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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM PICKENS COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

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Opinion No. 6075 (S.C. Ct. App. filed July 31, 2024)
Appellate Case No. 2019-001246

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State of South Carolina, ..... Petitioner,

v.

Wanda J. Crumpton, ..... Respondent.

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# PETITION FOR A WRIT OF CERTIORARI

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[1] *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012) (Pleicones, J., dissenting) & *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001).

## QUESTION PRESENTED

1. Whether the Court of Appeals erred in finding the trial court's error in admitting Cowan's expert testimony and written report was not harmless in light of the evidence presented against Crumpton at trial and Crumpton's defense where the Court of Appeals: (1) misapplied the harmless error standard of review by improperly presuming prejudice in one instance and by improperly assigning specific prejudicial weight in another, and (2) misleadingly quoted language from two cases, *Tapp* and *Ellis*, for a proposition that does not mesh with a proper harmless error analysis.

## STATEMENT OF THE CASE

In July of 2019, the Pickens County Grand Jury indicted Respondent Wanda Jane Crumpton (Crumpton) for one count of possession with intent to distribute (PWID) marijuana (2017-GS-39-3291) and one count of distribution of marijuana within close proximity of a school or park. (2017-GS-39-3292). She was represented by public defender Daniel M.H. King of the Thirteenth Circuit Public Defender's Office and Petitioner (the State) was represented by Assistant Solicitor Megan Owen of the Thirteenth Circuit Solicitor's Office. On July 22-23, 2019, Crumpton proceeded to a jury trial before the Honorable Robin B. Stilwell at the conclusion of which she was convicted as indicted. Judge Stilwell sentenced Crumpton to concurrent terms of forty-two (42) months' imprisonment, sentences she has completed serving. (App.p.1; p.221-p.222; p.230-p.235).

Crumpton timely filed a notice of intent to appeal and the parties submitted briefs addressing the issues raised by Crumpton on appeal. (App.p.238-p.278). On July 31, 2024, the Court of Appeals issued a published opinion reversing Crumpton's convictions. *State v. Crumpton*, Op. No. 6075 (S.C. Ct. App. filed July 31, 2024) (App.p.279-p.290).[2] On August 13, 2024, the State submitted a petition for rehearing pursuant to Rule 221(a), SCACR. (App.p.291-p.302). By order filed September 16, 2024, the petition for rehearing was denied. (App.p.303). This Petition for a Writ of Certiorari, submitted on behalf of the State, now follows.

## STATEMENT OF FACTS

In March of 2017, the Easley Police Department began to receive complaints from local citizens and businesses of heavy traffic occurring in the vicinity of a trailer located in the city of Easley. (App.p.119-p.120). Law enforcement also received a complaint from a mother who claimed her child had purchased marijuana from the trailer. (App.p.68). In response, Detective

[2] *State v. Crumpton*, ___ S.C. ___, 905 S.E.2d 448 (Ct. App. 2024).

Jonathan Hamby conducted surveillance of the residence and discovered Crumpton resided at the address. (App.p.120). On the afternoon of March 20, 2017, Hamby observed Kerek Harris leaving Crumpton's residence. (App.p.120). Harris was already the subject of an active drug investigation by the Easley Police Department. (App.p.69). On March 21, 2017, Law enforcement executed a search warrant on Harris' apartment. (App.p.69). Inside the apartment, five pounds of marijuana were found. (App.p.63). Harris was placed under arrest and agreed to talk with law enforcement. (App.p.69). Harris admitted he knew Crumpton and told law enforcement he sold marijuana to her frequently. (App.p.57; p.69). Between March 11th and March 21st Harris sold Crumpton two ounces of marijuana approximately eleven different times. (App.p.132). Harris charged Crumpton $90 per ounce. (App.p.58; p.132). Harris allowed law enforcement to search his cell phone. Hamby located multiple text messages between Harris and Crumpton that confirmed the information given by Harris. (App.p.69).

After completing their search of Harris' apartment, law enforcement drafted a search warrant for Crumpton's trailer and executed the search later the same day. (App.p.70). Crumpton cooperated with law enforcement during the search of her home. She led officers to a cabinet "where the drugs were" that contained baggies of suspected marijuana and a set of scales. (App.p.122). Crumpton also had $534 with her and a joint that she was in the process of smoking when law enforcement arrived. (App.p.123). The suspected marijuana weighed .66 ounces. (App.p.229). It was analyzed by Robert Cowan of the Easley Police Department and, based on a testing method whose unreliability is the centerpiece of this appeal, determined to be marijuana. (App.p.170-71; p.229). Cowan was previously certified as a marijuana analyst through a SLED program that Cowan conceded had been discontinued in 2018. (App.p.152; p.224). Cowan analyzed the marijuana found in Appellant's home using the Duquenois-Levine

test. (App.p.154). He acknowledged the test he used could determine the presence of THC[3], but could not specify a quantitative amount of THC which meant he could not say whether it was actually marijuana rather than industrial hemp. (App.p.59).

At trial, Crumpton never suggested that she did not possess marijuana or that the substance found in her house and weighed was anything but marijuana. Indeed, in both her opening statement and closing argument, Crumpton admitted she possessed marijuana for her personal use, but claimed she was not distributing it. (App.p.113-p.114, p.197-p.198). In her opening statement Crumpton's counsel stated:

> [P]ersonal use, that's what you're going to hear about today. It's personal use and personal use only. The evidence is going to show that [Crumpton] was in her home, **she had a small amount of marijuana**, less than an ounce, which is perfectly legal in other states. She had a blunt in her house, in her easy chair. Her easy chair she was sitting in when law enforcement came up to her house. It was personal use.

(App.p.113, line 24-p.114, line 8) (emphasis added). Similarly, in closing argument Crumpton's counsel argued:

> So let's look at the evidence we have here. We have State's Number 10, which is the joint, and we have State's Number 11, **which is the pack of marijuana. Personal use**, remember, like I said at the beginning, State's Number 11 is like a six pack of Coke you got at home. State's Number 10 is a single can of Coke. Just because you got a six pack of Coke in your fridge doesn't mean you're distributing it. Now, along with just that personal use evidence, we've got that State's Number 8, which was that picture of the joint on the easy chair. That's the easy chair she was sitting in when law enforcement approached. They saw her there. That's where they found it. **She was smoking it right beforehand**. That's personal use. You light up. She's using it.

[3] THC refers to tetrahydrocannabinol which is a chemical that is found in marijuana. Cowan testified that a substance which contains less than 0.3 percent THC is classified as industrial hemp as opposed to marijuana and is not prohibited under S.C. Code § 44-53-370(B). (R. 154, 159). *See also* S.C. Code § 46-55-10(6)("'Federally defined THC level for hemp' means a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis, or the THC concentration for hemp defined in 7 U.S.C. SECTION 5940, whichever is greater.").

(App.p.197, line 12-p.198, lines 3) (emphasis added). Thus, the theme of Crumpton's defense remained consistent from her opening statement through her closing argument. Crumpton argued that she possessed marijuana, but she was using it herself and not distributing it. Crumpton never claimed that she possessed industrial hemp. In fact, Crumpton acknowledged to the trial judge before trial that she was "100 percent" guilty of smoking marijuana. (App.p.8, line 11).

During the trial itself, the jury heard testimony from Detective Jonathan Hamby that during the execution of the search warrant for Crumpton's residence, Crumpton offered to show the police "where the drugs were," then took them "to the cabinet where her marijuana was" where indeed "there was a bag of marijuana." (App.p.122, lines 2-20). When Hamby asked Crumpton about "any scales she would have to weigh the marijuana," she admitted she had such scales and showed the police where those scales were located. (App.p.122, lines 21-24). Crumpton also **admitted to Hamby she was smoking a joint** when the police approached the residence and had stuffed it down into the chair when they came to the front door. The partially smoked joint was recovered and seized along with the bags of marijuana from the cabinet. (App.p.123, lines 7-11) (emphasis added). Based on his experience with scales, the quantity of marijuana discovered, and the discovery of a significant amount of cash, Hamby opined these items could be an indication of someone selling marijuana. (App.p.126, lines 21-25). The jury also heard testimony from Captain Jason Lovell, who was present during execution of the search warrant and confirmed Crumpton took the police to **baggies containing what Crumpton herself identified as marijuana**. (App.p.140, lines 15-17). Lovell similarly opined that in his experience, when someone has digital scales and a quantity of cash, it is indicative of distribution. (App.p.146, lines 17-24).

Furthermore, Kerek Harris testified he sold Crumpton two ounces of marijuana approximately eleven different times. (App.p.132). Harris acknowledged being a drug dealer and claimed to have sold Crumpton marijuana, not industrial hemp. (App.p.131-p.136). The closest Crupton came to suggesting the substance she possessed was industrial hemp occurred at the very end of her closing argument when trial counsel questioned the accuracy of the State's testing methods. (App.p.200, lines 1-17).

## CERTIORARI

The State submits that, pursuant to Rule 242(b), SCACR, there are "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Specifically, it appears the Court of Appeals misapprehended or overlooked the application of the harmless error rule in Crumpton's case in two critical respects, the second of which is in conflict with prior decisions of this Court. *See* Rule 242(b)(3) ("The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character or reasons which will be considered: . . . (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.").

First, the Court of Appeals misapplied the harmless error standard of review despite correctly citing that standard in its opinion. Specifically, the Court of Appeals erred when it: (1) presumed prejudice from the fact that the trial court heard arguments addressing Cowan's qualification and the matter of reliability in the presence of the jury; and (2) assigned specific prejudicial weight to the trial court's declaration that "hemp is not part of the equation." Second, and more problematically in the context of its published opinion, the Court of Appeals misleadingly quoted language from two cases, *Tapp* and *Ellis*, for a proposition that does not

mesh with a proper harmless error analysis, even though that analysis was applied by the majority opinions in the two cases cited, and by the Court of Appeals itself when considering Crumpton's case. The State submits these citations may have contributed to the Court of Appeals' analytical misapplication of the harmless error rule in Crumpton's case and are dangerously misleading to the bench and bar. For these reasons, the State respectfully requests that this Court grant this petition for a writ of certiorari and reverse the Court of Appeals in whole or in part.

## ARGUMENT

### I.

**The Court of Appeals erred in finding the trial court's error in admitting Cowan's expert testimony and written report was not harmless in light of the evidence presented against Crumpton at trial and Crumpton's defense because the Court of Appeals: (1) misapplied the harmless error standard of review by improperly presuming prejudice in one instance and by improperly assigning specific prejudicial weight in another, and (2) misleadingly quoted language from two cases, *Tapp* and *Ellis*, for a proposition that does not mesh with a proper harmless error analysis.**

The Court of Appeals misapprehended or overlooked the application of the harmless error rule in Crumpton's case in two critical respects, first by simply misapplying that standard in light of the evidence presented at trial and second by relying on two opinions from this Court, *Tapp* and *Ellis*, for a proposition not supported under the appropriate harmless error review recognized by this Court.

#### Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "Generally, appellate courts will not set aside convictions due to insubstantial errors not

affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E2d 262, 267 (2006). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained." *State v. Collins*, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

**Discussion**

As argued in its final brief, the State maintains that any error related to the admission of Cowan's testimony or written report was harmless in light of the evidence presented against Crumpton and Crumpton's defense at trial. As set out in the facts above, Crumpton never claimed the substance she possessed was anything but marijuana. In fact, Crumpton explicitly argued that she possessed marijuana, but it was merely for her personal use and not for distribution. She also admitted to Hamby she was smoking a joint just before the police arrived and then showed Lovell baggies containing what she identified as marijuana. While Crumpton challenged Cowan's qualifications based on the limitations of his testing method, Crumpton never maintained that she possessed industrial hemp rather than marijuana. Furthermore, Cowan admitted to the jury that he could **not** say whether the substance discovered was in fact marijuana. Therefore, any error committed by the trial judge in allowing Cowan to offer his opinion regarding the substance found in Crumpton's home did not affect the outcome of the trial and was entirely harmless.

The State submits the jury was convinced of Crumpton's guilt based on her own defense, her statements to the police during execution of the search warrant, and the testimony of Kerek Harris, **not** based on the unreliable testing method used by Cowan. The State therefore submits that any error by the trial judge in allowing Cowan to offer his opinion regarding the substance found in Crumpton's home was entirely harmless. In its published opinion, the Court of Appeals disagreed. As noted above, however, the State submits the Court of Appeals misapprehended or overlooked the application of the harmless error rule in Crumpton's case in two critical respects.

First, the Court of Appeals seems to have misapplied the harmless error standard of review despite correctly citing that standard in its opinion. The Court of Appeals erred when it: (1) presumed prejudice from the fact that the trial court heard arguments addressing Cowan's qualification and the matter of reliability in the presence of the jury; and (2) assigned specific prejudicial weight to the trial court's declaration that "hemp is not part of the equation." In regard to presumed prejudice, the Court of Appeals stated: "we also cannot ignore the effect" that hearing the arguments "may have had on the jury." It noted the arguments should have been made outside the jury's presence before Cowan was qualified as an expert and that the jury should have been removed before the threshold question of reliability was discussed; however, it offered no explanation as to why this necessarily created prejudice, particularly where Cowan himself was forced to admit on cross-examination that his test was so unreliable he could not say whether the substance was actually marijuana as opposed to industrial hemp, which contradicted his testimony on direct that it was marijuana. And this contradictory testimony occurred **after** the jury had already heard about the SLED memo and the unreliability of the testing method that was used by Cowan, and **after** the trial judge explicitly (although erroneously from a Rule 702

standpoint) declined to rule that Cowan's methods were reliable. These circumstances weigh in favor of finding a **lack** of prejudice.

In regard to the declaration that "[h]emp is not part of the equation" the Court of Appeals found it "further compounded this prejudice." Yet, the Court of Appeals again failed to explain how. Taken in further context, the entire comment was:

> Well, here's the deal: When I charge the jury as to the law, **the question is going to be marijuana**. Hemp is not part of the equation. Okay? And, the State, **it has to be proven beyond a reasonable doubt that she possessed marijuana with intent to distribute the same**. Okay?

(App.p.163, line 24-p.164, line 5) (emphasis added). Thus, rather than being prejudicial, especially in a case where nobody ever suggested the substance was anything other than marijuana, the comment seems to merely be the trial court's attempt to make sure the jury understood that, to the extent the substance was [or could be] hemp, it should **not** be part of "the equation," i.e., their determination of guilt or innocence. Indeed, in light of Cowan's contradictory, unreliable, and therefore non-credible "expert" testimony, the trial court's comment actually **undermined** the strength of the State's case. This should have led the Court of Appeals to conclude that neither Cowan's testimony itself, nor the jury hearing the arguments addressing Cowan's qualifications and reliability, could have contributed to the guilty verdict rendered. Thus, without the improper presumption of prejudice, the trial court's errors should have been deemed harmless beyond a reasonable doubt by the Court of Appeals.

Second, and more critically to the danger of extending improper harmless error review in the future, the Court of Appeals misleadingly quoted language from two cases, *Tapp* and *Ellis*, for a proposition that does not mesh with a proper harmless error analysis, even though that analysis was applied by the majority opinions in the two cases cited, and by the Court of Appeals

itself in considering Crumpton's case. Improperly relying on the misleading quotes is dangerously misleading to the bench and bar. Indeed, these citations may have contributed to the analytical misapplication of the harmless error rule in Crumpton's case. Specifically relying on the dissent in *Tapp* and the decision in *Ellis*, the Court of Appeals seems to imply the admission of improper opinion testimony from an expert or law enforcement officer **always** requires reversal as a matter of law without consideration of the impact such testimony's admission had in a particular case. Thus, the Court Appeals appears to be suggesting the *Ellis* decision established the admission of improper opinion testimony from a law enforcement officer categorically constitutes the rare type of error deemed structural in nature. *See Neder v. United States*, 527 U.S. 1, 8 (1999) ("[W]e have found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases." (citations and internal quotations omitted)); *see also State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) ("Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis.").

To the contrary, this Court in *Ellis* did not create any categorical rules of reversal and, instead, only found reversible error occurred in that case after specifically finding Ellis was prejudiced under the specific circumstances involved. *See State v. Ellis*, 345 S.C. 175, 178-179, 547 S.E.2d 490, 491-492 (2001) ("We find appellant has established reversible error in the admission of Sergeant Walters' 'expert opinion' reconstructing the position of the victim's body when he was shot. The effect of this error, compounded by the solicitor's repeated references to this 'scientific evidence,' was to impermissibly undermine appellant's self-defense claim. This error entitles appellant to a new trial."). Therefore, the decision in *Ellis* supports—rather than refutes—the need for a case-specific and circumstances-specific analysis of whether prejudice

occurred after improper testimony is admitted. Similarly, the majority opinion in *Tapp* conducted a case-specific and circumstance-specific analysis of whether prejudice occurred after improper expert testimony was admitted. *Tapp*, 398 S.C. at 389-91; 728 S.E.2d at 475-76. Thus, the Court of Appeals properly examined what occurred in Crumpton's case when evaluating whether reversal was warranted based on the admission of the challenged testimony from Cowan rather than deeming it a structural error. Although the State disagrees with the result of that examination, it was nevertheless conducted by the Court of Appeals and therefore, at a minimum the references to *Ellis* and the dissent in *Tapp* should be reversed by this Court.

Furthermore, and as argued above, the State respectfully submits that when the circumstances of Crumpton's case are properly evaluated, any conceivable error in the admission of the challenged portion of Cowan's testimony was entirely harmless beyond a reasonable doubt. Ther Court of Appeals improperly reversed Crumpton's convictions; therefore, certiorari should be granted and the Court of Appeals should be reversed in whole or in part.

## CONCLUSION

For these reasons and the arguments made in its final brief, the State respectfully requests that this Court grant this petition for a writ of certiorari and either: (1) issue an opinion that reverses the Court of Appeals and affirms Crumpton's convictions on grounds that any error was harmless, or (2) issue an opinion that affirms the Court of Appeals' finding the error was not harmless, but reverses that court's inartful references to *Ellis* and the dissent in *Tapp*, as well as any implication that improper opinion testimony from an expert or law enforcement officer **always** requires reversal as a matter of law. If the Court grants the petition for a writ of

certiorari, the State would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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