STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
General Sessions Court
The Honorable Perry H. Gravely

Appellant Case No 2022-000928
Lower Case No. (2021GS2306825)

State of South Carolina, ... Respondent,

vs.

Joseph M. Swaringen ..... Appellant

FINAL BRIEF OF APPELLANT

C. Rauch Wise
Attorney at Law
305 Main Street
Greenwood, SC 29646
864-229-5010
SC Bar No. 6188

Attorney for Appellant

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Question V: Did the trial court error in failing to suppress the evidence found in the motorcycle saddle bag on the ground that the search at the hospital was not by a state agency and was the action of private citizens?

Question VI: Did the trial judge err in failing to give the requested charge as to how the jury should address any flaws in the chain of custody?

Statement of the Case

Procedural History

Joseph Swaringen was arrested on November 18, 2020, and charged with trafficking in methamphetamine, more than 28 grams but less than 100. He was indicted on October 5, 2021. On August 10, 2021 the State served Mr. Swaringen with notice of intent to seek life without parole. The trial was originally scheduled June 7, 2022. Because of the late discovery of a chain of custody form, a mistrial was declared and the case re-scheduled for June 27, 2022.

The case was tried before the Honorable Perry Gravely and a jury on June 27-29, 2022. The jury convicted Mr. Swaringen of trafficking methamphetamine. He was sentenced to life without the possibility of parole.

Mr. Swaringen filed his Notice of Appeal on July 1, 2022.

Factual History

Joseph Swaringen was involved in an automobile accident with Katlin Glenn on November 18, 2020. Mr. Swaringen was knocked off his motorcycle. He received a minor laceration to his head. Rec. on App. at 116, ll 8-22. At first Mr. Swaringen did not want to go to the hospital for any further treatment. The medics and several bystanders eventually talked him into going to the hospital. Rec. on App. at 116, l 25 to 86, l 3. The medics carried a motorcycle saddle bag with them to the hospital as it was in his immediate vicinity when they started to transport him. Rec. on App. at 117, l 19-22.

At the hospital, Mr. Swaringen can be seen on State's Exhibit 1 entering the hospital on a stretcher. The saddlebag was not with him. Subsequently, the saddlebag was brought into the hospital. Then, Michael McKnight, an EMS person who worked the accident, gave the saddle

bag to a security officer to inspect. The bag was opened and inspected by the security officer. Rec. on App. at 106, l 19 to 107, l 25; 112, l 14-23. State's Exhibit 1 did not show the saddlebag entering the hospital from the ambulance area. It was later seen in the hospital in the possession of an EMS person.

While Mr. Swaringen was being taken for a CAT scan, Ms. Lisa Edmonds testified she did a search of his personal property. She testified she went through the personal belongings of Mr. Swaringen to conduct an inventory was what he had. Rec. on App. at 129, l 13-23. No inventory report was produced. Rec. on App. at 34, l 14 to 35, l 4. Ms. Edmonds testified she found several small plastic bags that she believed to be illegal drugs. Rec. on App. at 135, ll 18-22. She did not recall where the plastic bags were found. Rec. on App. at 141, l 14 to 142, l 5; 146, l 15 to 147, l 1. She did subsequently testify, she found the plastic bags loose inside the black saddle bag. Rec. on App. at 291, l 6 to 292, l 2.

During her direct testimony, she stated she gave the small plastic bags to the officers without being specific as to which one. Rec. on App. at 136, ll 5-9. When specifically asked if she turned the plastic bags over to Officer Christopher Miller, she answered, "I assume." Rec. on App. at 147, ll 18-19.

Officer Christopher Miller testified he was called to the emergency room trauma bay. He "Was handed a black Pelican case." Rec. on App. at 167, l 18. He testified, "[I]nside the Pelican case was there was a white-like substance and also there was a baggy." Rec. on App. at 167, l 25 to 168, l 1. He testified he received the items from Lisa Edmonds. Rec. on App. at 168, ll 2-4. He stated he then took them back to his office.

On cross-examination, however, Officer Miller admitted that he did not leave the trauma

bay area with the drugs, the Pelican Box or the black saddlebag. Rec. on App. at 204, l 1 to 205, 25; 223, l 10 to 224, l 6. Officer Miller never testified he went back to the trauma room at a later time to retrieve the plastic bags, the Pelican Box or the black saddle bag. Ms. Edmonds never testified Officer Miller made two trips to the trauma bay in reference to these items. The officer with Officer Miller in the video did not testify.

Eric Keiper, an officer with Greenville Memorial Hospital, testified as to obtaining the items from a locker at the hospital. He transported the items to Greenville for testing. Rec. on App. at 228, l 17 to 229, l 5. State's Exhibit 12 (Rec. on App. at 463), a chain of custody form, did not have on it that Officer Keiper picked up the items from an evidence locker. He testified that information would be on LawTrak, which was not introduced as an Exhibit. Rec. on App. at 232, l 18 to 233, l 4. He also testified that the Pelican Box also contained the plastic bags of suspected drugs. He then took the small plastic bags out of the Pelican case and placed them together in another plastic bag. Rec. on App. at 234, ll 3-17. When he received the plastic bag from the evidence locker, he did not recall the plastic bag being sealed. Rec. on App. at 238, l 20 to 239, l 8.

Kara Bennick was the evidence custodial for Greenville County. She acknowledged that the items were actually received by Rachael Richenburg, who did not testify. She testified as to the security at the Greenville County laboratory. Rec. on App. at 260, l 2 to 265, l 22.

James Armstrong examined and tested the substance sent to the laboratory. He testified what he tested was positive for methamphetamine and weighed 29.65 grams. He did not test each individual bag as due to the manner in which they were placed in the plastic bag, the contents of the four small bags spilled into the sealed plastic bag. Rec. on App. at 278, ll 3-9.

He admitted it was not a good thing to happen. Rec. on App. at 278, 10-14. He further testified that he preferred to weigh and test each bag separately. Due to the manner in which the evidence was packaged, this could not be done in this case. Rec. on App. at 278, l 15 to 279 1 5; 280, l 24 to 281, l 10. Due to the commingling of the four bags, Mr. Armstrong stated the only thing he could guarantee is that what he tested, less than a hundredth of a gram, is in fact methamphetamine.

Standard of Review

As all the issues involve a question of law, the standard of review is de novo. "We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018)

Argument

Question I

Did the trial court err in failing to direct a verdict as to the trafficking charge when the testimony of the chemist was the substances in the four individual bags had come out and co-mingled and therefore he was unable to test the individual bags to determine if each contained methamphetamine?

James Armstrong, the chemist who did the analysis on the substance seized, testified the substance inside each of the four bags had come out and was therefore co-mingled when he received it. Rec. on App. at 278, ll 3-9. He agreed the contents of the bags falling out and commingling was " not a good thing to happen." Rec. on App. at 278, l 12-14. He preferred to be able to take each bag individually, test it and weight it. Rec. on App. at 278, l 15 to 279, l 5.

He obviously was not able to do that in this case. Which such commingling, he was unable to testify that each individual bag contained methamphetamine. The only thing he positively could say is that what he tested, less than one hundredth of a gram, contained methamphetamine. Rec. on App. at 280, ll 16-20. He was unable to give an opinion as to the weight or content of any individual bag. The State thus failed to prove Mr. Swaringen possessed the amount required for trafficking, as alleged in the indictment.

Several states that have addressed the issue have held that when the drugs in different bags are commingled prior to testing, the state is not permitted to use the combined weight to establish a crime that is based upon weight. *Greenwade v. State*, 124 So. 3d 215 (Fla. 2013); *People v. Clinton*, 397 Ill. App. 3d 215, 922 N.E.2d 1118 (2009); *State v. Robinson*, 517 N.W.2d 336 (Minn. 1994). The crime in this case is based upon weight.

The Florida Supreme Court in *Greenwade*, approved the holding in *Ross v. State* and stated:

> The court reasoned that when suspected drugs are taken from a single package—i.e., which have been commingled by the defendant—it is a fair inference that the remaining similar-looking commingled material is chemically identical to the random positive sample. However, the same inference cannot be made where the untested material has not been commingled with the random sample by the defendant, but is contained in a separately wrapped package from which a random sample is not tested. Consequently, the Third District limited the principle of law to require independent chemical testing only when the suspected substance is contained in individually wrapped packets." *Id.* at 221–22 (internal citations omitted)

In *State v. Robinson,* 517 N.W.2nd 336, 337(Minn. 1994) a defendant was charged "with a number of counts, including one count of first degree sale of a controlled substance (10 grams

or more) and one count of second degree possession of a controlled substance (6 grams or more)." The alleged drugs were found in 13 separate small bags. The person in the state lab testified they tested six or seven bags. In reversing the conviction, the Court stated:

> We conclude that random sampling in a case such as this one is insufficient to establish the total weight required of the mixture containing a controlled substance. The weight of the mixture is an essential element of the offense charged; like every other essential element, it must be proven by the state and proven beyond a reasonable doubt. "Protocol" notwithstanding, there seems to be no good reason why a sufficient quantity of the mixture should not be scientifically tested so as to establish beyond a reasonable doubt an essential element of the crime charged.
> *Id* at 339 (internal citations omitted)

In *Clinton*, the Illinois Appellate Court said, "Here, Boler combined six packets of suspected heroin before determining whether each of the packets did, in fact, contain heroin. In doing so, we now have no way of knowing whether each packet contained heroin or if only one contained heroin." *Id.* at 223, 922 N.E.2d at 1126. The arresting officer has no more right to combine the bags than does the person testing the bags. In fact, to preserve the evidence in a proper chain of custody, the investigating officer would be forbidden to mix the bags together. To take four bags and make them one, he has altered the evidence from the manner in which it was seized. This would be true whether the act is done intentionally or accidentally.

The problem with this case is this. The jury has not made the determination that the four bags contained a trafficking amount of methamphetamine based upon the testimony of James Armstrong and his expertise. They could not so conclude because Mr. Armstrong testified he could not so conclude. While granted, he testified the total weight met the trafficking amount, he could not testify as to the content of any one individual bag. He could only testify that what he

tested, less than one one-hundredth of a gram, was methamphetamine. To make the determination that a trafficking amount of methamphetamine existed, the jury had to rely upon the hearsay testimony of an unknown drug dealer to place the drugs in the stream of commerce. Such testimony is not sufficient to sustain the conviction in this case. This case should be remanded for a new trial as to whether Mr. Swaringen possessed less than a gram of methamphetamine.

Question II

Did the trial court err in holding the chain of custody had been properly established when the testimony and the video established the investigating officers left the emergency room without the alleged drugs and no testimony ever established when they obtained possession of the alleged drugs after their departure from the emergency room?

The chain of custody in this case is confusing at best. There is testimony from Christopher Miller that the alleged drugs were handed to him in a black Pelican box. Rec. on App. at 194, 7-13. Lisa Edmonds testified originally she found the alleged drugs in the personal property of Mr. Swaringen. Rec. on App. at 29 l 19-21. She made no mention of a black Pelican Box. When re-called as part of the defense case, she admitted she had previously testified the plastic bags were found loose in a black saddle bag that came into the emergency room as part of Mr. Swaringen's property. She, again, made no mention of a black Pelican box. She also testified that she "assumes" she gave the small plastic bags to Mr. Miller. Rec. on App. at 147, l 18-19. In her direct testimony she testified she gave the small plastic bags to "these officers." No officer was named. Rec. on App. at 136, l 8-9.

To further complicate the chain, the video shows the two officers leaving the emergency room with nothing in their hands. States's Exhibit 1, Rec. on App. at 204, ll 1-24; 225, l 20 to 226, l 6. The State never asked officer Miller if he made two trips to retrieve the small plastic bags and the black Pelican Box. Ms. Edmonds never testified she made two trips to obtain the items. When and how the items were obtained is simply not known. The hospital system had the video reviewed and all relevant video involving this case was saved. Rec. on App. at __. As no video of Officer Miller returning to the emergency room to retrieve the evidence was preserved, the only conclusion is that it did not exist.

When the video shows the two officers leaving the emergency room without the evidence and no testimony exists as to when the evidence was retrieved nor who retrieved it, then the chain of custody has not been proven. This is very similar to *State v. Pulley,* 423 S.C. 371, 378, 815 S.E.2d 461, 464 (2018). In *Pulley*, drugs were left on the hood of the patrol car. No one ever testified as to how the drugs were taken from the hood of the patrol car to the police department. In holding the chain was not established, the court said, "[T]here was no testimony or forms indicating how the cocaine was transported from Brewer's car back to Craven. Thus, at the time of the trial court's ruling, it was error to assume that Brewer transferred the cocaine to Craven and the State had established a sufficient chain of custody as far as practicable." *Id.* at 378, 815 S.E.2d at 464. With no evidence supporting the position, it was error to assume Officer Miller returned to the emergency room at a later time to pick up the evidence. No court can assume that which is not proven. At the trial, after the video was shown in which officer Miller and another officer left the emergency room without the evidence, the State had the opportunity to examine Officer Miller about when, if he did, he returned to the emergency room

and retrieved the evidence. All the record in this case shows is that the evidence was later placed in a locker. The record does not establish what was done with the evidence after the two officers left the emergency room. This is not sufficient to establish the chain of custody. From the testimony of Eric Keiper, the evidence was apparently not in a sealed container. He testified, "[Y]ou can see the case number, but when it comes to a signature for it, it says it was sealed, but I don't remember it actually being sealed. Because those typically to break them open, you would have to cut - - cut with scissors." Rec. on App. at 239, ll 2-6.

The period of time in which the evidence is not accounted for is a period of time in which the evidence is not in a secure, sealed container. If the items have been sealed in a tamper proof container and there is no evidence of tampering, then requiring the State to prove in whose possession the items were placed is not necessary. When fungible items are unsealed, the state must prove who handled the items to establish the proper chain of custody.

In *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) the witnesses who handled the drugs who did not testify, all occurred after the drugs were sealed. The record established no evidence of tampering. The court said, "We agree with the Court of Appeals that the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody. 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.* at 95, 708 S.E.2d at 755. In this case, the testimony as to how the evidence was obtained by Officer Miller is missing. The testimony as to who handled the evidence after Officer Miller left the emergency is missing. With these two key facts missing, the chain simply has not been legally established.

Question III

Did the trial court err in failing to charge the lesser included offense of simple possession of methamphetamine when James Armstrong, the chemist, could not testify that all the commingled bags contained methamphetamine and he could only say was what he tested contained methamphetamine?

In reviewing this issue, this court must look at the evidence in the light most favorable to Joseph Swaringen to determine if the requested charge should have been given. As the South Carolina Supreme Court has said, "In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant." *State v. Williams*, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019). The Court has also stated, "The trial court is required to charge a jury on a lesser-included offense 'if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *Suber v. State*, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)(internal citation omitted). Against this standard of review, the facts of this case must be considered.

As noted in Question I, the substances in the four bags were commingled when the contents of the bags came out after being sealed in a plastic evidence bag. When Mr. Armstrong received the evidence, he noted that virtually all the contents from the 4 small bags had spilled out and commingled in the larger bag. Rec. on App. at 278, ll 5-9. He also admitted receiving evidence in this form was not good. Rec. on App. at 278, ll 10-14. He testified that he was not able to say what was in each individual bag before they were commingled. He admitted that some drug dealers will sell substances that are not illegal. Rec. on App. at 279, ll 6-10. He admitted that the only guarantee he could make is that what he tested, one one-hundredth of a

gram, was in fact methamphetamine. Rec. on App. at 280, ll 16-20.

Based upon this testimony, the jury would have been justified in rejecting the conclusion that all the substance in the bag was in fact methamphetamine. The jury could have found that the state only proves that one one-hundredth of a gram was in fact methamphetamine. As evidence exists that the jury could have returned a verdict of simple possession of methamphetamine, the trial judge erred in failing to charge the lesser included of charge of simple possession. At the very least, there was some evidence that the state only proved Mr. Swaringen guilty of simple possession. The jury was not required to accept the fact that all of the commingled substance was in fact methamphetamine. An objection was raised to the trial court over his failure to charge simple possession of methamphetamine. Rec. on App. at 318, ll 20-22. As at least some evidence existed to support the position of Mr. Swaringen, the trial court erred in failing to give the requested charge.

Question IV

Did the trial court err in admitting the seized items into evidence when the officers handling the evidence failed to comply with the SLED regulations for handling evidence that were issued pursuant to S. C. Code § 44-53-485 states the evidence must be handled "pursuant procedure promulgated by the South Carolina Law Enforcement Division?

In 1992, the South Carolina legislature passed S. C. Code § 44-53-485. This section mandates that the State Law Enforcement Division issue regulations for the handling and destruction of controlled substances seized pursuant to the section. The statute specifically provides, "Controlled substances seized pursuant to this section must be inventoried, reported, audited, handled, tested, stored preserved, or destroyed pursuant to procedures promulgated by

the South Carolina Law Enforcement Division." The legislature used the word "must" which makes the provisions of the statute mandatory.

In this case, Christopher Miller, Eric Keiper, Kara Bennick, and James Armstrong were all people who testified that would qualify as people required to comply with the SLED regulations. Mr. Miller would be the seizing officer as defined in S.C. Code Regs, 73-80.[1] Mr. Keiper and Ms. Bennick would be the custodian as defined in S.C. Code Regs. 73-90. Mr. Armstrong would be the criminalist as defined in S.C. Code Regs. 73-110. With the exception of Mr. Armstrong, who was not asked, none of these witnesses were knowledgeable of the SLED regulations that control their conduct and actions.

Officer Miller, who is the seizing officer under the SLED regulations, testified he was familiar with "our department procedures." Rec. on App. at 187, l 9. He also admitted he was required to follow SLED guidelines. Rec. on App. at 187, l 16. He further admitted that the form he submitted as a chain of custody form, State's Exhibit 12, did not include where he placed the drugs. The document fails to show he complied with S. C. Code Regs. 73-80 (C)(5) or any of the provisions of (E). As he field tested at least one bag, that would be an alteration of the evidence that he should have noted on the chain of custody form. S. C. Code Regs. 73-100 require that a Best Evidence Sample Testing be used. This is know as the "BEST Pack." It was not used in this case. S.C. Code Regs. 73-73 J also requires that any loose drugs be placed in separate plastic bags to prevent contamination. Has this simple procedure been followed , the issue in Question I would not have arisen. At the suppression hearing Officer Miller stated he did not put in his report the name of the person from whom he received the evidence. Rec. on

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[1] All the regulations referred to in this brief were added to be effective on April 22, 1994.

App. at 43, ll 4-11. The Prisma records showed that the evidence was found by Kelsey Lynn Ridgeway. Rec. on App. at 42, l 19 to 43, l 9. If the officer had simply complied with the mandates of the statue, there should have been no confusion as to who found the evidence.

Eric Keiper and Kara Bennick would both qualify as evidence custodians under S. C. Code Reg. 73-90. He testified that he did not recall receiving any training as to the requirements of S. C. Code § 44-53-485 Rec. on App. 240 at 16-21. He shown the actual statute, he stated it refreshed his memory "a little bit." Rec. on App. at 241, l 13. He did not, however, remember being taught any of the obligations of the evidence custodian. Rec. on App. at 241, ll 16-21. He stated he took no courses as part of his police academy training on being an evidence custodian. Rec. on App. at 242, ll 6-11. He specifically admitted he had had no training as to S. C. Code § 44-53-485 and S.C. Code Reg. 73-90.

Mr. Keiper testified the form he was using did not comply with many of the requirements of S.C. Code Reg. 73-90. Rec. on App. at 245, l 6 to 248, l 21. Among the things that 73-90 requires an evidence custodian to do is certify, when he passes on the evidence, the items to certify that it was in substantially the same condition as when he received it. This was not done. In fact, as Mr. Keiper testified to removing the items from one bag and placing them in another, he would have been required to report this modification. S. C. Code Reg. 73-90 E(4). Also, as noted above, had Mr. Keiper complied with S. C. Code § 73-73 J, the first question in this brief would not have arisen. From the testimony, it seems there were four bags when Mr. Keiper removed them from the bag he received them in and placed them in another bag.[2]

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[2] If the alleged drugs were received by Mr. Keiper were in the same condition as shown in the photographs of the drugs, Exhibits 2-11, commingling would likely not have occurred. Whether Mr. Keiper or Officer Miller altered the drugs from the photographs is not known.

The next evidence custodian was Kara Bennick, who received the items at the Greenville County property and evidence section. While she stated she is a certified evidence technician, she also stated she did not have to comply with SLED regulations. She stated, "We do not have to comply with SLED regulations. We are a separate agency from SLED regulations." Rec. on App. at 262, ll 2-3. She admitted she was familiar with 73-90, but was not "operationally familiar with it." Rec. on App. at 264, l 25 to 265, l 1.

She then admitted her laboratory document, Exhibit 15, does not comply with many of the requirements of S. C. Code Reg. 73-90. She claimed the missing information was contained in their computer system, but she was not asked to print it out. Rec. on App. at 266, l 15-25.

None of the people involved in the chain of custody, nor the trial judge, seemed to appreciate that S. C. Code § 44-53-485 says "Controlled substances seized pursuant to this article must be inventoried, reported . . . pursuant to procedures promulgated by the South Carolina Law Enforcement Division." The legislature did not ask SLED to make recommendations or suggestions as to how controlled substances are to be handled. This court is obligated to interpret the word "must" as mandatory. "The term 'shall' in a statute means that the action is mandatory." *Johnston v. S.C. Dep't of Lab., Licensing, & Regul., S.C. Real Est. Appraisers Bd.*, 365 S.C. 293, 296–97, 617 S.E.2d 363, 364 (2005). As the meaning of "must" is mandatory, the trial court was required to suppress any evidence that was introduced in violation of the statute. In the original bill introduced in the house as H.B. № 3296, the title contains the phrase "Admissibility of Evidence presented at the original proceedings." The bill also states in its body, "Handling of seized controlled substances; use of photograph or videos of substances at trial; admissibility of evidence." The preamble to the bill calls attention to the fact that there is

no uniform policy governing the handling of controlled substances. The goal of the legislature was to have a uniform system for handling controlled substances. The only means of achieving this purpose is to make the procedure mandatory and suppressing any evidence that the state attempts to use that violates the mandatory rules. For these reasons this case must be reversed.

Question V

Did the trial court error in failing to suppress the evidence found in motorcycle saddle bag on the ground that the search at the hospital was not by a state agency and was the action of private citizens?

In this case, the saddle bag was searched at the hospital by an employee of Prisma Health. The lower court ruled, "Critical help [sic] is a private or profit hospital, not a government actor." Based on this finding, the lower court ruled the actions in searching the bag was conducted by a private company and did not implicate the Fourth Amendment or Article I, § 10 of the state constitution. He concluded, "Her hospital employer directed her to report any suspicious items or item to law enforcement and to safeguard that item or items until law enforcement arrived, which she did. This was not a search in violation of the Fourth Amendment." Rec. on App. at 65, ll 17-21.

This finding by the lower court ignores that Upstate Affiliate leases the property from Greenville Health Authority, "a political subdivision of the state of South Carolina." Court's Exhibit 1, at 37. As such, the political subdivision cannot eliminate its constitutional obligations to a private company. As the United States Supreme Court has said, " Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth

produce an inventory." *Florida v. Wells*, 495 U.S. 1, 4 (1990)

As the search in this matter was in fact a search conducted by a government agent both without probable cause and without a proper inventory, the search was improper and should be suppressed under the Fourth Amendment to the Constitution of the United States and Article I, § __ of the Constitution of the State of South Carolina.

Question VI

Did the trial judge err in failing to give the requested charge as to how the jury should address any flaws in the chain of custody?

When the attorneys made a motion to suppress the evidence on the failure of the State to produce a proper chain of custody, the court stated, "I think y'all have some arguments, you known, maybe to the jury . . . ." Rec. on App. at 315, ll 7-8. But without a proper charge to the jury as to how they are to use a questionable chain of custody, a jury will not know what they are to do.

In *State v. Carter,* 344 S.C. 419, 425, 544 S.E.2d 835, 837, 838 (2001) the South Carolina Supreme Court said, "The evidence that a saliva sample was placed in the kit simply contradicts the State's evidence negating tampering, thereby creating a factual issue. In sum, we find the evidence of a discrepancy in the contents of the kit does not render the blood sample inadmissible but goes only to its weight as credible evidence." If possible flaws in the chain go to the weight and not the admissibility, then a jury has to be instructed as to how to use the testimony as to possible flaws in the chain of custody. Without an instruction, a jury would be led to believe if the judge admitted the evidence, then they are to consider. Jurors are routinely

instructed as to credibility of witnesses. They are not, unfortunately, routinely instructed as to how to deal with possible flaws in the chain of custody.

The trial court erred in failing to give the requested instruction on the chain of custody. The conviction should be reversed.

CONCLUSION

As to Issues I, II, IV and V, this Court should reversed the conviction of Joseph Swaringen and dismissed the charges against him. As to issues III and VI, this Court should reversed the conviction and remand to the lower court for a new trial.

October 5th, 2023

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 6188

Attorney for Joseph Swaringen

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CERTIFICATE OF COUNSEL

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

October 5th, 2023

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 6188

Attorney for Appellant