App. 83, l. 24 – 94, l. 4; App. 93, l. 20 – 94, l. 15.

[7] App. 132, l. 9 – 143, l. 24.

[8] App. 150, l. 22 – 152, l. 7; App. 154, l. 12 – 155, l. 3; App. 201, ll. 9-15.

the rape kit on January 2, 1985, and he took the rest of the evidence on January 31, 1985. State's Exhibit #18 and State's Exhibit #19 reflect that Nevins took the evidence to SLED in two trips during January of 1985. *See* App. 583 – 584. Court's Exhibit #1 is a stipulation by the parties of what items were taken to SLED by Nevins in January 1985. *See* App. 581. Lieutenant Nevins said a Sergeant Salvely, who is now deceased, picked the evidence back up from SLED in 1985 and brought it back to the Sherriff's Office.[9]

In 1988, the Sheriff's Office sent the evidence in the case back to SLED when a man named Barry Daniels became a suspect. Nevins took the evidence to SLED in 1988. State's Exhibit #22 is Nevins's 1988 request to SLED, and it has a stamp from SLED saying the evidence was received by its chemistry lab on July 21, 1988. *See* App. 585. Confusingly, however, Nevins testified the evidence was transported back to the Sheriff's Office from SLED by an Officer Joseph Rivers on April 28, 1988, which would have meant it was returned prior to being delivered.[10]

Also problematic regarding the evidence's handling in the late 1980's was the testimony of Officer Emory Rush, who testified that he transported unidentified evidence from this case along with evidence from seven other cases, from SLED back to the Sheriff's Office on December 19, 1989. State's Exhibit #23 is the form Rush signed, which documented that he retrieved the evidence from SLED in 1989. *See* App. 586. The status of where the evidence was at various times in 1988 and 1989 therefore seems unclear. Back at the Sheriff's Office, Rush gave the evidence to Nevins.[11]

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[9] App. 155, l. 7 – 161, l. 9.

[10] App. 162, l. 18 – 166, l. 16.

[11] App.196, l. 22 – 199, l. 8.

Regarding what testing was done on the evidence at SLED in 1988, the evidence was viewed but returned without further testing because the analyst did not believe enough material was present for the existing technology to be of use.[12]

In 1993, Lieutenant Nevins left the Sheriff's Office, and Lieutenant Earl Asbell became the evidence custodian. When Asbell took custody of the evidence, the two men signed off on an inventory of the evidence locker. The inventory sheet was five pages long. The only mention of the evidence in this case on that inventory is listed on page three as item nineteen, which was a "box of miscellaneous envelopes" with eight different people's names listed on it. The only thing listed as being in the box were "envelopes." The inventory did not mention any bags of clothes, kits, swabs, cuttings, or vials.[13]

In 1993, Asbell moved the evidence to a different evidence storage room. In 1994, the Sheriff's Office moved, and the evidence from the evidence room was boxed up, packed on a truck, and moved to the new office over the course of a couple of days. Others were involved in the moving, but Asbell supervised. Asbell did not remember who helped with the move, but believed it was a detective. Asbell said he would have noticed if something appeared to be tampered with.[14]

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[12] App. 315, l. 14 – 316, l. 19.

[13] App. 201, l. 16 – 202, l. 20; App. 166, l. 22 – 168, l. 12; App. 209, l. 24 – 211, l. 14.

[14] App. 204, l. 1 – 206, l. 16; App. 212, l. 20 – 213, l. 19.

Asbell decided to resubmit the evidence to SLED in 2009. Another officer transported it there. When Asbell filled out the request for SLED to test the evidence, one of the items he sent to SLED was oral wash.[15]

Officer Buster Edwards transported the evidence to SLED and retrieved it back from SLED (apparently this was in 2009, given his employment history).[16]

Kenneth Bogan, who was qualified as an expert in DNA analysis, worked at SLED for many years. He did all of the testing on the evidence in this case. Bogan was the analyst who tested the evidence originally when it came to SLED in 1985. As part of that initial round of testing, Bogan took a cutting from the panties that were collected. Bogan again checked the evidence in 1988 and determined not to do further testing at that time. In 2009, Bogan performed additional testing on the evidence when it was again sent to SLED for analysis.[17]

At some point in the 1980's, Bogan removed certain items of evidence from the sexual assault kit, including vaginal wash, vaginal swab, oral swab, rectal swab, saliva, and oral wash. They became separated from the other evidence. When certain items were resubmitted, the oral wash was "not found."[18]

Bogan was asked why there was no "signature of person receiving evidence" signed on the SLED request for analysis forms from the 1980's. Bogan said he did not know, but that at the time, "[t]he secretaries would call the analyst and ask them to come up and pick up the evidence." The

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[15] App. 203, ll. 1-24; App. 206, l. 19 – 215, l. 6.

[16] App. 225, l. 16 – 233, l. 16.

[17] App. 299, ll. 12-15; App. 310, ll. 1-6; App. 300, l. 13 – 335, l. 10.

[18] App. 332, l. 4 – 333, l. 1; App. 269, l. 1 – 270, l. 11.

forms were also time stamped as received by SLED. Bogan did not think he was required to sign the forms in 1985. Bogan believed the secretary at that time was Susie Wilson.[19]

Bogan opined that when he re-tested the cutting from the panties in 2009, he found DNA that was a mixture of at least two individuals. He got a partial profile from a major contributor, who was an unidentified male. The minor contributor to the mixture was consistent with Complainant. At a later time, a known standard for Appellant was submitted. Bogan opined that the "DNA profile that I developed from that major contributor from the panties, matched the DNA profile of Herbert Holmes. The probability of randomly selecting a unrelated of unrelated individuals [sic] having a DNA profile matching that major contributor is approximately 1 in 350 billion."[20]

However, in 2009, when Bogan received the evidence, one of the items was mismarked. Bogan noted the receipt for the cutting from the panties and the cutting from the skirt were both labeled N. Bogan claimed Item N was the cutting from the panties and Item M was the cutting from the skirt. As seen, Bogan matched Appellant's DNA to the cutting from the panties. However, Bogan said it was only the receipt that was mislabeled, not the items themselves.[21]

Appellant moved to exclude the DNA evidence, cited to *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011), and argued the State had not proven chain of custody as far as practicable, since

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[19] App. 249, l. 8 – 250, l. 24; App. 258, l. 260, l. 13.

[20] App. 320, l. 6 – 324, l. 24; App. 335, ll. 1-10.

[21] App. 270, l. 12 – 272, l. 5.

much was left to conjecture.[22] The bases for exclusion due to an incomplete chain of custody were as follows.

- First, a discrepancy in the testimony about whether the rape occurred on October 24 or 25, 1984. Complainant was certain the crime occurred on the 24th but others' testimony was that it occurred on the 25th.[23]
- Second, when the evidence was collected during the sexual assault examination, "neither one of the nurses was able to say for sure who collected the evidence and who labeled it, if they were both there."[24]
- Third, no one at SLED signed they received the evidence when it was delivered by Lt. Nevins in January of 1985. *See* App. 583 – 584. (State's Exhibit #18 and State's Exhibit #19 are the forms Nevins submitted to SLED and the "signature of person receiving evidence" line is blank.) Counsel argued that since these were SLED's own forms, they should have followed "their own protocol." Moreover, testimony about how the evidence got from Nevins to Bogan while at SLED was speculative.[25]

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[22] App. 273, l. 25 – 295, l. 13; App. 246, l. 8 – 248, l. 17.

[23] App. 275, ll. 19-25.

[24] App. 276, ll. 2-16.

[25] App. 276, l. 25 – 278, l. 9.

- Fourth, it was unclear when the evidence was returned from SLED in 1985; whether it all came back in the same batch or whether it was returned in two batches (which is how it was delivered).[26]
- Fifth, when the evidence went back up to SLED in 1988, once again no one at SLED signed receipt of the evidence, as shown by State's Exhibit #22 and State's Exhibit #33. (State's Exhibit #33 is the second page of State's Exhibit #22). *See* App. 585; App. 587. Also, testimony differed on whether the evidence was returned to the Sheriff's Office in 1988 or 1989.[27]
- Sixth, the State presented conflicting testimony on how evidence was stored while at the Sheriff's Office. As seen, Nevins, Moultrie, and Knight agreed the evidence was kept in a locker and only Nevins, Moultrie, and the Sheriff had a key. However, Asbell said each of the detectives kept his own evidence.[28]
- Seventh, when Nevins left the office and Asbell took custody of the evidence, the inventory of the evidence locker was incomplete as to this case. The only mention of the evidence in this case on the inventory was the inclusion of P.R.'s name along with seven other people's names listed as a "box of miscellaneous envelopes." The inventory did not mention any bags of clothes, kits, swabs, cuttings, or vials. Counsel argued this was "a documented break in the chain."[29]

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[26] App. 278, l. 14-20.

[27] App. 278, ll. 20-22.

[28] App. 279, ll. 16-23.

[29] App. 279, l. 23 – 281, l. 1.

- Eighth, the evidence was boxed up and moved from the old Sheriff's Office to the new Sheriff's Office and it was unclear who helped Asbell move the evidence.[30]
- Ninth, when the evidence went back to SLED in 2009, the receipt for the cutting from the panties was mislabeled—the item was marked M but should have been marked N. Also, the oral wash had disappeared.[31]
- Tenth, a lack of testimony about the standard operating procedure for chain of custody at SLED or the Sheriff's Office.[32]

The court denied the motion. It ruled that discrepancies about the date of the rape went to weight, that Nurse Schafer remembered how the evidence was collected, and that Nevins and Moultrie were clear about their procedure and who had access to the evidence. The court found the chain was clear as to the hospital, the Sheriff's Office, and SLED, noting the same analyst at SLED did the analysis each time. The court did note the oral wash disappeared, but found any problems went to weight and not admissibility.[33]

The DNA was the only evidence linking Petitioner to the crime. Petitioner was convicted as indicted. He was sentenced to serve consecutive terms of life imprisonment for kidnapping and thirty years for first-degree criminal sexual conduct. Trial counsel attempted to directly appeal but he erroneously filed a notice of appeal that was proper for a guilty plea and not for a trial—the

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[30] App. 281, ll. 1-14.

[31] App. 281, l. 16 – 283, l. 9.

[32] App. 284, l. 1 – 287, l. 2.

[33] App. 295, l. 14 – 298, l. 19.

notice stated counsel was "not aware of any exceptions to Rule 203." Therefore, the court of appeals issued an order dismissing the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR.[34]

Post-conviction relief

On November 21, 2017, Appellant filed an application for post-conviction relief (PCR). On January 4, 2022, the State made its return and partial motion to dismiss. A hearing was held in the matter on May 19, 2022, before the Honorable Robert J. Bonds. Christopher Geel represented Appellant. Samantha Weidauer represented the State.[35]

Trial counsel testified that Petitioner asked him to file an appeal but that he mistakenly filed a notice of appeal from a guilty plea instead of a trial. "Mr. Holmes asked me to file the appeal." Petitioner agreed he asked counsel to appeal. The State agreed that Petitioner was entitled to a belated direct appeal.[36]

As to an additional ineffective assistance of counsel claim, Petitioner testified that he believed counsel's performance was deficient insofar as how he challenged the chain of custody, specifically that counsel did not argue the death of certain law enforcement personnel should have been part of the motion to exclude. (At trial, the State admitted Sergeant Salvely, who was now deceased, had transported the evidence back from SLED in 1985.) Counsel admitted that his failure

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[34] App. 427, l. 20 – 428, l. 4; App. 578 – 579; App. 438, l. 3 – 439, l. 3; App. 541 – 546; App. 547.

[35] App. 441 – 447; App. 448 – 461; App. 462.

[36] App. 498, l. 11 – 499, l. 13; App. 510, l. 5 – 516, l. 5; App. 531, ll. 21-25; App. 472, l. 24 – 473, l. 1.

to argue Salvely's death as an additional basis to find the chain of custody was insufficient was not strategic.[37]

On September 19, 2022, the PCR court issued an order granting Appellant a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but denying post-conviction relief. The order of dismissal stated that the petitioner's testimony, counsel's testimony, and the deficient notice of appeal that was filed demonstrated that Petitioner was entitled to belated appellate review.[38]

The order of dismissal also addressed Petitioner's claim that counsel was ineffective for failing to investigate and challenge chain of custody on the DNA evidence. The order concluded that "because Counsel did in fact move to exclude the DNA evidence and vehemently argued his basis for his motion to the trial court, this Court finds no deficiency." "This Court further finds Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. Specifically, this Court agrees with the trial court and finds a sufficient chain of custody was established at trial."[39]

This petition for writ of certiorari follows. [40]

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[37] App. 475, l. 17 – 476, l. 20; App. 160, l. 6 – 161, l. 9; App. 520, l. 19 – 521, l. 522, l. 4.

[38] App. 550 – 573; app. 565 – 566.

[39] App. 568 – 569.

[40] Contemporaneously, Petitioner is filing a Brief of Appellant Pursuant to *White v. State*.

ARGUMENT

I.

The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where it was undisputed that Petitioner asked counsel to appeal, but counsel erroneously filed a notice of appeal from a guilty plea instead of a trial, which resulted in dismissal of the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, and since the State agreed Petitioner was entitled to a belated direct appeal.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Wilson v. State*, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)." *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992).

As seen, trial counsel testified that Petitioner asked him to file an appeal but that he mistakenly filed a notice of appeal from a guilty plea instead of a trial. "Mr. Holmes asked me to file the appeal." Petitioner agreed he asked counsel to appeal. The State agreed that Petitioner was entitled to a belated direct appeal.[41]

This evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974). The PCR court correctly

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[41] App. 498, l. 11 – 499, l. 13; App. 510, l. 5 – 516, l. 5; App. 531, ll. 21-25; App. 472, l. 24 – 473, l. 1.

granted Petitioner belated appellate review. *Anders v. California*, 386 U.S. at 744; *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626.

2.

The PCR court erred in denying Petitioner post-conviction relief where it found counsel provided effective representation despite counsel's failure to argue an additional basis to exclude the DNA evidence based on chain of custody, and where the PCR court erroneously concluded a sufficient chain of custody was established at trial, since the State failed to establish chain of custody as far as practicable, where the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

As seen, Sergeant Salvely, who transported the evidence back to the Sheriff's Office in 1985, had passed away by the time of Petitioner's trial. Counsel was ineffective—he should have argued Salvely's absence left to conjecture what happened to the evidence while it was in his custody. Counsel admitted his failure to so argue was not strategic. That fact, in addition to the other problems with the chain of custody, should have resulted in exclusion of the DNA evidence.

The State failed to establish the chain of custody on the DNA evidence as far as practicable. The sexual assault examination evidence passed through multiple hands over the decades; some of those hands were identified and some were not. The evidence was separated, moved, transported

and re-transported several times, and tested and retested several times. One item went permanently missing. Other items, including the critical evidence that purported to connect Appellant to the crime, were not listed on the inventory created when the evidence was transferred to a new custodian.

"[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007) (citing *Benton v. Pellum,* 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957)). "We have consistently held complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed." *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 628–29, 614 S.E.2d 642, 646 (2005) (citing *State v. Carter,* 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)). "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." *Id.*, 364 S.C. at 627, 614 S.E.2d at 645 (citing *Benton*, 232 S.C. at 33–34, 100 S.E.2d at 537). "Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive." *Sweet*, 374 S.C. at 6, 647 S.E.2d at 205–06 (citing *State v. Taylor,* 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)).

"Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) (citing *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the

manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id.* (citing *Sweet* at 7, 647 S.E.2d at 206). "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *Id.* (citing *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the substance was not established at least as far as practicable." *Id.* (cleaned up). A brief time discrepancy (fourteen minutes) is not fatal to chain of custody where each person who possessed the sample is identified. *State v. Rowell*, 436 S.C. 54, 60-65, 870 S.E.2d 175, 178-80 (Ct. App. 2022).

The trial judge's discretion regarding chain of custody and admission of evidence "must be reviewed in the light of the following factors: the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *State v. Hatcher*, 392 S.C. 86, 94–95, 708 S.E.2d 750, 754–55 (2011) (citing *United States v. De Larosa*, 450 F.2d 1057 (3d Cir. 1971) (cleaned up). "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." *Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755 (citing *Gallego v. United States,* 276 F.2d 914, 917 (9th Cir. 1960)).

"Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." *Id.* "While the admission of evidence is within the discretion of the trial judge, we have held that it is an abuse of discretion to admit the results of a blood alcohol test where the identity of those who sealed, labeled, and transported the blood sample is not established." *State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992). "[W]here there is evidence to establish the identity of those who have handled the evidence and

the manner in which it was handled, a weakness in the chain merely raises a question of credibility, not admissibility." *Taylor*, 360 S.C. at 24, 598 S.E.2d at 737. "The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case." *Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755.

In *State v. Cribb*, 310 S.C. at 522, 426 S.E.2d at 309, two nurses were present at the blood draw. One nurse testified that the other nurse administered IV to Cribb and it was customary for blood to be drawn by the person administering the IV; the other nurse who administered the IV did not recall drawing blood from Cribb, but assumed that she did so because that was her standard procedure. The admission of the blood evidence was found to be error, since the record did "not identify those persons who handled the blood from the time it was drawn until the time it was tested." *Id. See also State v. Trapp*, 420 S.C. 217, 233, 801 S.E.2d 742, 750 (Ct. App. 2017) (chain of custody sufficient where "the State identified every individual that handled the evidence").

The State failed to establish the chain of custody on the evidence analyzed for DNA as far as practicable here. There was a discrepancy in testimony about the date the evidence was collected during the sexual assault exam. The identity of each person who handled the evidence was not established, such as which nurse collected the evidence, who helped Lt. Asbell move the evidence in 1993, and who handled the evidence each time it was received at SLED. There was conflicting testimony on whether the evidence was returned to the Sheriff's Office by Officer Rivers in 1988 or Officer Rush in 1989. The State did not establish who had access to the evidence at the Sheriff's Office before 1993, since some officers said only three people had keys to one evidence locker, while another officer said each officer maintained his own evidence.

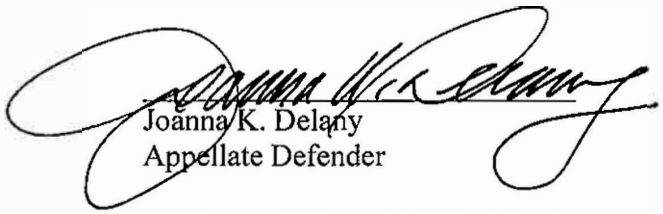
Breaks in the chain were documented, such as the missing oral wash, the failure to identify the evidence on the 1993 inventory except for noting a box of "miscellaneous envelopes" containing evidence from eight cases including this one. The critical evidence—a cutting from the panties that contained DNA matched to Appellant—was not listed on the 1993 inventory. At another point, when the items went to SLED, the receipt listing the cutting from the panties was mislabeled.

Much was left to conjecture in the manner of handling the evidence, such as what was the protocol for chain of custody at the Sheriff's Office and at SLED throughout the decades. When the evidence went to SLED in 1985 and in 1988, SLED failed to follow its own apparent protocol upon receipt of the evidence, since there was no "signature of person receiving evidence" on the request for analysis forms. *See* App. 583 – 585. The identity of the person at SLED who took the evidence from Lt. Nevins and gave it to Analyst Bogan during the various deliveries was not established. It was unclear how the evidence was returned from SLED in 1985—given Sergeant Salvely's death, he was not available to explain.

Given these circumstances, the nature of the evidence, and the opportunity for tampering, mixups, or contamination, the chain of custody was not established as far as practicable and the evidence should not have been admitted. *State v. Hatcher*, 392 S.C. at 94–95, 708 S.E.2d at 754–55; *State v. Sweet*, 374 S.C. at 6, 647 S.E.2d at 205; *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. at 627, 614 S.E.2d at 645. The PCR court erred when it found a sufficient chain of custody was established at trial. Petitioner has established prejudice. *Strickland*, 466 U.S. at 687.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari, permit full briefing on the issues presented, and consider Petitioner's belated direct appeal.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of March, 2023.