

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Indictment No.: 2012-GS-36-0267

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SC Court of Appeals

The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court error in admitting drug evidence when the Respondent was unable to establish a chain of custody for the drug evidence.
2. Did the trial court error in admitting testimonial evidence into the record in violation of the Appellant's right of confrontation.
3. Did the trial court error in failing to grant the Appellant a hearing and to suppress the drug evidence seized pursuant to a lack of probable cause for the search warrant.
4. Did the trial court error in admitting an alleged statement by the Appellant into evidence.

STATEMENT OF THE CASE

This is an appeal from a jury trial of the Circuit Court's denial of the Appellant's motions for suppression of certain evidence, an appeal of the Circuit Court's admission of testimonial evidence into the record, and an appeal of the Circuit Court's denial of the Appellant's request for a new trial based upon error of law.

The Appellant was charged with Trafficking Cocaine on November 21, 2011 under warrant number M481160; he was arrested on the that charge on December 15, 2011 by Investigator Nick Bouknight of the Newberry County Sheriff's Department. Investigator Nick Bouknight was the sole witness to present testimony to the grand jury in this case in Newberry County during the March 2012 Term; the Appellant was indicted under true bill indictment number 12GS36-0267 for Trafficking Crack Cocaine on March 16, 2012 based solely upon Investigator Nick Bouknight's testimony.

A trial involving the Appellant and the Respondent was held in a Newberry County General Sessions Court on October 30, 2014 and October 31, 2014, before the

Honorable Eugene C. Griffith, Jr. The trial court heard the following motions and arguments:

1. A motion to suppress drug evidence seized pursuant to search warrant. [R. p. 6, line 1 – p. 11, line 23; p. 28, line 19 – p. 51, line 16.]
2. A motion to suppress drug evidence for insufficient chain of custody. [R. p. 51, line 17 – p. 66, line 24; p. 87, line 21 – p. 94, line 20.]
3. A motion to exclude testimony of a state witness based upon lack of personal knowledge. [R. p. 12, line 12 – p. 13, line 16.]
4. A motion to suppress the Appellant's statement pursuant to Jackson v. Denno. [R. p. 94, line 21 – p. 96 line 10; p. 106, line 18 – p. 108, line 13.]
5. A motion to continue the trial. [R. p. 109, line 18 – p. 111, line 3.]

All of the Appellant's motions were denied by the trial court after hearing oral arguments from the parties. The Appellant renewed suppression motions several times throughout the course of the trial and the motions were denied by the court. [R. p. 175, line 18 – p. 176, line 1; p. 180, line 15 – p. 194, line 23; p. 205, line 15 – p. 208, line 14.]

The Respondent presented testimony from the initial responding officer, Deputy Stephen Epps, regarding what he observed upon arriving at the incident location and regarding what he did upon observing the condition of the Appellant's home. [R. p. 126, line 7 – p. 167, line 25.] Robert Spreng, the initial investigating officer who responded as the burglary investigator, did not testify or appear at trial; Investigator Spreng took all of the photographs entered into evidence. Investigator Nick Bouknight did not testify at trial as he was deceased at the time the case was called for trial; Investigator Bouknight was the officer who testified before the magistrate to secure the search warrant, he

recovered all of the items seized pursuant to the search warrant, he completed the Evidence Log In Form, he completed the Form B (Rule 6) chain form, he completed the SLED Drug Analysis Request Form, and he handled the evidence after it left the scene of the incident until an unknown date in time. [R. pp. 308 – 313; 316; 333; 346; 347.] None of the testimonial statements made by Investigator Bouknight during the Appellant's trial was subject to prior cross examination by the Petitioner.

The Respondent presented testimony from the chemist Lynn D. Black concerning the results of the drug test and testimony of the current evidence custodian at the Newberry County Sheriff's Department. [R. p. 246, line 1 – p. 272, line 5.] The Appellant continued to object to the admission of the drugs based upon an incomplete chain of custody. [R. p. 273, line 20 – p. 284, line 22.] The trial court repeatedly denied the Appellant's motion to suppress the drug evidence.

The Appellant made a motion for directed verdict at the conclusion of the Respondent's case; the Appellant's motion was denied. [R. p. 382, line 6 – p. 384, line 18.]

The Appellant did not present a case nor did he testify at trial. The Appellant did not formally rest on the record as the trial court moved on to closing arguments.

The case was submitted to the jury and the jury returned a verdict of guilty to one count of Trafficking Cocaine. The jury was polled as to their verdict and their verdict remained the same. [R. p. 291, line 17 – p. 292, line 13.] The Appellant orally made a motion for a JNOV and a new trial after the verdict; both motions were denied by the trial court after the discharge of the jury. [R. p. 292, line 18 – p. 296, line 5.] The Appellant was sentenced to twenty-five (25) years in prison and a fine of fifty

(\$50,000.00) thousand dollars. [R. p. 298, lines 15-20; p. 1.] The Appellant timely filed an appeal of his conviction and sentence on November 5, 2014. [R. pp. 4-5.]

STATEMENT OF THE FACTS

An unknown assailant burglarized the Appellant's residence at 91 Little Ranches Road, Newberry, South Carolina on or about October 8, 2011. The Appellant discovered his home had been ransacked with many of his personal items dispersed all over the floors throughout many areas of the home. The Appellant determined that a sum of money had been stolen from his residence and contacted the Newberry County Sheriff's Department to report the burglary. Deputy Stephen Epps was the first responding officer to the scene; he took notice of the severity of the Petitioner's ransacked home and called for an investigator. [R. p. 163, lines 9 – 14.] Deputy Epps testified that he did not enter the Appellant's room due to "shoe boxes" being all over the floor. [R. p. 145, lines 11 – 18.] Investigator Robert Spreng, with the Newberry County Sheriff's Department, responded to the scene, took photographs of the incident location, and indicated that a quantity of a white rock-like type substance was observed on a dresser in a pill bottle in the Appellant's room in plain view; however, Investigator Spreng did not appear at trial to testify to these facts. Investigator Nick Bouknight, Newberry County Sheriff's Department, obtained a search warrant for 91 Little Ranches Road, Newberry, South Carolina. Investigator Nick Bouknight presented the probable cause testimony to Judge Ron Halfacre to secure the search warrant on October 9, 2011; however, Investigator Nick Bouknight did not appear at trial to testify to these facts. The trial court allowed Captain Robert Dennis to testify to all of the facts related to what both Investigator Spreng and Investigator Bouknight did and said on the night of

this incident and further allowed Captain Dennis to testify about what happened to drugs from the time it left the scene until the time the drug evidence was brought to court for trial. [R. p. 13, line 21 – p. 28, line 15; p. 67, line 6 – p. 85, line 14; p. 169, line 1 – p. 182, line 11; p. 195, line 6 – p. 205, line 14; p. 208, line 19 – p. 242, line 25.] The Affidavit of the search warrant stated that officers upon arriving and processing the scene observed “a bottle containing a quantity of a white rock like substance believed to be crack cocaine and a razor blade with a white residue on it was observe in plain view of the residence.” [R. pp. 308-313.] Deputy Epps testified that he did not observe any pill bottle on the dresser until Investigator Spreng discovered it. [R. p. 159, lines 5 - 14.] Investigator Spreng did not testify at trial to state what and when he observed any items in plain view. The search warrant was signed by Judge Ron Halfacre who also did not testify at trial.

Captain Dennis was allowed to testify that drug evidence was found on a dresser in the bedroom, on the floor in the bedroom, and on a kitchen counter top. Captain Dennis testified that Investigator Bouknight seized and handled all drug evidence at the Appellant’s residence pursuant to the search warrant in the presence of both Investigator Spreng and Captain Dennis (whose signature was on the Return as the officer executing the warrant). The Return stated that the following property was taken pursuant to warrant: a) pictures taken by Investigator Spreng; b) two (2) plastic backs containing a white solid substance on the floor in the bedroom; c) a pill bottle on dresser with white solid substance; d) a cd case scale; e) a spoon and razor blade with residue; and f) a straw. [R. pp. 308-313.] No witness that testified at trial had personal knowledge of how Investigator Bouknight either secured or handled any of the drug

evidence after the items were placed in an unsealed envelope and left the scene of this incident with the items.

The Appellant was not arrested on the night of this incident. On or about November 21, 2011, a warrant number M481160 was signed against the Appellant for Trafficking Cocaine; the Appellant turned himself in and was arrested on this warrant on or about December 15, 2011.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING THE DRUG EVIDENCE WHEN THE RESPONDENT FAILED TO ESTABLISH A STRICT CHAIN OF CUSTODY

A decision regarding the admissibility of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006). This abuse occurs when the trial court lacks either evidentiary support for its decision or the decision is controlled by an error of law. See, *Pagan*. The trial court abused its discretion in admitting drug evidence found at the Appellant's home because the Respondent failed to establish a strict chain of custody.

Our courts have continually held that a party offering into evidence fungible items such as drugs must establish a chain of custody as far as practicable. *Benton v. Pellum*, 232 S.C. 26, 100 S.E.2d 534 (1957). In addition, when evidence has passed through several different parties, the identity of those parties who handled the evidence and the manner in which the evidence was handled must not be left to conjecture. *State v. Williams*, 297 S.C. 290, 376 S.E.2d 773 (1989).

The Respondent provided testimony that the drug evidence in this case passed through the hand of several different parties. The drug evidence passed through the hands of at least Investigator Bouknight, Forensic Technician Selena Kinard with SLED, Forensic Technician Patricia H. Crooks with SLED, Forensic Scientist Lynn Black, and Investigator Ben Chapman; others may have touched the drug evidence because its whereabouts could not be accounted for the entire time after it was seized. Investigator Bouknight was not available to testify at the call of this case for trial and the trial court allowed Captain Dennis to testify as to all the chain of custody evidence although he had no personal knowledge of the facts related to the seizure and handling of the drugs recovered. Captain Dennis did testify that the drugs were “moved probably three times to different locations” because the Newberry County Sheriff’s Department moved to different locations; however, Captain Dennis never testified from personal knowledge as to who specifically moved the drug evidence in this case. [R. p. 83, line 7 – p. 84, line 21.] Investigator Bouknight, Investigator Spreng, and Captain Dennis were all present in the bedroom where the drugs were alleged to have been found yet Captain Dennis had no knowledge as to who seized the drugs that were alleged to have been found on the floor in front of the dresser Captain Dennis testified that “As far as picking it up, I cannot say which one of us picked it up.” [R. p. 68, line 3 – p. 69, line 19.] When questioned further on whether he specifically recalled whether it was either Investigator Bouknight or himself who collected the evidence from the scene, he testified, “not at this time, I can’t say which one. I can say that all three of us were there. [R. p. 72, lines 8 - 16.]

It should be noted that although Captain Dennis claimed in his testimony that he was shown photographs of the pill bottle when he arrived, Captain Dennis could not explain in his testimony why the pill bottle was not in photographs on the dresser where it was alleged this item was found. [R. p. 14, line 19 – p. 15, line 10; p. 16, line 19 – p. 18, line 14; p. 25, line 9 – p. 26, line 15; p. 301; 304.] When further questioned about who could have moved the pill bottle, Captain Dennis could only testify that “without the timestamp of those pictures I cannot give you any time or who or when that evidence was moved until we’re able to view that.” [R. p. 25, lines 14-16.] The photographs were taken before Captain Dennis arrived at the scene and no photographs were taken by Investigator Spreng while Captain Dennis was there; furthermore, Captain Dennis testified that he never left the scene after he arrived there. [R. p. 21, lines 4 - 16.] Captain Dennis’ testimony concerning the chain of custody of this case was confined to customary practice. [R. p. 71, line 8 – p. 73, line 21; p. 75, line 7 – p. 77, line 2; p. 79, line 6 – p. 83, line 6; p. 181, line 5 – p. 185, line 15; p. 195, line 6 – p. 198, line 2; p. 203, line 15 – p. 205, line 14; p. 209, line 7 – p. 213, line 19.]

Our Supreme Court has held that the State’s proof of chain of custody is defective when it fails to establish the identity of each custodian who handled the evidence ... *State v. Sweet*, 374 SC. 1, 647 S.E.2d 202 (S.C. 2007). In *Sweet*, the Defendant was charged with distribution of drugs received from an informant and possession of drugs that were found on him. The trial court admitted the drugs received from the informant into evidence over the objections of the Defendant although the informant did not testify at trial. Our Supreme Court held that the State failed to establish a complete chain of custody without the testimony of the informant because

none of the State's witnesses were able to testify as to how the informant came into possession of the drug evidence. Our Supreme Court held that the State failed to establish the identity of a party in the chain even though the State offered circumstantial evidence to show that the Defendant was the only other person in the room at the time of the transaction with the informant. Our Supreme Court determined that "the officer's testimony did not fill the gap in the chain left by the unavailable informant;" therefore, "the trial court erred in admitting the drug evidence received by the confidential informant."

The Respondent has failed to satisfy the first prong of the chain of custody test laid out by our Supreme Court in *Sweet*. Just as in *Sweet*, the Respondent failed to establish a complete chain of custody when it was unable to identify all the parties who handled the drug evidence in this case. Captain Dennis, the Respondent's sole custodian witness before the drugs were tested, failed to testify about who specifically and who initially moved the drug evidence off of the dresser or about who collected the drug evidence at the scene before it finally came into the possession of Investigator Bouknight. Captain Dennis' testimony failed to fill the gap in the chain of custody left by two investigators, Investigator Bouknight and Investigator Spreng, who did not testify at trial. Captain Dennis had no personal knowledge about all of the handlers of the drugs because he was not the first officer on the scene nor did he prepare any reports nor did he have any further contact with the drug evidence after Investigator Bouknight left the scene with it; Captain Dennis' testimony regarding identity of the parties who handled the drugs was limited to the drug evidence form. [R. p. 69, line 9 – p. 72, line 16; p. 79, line 6 – p. 84, line 21; p. 235, line 24 – p. 240, line 8.] Captain's Dennis personal

knowledge about who handled the drug evidence can almost be captured in this one statement from counsel for the State, “Probably Nick’s the one who seized it if he’s the one who signed the seal.” [R. p. 71, lines 8 - 9.] The problem with that statement is that the Form B chain of custody form was not a sworn statement or document. [R. pp. 333; 346.]

Investigator Spreng took photographs of the interior of Appellant’s house as he was responding to the burglary call. These photographs illustrate how the room looked when Deputy Epps first arrived at the scene. [R. p. 25, line 23 – p. 26, line 15.] Several of the photos depict the room from the doorway entrance of the bedroom and capture the dresser area where the alleged pill bottle containing drug evidence was alleged to have been found in plain view; these photographs show no pill bottle on the dresser. [R. pp. 299; 300; 301; 304; 305; 314; 315.] Captain Dennis testified that Investigator Spreng took the photographs and showed him the photographs before Investigator Bouknight arrived at the scene. [R. p. 14, lines 19 – p. 15, line 4; p. 17, line 13 – p. 18, line 14; p. 23, lines 15 - 18.] It is clear from Captain Dennis’ testimony and these photos that Investigator Bouknight did not seize this alleged pill bottle on the dresser; therefore, the identity of a party who seized and handled the pill bottle from the dresser is unknown and Captain Dennis’ testimony did not fill the gaps in the chain of custody left by Investigator Bouknight and Investigator Spreng who both did not testify at trial.

A complete chain of custody also requires the Respondent to satisfy the second prong of the chain of custody test by reasonably showing the manner in which the drug evidence was handled after it was seized by law enforcement. See, *Sweet*. Our courts have held that a missing link in the chain of custody “creates an issue of admissibility.”

State v. Chisolm, 355 S.C. 175, 584 S.E.2d 401 (S.C.App. 2003). *Chisolm* goes on to reaffirm the opinion that “if a substance has passed through multiple custodians, it must not be left to conjecture concerning who had the evidence **and what was done with it between the taking and the analysis.**”

The Respondent presented no testimony about how the drug evidence was handled from the time it left the Petitioner’s home until the time it arrived at the State Law Enforcement Division (SLED) for testing; furthermore, there was no testimony about the handling of the drugs from the time it left SLED until the time it came into the possession of Investigator Chapman. When Captain Dennis was asked whether he had any knowledge as to the condition of the drug evidence from October 9, 2011 until October 21, 2011 when it was submitted to SLED for testing, his response was “No, sir.” [R. p. 79, lines 6 – p. 80, line 12; p. 232, line 13 – p. 233, line 24.] Captain Dennis testified that the drug evidence was placed in a manila envelope which could not be heat sealed. [R. p. 80, line 13 – p. 81, line 6.] In addition, Captain Dennis never observed Investigator Bouknight seal the items in the envelope nor was this drug evidence placed in a best evidence bag at the scene. [R. p. 203, line 23 – p. 204, line 5; p. 233, lines 18 – 24.]

It was clear from testimony of the Respondent’s witness that the drug evidence was removed from the manila envelope by an unknown party and the items were separated at some point after the drug evidence left the Petitioner’s home. The Return on the search warrant indicates that the following items was the only evidence recovered from the Petitioner’s address: a) pictures taken by Investigator Robert Spreng; b) two (2) plastic bags containing a white solid substance on the floor in the

bedroom; c) a pill bottle on dresser with white solid substance; d) a cd case scale; e) a spoon and razor blade with residue; and f) a straw. [R. pp. 311; 313.] These were the items testified to by Captain Dennis as the only items that he handed over to Investigator Bouknight in an unsealed manila envelope. The Newberry County Sheriff's Office Evidence Log In Form dated October 9, 2011 lists the following items held by Investigator Bouknight from this incident: a) two (2) razor blades; b) pill bottle containing a quantity of a white substance; c) a pipe; d) two (2) plastic baggies containing a quantity of a white cookie like substance; e) spoon with a white residue; f) scale with a quantity of a white residue on it. [R. p. 70, line 8 – p. 71, line 7; p. 313; p. 346.] The Evidence Log In Form contained a pipe and extra razor that were not listed on the Return indicating that something new had been added to the unsealed manila envelope that contained the drug evidence; however, the Respondent never stated who handled the items again. In fact, the Respondent provided no testimony from either Captain Dennis or any other witnesses as to how the extra razor and pipe got into the manila envelope nor did Captain Dennis testify as to what happened to the straw listed on the Return.

A Form B document chronicles all of the items in the best evidence bag listed for testing. The Form B listed the following items as being placed in the best evidence bag: a) plastic bag containing a quantity of a white cookie like substance; b) plastic baggy containing a quantity of a white cookie substance; c) orange pill bottle containing a quantity of white cookie substance; d) scale containing a quantity of a white residue on it; e) spoon with a quantity of white residue on it; f) quantity of a white residue. [R. p. 316.] Items that were listed on both the Return and the Evidence Log In Form did not

make it into the best evidence bag as listed on the Form B Form. The straw from the Return and the two (2) razor blades did not make it into the best evidence bag. [R. p. 203, lines 4 -14.] In addition, the Best Evidence Bag now contained a quantity of a white substance which no one could testify as to how it got there, no one could testify about the parties who handled the drug residue evidence, and no one could testify about the manner in which this drug residue evidence was handled before it made it to SLED for analysis. [R. p. 77, line 9 – p. 78, line14; p. 232, line 6 – p. 233, line 17.] This new drug evidence in the best evidence bag is clear evidence of tampering because there was no record of it ever being collected by any of the officers who were present at the scene nor was there any record of this new drug being placed in the unsealed manila envelope that Captain Dennis handed over to Investigator Bouknight.

Investigator Ben Chapman, the current evidence custodian, could provide no testimony about either the possession or care of any of the drug evidence before the items entered the best evidence bag. [R. p. 286, line 19 – p. 287, line 8; p. 289, line 8 – p. 290, line 19.] Investigator Chapman did clarify that the drug evidence in this case was stored in a card box on a shelf thereby contradicting the trial testimony of Captain Dennis that this drug evidence was placed in a secure lock box. [R. p. 196, line 13 – p. 197, line 13; p. 204, lines 10 – 23; p. 209, line 14 – p. 210, line 12; p. 287, line 9 – p. 289, line 7.] The drug evidence was not contained in a bag or condition that would prevent tampering up until the point where the drug evidence was handled by the forensic scientist Lynn Black who tested the drugs.

The Respondent presented chemical analysis testimony from Lynn Black indicating the drug evidence was crack cocaine. [R. p. 253, lines 8 – 13; p. 258, lines 2

– 9; pp. 348-350.] Ms. Black testified that Selena Kinard received the drugs at SLED on October 21, 2011; however, she failed to testify as to the condition or manner in which Selena Kinard received the drug evidence from Investigator Bouknight. [R. p. 248, line 4 – p. 252, line 23.] Neither Selena Kinard nor Patricia Crooks provided a sworn statement as to the condition of the drug evidence when it was received at SLED. She testified that she received the evidence in several manila envelopes that were not sealed which again contradicted the testimony of Captain Dennis; furthermore, Ms. Black had no knowledge of whether this drug evidence could have been tampered with prior to her receiving the evidence. [R. p. 268, line 6 – p. 272, line 4.]

Ms. Black clearly testified that she had no knowledge about the condition of the drugs either before it came to her for testing or before it was placed in the manila envelope. [R. p. 268, line 17 – p. 269, line 11.] In fact, Ms. Black's testimony revealed that she tested a rock like substance (Item 1.6) from a zip lock bag which was not listed on the Respondent's Form B; the Form B states that residue was submitted in the Best Evidence Kit in no bag. [R. p. 266, line 8 – p. 267, line 19; p. 316.] Ms. Black's further testified that the best evidence bag that she received and resealed after testing the drug evidence now contained a new envelope which she was unfamiliar with at the time of trial; this new envelope caused her to question the veracity of the information stated in the bag. [R. p. 270, line 9 – p. 271, line 13.] The best evidence bag clearly had been tampered after it left SLED if the bag not contained a new item that the chemist did not seal in the bag or could identify.

There is no evidence as to either when Investigator Bouknight either took the drug evidence from the evidence room for transport nor is there any evidence as to

when he returned the drug evidence to the Sheriff's Department nor is there any evidence as to where Investigator Bouknight kept the evidence before it was handled by Investigator Chapman. [R. p. 289, line 8 – p. 290, line 8; p. 333; p. 346.] One additional thing that should be pointed out to this appellate court is that the drugs changed to a dark color after it left Ms. Black's possession and she noted no such degradation or change in the color of the drug while in her possession; Ms. Black testified that one possible cause for that type of degradation of the drug evidence was where the drug evidence was stored after it left SLED. [R. p. 252, line 24 – p. 254, line 7; p. 262, line 1 – p. 264, line 4.]

The Appellant agrees with our courts that have held that if the identity of each person who handled the evidence was established, and the manner of handling the drug evidence was reasonably demonstrated, then there would have been no abuse of discretion by the trial court in admitting the evidence absent proof of tampering ... *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App.2004). In *Taylor*, our appellate court upheld the defendant's conviction and held that the State had established a sufficient chain of custody though all of the chain witnesses did not testify at trial. The State provided testimony from an evidence custodian that identified everyone in the chain and the manner in which each of these individuals handled the drug evidence; furthermore, there was testimony that the officer placed drug evidence into a special sealed bag to prevent tampering and that the bag could not be opened without being torn. Finally, the chemist testified the special sealed bag was sealed when it was received for testing.

This case is easily distinguishable from *Taylor* as the Respondent in this case could not identify all of the individuals who handled the drug evidence nor could the

Respondent demonstrate the manner in which each individual handled the drug evidence. The Respondent provided no testimony from either Captain Dennis or any other witnesses about who or when or under what conditions or the manner in which the drug evidence was separated after Investigator Bouknight left the Appellant's home. [R. p. 238, line 24 – p. 240, line 3.] The drug evidence was not placed in a sealed envelope in a locked box when it left the Appellant's home nor was the drug evidence in a sealed envelope when it was received at SLED before testing. There was no testimony about when the drug evidence was removed from the Sheriff's Department or when the drug evidence was returned to the Sheriff's Department or where the drug evidence was stored during the three (3) different moves of the Sheriff's Department; more specifically, there was no testimony about who specifically handled the drug evidence during these three (3) times when the Sheriff's Department moved the evidence in this case. Investigator Bouknight did not testify in this trial and his testimony was necessary to fill the gaps in the chain of custody.

The trial court acknowledged that there were problems with the Respondent's chain of custody drug evidence and stated that the Respondent's chain was "tenuous" and "barely gets by it." The court erroneously concluded that this chain of custody drug evidence went to the weight of the chain of custody evidence and not its admissibility. [R. p. 206, line 1 – p. 208, line 14.] The Appellant would point out to this appellate court that the trial court actually suppressed the drug evidence of the quantity of drug residue identified as number six (6) on the Form B and as the rock substance as identified as Item 1.6 on the drug analysis; however, the trial court admitted the remaining drugs into evidence. [R. p. 282, lines 5 – p. 284, line 11.] This decision was in error as the entire

evidence was contained in the same best evidence bag and subject to the same chain of custody requirements. The Appellant would contend that if Item 1.6 was suppressed because of a defective chain of custody, then all of the remaining drug evidence should have been suppressed for the same reason as Item 1.6 as well.

Captain Dennis testified that if the Appellant wanted to know what the condition of the drug evidence during the entire time from October 9, 2011 until October 21, 2011, then, "that would be a question for SLED on how they received it." [R. p. 76, line 23 – p. 77, line 2.] SLED never answered the question on the condition of the drugs when it was received from Investigator Bouknight nor did SLED fill in the gaps of the chain of custody from any the chain witnesses of either Investigator Bouknight, or Selena Kinard or Patricia Crooks. The Respondent could only offer testimony from Captain Dennis to show the customary practice of how Investigator Bouknight "would have" handled the evidence; however, our courts have held that this is not enough. See, *Benton*.

Finally, it is also quite clear that the Respondent did not understand the importance of chain of custody evidence. The Respondent's confusion regarding chain of custody drug evidence is illustrated clearly in their argument to the trial court when the Respondent stated, "We don't know what happened those five days they were in the locker room. You know, somebody else could have gone in there and added something or taken something from them." [R. p. 185, line 16 – p. 187, line 1.] The Petitioner would contend that if the Respondent admits that he does not know what happened to the drug evidence for five days then the chain of custody is defective as the Respondent could not identify the individuals who handled the drug evidence nor could the Respondent demonstrate the manner in which this drug evidence was held.

The trial court abused its discretion in admitting drug evidence obtained from the Appellant's home because the chain of custody was defective. The Respondent failed to establish a complete chain of custody as far as practicable as the Respondent failed to establish the identity of all of the individuals who handled the drug evidence in this case and the Respondent failed to reasonably demonstrate the manner in which these same individuals handled the drug evidence in this case. The Respondent failed to fill in the gaps in the chain of custody by providing other evidence which would have reasonably demonstrated the identity of all of the individuals who both handled the drug evidence and reasonably demonstrated the manner in which the drug evidence was handled by the same identified individuals. The Appellant's drug convictions should be reversed and this case remanded for a new trial with all drug evidence seized in this case excluded pursuant to a defective chain of custody.

ARGUMENT

II.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONIAL EVIDENCE IN VIOLATION OF THE APPELLANT'S RIGHT OF CONFRONTATION.

The confrontation clause contained in the Sixth Amendment gives an accused in a criminal case the constitutional right to confront the witnesses against him. *U.S. Const. am. 6*. An accused in a criminal case is also protected against hearsay evidence; hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *SCR Rule 801*. The general rule is that hearsay is not admissible except as

provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute. *SCR Rule 802.*

Investigator Bouknight obtained a search warrant on October 9, 2011 to execute a search on the Appellant's property at 91 Little Ranches Road, Newberry, South Carolina. Investigator Spreng provided Investigator Bouknight with the information used to obtain the search warrant from the Honorable Ron Halfacre at the magistrate court. Neither Investigator Spreng or Investigator Bouknight or the Honorable Judge Halfacre appeared at the trial in this case to testify as to the grounds for obtaining the search warrant to look for evidence of a crime. In connection with the seized fungible items, Investigator Bouknight completed an Evidence Log In Form, a Form B and a SLED Drug Analysis Request Form outlining the alleged items seized and requested to be tested. [R. p. 316; p. 333; p.346; p. 347.] The Evidence Log In Form was an unsigned, inaccurate, and an incomplete document. The Form B document designated for chain of custody was not a sworn document or statement; nor was the document dated. The SLED Drug Analysis Request Form was also not a sworn or dated document. The trial court allowed Captain Dennis to testify in error about the search warrant, the Evidence Log In Form, the Form B, and the SLED Drug Analysis Request Form even though he had no personal knowledge about these documents. [R. p. 20, line 24 – p. 21, line 16; p. 23, lines 2 – 18; p. 68, lines 3-10; p. 70, line 8 – p. 71, line 8; p. 75, line 7 – p. 76, line 22; p. 81, lines 2 – 25; p. 198, line 10 – p. 199, line 17; p. 201, line3 – 202, line 11; p. 209, line 7 – p. 213, line 21.] The trial court admitted the Form B form as an exhibit and as a self-authenticated business record under the exception to hearsay rule with the documents contents read into the record at trial. [R. p. 192, line 11 – p. 195, line 3.]

The admission of the contents of the Form B into the record was in error. The trial court did not expound on how it admitted evidence from the Evidence Log In Form or SLED Drug Analysis Request Form or the search warrant.

Out of court statements by witnesses that are testimonial are inadmissible unless the witness is unavailable and the Defendant had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the court. *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed.2d 177, 541 U.S. 36 (2004). This rule is grounded in the Sixth Amendment's Confrontation Clause. In addition, *Crawford* goes on to hold that an "accused has a right to confront and cross-examine witnesses ... applies not only to in-court testimony, but also to out of court statements introduced at trial, regardless of admissibility of statements under law of evidence." In *Crawford*, the State sought to introduce an out of court statement from the defendant's wife about the crime for which the husband was charged; the State sought admission of the wife's testimony through an exception to the hearsay rule. The wife did not testify at trial and the husband did not have an opportunity to cross-examine her about the statement. The United States Supreme Court in *Crawford* determined that hearsay evidence would be separated in to what was deemed testimonial or non-testimonial; if the statement was testimonial, then the statement would be excluded at trial unless the declarant was available for cross-examination at trial or if the declarant was unavailable, it would only be admissible if the statement was previously subjected to cross-examination. If the statement was non-testimonial, then the statement would be analyzed under the existing evidentiary rules.

This appellate court has addressed the right of confrontation issue in *Crawford*, and outlined the framework for identifying testimonial statements as:

1. “ex parte in court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;”
2. “extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and
3. “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *State v. Davis*, 613 S.E.2d 760, 364 S.C. 364 (SC, 2005)

In this case, the Petitioner would contend that the trial court erred in examining the documents under the traditional hearsay analysis and erred in determining that the Form B chain of custody form was a self-authenticating document. The trial court erred in failing to analyze the admissibility of the search warrant, the Evidence Log In Form, the Form B, and the SLED Analysis Request Form documents under the *Crawford* analysis to determine if the documents were testimonial; and, the trial court erred in failing to determine whether the witnesses were “unavailable” for trial. Finally, the trial court erred in admitting certain testimonial statements from Investigator Spreng concerning the location of the plain view drug evidence in the Appellant’s residence.

Rule 902 of the South Carolina Rules of Evidence provides guidance as to what documents are self-authenticated. The Form B was neither a Domestic Public

Document Under Seal or Not Under Seal or a Certified Copy of a Public Record; these subsections were the only applicable sections where “extrinsic evidence of authenticity as a condition precedent to admissibility was not required.” It is clear that the Form B is not a self-authenticated document and there was no testimony properly authenticating the Form B pursuant to *Rule 901 (a), (b)(1) or (2) of the South Carolina Rules of Evidence* which either requires a witness with knowledge or a non-expert opinion on handwriting based upon familiarity not acquired for purposes of the litigation. Investigator Bouknight was the only witness that could authenticate the Form B and he did not testify at trial.

The Respondent cited *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 614 (2013) in its argument for chain of custody in this case. The Appellant would argue that *Brockmeyer* is distinguishable from this case and makes the Appellant’s argument regarding testimonial evidence and chain of custody. In *Brockmeyer*, the defendant was convicted of murder and possession of a weapon during a violent crime. The defendant challenged the admissibility of computerized chain of custody logs from witnesses who did not testify at trial regarding non-fungible evidence. The Supreme Court determined that the issue regarding a violation of the Confrontation was not preserved for the record and reaffirmed our appellate court holdings that all witnesses in the chain do not have to be called to testify at trial; furthermore, our Supreme Court held that chain of custody is not as important when the testifying witness identifies the object as the actual object that the witness handled and demonstrates that the object has not been altered in any material way.

Brockmeyer is instructive in this case because our Supreme Court weighed the issue of the admissibility of the items using the *Crawford* analysis. Our Supreme Court reaffirmed the position that *Crawford* applies whenever “testimonial evidence is at issue,” and that the witness must be unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. *Brockmeyer* citing *Bullcoming v. New Mexico*, 564 U. S. ____ (2011), held that the trial court is required to undergo a primary purpose analysis mandated by the Confrontation Clause to determine if the out of court statement is testimonial or not; furthermore, “where the primary purpose of an out of court statement is to serve as evidence or ‘an out of court substitute for trial testimony,’ the statement is considered testimonial.

In this case, Captain Dennis testified as to facts given to him by Investigator Spreng. [R. p. 13, line 25 – p. 14, line 25; p. 96, lines 20 – 22; p. 169, line 17 – p. 170, line 7; p. 227, line 5 – p. 228, line 6.] Those statements were testimonial in nature and should have been inadmissible at trial. It is clear also that the search warrant, the Evidence Log In Form, the Form B, and the SLED Drug Analysis Request Form were testimonial documents/statements and should have been inadmissible at trial. The Appellant raised the issue of right of confrontation and hearsay throughout the trial as the Respondent used Captain Dennis to testify to facts relayed to him by Investigator Spreng; furthermore, the Respondent was using the search warrant, the Evidence Log In Form, the Form B and the SLED Drug Analysis Request Form for the specific purpose of “establishing or proving some fact at trial.” See *Bullcoming*. The Respondent used these testimonial documents to prove where fungible items were found in the home initially, to prove what fungible items were collected by Investigator

Bouknight, to prove what Investigator Bouknight did with those collected fungible items and when he did it, and used these testimonial documents to prove how Investigator Bouknight stored those fungible items and what conditions those fungible items were stored at until trial. These documents were used for all of the above-listed reasons without the Appellant having a right to confront any of the witnesses concerning these testimonial documents and the Appellant was prejudiced by these admissions; without a complete chain of custody, the drugs would not have been admitted into the evidence and the Appellant would not have been convicted of this drug charge. The documents were prepared by the Respondent for prosecutorial litigation and generated for the purpose of proving the majority of the evidentiary and chain of custody facts at trial. The search warrant and Form B were even made exhibits and were read into evidence word for word without an opportunity to cross-examine Investigator Bouknight on the veracity of the documents and the facts of the case. The Appellant's right to confrontation was critical in this case because of the discrepancies between the search warrant/return and the Evidence Log In Form and the Form B document. [R. pp. 308 – 313; p. 316; p. 333; p. 346.]

The trial court erred by allowing Captain Dennis to testify concerning testimonial facts relayed to him by Investigator Spreng over the objections of the Appellant. The Appellant contends that the Respondent violated the Appellant's right of confrontation and *Rule 602 of the South Carolina Rules of Evidence*. Captain Dennis lacked personal knowledge about the facts for which he was testifying at trial. *Rule 602* states that "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." In this case, the trial

court repeatedly allowed Captain Dennis to testify about matters for which he had no personal knowledge such as how Investigator Bouknight handled the drug evidence after he left the scene of this incident up until the time that Investigator Chapman had contact with the items.

In addition, the Respondent failed to establish that either Investigator Spreng or the Honorable Ron Halfacre were unavailable at trial pursuant to a *Crawford* analysis for the search warrant. *Rule 804 of the South Carolina Rules of Evidence* provides the definition for an unavailable witness as the following:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant –

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means ...

The Appellant does not dispute that Investigator Bouknight meets the first test under *Crawford* and would be considered an unavailable witness as Investigator Bouknight was deceased at the time of trial; however, Investigator Bouknight's testimonial statements were inadmissible because the Appellant did not have a prior opportunity to cross-examine Investigator Bouknight. In this case, neither Investigator Spreng nor the

Honorable Ron Halfacre would be considered an unavailable witness under *Rule 901* as the Respondent made no attempt to procure their attendance at trial to testify about the search warrant. [R. p. 240, line 25 – p. 241, line 23.] Under the *Crawford* analysis, the search warrant was a testimonial document which required the testimony of either Investigator Spreng or the Honorable Ron Halfacre concerning the proof of facts contained within the search warrant since Investigator Bouknight was unavailable at trial and since Captain Dennis had no personal knowledge about the underlying facts of the search warrant at the time it was issued. Also, any other verbal statements made by Investigator Spreng and/or Investigator Bouknight were testimonial and this evidence should have been excluded because the Appellant did not have an opportunity to cross-examine either investigator regarding those verbal statements. In a bit of irony, the trial court stated that “you may be right on the search warrant” when counsel for the Petitioner was arguing that Captain Dennis was not qualified to testify about things for which he had no personal knowledge; however, the court still allowed Captain Dennis to testify concerning the search warrant. [R. p. 28, line 10 – p. 29, line 24.]

The trial court abused its discretion in admitting testimonial evidence from the search warrant, the Evidence Log In Form, the Form B and the SLED Drug Analysis Request Form. Just as in *Bullcoming*, the primary purpose of the above listed documents at the Appellant’s trial was to establish and prove facts concerning where drug evidence would likely be found, to establish and prove facts concerning the identity of the individual who possessed the drug evidence and also used to establish and prove facts regarding the manner in which that individual handled the drug evidence. The request for drug analysis was done with primary purpose of discovering evidence

against the Appellant and was therefore testimonial. Since the primary purpose of the documents were evidentiary, then the Sixth Amendment's right of confrontation was "triggered." See *Bullcoming*. The trial court erred in analyzing the admissibility of these documents under the traditional hearsay rules rather than under the *Crawford* analysis as required with testimonial statements. All of the documents were out of court testimonial statements from the main investigators in this case whose verbal and/or written evidentiary documents and evidentiary statements were designed to bear witness against the Appellant. The Appellant's drug convictions should be reversed and this case remanded for a new trial with a finding that the search warrant, the Evidence Log In Form, the Form B and the SLED Drug Analysis Request Form were testimonial documents and were therefore inadmissible at trial because the Petitioner was unable to cross-examine Investigator Bouknight. In addition, the Appellant's drug convictions should be reversed and this case remanded for a new trial with a finding that any verbal statements from either Investigator Spreng or Investigator Bouknight or the Honorable Ron Halfacre were testimonial statements and were therefore inadmissible at trial as the Respondent failed to show that either Investigator Spreng or Judge Halfacre were unavailable witnesses for trial; those statements would be inadmissible at trial because the Appellant was unable to cross-examine either Investigator Spreng or Judge Halfacre at trial.

ARGUMENT

III.

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT A HEARING AND SUPPRESS THE EVIDENCE PURSUANT TO A LACK OF PROBABLE CAUSE FOR THE SEARCH

WARRANT.

This appellate court has held that “the task of a court reviewing a decision to issue a search warrant is simply to decide whether the issuing magistrate had a substantial basis for concluding that probable cause existed. *State v. Jones*, 331 S.C. 228, 500 S.E.2d 499 (S.C.App. 1998), citing *State v. Clifton*, 302 S.C. 431, 396 S.E.2d 831 (Ct. App.1990). *Clifton* goes on to hold that the magistrate is required to examine the affidavit to determine under the totality of the circumstances whether there is a greater probability that evidence of a crime will be found in a particular location. In *State v. Smith*, 301 S.C. 371, 392 S.E.2d 182 (1990), our Supreme Court held that “an affidavit must contain sufficient underlying facts and information upon which a magistrate may make a determination of probable cause ...”

The Appellant contends that the supporting affidavit to the search warrant in this case contained false information thereby entitling him to a hearing on the Fourth Amendment issue; furthermore, the Appellant contends this false statement was necessary to the finding of probable cause in this case. The Fourth Amendment guarantees citizens protections against unreasonable searches and seizures. *U.S. Const. am. 4*. There is no record of the Appellant consenting to law enforcement searching his home; therefore, law enforcement needed a search warrant since there was no drug evidence in plain view as the Appellant has contended in this brief.

Captain Dennis testified that the sole basis of the search warrant was the pill bottle located on the dresser. [R. p. 20, line 24 – p. 21, line 16; p. 23, lines 2 - 14.] Captain Dennis testimony was based upon the testimonial statement of Investigator Spreng (who did not testify at trial) that the drug evidence was located in plain view on

the Appellant's dresser. The search warrant affidavit listed the following reasons for the affiant's belief that evidence of a crime would be found at the Appellant's residence:

1) That the affiant is a police officer certified in South Carolina, employed by the Newberry County Sheriff's Office, and is authorized to make searches and seizures; 2) that the affiant has numerous hours of training and experience in the area of narcotics and narcotic investigations; 3) that on October 8, 2011 officers with the Newberry County Sheriff's Office responded to 91 Little Ranches Road in Newberry County for a complaint of a break in to the residence and a larceny of approximately seven thousand dollars of U.S. currency; 4) once arriving officers started processing the scene a bottle containing a quantity of a white rock like substance believed to be crack cocaine and a razor blade with a white residue on it was observed in plain view in a bedroom of the residence; 5) that Toaby Alexander Trapp is the Complainant of the break and claims the bedroom where the substance was located is his; 6) that Trapp does have a prior criminal history for illegal narcotics. [R. p. 310.]

The Appellant would contend that only paragraph four (4) is applicable based upon the testimony of Captain Dennis. The false information in the affidavit was that a pill bottle containing a rock like type substance and a razor were found in plain view on the dresser in the Appellant's bedroom.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request." *Franks* further held that "in the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the

fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.”

Deputy Epps testified to certain facts that are critical in this appellate court's analysis of the false affidavit in the search warrant. Deputy Epps testified to the following set of facts:

- 1) Deputy Epps testified that the Defendant's Exhibits 2, 3, 4, 6, 7, and 13 depicted the room as it was when he first arrived at the scene; and that the Appellant did not touch anything while in his presence. [R. p. 137, line 5 – p. 143, line 16; pp. 300 – 302; pp. 304-305; p. 314; p. 319.]
- 2) Deputy Epps testified that it was Investigator Sprengs who first saw and discovered the drugs; he was “behind him”. [R. p. 159, lines 5 - 14.]
- 3) Deputy Epps testified that neither he nor Investigator Spreng touched the pill bottle after its discovery. [R. p. 151, line 6 – p. 152, line 3.]
- 4) Deputy Epps testified that Captain Dennis arrived at the scene “a little bit after Investigator Sprengs got there.” [R. p. 154, line 17 – p. 155, line 1.]

The fact that Captain Dennis arrived “a little bit after” Investigator Sprengs is in important because Captain Dennis testified that he was shown photos of the drug evidence on the dresser before he went inside the residence and that no photos were taken by Investigator Spreng in his presence. [R. p. 14, line 21 – p. 15, line 3; p. 21, line 4 - 18.] The best evidence that there was no pill bottle or razor on the dresser is found on Appellant's Exhibits 3, 6, 7, and 13. [R. p. 301; pp. 304 – 305; p. 314; p. 319.] Each photograph shows the room in the same condition as when Deputy Epps first

arrived at the scene (and as he testified to) and there is no pill bottle or razor blade in any these exhibit photographs. [R. p. 161, line 16 – p. 162, line 25.]

A close examination of Defendant's Exhibit 3 and Exhibit 7 and State's Exhibit 18 together illustrates the ransacked room before the search. [R. p. 301; p. 305; p. 326.] A red shoe box with the lettering "SAO" is resting against a black shoe box with the label "Stacy Adams" in Defendant's Exhibit 3 and State's Exhibit 18; a box with the lettering "SWISS" is located in Defendant's Exhibit 3 and Exhibit 7. These three boxes along with a large number of other boxes clearly block the access to the dresser and are in the same ransacked condition that they were before the boxes were moved for law enforcement to get closer to the dresser. [R. p. 138, line 17 – p. 143, line 16.] The photographs were taken from various angles as you are entering the bedroom and approaching the dresser and there is no pill bottle or razor on that dresser. Only when you get to Defendant's Exhibit 8, which is a right up close photograph of the dresser, is there suddenly a pill bottle on the dresser. [R. p. 306.] When Deputy Epps was shown Defendant's Exhibits 3, 6, 7, and 13 and asked by the Respondent whether he could see the pill bottle in either Defendant's Exhibits 3, 6, 7, or 13, Deputy Epps testified "no." [R. p. 161, line 16 – p. 162, line 5.] When counsel for the Petitioner asked Deputy Epps compare Defendant's Exhibit 13 to Defendant's Exhibit 8, Deputy Epps testified that he still did not see the pill bottle in both photographs even though other background items such as the blue alka seltzer box, the white ash tray, the pink baseball cap, the white piece of paper; all of which are still within both sets of photographs. [R. p. 166, line 22 – p. 167, line 25.]

The Appellant contends that he established at trial by a preponderance of the evidence that the Respondent's search warrant contained a false statement that a pill bottle containing a rock like type substance and a razor were found in plain view on the dresser. Defendant's Exhibits 3, 6, 7, and 13 completely contradict this assertion. [R. p. 301; pp. 304 – 305; p. 314.] Our U.S. Supreme Court is clear that "where false information is contained within the supporting affidavit, special consideration must be given." See *Franks*. In *Jones*, our court adopted the *Franks* test in analyzing what role a false statement plays in the probable cause determination. The reason for this special consideration is because if a false statement is necessary to the finding of probable cause then it bears directly on the truthfulness of the person supplying the information for probable cause; the credibility of the affiant is a crucial element of probable cause in the totality of the circumstances. *Id.*

In *Jones*, the defendant sought suppression of the search warrant based upon a knowing and intentional false statement contained in the affidavit regarding the identity of the person who provided probable cause information to the officer. The defendant argued that there was no basis for determining probable cause based upon a knowing and intentional false statement to the magistrate. This appellate court agreed with the defendant and reversed the convictions of the defendant applying the *Frank's* test holding that "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* This appellate court determined that removal of the false statement left the remaining affidavit insufficient to establish probable cause.

In this case, the Appellant met its burden by a preponderance of the evidence that the initial photos of the scene depicted no pill bottle or razor on the dresser in the Appellant's room. Defendant's Exhibits 3, 6, 7, and 13 provide a substantial preliminary showing that Investigator Spreng included either a knowing and intentional false statement or a statement with a reckless disregard for the truth into the search warrant affidavit. [R. p. 301; pp. 304 – 305; p. 314.] The trial court erred when it did not grant the Appellant a hearing on the search warrant and erred when it did not utilize the *Frank's* test to determine the role any potential knowing and false statement played in the probable cause determination. The trial court's error violated the Fourth Amendment requirement that allowed the Appellant to request a hearing on the probable cause contained within the affidavit. In applying the *Frank's* test to this case, the affidavit's remaining content is insufficient to establish probable cause as Captain Dennis testified that the drug evidence in plain view was the sole basis of the search warrant; in addition, the affidavit does not indicate that the Appellant confessed to possession of the drug evidence. Therefore, the search warrant in this case should be voided and "the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." The Appellant's drug convictions should be reversed and this case remanded for a new trial with a finding that all evidence seized pursuant to the defective search warrant excluded.

ARGUMENT

IV.

THE TRIAL COURT ERRED IN ADMITTING AN ALLEGED STATEMENT BY THE APPELLANT INTO EVIDENCE.

“A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.” *Jackson v. Denno*, 378 U.S. 368 (1964). In addition, that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary [statement], without regard for the truth or falsity of the [statement] . . . “ *Id.* The State must prove by a preponderance of the evidence that a defendant’s rights were voluntarily waived and prove that the statement was voluntary. The trial judge must examine the totality of the circumstances surrounding the statement and determine whether the State has met its burden of showing the statement was made voluntarily in determining the admissibility of a statement against a defendant. *State v. Childs*, 299 S.C. 471, 385 S.E.2d 839 (1989). The U.S. Supreme Court has stated that a statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights. *Miranda v. Arizona*, 384 U.S. 436 (1966).

In this case, the Respondent alleged that the Appellant was read his Miranda rights after deputies found the drug evidence and further alleged that the Appellant told Investigator Bouknight and Captain Dennis that he forgot that the drug evidence was in the bedroom and did not think about it after the burglary. [R. p. 15, line 23 – p. 16, line 18; p. 100, line 13 – p. 101, line 7; p. 175, line 11 – p. 176, line 11.] Investigator Bouknight placed it in his report and Captain Dennis testified to it at trial although Captain Dennis had prepared no such report. [R. p. 27, line 6 – p. 27, line 9; p. 225, lines 4 – 19.]

The Appellant contends that he was entitled to an examination on the admissibility of the statement under the totality of the circumstances. Furthermore, the Appellant contends that an examination under the totality of the circumstances was required and necessary because Appellant made no such statement or admissions to any law enforcement officer. The Appellant would point this appellate to the following record to examine the inconsistency of Captain Dennis' testimony as it relates to when *Miranda* was given, the type of *Miranda* warnings that were given, and this alleged confession:

- 1) Captain Dennis testified that he Mirandized the Appellant almost immediately after arriving and looking at the photographs of the drug evidence. [R. p. 97, lines 2 – 17; p. 172, line 12 – 173, line 24.]
- 2) Captain Dennis testified that Investigator Bouknight did not arrive until about “five to six minutes after I arrived.” [R. p. 97, lines 6 - 21.]
- 3) Captain Dennis testified that *Miranda* warnings were given in front of and documented by Investigator Bouknight when he was asked to explain why he prepared no report indicating that the Appellant had confessed to him. [R. p. 225, lines 14 - 19.]
- 4) Captain Dennis testified that he had somehow “probably” given the *Miranda* warnings to the Appellant “two-fold.” [R. p. 97, line 25 – p. 99, line 11.] It should be noted that this proffered testimony arose during another motion seeking to limit Captain Dennis' testimony to matters for which he had personal knowledge and not during the requested *Denno* hearing.

5) Captain Dennis testified that the Appellant was in custody and in handcuffs before he arrived. [R. p. 172, lines 12 - 23.]

It is clear from the initial testimony of Captain Dennis and the testimony of Deputy Epps that Investigator Bouknight was not present at the scene when Captain Dennis first arrived and allegedly read the Appellant his *Miranda* warnings after first making contact with the Appellant; therefore, a major inconsistency existed as to when *Miranda* was done or if it was done because other testimony showed that Investigator Bouknight could not have been present to document *Miranda* warnings. Further bolstering this argument that Investigator Bouknight was not present just shortly after Captain Dennis arrived, the Return on the search warrant indicates that the document was not printed until 1:06:50 am on October 9, 2011 and the time of execution was 1:24 am on October 9, 2011. Although Deputy Epps could not testify as to exact time that Investigator Spreng arrived at the scene, we do know that Deputy Epps arrived at approximately 10:19 pm on October 8, 2011. [R. p. 126, line 7 – p. 127, line 1.] Deputy Epps contacted Investigator Spreng upon discovering the home ransacked. [R. p. 129, line 1 – p. 130, line 2.] Deputy Epps testified that Captain Dennis arrived at the scene a “little bit after Investigator Spreng got there,” but that Investigator Spreng was still in control of the scene as the on call investigator. [R. p. 154, line 2 – p. 155, line 11.] The testimony of Deputy Epps contemplates that Captain Dennis may have been at the scene for a longer period of time before Investigator Bouknight arrives with the search warrant.

Captain Dennis’ testimony about an admission by the Appellant stands in stark contrast to Deputy Epps testimony that he did not recall the Appellant being ready *Miranda* warnings nor did he recall Captain Dennis having a conversation with the

Appellant. [R. p. 155, lines 4 - 11.] Deputy Epps was also very clear that the Appellant never confessed in his presence though he was at the scene for over five hours. [R. p. 153, line 18 – p. 154, line 7.] Deputy Epps' report contained no information about a confession from the Appellant.

The trial court erred when it admitted this alleged statement by the Appellant into evidence in this trial. The trial court should have considered both Captain Dennis' and Deputy Epps' testimony in their totality to ascertain the admissibility of this alleged statement by the Appellant. The need for this complete analysis was magnified when this appellate court considers the fact that Captain Dennis sole recollection of this alleged statement is based solely upon Investigator Bouknight's report; Captain Dennis' sole reliance upon Investigator Bouknight's report is evident when Captain Dennis testified that, "I do not dispute what he just typed and what I just read." [R. p. 27, line 21 – p. 28, line 1.] Three of the four responding officers with the Newberry County Sheriff's Department did not provide either a report or record that the Appellant confessed to ownership of the drugs, including Captain Dennis who claimed he secured the confession. The inherent problem with Captain Dennis' sole reliance upon Investigator's Bouknight's report regarding *Miranda* warnings and a confession was that Investigator Bouknight was clearly not present when Captain Dennis first arrived at the scene and made contact with the Appellant. Captain Dennis did not testify to any other facts about this alleged confession other than what was contained in Investigator Bouknight's report.

"A defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the

submission of such statements to the jury.” *State v. Miller*, 652 S.E.2d 444, 375 S.C. 370 (S.C. App., 2007). *Miller* goes on to say that, “The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence.” See also *Denno*. In *Miller*, the defendant was alleging that his statements to law enforcement were involuntary and inadmissible based upon those statements being procured based upon an offer of leniency from the State. The defendant in *Miller* had a *Denno* hearing and the trial court determined that the statements were admissible based upon the totality of the circumstances surrounding giving and obtaining the statement.

Unlike the defendant in *Miller* who received a *Denno* hearing, the Appellant’s statement was not examined under a totality of the circumstances standard as required by *Denno*. Furthermore, the Appellant would contend that the alleged confession would still be inadmissible under the totality of the circumstances even if this appellate court considered other proffered testimony by Captain Dennis. The totalities of the circumstances surrounding this alleged confession are the following:

- 1) That Captain Dennis prepared no report of what specific rights he advised the Appellant.
- 2) That Captain Dennis prepared no report alleging that the Appellant had confessed to him and relied upon a testimonial document/statement prepared by Investigator Bouknight.

- 3) That Captain Dennis proffered testimony and trial testimony that he gave *Miranda* immediately after arriving at the scene and that Investigator Bouknight arrived five (5) to six (6) minutes after he arrived clearly contradict his cross-examined testimony in the case-in-chief that Investigator Bouknight was present when he gave *Miranda* warnings to the Appellant.
- 4) That Deputy Epps testified that he did not recall either the Appellant receiving *Miranda* warnings nor did he recall the Appellant having any communications with Captain Dennis.
- 5) That Deputy Epps did not recall the Appellant confessing to possession of the drugs even though he was out there for approximately five (5) hours.

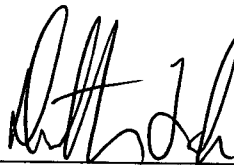
The Appellant contends that he has shown by a preponderance of the evidence that *Miranda* was never given by Captain Dennis in front of Investigator Bouknight for Investigator Bouknight to document this confession; the Appellant has shown by a preponderance of the evidence that the Appellant never confessed to this crime because no other officers who were present at the scene documented this confession, including Captain Dennis who stated that he received the confession from the Appellant. This statement is unreliable under the totality of the circumstances because it is based solely upon the testimonial statement of Investigator Bouknight who did not testify at trial and who was not subject to any prior cross-examination about this testimonial document. In addition, the search warrant affidavit was not based upon a confession to possession of the drug evidence nor was this alleged confession later supplemented to the affidavit for the magistrate court to consider in its probable cause determination.

The trial court erred when it failed to suppress this alleged statement under the totality of the circumstances. There was no credible evidence that *Miranda* warnings were provided to the Appellant nor was there any credible evidence that the Appellant actually gave any statements or admitted to this crime. The Appellant's drug convictions should be reversed and this case remanded for a new trial with a finding that the Appellant's statement should be suppressed under the totality of the circumstances.

CONCLUSION

For all of the above-stated reasons and the reasons stated in the Appellant's primary brief, this court should reverse the result below and remand this case for a new trial with instructions that all drug evidence should be suppressed due to a defect chain of custody, that all testimonial documents, including the search warrant, be suppressed due to *Crawford*, and that any statement attributed to the Appellant be suppressed under the totality of the circumstances.

Respectfully submitted,



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November 27, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Indictment No.: 2012-GS-36-0267

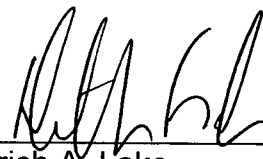
The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant hereby certifies that this Final Appellant's Brief is identical to the Initial Appellant's Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise complies with Rule 211 (b) SCACR.



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PROOF OF SERVICE

The undersigned counsel for the Appellant hereby certifies hereby certifies that the Final Brief of the Appellant and the Final Reply Brief was served and delivered upon counsel for the Respondent by U.S. mail to: Alan Wilson and William M. Blich, Jr., Office of the Attorney General, PO Box 11549, Columbia, SC 29211-1549; and David M. Stumbo, Eighth Circuit Solicitor's Office, PO Box 516, Greenwood, SC 29648.

November 30, 2015



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