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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Dorchester County
Honorable Robert J. Bonds, Circuit Court Judge

HERBERT LEROY HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Opinion No. 2026-UP-096 (S.C. Ct. App. Filed February 25, 2026)

APPELLATE CASE NO. 2026-001166

SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT

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PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2022-001369

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting DNA evidence where the State failed to establish chain of custody as far as practicable, since the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled?

STATEMENT OF THE CASE

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

Trial counsel attempted to directly appeal but he filed a defective notice of appeal—the notice stated counsel was "not aware of any exceptions to Rule 203." Therefore, the court of appeals issued an order dismissing the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR.[2]

On November 21, 2017, Appellant filed an application for post-conviction relief (PCR). On January 4, 2022, the State made its return and partial motion to dismiss. A hearing was held in the matter on May 19, 2022, before the Honorable Robert J. Bonds. Christopher Geel represented Appellant. Samantha Weidauer represented the State. On September 19, 2022, the PCR court issued an order granting Appellant a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but denying post-conviction relief.[3]

This brief of appellant pursuant to *White v. State* follows.[4]

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[1] App. 574 – 577; App. 1; App. 427, l. 20 – 428, l. 4; App. 578 – 579; App. 438, l. 3 – 439, l. 3.

[2] App. 541 – 546; App. 547.

[3] App. 441 – 447; App. 448 – 461; App. 462; App. 550 – 573.

[4] Contemporaneously, Appellant is filing a petition for writ of certiorari.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "In criminal cases, the appellate court sits to review errors of law only." *State v. Pulley*, 423 S.C. 371, 815 S.E.2d 461 (2018) (quoting *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (quoting *Baccus*, 367 S.C. at 48, 625 S.E.2d at 220)).

ARGUMENT

The trial court erred in admitting DNA evidence where the State failed to establish chain of custody as far as practicable, since the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled.

Relevant facts

This trial involved a cold case DNA hit from a decades-old rape. On or about October 25, 1984, P.R., the complainant, was working at The Bookbag, a bookstore in Dorchester County. A black man of medium height, who was in his twenties or thirties, and had a "nondescript," "very common face" pointed a gun at Complainant. The man stole money from the cash register, and he forced Complainant into a back room where he raped her. Then the man stole Complainant's wedding ring and ran away.[5]

Law enforcement and Complainant's husband were called. Detective Knight drove Complainant and her husband to the emergency room at MUSC, stopping at Complainant's home along the way so that she could get fresh clothes to wear home from the hospital.[6]

Michelle Aimes Vevon and Lisa Cox Schafer were both nurses working in the trauma unit at MUSC at the time of Complainant's sexual assault examination. Due to the passage of time, neither nurse remembered the Complainant's exam. Vevon explained that the process for a sexual assault examination was for a physician to perform the exam and a nurse to assist and collect evidence. Nurse Vevon stated her handwriting indicated that she was present during the exam, but she believed Nurse Cox Schafer assisted the doctor. Vevon recognized her handwriting on an

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[5] App. 82, l. 17 – 88, l. 15.

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

envelope of pubic hair combings, and she recognized her handwriting on a checklist of evidence that was turned over to Detective Knight.[7]

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

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

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

Nurse Cox Schafer explained there was a protocol for sexual assault examinations. Although Cox Schafer did not remember Complainant's exam, Cox Schafer believed she assisted the doctor with the exam because her signature was present on the envelopes or paper bags which contained the evidence collected during the exam.[8]

Of note, Complainant was insistent the rape occurred on October 24, 1984, and not October 25, 1984. However, Nurse Vevon noted the envelope of pubic hair combings was labeled October 25, 1984. Detective Knight also testified the crime occurred on October 25, 1984.[9]

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

[8] App. 120, l. 25 – 127, l. 25.

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

Detective Knight waited outside the hospital room until he was handed the evidence collected during the exam. He received the rape kit, which was a sealed box full of envelopes and samples, and signed State's Exhibit #8, the checklist, that he received the items. Detective Knight was the Sheriff's son. According to Knight, only his father (Sheriff Knight), Captain Ernest Moultrie, and Lieutenant Dale Nevins had keys to the evidence locker. Detective Knight said he kept the evidence until he turned it over to Lieutenant Nevins. Knight said the evidence locker was a storage room with a deadbolt.[10]

Captain Moultrie's testimony about who had keys to the evidence locker was the same—Moultrie said he had a key to the evidence locker along with the Sheriff and Nevins. Lieutenant Nevins's testimony was in agreement—Nevins said he, Moultrie, and the Sheriff had a key to the evidence locker. However, Lieutenant Earl Asbell's testimony about the evidence locker differed. According to Lieutenant Asbell, "Each individual detective—I handled my own evidence. Lieutenant Nevins handled his. My office was separate from his and I had a storage room in there that I locked my evidence in."[11]

Lieutenant Nevins agreed he received the evidence from Knight and put it in the evidence locker. According to Nevins, he personally made two trips to SLED in January of 1985—he took the rape kit on January 2, 1985, and he took the rest of the evidence on January 31, 1985. State's Exhibit #18 and State's Exhibit #19 reflect that Nevins took the evidence to SLED in two trips during January of 1985. *See* App. 583 – 584. Court's Exhibit #1 is a stipulation by the parties of what items were taken to SLED by Nevins in January 1985. *See* App. 581. Lieutenant Nevins said

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[10] App. 132, l. 9 – 143, l. 24.

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

a Sergeant Salvely, who is now deceased, picked the evidence back up from SLED in 1985 and brought it back to the Sherriff's Office.[12]

In 1988, the Sheriff's Office sent the evidence in the case back to SLED when a man named Barry Daniels became a suspect. Nevins took the evidence to SLED in 1988. State's Exhibit #22 is Nevins's 1988 request to SLED and it has a stamp from SLED saying the evidence was received by its chemistry lab on July 21, 1988. *See* App. 585. Confusingly, however, Nevins testified the evidence was transported back to the Sheriff's Office from SLED by an Officer Joseph Rivers on April 28, 1988, which would have meant it was returned prior to being delivered.[13]

Also problematic regarding the evidence's handling in the late 1980's was the testimony of Officer Emory Rush, who testified that he transported unidentified evidence from this case along with evidence from seven other cases, from SLED back to the Sheriff's Office on December 19, 1989. State's Exhibit #23 is the form Rush signed, which documented that he retrieved the evidence from SLED in 1989. *See* App. 586. The status of where the evidence was at various times in 1988 and 1989 therefore seems unclear. Back at the Sheriff's Office, Rush gave the evidence to Nevins.[14]

Regarding what testing was done on the evidence at SLED in 1988, the evidence was viewed but returned without further testing because the analyst did not believe enough material was present for the existing technology to be of use.[15]

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[12] App. 155, l. 7 – 161, l. 9.

[13] App. 162, l. 18 – 166, l. 16.

[14] App.196, l. 22 – 199, l. 8.

[15] App. 315, l. 14 – 316, l. 19.

In 1993, Lieutenant Nevins left the Sheriff's Office, and Lieutenant Earl Asbell became the evidence custodian. When Asbell took custody of the evidence, the two men signed off on an inventory of the evidence locker. The inventory sheet was five pages long. The only mention of the evidence in this case on that inventory is listed on page three as item nineteen., which was a "box of miscellaneous envelopes" with eight different people's names listed on it. The only thing listed as being in the box were "envelopes." The inventory did not mention any bags of clothes, kits, swabs, cuttings, or vials.[16]

In 1993, Asbell moved the evidence to a different evidence storage room. In 1994, the Sheriff's Office moved, and the evidence from the evidence room was boxed up, packed on a truck, and moved to the new office over the course of a couple of days. Others were involved in the moving, but Asbell supervised. Asbell did not remember who helped with the move, but believed it was a detective. Asbell said he would have noticed if something appeared to be tampered with.[17]

Asbell decided to resubmit the evidence to SLED in 2009. Another officer transported it there. When Asbell filled out the request for SLED to test the evidence, one of the items he sent to SLED was oral wash.[18]

Officer Buster Edwards also transported the evidence to SLED and retrieved it back from SLED (apparently this was in 2009, given his employment history).[19]

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

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

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

[19] App. 225, l. 16 – 233, l. 16.

Kenneth Bogan, who was qualified as an expert in DNA analysis, worked at SLED for many years. He did all of the testing on the evidence in this case. Bogan was the analyst who tested the evidence originally when it came to SLED in 1985. As part of that initial round of testing, Bogan took a cutting from the panties that were collected. Bogan again checked the evidence in 1988 and determined not to do further testing at that time. In 2009, Bogan performed additional testing on the evidence when it was again sent to SLED for analysis.[20]

At some point in the 1980's, Bogan removed certain items of evidence from the sexual assault kit, including vaginal wash, vaginal swab, oral swab, rectal swab, saliva, and oral wash. They became separated from the other evidence. When certain items were resubmitted, the oral wash was "not found."[21]

Bogan was asked why there was no "signature of person receiving evidence" signed on the SLED request for analysis forms from the 1980's. Bogan said he did not know, but that at the time, "[t]he secretaries would call the analyst and ask them to come up and pick up the evidence." The forms were also time stamped as received by SLED. Bogan did not think he was required to sign the forms in 1985. Bogan believed the secretary at that time was Susie Wilson.[22]

Bogan opined that when he re-tested the cutting from the panties in 2009, he found DNA that was a mixture of at least two individuals. He got a partial profile from a major contributor, who was an unidentified male. The minor contributor to the mixture was consistent with Complainant. At a later time, a known standard for Appellant was submitted. Bogan opined that

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

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

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

the "DNA profile that I developed from that major contributor from the panties, matched the DNA profile of Herbert Holmes. The probability of randomly selecting a unrelated of unrelated individuals [sic] having a DNA profile matching that major contributor is approximately 1 in 350 billion."[23]

However, in 2009, when Bogan received the evidence, one of the items was mismarked. Bogan noted receipt said the cutting from the panties and the cutting from the skirt were both labeled N. Bogan claimed Item N was the cutting from the panties and Item M was the cutting from the skirt. As seen, Bogan matched Appellant's DNA to the cutting from the panties. However, Bogan said it was only the receipt that was mislabeled, not the items themselves.[24]

Appellant moved to exclude the DNA evidence, cited to *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011), and argued the State had not proven chain of custody as far as practicable, since much was left to conjecture.[25] The bases for exclusion due to an incomplete chain of custody were as follows.

- First, a discrepancy in the testimony about whether the rape occurred on October 24 or 25, 1984. Complainant was certain the crime occurred on the 24th but others' testimony was that it occurred on the 25th.[26]

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

[24] App. 270, l. 12 – 272, l. 5.

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

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

- Second, when the evidence was collected during the sexual assault examination, "neither one of the nurses was able to say for sure who collected the evidence and who labeled it, if they were both there."[27]
- Third, no one at SLED signed they received the evidence when it was delivered by Lt. Nevins in January of 1985. *See* App. 583 – 584. (State's Exhibit #18 and State's Exhibit #19 are the forms Nevins submitted to SLED and the "signature of person receiving evidence" line is blank.) Counsel argued that since these were SLED's own forms, they should have followed "their own protocol." Moreover, testimony about how the evidence got from Nevins to Bogan while at SLED was speculative.[28]
- Fourth, it was unclear when the evidence was returned from SLED in 1985; whether it all came back in the same batch or whether it was returned in two batches (which is how it was delivered).[29]
- Fifth, when the evidence went back up to SLED in 1988, once again no one at SLED signed receipt of the evidence, as shown by State's Exhibit #22 and State's Exhibit #33. (State's Exhibit #33 is the second page of State's Exhibit #22). *See* App. 585; App. 587. Also, testimony differed on whether the evidence was returned to the Sheriff's Office in 1988 or 1989. [30]

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

[28] App. 276, l. 25 – 278, l. 9.

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

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

- Sixth, the State presented conflicting testimony on how evidence was stored while at the Sheriff's Office. As seen, Nevins, Moultrie, and Knight agreed the evidence was kept in a locker and only Nevins, Moultrie, and the Sheriff had a key. However, Asbell said each of the detectives kept his own evidence.[31]
- Seventh, when Nevins left the office and Asbell took custody of the evidence, the inventory of the evidence locker was incomplete as to this case. The only mention of the evidence in this case on the inventory was the inclusion of P.R.'s name along with seven other people's names listed as a "box of miscellaneous envelopes." The inventory did not mention any bags of clothes, kits, swabs, cuttings, or vials. Counsel argued this was "a documented break in the chain."[32]
- Eighth, the evidence was boxed up and moved from the old Sheriff's Office to the new Sheriff's Office and it was unclear who helped Asbell move the evidence.[33]
- Ninth, when the evidence went back to SLED in 2009, the receipt for the cuttings from the panties and skirt was mislabeled—an item was marked N but should have been marked M. Also, the oral wash had disappeared.[34]

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

[32] App. 279, l. 23 – 281, l. 1.

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

[34] App. 281, l. 16 – 283, l. 9.

- Tenth, a lack of testimony about the standard operating procedure for chain of custody at SLED or the Sheriff's Office.[35]

The court denied the motion. It ruled that discrepancies about the date of the rape went to weight, that Nurse Schafer remembered how the evidence was collected, and that Nevins and Moultrie were clear about their procedure and who had access to the evidence. The court found the chain was clear as to the hospital, the Sheriff's Office, and SLED, noting the same analyst at SLED did the analysis each time. The court did note the oral wash disappeared, but found any problems went to weight and not admissibility.[36]

The DNA was the only evidence linking Appellant to the crime. He was convicted as indicted and sentenced to consecutive terms of life for kidnapping and thirty years for first-degree criminal sexual conduct.[37]

Discussion

The State failed to establish the chain of custody on the DNA evidence as far as practicable. The sexual assault examination evidence passed through multiple hands over the decades; some of those hands were identified and some were not. The evidence was separated, moved, transported and re-transported several times, and tested and retested several times. One item went permanently missing. Other items, including the critical evidence that purported to connect Appellant to the crime, was not listed on the inventory created when the evidence was transferred to a new custodian.

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[35] App. 284, l. 1 – 287, l. 2.

[36] App. 295, l. 14 – 298, l. 19.

[37] App. 427, l. 21 – 428, l. 4; App. 438, l. 3 – 439, l. 3.

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

"Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) (citing *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id.* (citing *Sweet* at 7, 647 S.E.2d at 206). "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *Id.* (citing *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)). "In applying this rule, we

have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the substance was not established at least as far as practicable." *Id.* (cleaned up). A brief time discrepancy (fourteen minutes) is not fatal to chain of custody where each person who possessed the sample is identified. *State v. Rowell*, 436 S.C. 54, 60-65, 870 S.E.2d 175, 178-80 (Ct. App. 2022).

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

"Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." *Id.* "While the admission of evidence is within the discretion of the trial judge, we have held that it is an abuse of discretion to admit the results of a blood alcohol test where the identity of those who sealed, labeled, and transported the blood sample is not established." *State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992). "[W]here there is evidence to establish the identity of those who have handled the evidence and the manner in which it was handled, a weakness in the chain merely raises a question of credibility, not admissibility." *Taylor*, 360 S.C. at 24, 598 S.E.2d at 737. "The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as

practicable. This determination will necessarily depend on the unique factual circumstances of each case." *Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755.

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

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

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

point, when the items went to SLED, the receipt listing the cutting from the panties was mislabeled N instead of M.

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

Given these circumstances, the nature of the evidence, and the opportunity for tampering, mixups, or contamination, the admission was an abuse of discretion. There was not a reasonable probability the evidence was not changed in important respects. *State v. Hatcher*, 392 S.C. at 94–95, 708 S.E.2d at 754–55. The State failed to establish chain of custody as far as practicable. *State v. Sweet*, 374 S.C. at 6, 647 S.E.2d at 205. Much was left to conjecture. *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. at 627, 614 S.E.2d at 645.

The error was not harmless. "Whether an error is harmless depends on the circumstances of the particular case. 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. Error is harmless when it 'could not reasonably have affected the result of the trial.'" *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key,* 256 S.C. 90, 180 S.E.2d 888 (1971)). This was a twenty-nine-year-old rape case where the complainant could not identify her assailant. The critical evidence identifying Appellant as the perpetrator was the DNA evidence. Absent this evidence, the jury would not have convicted.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse the decision of the trial court and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of March, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Mar 10 2023

S.C. SUPREME COURT

Appeal from Dorchester County

Honorable Robert J. Bonds, Circuit Court Judge

HERBERT LEROY HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant Pursuant to White v. State and Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the primary email address listed within the Attorney Information System (AIS); and a copy of the Brief of Appellant Pursuant to White v. State and Appendix have been served on Herbert Leroy Holmes, #139850, at Allendale Correctional Institution, P.O. Box 1151, Highway 47 Fairfax, SC 29827, this 10th day of March, 2023.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

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Jul 24 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Dorchester County
Honorable Diane Goodstein, Trial Judge

Appellate Case No. 2022-001369

HERBERT LEROY HOLMES, SCDC # 139850,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Trial Court erred in admitting DNA evidence where the State failed to establish chain of custody as far as practicable, since the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether the Trial Court correctly held that the State established the chain of custody, as far as is practicable, for the DNA evidence and therefore denied Petitioner's motion to suppress.

STATEMENT OF THE CASE

Petitioner Herbert Leroy Holmes is currently incarcerated within the South Carolina Department of Corrections following his conviction for first degree criminal sexual conduct and kidnapping, for which he was sentenced to concurrent terms of incarceration for thirty years and life, respectively.

In May 2011, Petitioner was indicted by the Dorchester County Grand Jury for first degree criminal sexual conduct (2011-GS-18-0257) and kidnapping (2011-GS-18-0256). App. at 575-578. On April 22-25, 2013, Petitioner proceeded to a jury trial before the Honorable Diane Goodstein. Id. at 552. At the conclusion of trial, the jury found Petitioner guilty as indicted, and Judge Goodstein sentenced Petitioner to concurrent terms of thirty years and life imprisonment, for criminal sexual conduct and kidnapping, respectively. Id. at 579-580.

Petitioner's trial counsel attempted to file a notice of appeal, but the notice of appeal inadvertently cited Rule 203(d)(1)(B)(4), which governs guilty pleas. Id. at 543. As a result, on June 10, 2013, the Court of Appeals dismissed Petitioner's direct appeal. Id. at 548.

On November 21, 2017, Petitioner filed a petition for post-conviction relief.[1] Id. at 441-447. An evidentiary hearing was held on May 19, 2022, before the Honorable Robert J. Bonds. Id. at 463-541. The PCR court held that Petitioner was entitled to a belated direct appeal pursuant to White v. State, but Petitioner was not entitled to post-conviction relief. [2] Id. at 462.

Petitioner then initiated this appeal.

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[1] Petitioner filed this post-conviction relief application *pro se*. Counsel, Christopher R. Geel, was appointed on December 9, 2019.

[2] Concurrent with this Brief, Respondent is filing a Return to Petition for Writ of Certiorari regarding the other matters raised in Petitioner's PCR appeal.

STATEMENT OF FACTS

Victim P.R. ("Victim," her name has been withheld) was held at gun point, instructed to perform oral sex on her attacker, who then anally and vaginally raped her. Id. at 553. During trial, Petitioner objected to the admission of Dr. Bogan's testimony regarding DNA testing. Id. at 274-287. Petitioner objected to the chain of custody regarding the evidence and argued that the State had not fulfilled its obligations under State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011). App. at 274-287. The Trial Court overruled the objection and admitted the evidence. Id. at 298.

The DNA evidence in question was collected from clothing and various swabs of Victim's body ("clothing" and the "rape kit"), all of which were collected at the Medical University of South Carolina the night of the assault. Id. at 553. Michelle Aimes Vevon and Lisa Cox Schafer were nurses working at MUSC in the trauma unit at the time of Victim's exam. Id. at 99, 120. Neither nurse remembered the Victim's exam at the time of the trial in 2011, Id. at 105, but Vevon recognized her own handwriting on the documentation from the exam, Id. at 103. Cox testified that she collected evidence during the exam based upon her signature on certain items. Id. at 127. During the exam, Victim's clothes were collected along with several swabs and washes (collectively, the "rape kit"). Id. at 553.

Detective James Knight collected the clothes and rape kit from the hospital. Id. at 135, lines 1-11, 582. Detective Knight then transported the evidence to Lieutenant Dale Nevins. Id. at 136-137. Lieutenant Nevins placed the evidence in the Dorchester Sheriff Office evidence locker. Id. at 155-156. In January 1985, the evidence was transported to SLED for testing by Lieutenant Nevins. Id. at 159-160. The rape kit was transported on January 2, 1985, and the clothing was transported on January 31, 1985. Id. at 581, 583, 584. The evidence was tested, and some of it was returned to the Sheriff's Office by Sergeant Burt Salvely. Id. at 161. Other evidence was returned

by Joseph Rivers in April 1988. Id. at 163. In July 1988, evidence was sent back to SLED for additional testing. Id. at 165, 313-314, 585. The evidence was returned to the Sheriff's Office on December 19, 1989, by Emory Rush. Id. at 165-166, 586.

In 1993, Lieutenant Nevins left the Sheriff's Office and custody of the evidence was transferred to Earl Absell. Id. at 167. In 1994, the Sheriff's Office moved. Id. at 204-205. During and after the move, Absell maintained custody of the evidence. Id. at 206.

On March 6, 2009, the evidence was again submitted to SLED for DNA testing. Id. at 317. Dr. Kenneth Bogan at SLED, who had previously tested the evidence, extracted DNA from the Victim's panties and skirt. Id. at 321. Dr. Bogan identified a DNA mixture from at least two individuals. Id. at 322. Dr. Bogan then received a reference sample of Petitioner's DNA, developed a profile, and compared it to the DNA extracted from Victim's body and clothing. Id. at 324. Dr. Bogan eventually determined that Petitioner's DNA matched the DNA found on the Victim's panties. Id. at 331.

Notably, every law enforcement officer and SLED technician who testified stated that the evidence was sealed when they received it and did not contain any signs of tampering. See Id. at 135 (Detective Knight), 162 (Lieutenant Nevins), 198 (Emory Rush), 206 (Earl Absell), 227 (Buster Edwards), 238 (Stephanie Stanley), 307, 314, 317 (Dr. Kenneth Bogan).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements . . . ." Watson v. Ford Motor Co., 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010). One of those preliminary determinations is whether a proper chain of custody has been presented prior to the admission of fungible evidence. See e.g, State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 754 (2011); State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

ARGUMENT

I. The Trial Court correctly ruled that the State had established the chain of custody as far as practicable and thus correctly denied Petitioner's motion to suppress.

Petitioner has argued that the Trial Court erred by admitting DNA evidence from Dr. Bogan. Petitioner bases this argument, both at trial and on appeal, on what he perceives to be an insufficient chain of custody. Given the long history of this investigation, the State established the chain of custody as far as is practicable, and there was no evidence of tampering or contamination of the evidence. Thus, the Trial Court's ruling should be upheld.

"The trial court serves as the gatekeeper in the admission of all evidence presented at trial, and in making admissibility determinations, the trial court is required to make certain preliminary findings regarding admissibility requirements . . . ." Watson v. Ford Motor Co., 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010). One of those preliminary determinations is whether a proper chain of custody has been presented prior to the admission of fungible evidence. See e.g, State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 754 (2011); State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"South Carolina law does not require testimony as to the exclusion of any possibility of tampering." State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004). The Courts of this State have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is

only one of credibility, not admissibility." Carter, 344 S.C. at 424, 544 S.E.2d at 837. Importantly: "Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629 n.1, 614 S.E.2d 642, 646 n.1 (2005). The Supreme Court has stated:

> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence."

State v. Hatcher, 392 S.C. 86, 94-95, 708 S.E.2d 750, 754-755 (2011). The Court in Hatcher indicated: "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." Id.

In this case, testimony and exhibits entered at trial established that:

- Following the assault, a medical exam was performed on Victim during which her clothes and a "rape kit" containing various swabs and specimens were collected. App. at 90.
- On October 25, 1985, Detective Knight collected Victim's clothing and the rape kit from the Medical University of South Carolina. App. at 135-136, 582. Detective Knight coordinated with Lieutenant Nevins to place those items in the Dorchester County Sheriff's Office evidence locker. App. at 135-136.
- On January 2, 1985, Lieutenant Nevins delivered the rape kit to SLED for testing. App. at 158-160.On January 31, 1985, Lieutenant Nevins delivered the clothing to SLED for testing. App. at 158-160. Notably, the evidence was sent in two separate trips.
- Dr. Kenneth Bogan of SLED analyzed the evidence and found sperm cells. App. at 308.
- On May 6, 1985, Sgt. Burt Salvely returned some of the evidence to the Dorchester County Sheriff's Office. App. at 161.
- On April 28, 1988, Joseph Rivers returned some of the evidence to the Dorchester County Sheriff's Office. App. at 163.

- On July 21, 1988, Lieutenant Nevins transported evidence, including a woods lamp, saliva filter paper, vaginal wash, oral wash, and an additional vaginal wash. to SLED for DNA testing. App. at 165, 585, 587.
- On July 24, 2988, Dr. Bogan of SLED determined that the evidence was not suitable for DNA testing. App. at 314.
- On December 19, 1989, SLED discharged a 9 x 12 envelope to Emory Rush, who returned it to the Dorchester County Sheriff's Office, where it was kept by Lieutenant Nevins. App. at 166, 586.
- In 1993, Lieutenant Nevins signed over custody of all evidence at the Dorchester County Sheriff's Office to Earl Asbell. App. At 167.
- In 1994, the Dorchester County Sheriff's Office moved buildings. During and after the move, Earl Asbell maintained custody of the evidence. App. At 205.
- On March 6, 2009, evidence technician Buster Edwards transported evidence for this case to and from SLED. App. at 228-229.
- While the evidence was at SLED, Dr. Bogan performed additional DNA testing on the panties and was able to develop a DNA profile. App. at 322. That DNA profile was eventually matched to Herbert Holmes. App. at 331.

Notably, every law enforcement officer and SLED technician who testified stated that the evidence was sealed when they received it and did not contain any signs of tampering. See App. at 135 (Detective Knight), 162 (Lieutenant Nevins), 198 (Emory Rush), 206 (Earl Absell), 227 (Buster Edwards), 238 (Stephanie Stanley), 307, 314, 317 (Dr. Kenneth Bogan).

The investigation in this case took place over 29 years. During that time, law enforcement maintained custody of the evidence and kept it secure. While the chain of custody is not as robust as seen in many modern investigation, none of the issues raised by Petitioner challenge that the items are what they purport to be. Given the "the nature of the article[s]" and "the circumstances surrounding the preservation and custody of [them]," the likelihood of intermeddlers tampering with them is incredibly low. Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-755. To hold otherwise would require a finding that an individual accessed these items, which were under law enforcement control, and resealed them in a manner which was undetectable by law enforcement. Additionally,

the intermeddler would have had to add or modify the evidence with items which were so similar to the original evidence that the change went unnoticed by law enforcement. The Trial Court was satisfied that the article had not been changed in important respects and permitted its introduction in evidence. There was evidentiary support for the Trial Court's ruling, so it was not an abuse of discretion. State v. Pagan, 369 S.C. at 208, 631 S.E.2d at 265.

The facts of this case are similar to those in State v. Hatcher, in which the Supreme Court upheld the admission of evidence despite similar questions regarding the chain of custody. In Hatcher, crack cocaine was purchased from the defendant by an undercover informant. 392 S.C. at 88-89, 708 S.E.2d at 751. The drugs which were purchased were collected by a law enforcement officer, who testified at trial, placed into a sealed bag, and transported to SLED for testing. Id. at 89, 708 S.E.2d at 751. Once at SLED, the forensic scientist analyzed the substances and confirmed they were controlled substances. Id. at 89, 708 S.E.2d at 752. The bags were then resealed and returned to local law enforcement. Id. The defendant objected to the chain of custody arguing that the chain of custody did not account for every hand-to-hand transfer within SLED. Id. at 90, 708 S.E.2d at 752. The trial court overruled the objection and admitted the evidence. Id. The Supreme Court ruled that the trial did not abuse its discretion when admitting the evidence because "[i]t is unnecessary that the police account for 'every hand-to-hand transfer' of the item; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained until its introduction at trial." Id. at 94, 708 at 754 (quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987)). The Supreme Court went on to say, "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.

However, we have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases." Id. at 95, 708 S.E.2d 755. The Supreme Court observed that both the officer who collected the drugs and transported them to SLED in tamper evident bags and the SLED agent who retrieved the drugs from the Log–In Department at SLED (still double-sealed) and tested them testified about the chain of custody and their handling of the drugs and the fact that there was no evidence of tampering. Id. While there are more officers involved in Petitioner's case, the facts are similar. Each officer testified that when he received the evidence, it was sealed. See App. at 135 (Detective Knight), 162 (Lieutenant Nevins), 198 (Emory Rush), 206 (Earl Absell), 227 (Buster Edwards), 238 (Stephanie Stanley), 307, 314, 317 (Dr. Kenneth Bogan). Further, the State produced documentation establishing when the evidence was transferred from the Sheriff's Office to SLED for testing and back. Id. at 581-587, see also, e.g., App. at 160-164 (testimony regarding items which were exhibits for identification only but which reflect the chain of custody). Due to the age of the case and the evolution of police documentation standards, the documentation chain is admittedly weaker than in modern cases. Nonetheless, the documentation and testimony demonstrates that the evidence was in law enforcement custody from the time it was collected to the time it was presented at trial. Thus, there is evidentiary support for the Trial Court's ruling admitting the evidence.

This case is also similar to State v. Trapp. In Trapp, drugs were seized from the defendant's bedroom by an investigator. 420 S.C. at 227, 801 S.E.2d at 747. A separate investigator completed a form acknowledging receipt of the drugs and their storage in the evidence locker. Id. The form contained some discrepancies between the search warrant return and the evidence form. Id. at 228, 801 S.E.2d at 748. The drugs were then transported to SLED for testing. Id. at 229, 801 S.E.2d at

748. The defendant objected to testimony regarding the actions of the first investigator, who was unavailable because he had died. Id. at 227, 801 S.E.2d 747 n.4. The defendant also objected to an incomplete chain of custody. Id. The Supreme Court held that the State presented sufficient evidence to reasonably demonstrate a complete chain of custody. Id. at 231, 801 S.E.2d at 749. The Supreme Court noted "[t]estimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Id. (citing State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007)). The Court continued, "Whe[n] other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id. at 231, 801 S.E.2d at 749-750 (citing State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007)). At trial, a responding officer had testified that he saw the items which were seized. Id. at 232, 801 S.E.2d at 750. He also testified to the standard procedures regarding the receipt of storage of narcotics. Id. The State then produced evidence regarding the transportation of the narcotics to SLED for testing. Id. The Supreme Court also looked to the testimony of the forensic scientist. Id. She stated the items she received were still inside manila envelopes when she removed them from the best evidence kit for testing. Id. Further, the items in the SLED report matched the items that the first investigator certified on the evidence form that he delivered to SLED. Id. The Court found this was evidence from which a juror could reasonably conclude the item was what the State purported it to be. Id. Importantly the Court noted, "Although we are aware that two of the items—a straw and one razor blade—were documented by [the investigator] on the evidence log-in form but not delivered to SLED, we find the care given to these pieces of evidence goes only to the weight of the evidence as opposed to its admissibility." Id. (citing State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)). In Petitioner's case,

there was testimony regarding the collection of the rape kit and clothing. App. at 116, 124. Further, there was testimony regarding their storage at the Sheriff's Office. Id. at 136. The State then produced documents and elicited testimony to establish when the evidence was transported to and from SLED for testing. See, e.g., Id. at 58181-587. While certain entries lacked clarity regarding what was transported, "precedent does not require the court to account for every minute of the custody and control of the evidence. Rather, [courts] must view the evidence and ascertain whether the State identified the individuals involved in handling the evidence, reasonably demonstrated that the evidence was handled properly, and established that the evidence seized was the same evidence tested." Trapp at 233, 801 at 750. All of which was done in this case.

Finally, Petitioner points to State v. Cribb. 310 S.C. 518, 426 S.E.2d 306 (1992). In Cribb, two nurses were present for a blood draw. Id. at 309, 426 S.E.2d at 522. One nurse testified that the other nurse administered an IV to Cribb and it was customary for blood to be drawn by the person administering the IV; the other nurse, who administered the IV, did not recall drawing blood from Cribb but assumed she did so because that was her standard procedure. Id. The lab technician did not know who drew Cribb's blood or how it was transferred to the lab. Id. Neither Cribb's medical records nor the label on the blood sample discloses the person(s) who drew the sample and transported it to the lab. Id. The admission of the blood evidence was an error because "[t]he evidence in the record of this case does not identify those persons who handled the blood from the time it was drawn until the time it was tested." Id. In contrast to Cribb, nurse Cox testified that, based upon her signature, she collected the evidence in this case. App. at 124. From that time forward, testimony and documentation shows that the evidence was either in the custody of the Dorchester County Sheriff's Office or SLED. Documentation and testimony detail when the evidence was brought back and forth between the two departments. Thus, Petitioner's case, unlike

Cribb, does have evidence identifying the persons who handled the evidence from the time it was collected until it was tested.

The Trial Court correctly held that the State had established the chain of custody as far as was practicable, admitted the evidence, and allowed Petitioner to challenge the weight and credibility of the evidence, but not its admission, before the jury. Petitioner was able to argue to the jury that they should discount the reliability of the DNA and raised questions regarding the testimony supporting a chain of custody, and he did as evidenced by approximately 25 pages of trial transcript. App. at 274-298. Through cross-examination and argument Petitioner raised these questions so that the jury could then determine what weight to give the evidence and what credibility to assign the witnesses. The jury ultimately found the evidence to be credible and convicted Petitioner.

Thus, the Trial Court did not abuse its discretion in admitting the evidence, and the denial of the motion to suppress was proper.

CONCLUSION

Because the Trial Court correctly found that the State established the chain of custody as far as was practicable, the Trial Court denied the motion to suppress. Therefore, this Court should deny Petitioner's appeal and uphold Petitioner's conviction. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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July 24, 2023

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Dorchester County
Honorable Diane Goodstein, Trial Judge

Appellate Case No. 2022-001369

HERBERT LEROY HOLMES, SCDC # 139850,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Carolina Collins, certify that I have served the within **Brief of Respondent Pursuant to White v. State** on Petitioner by sending an electronic copy via email to the addresses listed in AIS to Petitioner by his counsel of record listed below

Joanna K. Delany
South Carolina Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 24th day of July, 2023.

CAROLINE COLLINS
ADMINISTRATIVE COORDINATOR
Office of Attorney General
Post Office Box 11549

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Herbert Leroy Holmes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2022-001369

Appeal From Dorchester County
Robert J. Bonds, Circuit Court Judge

Unpublished Opinion No. 2026-UP-096
Submitted February 18, 2026 – Filed February 25, 2026

AFFIRMED

Appellant Defender Joanna Katherine Delany, of Columbia, for Petitioner.

Assistant Attorney General Leon David Leggett, III, of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from an order partially granting and partially denying his application for post-conviction relief (PCR). The PCR court found Petitioner was entitled to a belated review of his direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

However, the PCR court found Petitioner was not entitled to relief on any other ground.

Because there is sufficient evidence to support the PCR court's finding that Petitioner did not knowingly and intelligently waive his right to a direct appeal, we grant certiorari on Petitioner's Question 1 and proceed with a review of the direct appeal issues pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986). We deny certiorari on Petitioner's Question 2.

On appeal, Petitioner argues the trial court erred by denying his motion to suppress DNA evidence related to his case because the State failed to establish a chain of custody for the evidence "as far as practicable." We affirm pursuant to Rule 220(b), SCACR.

We hold the trial court did not abuse its discretion in denying the motion to suppress the DNA evidence because the State established a sufficient chain of custody. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion"); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); *State v. Hatcher*, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011) ("Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts."). We hold the State established the chain of custody as far as practicable given the facts of Petitioner's case: at trial, the State identified nearly every individual who handled the DNA evidence, and each witness who testified indicated the evidence was properly sealed and secure when it was received. *See State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) ("[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." (quoting *Hatcher*, 392 S.C. at 91, 708 S.E.2d at 753)); *Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55 ("The trial [court]'s exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" (quoting *United States v. De Larosa*, 450 F.2d 1057, 1068 (3d Cir. 1971))); *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 629 n.1, 614 S.E.2d 642, 646 n.1 (2005) ("Whether the chain of custody has been established as far as practicable . . . depends on the unique factual circumstances of each case."); *id.* at 629, 614 S.E.2d at 646 ("Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person

associated with the procedure is not personally identified."). The only unidentified individuals in the chain of custody were receptionists at the South Carolina Law Enforcement Division (SLED) who accepted deliveries of the items; however, agent Kenneth Bogan—a SLED analyst who tested the evidence on every occasion it was transported to the agency—testified that when the items were delivered, he picked up the items from the secretaries, filled out the intake forms, and observed that the items were sealed and lacked evidence of tampering. *See Hatcher*, 392 S.C. at 92, 95, 708 S.E.2d at 753, 755 (ruling the trial court did not abuse its discretion in finding the State established a sufficient chain of custody for evidence when the employee at SLED who received the drug evidence from law enforcement was not identified, but the agent who tested the drugs testified he retrieved the evidence from the Log-In Department at SLED and the items were still "double-sealed" and did not show any evidence of tampering); *Cochran*, 364 S.C. at 628-29, 614 S.E.2d at 646 (finding the chain of custody of blood samples was established as far as practicable because, although an unknown courier transported the samples from the collection site to the testing facility, every other person who handled the samples testified at trial and evidence indicated the samples were sealed and intact upon their arrival).

Although there were discrepancies with the documentation of some of the State's evidence—the Victim testified her assault occurred the day prior the hospital's records; an inventory sheet mistakenly listed cuttings from Victim's skirt as item "N" instead of "M"; and an oral wash, which had been previously found to lack DNA samples, was unaccounted for after SLED's initial analyses of the evidence—we hold these discrepancies did not render the evidence inadmissible but rather goes only to its weight as credible evidence. *See State v. Carter*, 344 S.C. 419, 423-25, 544 S.E.2d 835, 836-37 (2001) (ruling a missing saliva sample from a DNA collection kit performed on the defendant did not render the chain of custody for blood samples incomplete because "all custodians of the blood testified" at trial they "did not alter the evidence in any way and that the security tape [which sealed the packaging of the blood samples] was unbroken"); *id.* at 425, 544 S.E.2d at 838 ("[W]e 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."); *see also State v. Rowell*, 436 S.C. 54, 870 S.E.2d 175 (Ct. App. 2022) (finding an inconsistency between flight records and the defendant's medical records as to the time his blood sample was taken "did not establish either a break in the chain of custody or that the blood was from someone else" because "[the] brief time discrepancy between organizations d[id] not alter the chain of custody analysis [where] each person who possessed the sample was identified"), *vacated and remanded on other grounds*, 444 S.C. 109, 906 S.E.2d 554 (2024); *State v.*

Patterson, 425 S.C. 500, 508, 823 S.E.2d 217, 222 (Ct. App. 2019) ("Minor discrepancies in the chain of custody implicates the credibility of the evidence, but does not render the evidence inadmissible."); *Cochran*, 346 S.C. at 630, 614 S.E.2d at 646 ("[P]roof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.").

AFFIRMED. [1]

GEATHERS, HEWITT, and CURTIS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Goodstein, Circuit Court Judge

Opinion No. 2026-UP-096

HERBERT LEROY HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001369

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Herbert Leroy Holmes requests that this Court grant rehearing. On February 25, 2026, this Court affirmed the PCR court's finding that Petitioner did not knowingly and intelligently waive his right to a direct appeal, thus it proceeded with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986). It denied certiorari as to his ineffective assistance of counsel claim. *Holmes v. State*, Op. No. 2026-UP-096 (S.C. Ct. App. filed February 25, 2026). As to Petitioner's argument the trial court erred in admitting DNA evidence where the State failed to establish chain of custody as far as practicable, since the prosecution left to conjecture the identity of some of the persons who

handled the evidence and the manner in which the evidence was handled, this Court concluded "the trial court did not abuse its discretion in denying his motion to suppress DNA evidence because the State established a sufficient chain of custody." *Holmes v. State*, Op. No. 2026-UP-096 at 2.

This Court held the chain of custody was sufficient because "the State identified nearly every individual who handled the DNA evidence, and each witness who testified indicated the evidence was properly sealed and secure when it was received." *Holmes v. State*, Op. No. 2026-UP-096 at 2. This Court further found,

> The only unidentified individuals in the chain of custody were receptionists at the South Carolina Law Enforment Division (SLED) who accepted deliveries of the items; however, agent Kenneth Bogan—a SLED analyst who tested the evidence on every occasion it was transported to the agency—testified that when the items were delivered, he picked up the items from the secretaries, filled out the intake forms, and observed that the items were sealed and lacked evidence of tampering.

Holmes v. State, Op. No. 2026-UP-096 at 3. This Court held that,

> Although there were discrepancies with the documentation of some of the State's evidence—the Victim testified her assault occurred the day prior the hospital's records; and inventory sheet mistakenly listed cuttings from Victim's skirt as item "N" instead of "M"; and an oral wash, which had been previously found to lack DNA samples, was unaccounted for after SLED's initial analyses of the evidence—we hold these discrepancies did not render the evidence inadmissible but rather goes only to its weight as credible evidence.

Holmes v. State, Op. No. 2026-UP-096 at 3.

Petitioner respectfully asserts this Court misapprehended and/or overlooked his arguments that the State did not reasonably demonstrate the manner of the evidence's handling, failed to identify each person who handled the evidence, and the evidence changed in important respects. The evidence in this case was not identified on the 1993 inventory. The cutting which

was taken from the panties and contained DNA matched to Petitioner was not identified on the inventory, and neither was the bag of clothing from which the cutting was taken. Instead there was simply a note regarding a box of miscellaneous envelopes containing evidence from eight cases including this one. Respectfully, this was a critical point which required exclusion of the evidence. Moreover, the missing oral wash demonstrated that something affected the integrity of the evidence. The evidence could not have been properly sealed if something went missing. Also demonstrating a lack of integrity, testimony and documentation conflicted on where the evidence was in 1988, showing the items to be both at SLED and the Sheriff's Office during the same time period. There was conflicting testimony over where the evidence was stored and who had access to it when it was at the Sheriff's Office: Detective Knight and Captain Moultrie said one thing, while Lieutenant Asbell said another. The status of where the evidence was at various times in 1988 and 1989 was unclear. Petitioner respectfully asserts this Court overlooked or misapprehended these points, and their effect on admissibility. These discrepancies went to admissibility, not weight.

The trial court erred in admitting DNA evidence where the State failed to establish chain of custody as far as practicable, since the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled.

Relevant facts

This trial involved a cold case DNA hit from a decades-old rape. On or about October 25, 1984, P.R., the complainant, was raped by a black man with a "nondescript," "very common face" at gunpoint. App. 82, l. 17 – 88, l. 15. Complainant was taken to the emergency room at MUSC. App. 88, l. 23 – 90, l. 22; App. 131, l. 5 – 132, l. 17.

Two nurses were working in the trauma unit at MUSC at the time of Complainant's sexual assault examination. Due to the passage of time, neither nurse remembered the Complainant's exam. However, both were present. There was a checklist of evidence that they turned over to Detective Knight. App. 99, l. 14 – 109, l. 4; App. 120, ll. 6-24. State's Exhibit #8 is the checklist and specifies the collected evidence was: 1) Clothing: hose, bra, panties, slip, skirt, blouse; 2) Chux x 2; 3) Photos: full length; 4) R & L fingernail scrapings; 5) Pubic hair combings; 6) Pubic hair pluckings; 7) Vaginal washing without fixative; 8) Vaginal swab for ABO; 9) Woods lamp + swab; 10) Filter paper with saliva; 11) Other evidence: oral washings without fixative, oral ABO, rectal ABO. *See* App. 582. This evidence would go back and forth from the Dorchester County Sheriff's Office to SLED multiple times over the years in an attempt to solve the crime—in 1985, 1988, 1989, and 2009.

Complainant believed the rape occurred on October 24, 1984, and not October 25, 1984. However, Nurse Vevon noted the envelope of pubic hair combings was labeled October 25, 1984. Detective Knight also testified the crime occurred on October 25, 1984. App. 107, l. 3 – 109, l. 4; App. 135, ll. 2-14; App. 83, l. 24 – 94, l. 4; App. 93, l. 20 – 94, l. 15.

Detective Knight waited outside the hospital room until he was handed the evidence collected during the exam. He received the rape kit, which was a sealed box full of envelopes and samples, and signed State's Exhibit #8, the checklist, that he received the items. Detective Knight was the Sheriff's son. According to Knight, only his father (Sheriff Knight), Captain Ernest Moultrie, and Lieutenant Dale Nevins had keys to the evidence locker. Detective Knight said he kept the evidence until he turned it over to Lieutenant Nevins. Knight said the evidence locker was a storage room with a deadbolt. App. 132, l. 9 – 143, l. 24.

Captain Moultrie's testimony about who had keys to the evidence locker was the same—Moultrie said he had a key to the evidence locker along with the Sheriff and Nevins. Lieutenant Nevins's testimony was in agreement—Nevins said he, Moultrie, and the Sheriff had a key to the evidence locker. However, Lieutenant Earl Asbell's testimony about the evidence locker differed. According to Lieutenant Asbell, "Each individual detective—I handled my own evidence. Lieutenant Nevins handled his. My office was separate from his and I had a storage room in there that I locked my evidence in." App. 150, l. 22 – 152, l. 7; App. 154, l. 12 – 155, l. 3; App. 201, ll. 9-15.

Lieutenant Nevins agreed he received the evidence from Knight and put it in the evidence locker. According to Nevins, he personally made two trips to SLED in January of 1985—he took the rape kit on January 2, 1985, and he took the rest of the evidence on January 31, 1985. State's Exhibit #18 and State's Exhibit #19 reflect that Nevins took the evidence to SLED in two trips during January of 1985. *See* App. 583 – 584. Court's Exhibit #1 is a stipulation by the parties of what items were taken to SLED by Nevins in January 1985. *See* App. 581. Lieutenant Nevins said a Sergeant Salvely, who is now deceased, picked the evidence back up from SLED in 1985 and brought it back to the Sherriff's Office. App. 155, l. 7 – 161, l. 9.

In 1988, the Sheriff's Office sent the evidence in the case back to SLED when a man named Barry Daniels became a suspect. Nevins took the evidence to SLED in 1988. State's Exhibit #22 is Nevins's 1988 request to SLED and it has a stamp from SLED saying the evidence was received by its chemistry lab on July 21, 1988. *See* App. 585. Confusingly, however, Nevins testified the evidence was transported back to the Sheriff's Office from SLED by an Officer Joseph Rivers on April 28, 1988, which would have meant it was returned prior to being delivered. App. 162, l. 18 – 166, l. 16.

Also problematic regarding the evidence's handling in the late 1980's was the testimony of Officer Emory Rush, who testified that he transported unidentified evidence from this case along with evidence from seven other cases, from SLED back to the Sheriff's Office on December 19, 1989. State's Exhibit #23 is the form Rush signed, which documented that he retrieved the evidence from SLED in 1989. *See* App. 586. The status of where the evidence was at various times in 1988 and 1989 therefore seems unclear. Back at the Sheriff's Office, Rush gave the evidence to Nevins. App. 196, l. 22 – 199, l. 8.

Regarding what testing was done on the evidence at SLED in 1988, the evidence was viewed but returned without further testing because the analyst did not believe enough material was present for the existing technology to be of use. App. 315, l. 14 – 316, l. 19.

In 1993, Lieutenant Nevins left the Sheriff's Office, and Lieutenant Earl Asbell became the evidence custodian. When Asbell took custody of the evidence, the two men signed off on an inventory of the evidence locker. The inventory sheet was five pages long. The only mention of the evidence in this case on that inventory is listed on page three as item nineteen, which was a "box of miscellaneous envelopes" with eight different people's names listed on it. The only thing listed as being in the box were "envelopes." The inventory did not mention any bags of clothes, kits, swabs, cuttings, or vials. App. 201, l. 16 – 202, l. 20; App. 166, l. 22 – 168, l. 12; App. 209, l. 24 – 211, l. 14.

In 1993, Asbell moved the evidence to a different evidence storage room. In 1994, the Sheriff's Office moved, and the evidence from the evidence room was boxed up, packed on a truck, and moved to the new office over the course of a couple of days. Others were involved in the moving, but Asbell supervised. Asbell did not remember who helped with the move, but

believed it was a detective. Asbell said he would have noticed if something appeared to be tampered with. App. 204, l. 1 – 206, l. 16; App. 212, l. 20 – 213, l. 19.

Asbell decided to resubmit the evidence to SLED in 2009. Another officer transported it there. When Asbell filled out the request for SLED to test the evidence, one of the items he sent to SLED was oral wash. App. 203, ll. 1-24; App. 206, l. 19 – 215, l. 6.

Officer Buster Edwards also transported the evidence to SLED and retrieved it back from SLED (apparently this was in 2009, given his employment history). App. 225, l. 16 – 233, l. 16.

Kenneth Bogan, who was qualified as an expert in DNA analysis, worked at SLED for many years. He did all of the testing on the evidence in this case. Bogan was the analyst who tested the evidence originally when it came to SLED in 1985. As part of that initial round of testing, Bogan took a cutting from the panties that were collected. Bogan again checked the evidence in 1988 and determined not to do further testing at that time. In 2009, Bogan performed additional testing on the evidence when it was again sent to SLED for analysis. App. 299, ll. 12-15; App. 310, ll. 1-6; App. 300, l. 13 – 335, l. 10.

At some point in the 1980's, Bogan removed certain items of evidence from the sexual assault kit, including vaginal wash, vaginal swab, oral swab, rectal swab, saliva, and oral wash. They became separated from the other evidence. When certain items were resubmitted, the oral wash was "not found." App. 332, l. 4 – 333, l. 1; App. 269, l. 1 – 270, l. 11.

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

required to sign the forms in 1985. Bogan believed the secretary at that time was Susie Wilson. App. 249, l. 8 – 250, l. 24; App. 258, l. 260, l. 13.

Bogan opined that when he re-tested the cutting from the panties in 2009, he found DNA that was a mixture of at least two individuals. He got a partial profile from a major contributor, who was an unidentified male. The minor contributor to the mixture was consistent with Complainant. At a later time, a known standard for Petitioner was submitted. Bogan opined that the "DNA profile that I developed from that major contributor from the panties, matched the DNA profile of Herbert Holmes. The probability of randomly selecting a unrelated of unrelated individuals [sic] having a DNA profile matching that major contributor is approximately 1 in 350 billion." App. 320, l. 6 – 324, l. 24; App. 335, ll. 1-10.

However, in 2009, when Bogan received the evidence, one of the items was mismarked. Bogan noted receipt said the cutting from the panties and the cutting from the skirt were both labeled N. Bogan claimed Item N was the cutting from the panties and Item M was the cutting from the skirt. As seen, Bogan matched Petitioner's DNA to the cutting from the panties. However, Bogan said it was only the receipt that was mislabeled, not the items themselves. App. 270, l. 12 – 272, l. 5.

Petitioner moved to exclude the DNA evidence, cited to *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011), and argued the State had not proven chain of custody as far as practicable, since much was left to conjecture. App. 273, l. 25 – 295, l. 13; App. 246, l. 8 – 248, l. 17. The bases for exclusion due to an incomplete chain of custody were as follows.

- First, a discrepancy in the testimony about whether the rape occurred on October 24 or 25, 1984. Complainant was certain the crime occurred on the 24th but others' testimony was that it occurred on the 25th. App. 275, ll. 19-25.

- Second, when the evidence was collected during the sexual assault examination, "neither one of the nurses was able to say for sure who collected the evidence and who labeled it, if they were both there." App. 276, ll. 2-16.
- Third, no one at SLED signed they received the evidence when it was delivered by Lt. Nevins in January of 1985. *See* App. 583 – 584. (State's Exhibit #18 and State's Exhibit #19 are the forms Nevins submitted to SLED and the "signature of person receiving evidence" line is blank.) Counsel argued that since these were SLED's own forms, they should have followed "their own protocol." Moreover, testimony about how the evidence got from Nevins to Bogan while at SLED was speculative. App. 276, l. 25 – 278, l. 9.
- Fourth, it was unclear when the evidence was returned from SLED in 1985; whether it all came back in the same batch or whether it was returned in two batches (which is how it was delivered). App. 278, l. 14-20.
- Fifth, when the evidence went back up to SLED in 1988, once again no one at SLED signed receipt of the evidence, as shown by State's Exhibit #22 and State's Exhibit #33. (State's Exhibit #33 is the second page of State's Exhibit #22). *See* App. 585; App. 587. Also, testimony differed on whether the evidence was returned to the Sheriff's Office in 1988 or 1989. App. 278, ll. 20-22.
- Sixth, the State presented conflicting testimony on how evidence was stored while at the Sheriff's Office. As seen, Nevins, Moultrie, and Knight agreed the evidence was kept in a locker and only Nevins, Moultrie, and the Sheriff had a key. However, Asbell said each of the detectives kept his own evidence. App. 279, ll. 16-23.
- Seventh, when Nevins left the office and Asbell took custody of the evidence, the inventory of the evidence locker was incomplete as to this case. The only mention of the

evidence in this case on the inventory was the inclusion of P.R.'s name along with seven other people's names listed as a "box of miscellaneous envelopes." The inventory did not mention any bags of clothes, kits, swabs, cuttings, or vials. Counsel argued this was "a documented break in the chain." App. 279, l. 23 – 281, l. 1.

- Eighth, the evidence was boxed up and moved from the old Sheriff's Office to the new Sheriff's Office and it was unclear who helped Asbell move the evidence. App. 281, ll. 1-14.
- Ninth, when the evidence went back to SLED in 2009, the receipt for the cuttings from the panties and skirt was mislabeled—an item was marked N but should have been marked M. Also, the oral wash had disappeared. App. 281, l. 16 – 283, l. 9.
- Tenth, a lack of testimony about the standard operating procedure for chain of custody at SLED or the Sheriff's Office. App. 284, l. 1 – 287, l. 2.

The court denied the motion. It ruled that discrepancies about the date of the rape went to weight, that Nurse Schafer remembered how the evidence was collected, and that Nevins and Moultrie were clear about their procedure and who had access to the evidence. The court found the chain was clear as to the hospital, the Sheriff's Office, and SLED, noting the same analyst at SLED did the analysis each time. The court did note the oral wash disappeared, but found any problems went to weight and not admissibility. App. 295, l. 14 – 298, l. 19.

The DNA was the only evidence linking Petitioner to the crime. He was convicted as indicted and sentenced to consecutive terms of life for kidnapping and thirty years for first-degree criminal sexual conduct. App. 427, l. 21 – 428, l. 4; App. 438, l. 3 – 439, l. 3.

Discussion

The State failed to establish the chain of custody on the DNA evidence as far as practicable. The sexual assault examination evidence passed through multiple hands over the decades; some of those hands were identified and some were not. The evidence was separated, moved, transported and re-transported several times, and tested and retested several times. During these events, one item, the wash, went permanently missing. Other items, including the item that purported to connect Petitioner to the crime, was not accounted for on the inventory when the evidence was transferred to a new custodian. There were discrepancies in the testimony and documentation regarding storage, handling, and transport of the evidence.

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

S.C. at 6, 647 S.E.2d at 205–06 (citing *State v. Taylor,* 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)).

"Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) (citing *Sweet*, 374 S.C. at 7, 647 S.E.2d at 206). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id.* (citing *Sweet* at 7, 647 S.E.2d at 206). "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *Id.* (citing *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the substance was not established at least as far as practicable." *Id.* (cleaned up). A brief time discrepancy (fourteen minutes) is not fatal to chain of custody where each person who possessed the sample is identified. *State v. Rowell*, 436 S.C. 54, 60-65, 870 S.E.2d 175, 178-80 (Ct. App. 2022).

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

"Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." *Id.* "While the admission of evidence is within the discretion of the trial judge, we have held that it is an abuse of discretion to admit the results of a blood alcohol test where the identity of those who sealed, labeled, and transported the blood sample is not established." *State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992). "[W]here there is evidence to establish the identity of those who have handled the evidence and the manner in which it was handled, a weakness in the chain merely raises a question of credibility, not admissibility." *Taylor*, 360 S.C. at 24, 598 S.E.2d at 737. "The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case." *Hatcher*, 392 S.C. at 95, 708 S.E.2d at 755. *See also State v. Trapp*, 420 S.C. 217, 233, 801 S.E.2d 742, 750 (Ct. App. 2017) (chain of custody sufficient where "the State identified every individual that handled the evidence").

The State failed to establish the chain of custody as far as practicable here. The problems with the chain were significant. Some discrepancies could be seen as minor (i.e., the discrepancy in testimony about the date the evidence was collected or which nurse collected the evidence, or who helped Lt. Asbell move the evidence in 1993). Other problems with the chain were serious (i.e., conflicting testimony on whether the evidence was returned to the Sheriff's Office by Officer Rivers in 1988 or Officer Rush in 1989; the failure to establish who had access to the evidence at the Sheriff's Office before 1993, since some officers said only three people had keys to one evidence locker, while another officer said each officer maintained his own evidence; documented breaks in the chain such as the missing oral wash; the failure to identify the

evidence on the 1993 inventory except for noting a box of "miscellaneous envelopes" containing evidence from eight cases including this one; the receipt listing the cutting from the panties was mislabeled N instead of M; SLED's failure to follow its own apparent protocol upon receipt of the evidence in 1985 and 1989 by leaving the signature blank on the request for analysis forms; the failure to establish the identity of the person at SLED who took the evidence from Lt. Nevins and gave it to Analyst Bogan during the various deliveries; the lack of information on how the evidence was returned from SLED in 1985).

Given these circumstances, the admission of this evidence was an abuse of discretion. *State v. Hatcher*, 392 S.C. at 94–95, 708 S.E.2d at 754–55. The State failed to establish chain of custody as far as practicable. *State v. Sweet*, 374 S.C. at 6, 647 S.E.2d at 205. Much was left to conjecture. *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. at 627, 614 S.E.2d at 645. Respectfully, rehearing should be granted to Petitioner Herbert Holmes.

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ATTORNEY FOR PETITIONER

This 12th day of March, 2026.

RECEIVED
Mar 12 2026
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Goodstein, Circuit Court Judge

HERBERT LEROY HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001369

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon L. David Leggett, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Herbert Leroy Holmes, #139850, at Allendale Correctional Institution, 1057 Revolutionary Trail, Fairfax, SC 29827, this 12th day of March, 2026.

Joanna K. Delany
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ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

Herbert Leroy Holmes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2022-001369

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Joanna Katherine Delany, Esquire
Leon David Leggett, III, Esquire
Herbert Leroy Holmes, 139850
The Honorable Robert J. Bonds

FILED
Apr 20 2026