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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellant Case No. 2025-001366
Lower Case No. (2021GS2306825)

The State ..... Respondent,

vs.

Joseph M. Swaringen ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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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 for 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. On April 23, 2025, the Court of Appeals affirmed his conviction. A timely petition for rehearing was filed on May 7, 2025 and a corrected Petition for Rehearing was filed on May 12, 2025. The Petition for Rehearing was denied on June 16, 2025.

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. App. at 118, 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. App. at 118, l 25 to 119, 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. App. at 119, 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. Michael McKnight, an EMS person who worked the accident, gave the saddle bag to a security officer to inspect before entering the hospital. The bag was opened and inspected by the security officer. App. at 108, l 19 to 109, l 25; 114, 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 of what he had. App. at 131, l 13-23. No inventory report was produced. App. at 36, l 14 to 37, l 4. Ms. Edmonds testified she found several small plastic bag that she believed to be illegal drugs. App. at 107, ll 18-22. She did not recall where the plastic bags were found. App. at 143, l 14 to 144, l 5; 148, l 15 to 149, l 1. She did subsequently testify, she found the plastic bags loose inside the black saddle bag. App. at 293, l 6 to 294, l 2.

During her direct testimony she stated she gave the small plastic bags to the officers without being specific as to which one. App. at 138, ll 5-9. When specifically asked if she turned the plastic bags over to Officer Christopher Miller, she answered, "I assume." App. at 149, ll 18-19.

Officer Christopher Miller testified he was called to the emergency room trauma bay. He stated he "Was handed a black Pelican case." App. at 169, l 18. He testified, "[I]nside the Pelican case was there was a white-like crystal-like substance and also there was a baggy." App.

at 169, l 25 to 170, l 1. He testified he received the items from Lisa Edmonds. App. at 170, 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. App. at 206, l 1 to 207, 25; 225, l 10 to 227, 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 County lab for testing. App. at 230, l 17 to 231, l 5. State's exhibit 12, a chain of custody form, App. at 465, 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. App. at 234, l 18 to 235, l 5. He also testified that the Pelican case 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. App. at 236, ll 3-17. When he received the plastic bag from the evidence locker, he did not recall the plastic bag being sealed. App. at 240, l 20 to 241, 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. App. at 262, l 2-22.

James Armstrong examined and tested the substance sent to the laboratory. 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 larger sealed plastic bag. App. at 280, ll 3-9. He testified what he tested was positive for methamphetamine. He testified the total weight of the contents of all the bags found was 29.65 grams. App. at 279, ll 12-14. He admitted the drugs spilling out was not a good thing to happen. App. at 280, 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. App. at 280, l 15 to 281 l 5; 282, l 24 to 283, 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, was 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?

In affirming the conviction, the court of appeals cited *People v. Coleman,* 391 Ill.App. 963, 909 N.E.2d 953 (Ill. Ct. App. 2009). As to the Illinois case, the court of appeals stated, "However, the appellate court found that the mixing did not change the substance so as to increase the defendant's criminal liability." *State v. Swaringen*, 446 S.C. 16, ___, 916 S.E.2d 343, 350 (Ct. App. 2025), reh'g denied (June 16, 2025). This is not the holding of the case nor is such a statement the law in Illinois. In *Coleman*, the Illinois court said, "[T]he parties had stipulated that 'Cravens was able to determine[,] to a reasonable degree of scientific certainty[,] that the white powder in People's [e]xhibit N[o.] 2N[o.] 2 was 926.0 grams of cocaine.'" *Id.* at 968, 909 N.E.2d at 958. The court of appeals ignored this stipulation in its attempt to equate the case of Mr. Swaringen to the *Coleman* case. This incorrect reading of *Coleman* was called to the attention of the court of appeals in the petition for rehearing. App. at 596. Also, the conviction of Mr. Coleman was reversed in a Post Conviction Relief petition. In reversing the conviction because of the stipulation as to commingling, the court said, "[W]e conclude that entering into the factually unfounded stipulation, together with failing to perform a reasonable investigation ahead of time, was 'representation [that] fell below an objective standard of reasonableness.'" *People v. Coleman*, 25 N.E.3d 82, 94 (Ill. App. Ct. 2015)

To further establish that co-mingling of different bags of a drug is prohibited in Illinois, counsel in the Petition for Rehearing cited to *People v. Miramontes*, 426 Ill. Dec. 350, 354 116 N.E.3d 199, 203 (Ill. App. Ct. 2018). In the case, the Illinois Court found trial counsel was ineffective for his failure to object to the commingling of the drugs. The court said, "Accordingly, defense counsel had a duty to at least raise the defense that the State had failed to test each bag individually. There is no reasonable trial strategy which would support defense counsel's stipulation that freed the State from proving the most important element of its case. Accordingly, we conclude that entering into the stipulation was representation that fell below an objective standard of reasonableness." *Miramontes*, at 354, 116 N.E.3d at 203.

To remove any doubt as to the position of the Illinois counsel also cited *People v. Clinton*, 397 Ill. App. 3d 215, 922 N.E.2d 1118 (2009) where the 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. *See, also*, *People v. Tilley*, 958 N.E.2d 1123, 1127 (Ill. 2011)("This court has indicated that materials found in separate containers should be considered separate 'substances' even if the contents of the different containers resemble each other."). The court of appeals ignored the holdings of these cases in incorrectly claiming that Illinois courts permit different bags to be commingled. The cases cited establish commingling is prohibited in Illinois and the cases cited by the court of appeals do not support the commingling of items found in different containers or bags.

The court of appeals also misapprehended *Sheffield v. State*, 635 S.W.2d 862 (Tex. App. 1982). The *Sheffield* Court stated:

> [T]he testimony at trial established that after appellant's employee handed Coleman the four pills, Coleman immediately handed them to Delgado. Delgado stated he then put the four pills in his front shirt pocket. Delgado already had four identical pills in his shirt pocket from a prior alleged transaction with appellant. Thus, the two groups of pills became commingled. Delgado testified at trial that he could not tell which pills came from which transaction with appellant.
> *Id.* at 864

In affirming the conviction, the Court said:

> It is appellant's position that the narcotics should not have been admitted into evidence since it could not be determined which pills were the ones appellant was charged with delivering. We do not agree. A chemist for the State testified that he tested five of the pills and that all contained phenmetrazine. It follows that at least one of the pills delivered by appellant at the time in question contained the controlled substance. Therefore, while we do not encourage the practice of commingling evidence, we do not believe that in the instant case it was harmful.
> *Id.*

In *Sheffield* the defendant could not show any prejudice from the commingling of the pills. The distribution of one pill was sufficient to sustain the conviction. When the five pills tested positive for phenmetrazine, the odds are 100 per cent that one of the pills involved in the last distribution was the controlled substance for which he was convicted. Mr. Sheffield could show no prejudice. The court of appeals here failed to consider this part of the opinion. The case cannot be cited for the authority that commingling of the four bags as found in this case is proper.

With no facts to back up the claim, the court of appeals said, "We find sufficient evidence was presented to establish the random samples collected from the uniform substance, which collectively weighed 29.65 grams, tested positive for methamphetamine during both an officer's initial field testing and upon subsequent analysis at the laboratory, which supported a logical and rational conclusion that the tested, and similar looking untested items, were the same substance: methamphetamine." *Swaringen* at ___, 916 S.E.2d at 350. This statement appears to give a

field test the same validity as a chemist test. The fact that substances in different bags may look the same is no basis for concluding that the substances in all four bags are the same. Such a position greatly lessens the burden of proof for the State. In a trafficking case, the State bears the burden of proving not only the fact that the substance is illegal, but the weight of the drugs that are tested. The actual total weight of the alleged illegal drug simply cannot be established in this case.

James Armstrong, the chemist who did the analysis on the substances seized, testified the substance inside each of the four bags had come out and was therefore commingled when he received it. App. at 280, ll 3-9. He agreed the contents of the bags falling out and commingling was "not a good thing to happen." App. at 280, l 12-14. He preferred to be able to take each bag individually, test it and weigh it. App. at 280, l 15 to 281, l 5. He obviously was not able to do that in this case. With 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. App. at 281, 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.

The court of appeals has cited to no case where substances such as those that exist in this case can be commingled and a reliable result obtained. Some states have held that a chemist need not test identical looking pills, but that is not this case.

Several other states that have addressed this issue have held that when 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).

The Florida Supreme Court in *Greenwade* 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)

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 SLED regulations for handling drugs, discussed later, also prohibit commingling of drugs. It provides:

> J. Small items of controlled substance evidence such as powders, rock-like substances, pills, and capsules shall not be placed into a large outer evidence container unless they have first been provided some form of protective interior container such as a pill box, bottle, envelope, or plastic pouch.
> S.C. Code Regs. 73-73

The problem with this case is 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 that methamphetamine was contained in each bag. While granted he testified the total weight of the substances sent to him met the trafficking amount, he could not testify as to the content of any one individual bag. He could only guarantee 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 an assumption that all the bags contained the same substance and not proof that they did. Such an assumption is not sufficient to sustain the conviction in this case.

The reliance of the court of appeals on *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 588 (Ct. App. 2001) is misplaced. *Cherry* did not involve a case of what was the substance. The laboratory report established the substance was marijuana. The only question was did the defendant possess the substance with the intent to distribute. The factors used by the court to make such a conclusion did not rely upon expert testimony. The jury in this case needed expert

testimony to conclude the substance was methamphetamine and they needed expert testimony as to how much did it weigh. They received the required information for 1/100 of a gram. They were given no guidance as to how to conclude all the 29.65 grams was methamphetamine. If the expert could not make the conclusion as to weight, the jury could only speculate. Speculation is not sufficient to convict. As this court has said, "Because the State offered no evidentiary basis on which the jury could have determined—without speculating—the quantity of methamphetamine Cain attempted to manufacture, the trial court was required to grant Cain's motion for a directed verdict . . . ." *State v. Cain*, 419 S.C. 24, 31, 795 S.E.2d 846, 850 (2017). Here the jury was likewise required to speculate as to whether all four bags contained methamphetamine and contained enough to convict Mr. Swaringen of trafficking. The trial judge should have directed a verdict as to trafficking.

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?

As to the chain of custody issue in this case, there are several facts beyond dispute that cannot be ignored. The first is the stipulation was all relevant video based on the police incident report were pulled by Alvin Harrison. Second, the video pulled shows Officer Miller and another officer leaving the trauma room with nothing in their hands. Their testimony supports what is shown on the video. Third, the video shows Ms. Edmonds leave the trauma room without the items she testified she seized. Finally, no testimony in the record exists that states if or when

Officer Miller or the other officer obtained the items allegedly seized by Ms. Edmonds after they left the trauma bay empty handed. The State has to admit these facts are beyond dispute. With these facts, the State simply cannot prove a proper chain of custody. The State cannot explain how or when the drugs came to be in the possession of Officer Miller.

In ruling against Mr. Swaringen on this issue, the court of appeals stated, "We find each step of the chain of custody has been properly established based on the testimony from the time it was received to the time it was tested." *Swaringen* at ___, 916 S.E.2d at 351. This is simply not correct. No testimony exists as to when or how the officers obtained the seized items after they left the trauma bay empty handed. The video shows the officers leaving the trauma bay with no evidence in their hands. The officers even admitted on cross examination the video does not show them taking any evidence from the emergency room. Officer Christopher Miller admitted there is no video of his taking the alleged drugs from the emergency room. App. at 215, ll 22-24.

The court of appeals stated, "There are no missing links or express denials from those who handled the drugs." *Id.* This statement is simply incorrect. Officer Miller stated he left the emergency room with no drugs in his hands. When Officer Miller was shown the video of his leaving the emergency room with no seized items, he stated, "I had not received any evidence at that time." App. at 206, l 24; States's Exhibit 1, App. at 206, ll 1-24; 227, ll 4-14. That statement is an express denial he seized any item in the trauma bay. As he had no evidence at the time he left, the question is when and how did he obtain the evidence? The record is barren of any other testimony as to how Officer Miller or the other officer obtained the evidence in question. The unanswered question for Mr. Swaringen is when and how did Officer Miller obtain the evidence he put in the lock box? The State cannot in this record answer that simple,

but necessary question.

Nor did the state attempt to answer the question when it arose at trial. Without an answer to that question, the chain of custody has not been proven. Ms. Edmonds also testified that she "assumes" she gave the small plastic bags to Mr. Miller. App. at 149, l 18-19. In her direct testimony she testified she gave the small plastic bags to "these officers." No officer was named. App. at 138, l 8-9. And the video obviously shows Mr. Edmonds did not give the seized items to the officers when they visited the trauma bay. Further, the video shows Ms. Edmonds leaving the trauma bay with the seized items still in the trauma bay.

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 he 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. App. at 453. As no video of Officer Miller returning to the emergency room to retrieve the evidence was preserved, the only conclusion is that it does not exist.

This case is controlled by *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.[1] In holding the chain was not established, this 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

[1] The officer was recalled the next day and stated the video refreshed his memory and he carried the seized items to Officer Craven. Officer Craven never confirmed this and this court gave that "refreshed" memory little, if any, credence.

sufficient chain of custody as far as practicable." *Id.* at 378, 815 S.E.2d at 464. With no video or testimony of an officer returning to the trauma bay at a later time to pick up the evidence, this court cannot assume the seized items were transferred to Officer Miller. An assumption does not prove a chain of custody. 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 if returned to the emergency room and retrieved the evidence. They did not. All the record in this case shows is that plastic bags were later placed in a locker. The record does not establish what was done with the seized items after the two officers left the emergency room without them. 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." App. at 241, ll 2-21.

The period of time in which the seized bags is not accounted for is a period of time in which the seized bags are not in a secure, sealed container. The seized items are left in the trauma bay. When fungible items are unsealed, the state must prove who handled the items and what was done with them to establish the proper chain of custody.

Further confusion is created by the fact that State's exhibit 12, App. at 465, lists the time of the seizure of the items by Officer Miller as 20:15 hours or 8:15 PM. The time stamp on the video of Mr. Swearingen entering the hospital is 9:51:58 PM. Obviously something is wrong.

In *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) the buyer of the small amount of

drugs testified he gave two small corner baggies, which were tied, to the officer. The officer testified upon receipt he sealed the two tied baggies inside a separate plastic bag. The record established no evidence of tampering with the sealed plastic bag. This 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 room is missing. With these two key facts missing, the chain simply has not been legally established.

In addition, this court has held, "Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). What was done with the seized items after the time Ms. Edmonds stated she seized them is not known. Whether the items Ms. Edmonds seized were the same items placed in the locker is not known. At trial Ms. Edmonds had no basis to say the items she seized from the personal property of Mr. Swaringen are the same items found in one large plastic bag open by Mr. Armstrong. How Mr. Miller received what he put in the locker is left to conjecture. Conjecture cannot supply the missing link is a chain of custody.

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 this 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). This 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. App. at 280, ll 5-9. He also admitted receiving evidence in this form was not good. App. at 280, 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 as illegal drugs. App. at 281, 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. App. at 282, ll 16-20.

Based upon this testimony, the jury would have been justified in rejecting the conclusion that all the substance in the large bag was in fact methamphetamine. The jury could have found

that the state only proved that one one-hundredth of a gram was in fact methamphetamine. As evidence exists from which the jury could have returned a verdict of simple possession of methamphetamine, the trial judge erred in failing to charge the lesser included 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. App. at 320, 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.

In affirming the conviction, the court of appeals relied upon *State v. Geiger*, 370 S.C. 600, 635 S.E.2d 669 (Ct. App. 2006). In holding a charge on a lesser included offense was not required, the court said, "The trial record in the case at bar contains no evidence tending to show Geiger may have assaulted Annie J. but not attempted a sexual battery. The victim's undisputed testimony recounting Geiger's efforts to sexually assault her supports only an ACSC instruction, not one of ABHAN." *Id.* at 610–11, 635 S.E.2d at 675. Here the testimony of Mr. Armstrong was that he could only guarantee that what he tested could be guaranteed to be methamphetamine. The testimony by Mr. Armstrong as to the entire weight being methamphetamine is disputed. Mr. Armstrong admitted it was disputed. This certainly would be some evidence that the state had not guaranteed the full weight of the substance tested was methamphetamine.

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 denying relief on this issue, the court of appeals stated:

> Nowhere in the language of the statute does the legislature provide a suppression remedy if the handling of the evidence is not sufficient. Just as the trial judge recognized, the legislature elected not to include any remedy, including suppression, for a violation of the statute; therefore, suppression was not warranted regardless of any statutory noncompliance in light of the trial court's correct conclusion a complete chain of custody had been established. *Swaringen* at ___, 916 S.E.2d at 353.[2]

In his Petition for Rehearing, Mr. Swaringen called the attention of the court of appeals to *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) and *State v. Taylor*, 436 S.C. 28, 870 S.E.2d 168 (2022) and their impact upon this case. App. at 606. Each case involved the impact of failing to video record the defendant at the scene of the driving under the influence arrest. South Carolina Code § 56-5-2953 provides, "(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 *must* have his conduct at the incident site and the breath test site video recorded." (emphasis added). The driving under the influence statute also provided no remedy if the section were violated. Just as in the present case, the legislature did not provide that the case be dismissed nor the evidence be excluded in the event the defendant is not recorded as required in the code section. These two cases by this court mandate that the decision of the court of appeals be reversed. The word "must" cannot have one meaning in one statute and another meaning in another statute.

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[2] This is a somewhat inconsistent argument. A trial court should not be able to conclude a proper chain of custody has been established if the state has not complied with the mandatory provisions of this chain of custody statute.

In 1992, the South Carolina legislature passed South Carolina 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." (emphasis added). 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 who 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. [3] 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." App. at 189, l 9. He also admitted he was required to follow SLED guidelines. App. at 189, l 16. He further admitted that the form he submitted as a chain of custody form, State's Exhibit 12, App. at 465, 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

[3] All the regulations referred to in this petition were added to be effective on April 22, 1994

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 known 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 bag to prevent contamination. Had 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 seized items. App. at 42, ll 12-18. The Prisma records showed that the seized items were found by Kelsey Lynn Ridgeway. App. at 44, l 19 to 45, l 11. If the officer had simply complied with the mandates of the statue and regulations, 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. Mr. Keiper testified that he did not recall receiving any training as to the requirements of S. C. Code § 44-53-485. App. at 243, ll 16-21. When he was shown the actual statute, he stated it refreshed his memory "a little bit." App. at 243, l 13. He did not, however, remember being taught any of the obligations of the evidence custodian. App. at 243, ll 16-21. He stated he took no courses as part of his police academy training on being an evidence custodian. App. at 244, 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. App. at 252, ll 15-18.

Mr. Keiper testified the form he was using did not comply with many of the requirements of S.C. Code Reg. 73-90. App. at 247, l 6 to 250, l 21. Among the things that 73-90 requires an evidence custodian to do when he passes on the evidence, is 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 petition 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.[4]

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." App. at 264, ll 2-3. She admitted she was familiar with 73-90, but was not "operationally familiar with it." App. at 266, l 25 to 267, l 1.

She then admitted her laboratory document, Exhibit 15, App. at 466, does not comply with many of the requirement of S. C. Code Reg. 73-90. App. 267, l 23 to 268, l 14. She claimed the missing information was contained in their computer system, but she was not asked to print it out. App. at 268, 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

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[4] 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.

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." App. at 67, ll 3-5. 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." App. at 67, 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." App. at 447. 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 Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961). Simply put, a government cannot ignore it constitutional obligations by contracting with a private company. If the law were not otherwise, a government could ignore virtually all of its constitutional obligations by leasing out its law enforcement and prison obligations. Such cannot be the law.

Any attempt to salvage this illegal search on the basis of an inventory search must also fail. First the state never introduced an inventory of what would found as to the possessions of Joseph Swaringen. Ms. Lisa Edmonds first testified a list of the inventory existed. App. at 36, ll 14-19. The state admitted they did not have the inventory. App. at 36, l 21 to 37, l 4. As the state was defending this motion , at least partly, on the basis of an inventory search, they should have produced the inventory.

In addition to the lack of an inventory, the state failed to offer any evidence of what the hospital policy was as to an inventory. Ms. Edmonds assumed a written policy existed but did not have a copy. App. at 34, l 25 to 35, l 1. The state stated, "I can try to get a copy." App. at

34, l 18. The State never produced a copy of any policy.

Without proof of a valid written policy as to inventory searches, this search in this case should also fail. "[W]e now hold that art. 14 of the Declaration of Rights requires the exclusion of evidence seized during an inventory search not conducted pursuant to standard police procedures, which procedures, from now on, must be in writing." *Commonwealth v. Bishop*, 402 Mass. 449, 451, 523 N.E.2d 779, 780 (1988). Without proof of an the actual inventory, such a search is not proper. "The policy or practice governing inventory searches should be designed to 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, § 10 of the Constitution of the State of South Carolina.

CONCLUSION

As to Issues I, II, IV and V, this Court should grant the Petition for Writ of Certiorari and reverse the conviction of Joseph Swaringen and dismiss the charges against him. As to issue III, this Court should grant the Petition for Writ of Certiorari and reverse the conviction and remand to the lower court for a new trial.

July 23, 2025

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