

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

JUN 07 2017

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge SC Court of Appeals

Case No.: 2014-002358

The State, Respondent,

v.

Toaby Alexander Trapp, Appellant.

PETITION FOR REHEARING

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The Appellant respectfully requests a rehearing in this matter pursuant to Rule 221, SCACR. The specific supporting grounds for this petition are set forth and discussed below.

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, an appeal of the Circuit Court's denying the Appellant's request for a hearing pursuant to *Franks v. Delaware*, an appeal of the Circuit Court's admission of a statement into evidence against the Appellant, 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.]

Oral arguments were heard in this matter on December 6, 2016. An Opinion affirming the trial court's decision was filed on May 24, 2017. The Appellant timely filed his Petition for Rehearing in this case.

ARGUMENT

I. Chain of Custody Determination

The Appellant contends that he is entitled to a new trial due to the admission of drug evidence from a defective chain of custody. The Respondent failed to establish a complete chain of custody as far as practicable when 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. Furthermore, 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.

This Court mistakenly did not consider the discovery of marijuana in its analysis of whether there was a defective chain of custody. Marijuana was submitted to SLED for testing under SLED LAB NO. L11-11971 which was attributed to the Appellant. [R. pp. 348-349.] There was no testimony from Captain Robert Dennis or Investigator Brad Epps that marijuana was ever observed or seized from the Appellant's residence nor was any marijuana listed by Captain Dennis on his Return in the search warrant. There is no reference or item number for marijuana indicated on either the Return or the Form B or the Evidence Log In Form or the SLED Drug Analysis Request Form; there is no

explanation in the record on how or when marijuana made its way into the unsealed manila envelopes. [R. pp. 313; 316; 346-347.] There was no testimony regarding any field testing of the marijuana or cocaine at the scene to determine either the weight of the drugs or to confirm that the seized items were what the items were purported to be.

This Court stated it relied upon Ms. Black's testimony in support of its conclusion that "the item is what it is purported to be," *State v. Hatcher*, 392 S.C. 86, 95, 708 SE2d 750, 755 (2011). This Court also indicated that it relied on the fact that "the items in the SLED report matched the items that Bouknight certified on the Form B that he delivered to SLED." In addition, this Court stated that it relied upon Captain Dennis' testimony that he was present at the scene and signed off on the return of the search warrant in reaching its conclusion that the Respondent had established a proper chain of custody.

This Court's conclusion appears to completely ignore that marijuana and additional cocaine were sent to SLED for testing even though neither one of these items were indicated or displayed on the Return or the Evidence Log In Form. There was no testimony explaining how these items made it into the Respondent's manila envelopes. The Appellant would point out again to this Court that the trial court actually suppressed the additional quantity of cocaine identified as number six (6) on the Form B and identified as the rock substance as Item 1.6 on the drug analysis report. [R. p. 282, lines 5 – p. 284, line 11.] This Court's conclusion would erroneously admit fungible items into evidence even though there is indication of tampering with these same items. The Appellant contends that this is conclusion is not consistent with our current chain of custody laws.

This Court cited *Hatcher* which basically held that a trial court should consider “the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it” when analyzing a challenge to the chain of custody evidence.

In *Hatcher*, our Supreme Court held that the trial court did not abuse its discretion in admitting the chain of custody evidence because the drug buyer who purchased the drugs from the Defendant, the officer who received the drugs from the drug buyer and transported the drug evidence to SLED in two sealed bags, and the chemist who secured and tested the drugs “all testified about the chain of custody and their handling of the drugs, and the fact that there was no evidence of tampering.” The Supreme Court went on to say that “the record here indicates the drugs received for testing were in fact, those taken from Hatcher without any alteration, tampering, or substitution;” in addition, each “determination will necessarily depend on the unique factual circumstances of each case.” See *Hatcher*.

The Appellant’s case is easily distinguishable from *Hatcher* in that neither the first investigator (Spreng) who allegedly discovered the drugs, or investigator (Bouknight) who received the drugs and handled the drugs at the scene and transported the some items to SLED for testing thereafter, or either of the two lab technicians (Kinard and Crooks) that received and handled the drugs from Investigator Bouknight testified in this case about the chain of custody and their respective handling of the drugs. Investigator Epps only testified that he observed a pill bottle but he never testified that he handled any drug evidence at any point. Captain Dennis only chronicled some items recovered at the scene but he never testified that he handled any drug evidence at the scene.

Therefore, the only true chain witness who testified at trial was the chemist Ms. Black and she testified that she had no knowledge about what happened with the drugs before they got to her. [R. p. 268, lines 17 - 19.] In addition, Ms. Black testified that the drug evidence came to her in **four (4)** separate unsealed envelopes and that multiple items that were placed in the **one (1)** envelope collected by Investigator Bouknight at the scene were not received or tested by her in the best evidence kit. There was no testimony about who separated and placed the seized fungible items into four (4) separate unsealed envelopes. Ms. Black's testimony confirms that not only was the original one (1) envelope from the scene not sealed, but also confirms that some unknown person added marijuana and additional cocaine to the one (1) unsealed envelope after it left the Appellant's residence. [R. p. 268, line 25 – p. 272, line 4.] This Court should find a defective chain of custody because the Respondent never identified “who” that person was that not only separated the seized items into four (4) separate unsealed envelopes but also the Respondent never identified “who” that person was that added the marijuana and the additional cocaine to the items seized from the Appellant's residence.

In further support of its conclusion on this issue, this Court cited Captain Dennis' testimony that the collected items were placed in envelopes for transported to a secured evidence locker. The Appellant contends that there was no testimony concerning where the seized items were actually taken before some of the items reached SLED. Captain Dennis had no personal knowledge about who handled the drugs because he was not the responding officer on the scene nor did he prepare any reports outlining what happened to the drugs; he did not have any further contact with the drug evidence after

Investigator Bouknight left the scene with it in an unsealed manila envelope. Captain Dennis' testimony regarding identity of the parties who handled the drugs was limited to the drug testimonial 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.]

The Appellant contends that this Court should revisit *South Carolina Department of Social Services v. Cochran*, 364 S.C. 621, 614 S.E.2d 642 (2005) to find an instructive example of the Appellant's case. An actual review of *Cochran* reveals that at the first trial, DSS presented only the testimony of a witness who "testified generally as to who would have handled the samples and how the testing of the samples would have occurred." The witness also testified that "he did not handle the samples, nor did he know which employee handled them." Our Supreme Court reversed the decision of the trial court stating that the testimony was "insufficient to establish the chain of custody" because the witness presented "no direct evidence of how those specific blood samples were processed." See *Cochran*. When the case was remanded because of insufficient testimony to establish chain of custody, DSS provided additional testimony and evidence from witnesses who testified they handled and tested the evidence and witnesses who described their respective procedure for handling and testing the evidence. See *Cochran*.

The Appellant's case is almost identical to the first *Cochran* trial where the testimony was insufficient to establish a strict chain of custody. The State presented testimony from Captain Dennis who was the signature on the Return at the scene but who also testified that he had no specific knowledge about the handling of the drug evidence after it left the scene; and, the State presented Ms. Black who testified about

what the item was but who also testified that she had no specific knowledge about the handling of the drug evidence before it was tested by her. [R. p. 234, lines 5 – 22; p. 238, line 24 – p. 240, line 3; p. 268, line 17 – p. 269, line 11.] As cited in *Cochran*, our courts have held regarding fungible evidence that 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). This Court should recognize the error in admitting this fungible chain of custody evidence where the identity of the person who added the marijuana and additional cocaine is left to conjecture; it is further left to conjecture the manner in which all of the drug evidence was handled.

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 S.C. 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."

A complete chain of custody also requires the Respondent to reasonably show 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."

Captain Dennis' testimony failed to fill in the gaps in the chain of custody when he could not testify about who added the marijuana and additional cocaine or about who handled the drugs at all times once the items left the scene of this incident. 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.] 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.] This lack of knowledge about the condition of the of the drugs is reinforced again when Ms. Black clearly testified that she had no knowledge about the condition of the drugs before it came to her for testing in the now four (4) manila envelopes. [R. p. 268, line 17 – p. 269, line 11.] Investigator Chapman, the evidence custodian who took over for Investigator Bouknight, testified that he had no knowledge about the condition of the drugs either before it went to SLED for testing or before it was placed in the manila envelope; however, Investigator Chapman did testify that the items in this case were in a cardboard box and not in a secured locked box as Captain Dennis had testified to previously in the trial. [R. p. 313, line 19 – p. 315, line 9.] This Court in error did not recognize that no Respondent witness provided any testimony regarding the condition of the drugs from the time it was seized on October 9, 2011 until the time it was tested on October 28, 2011.

The trial court abused its discretion in admitting the drugs into evidence 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. Furthermore, it is powerfully clear that some unknown person added marijuana and additional cocaine to the items seized by the Respondent after the one (1) envelope left the Appellant's residence. There is no explanation as to how the marijuana and additional cocaine made it into the now four (4) envelopes and there is no evidence as to who placed any drug items into these four (4) envelopes. This Court should grant a rehearing to consider how the added marijuana and additional cocaine affects its analysis of whether the chain of custody was defective; thereby, reassessing the admissibility of the drug evidence in this case. Under these circumstances, a new trial is clearly warranted; the Appellant requests that the Court grant this petition and reverse the decision below.

II. Right of Confrontation

The Appellant contends that he is entitled to a new trial due to the admission of testimony regarding the search warrant, the Evidence Log In Form, the Form B, the SLED Drug Analysis Request Form, and statements alleged to have been made to Captain Dennis by Investigator Spreng. 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 presenting evidence against him 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 to be used as evidence against the Appellant and generated for the purpose of proving the majority of the evidentiary and chain of custody facts at trial. The Appellant's right to confrontation was critical in this case because of the discrepancies between the search warrant/return, the Evidence Log In Form, and the Form B document. [R. pp. 308 – 313; p. 316; p. 333; p. 346.]

The Sixth Amendment gives a defendant a fundamental right to confront the witnesses against him or her. U.S. Const. am. 6. The confrontation clause incorporated into the Sixth Amendment is designed to protect a defendant from the use of out of court or ex parte statements as evidence against the defendant in a criminal trial. *Id.*

The confrontation clause prohibits testimonial evidence made by witnesses outside of court against the defendant from being admitted into evidence unless the witnesses are unavailable and the defendant had a previous opportunity to cross examine that witness. *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed.2d 177, 541 U.S. 36 (2004).

Our courts have set out the following framework in analyzing *Crawford* issues:

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).

This Court erroneously concluded that the search warrant, the Evidence Log In Form, the Form B, the SLED Drug Analysis Request Form, and statements alleged to have been made to Captain Dennis by Investigator Spreng were not testimonial and therefore not subject to a *Crawford* analysis. This Court added that even if the search warrant was testimonial in nature, it would still be admissible for the purpose of establishing matters other than for the truth.

Our U.S. Supreme Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), addressed the issue of affidavits, business records within a *Crawford* analysis. In *Melendez-Diaz*, the Defendant was charged with the distribution of drugs. The State at trial sought and introduced the drugs into evidence through the use of certificates instead of the testimony of the analysts. The State sought admission of the drugs arguing the following which are relevant to this case: 1) that the certificates were not testimonial documents; 2) that the items were not "accusatory;" and 3) that the items were business records. The Defendant objected to the admission of these items under *Crawford*.

Our U.S. Supreme Court in *Melendez-Diaz*, held that affidavits are considered within the "core class of testimonial statements" as these documents are a "solemn

declaration or affirmation made for the purpose of establishing or proving some fact.’ ”
See Crawford. Our U.S. Supreme Court further held that “absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “ ‘be confronted with’ ” the analysts at trial. *Melendez-Diaz* continued by stating that this right of confrontation extends every time testimonial evidence is presented against a defendant regardless of whether that testimony is directly accusing the defendant of a crime.

In addition, our U.S. Supreme Court in *Melendez-Diaz* held that while documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, it is not the case if the regularly conducted business activity is the production of evidence for use at trial. The U.S. Supreme Court reaffirmed a previous ruling where it held that a railroad company accident report did not qualify as a business record because it was “calculated for use essentially in the court, not in the business,” even though the record was kept in the regular course of the railroad’s business. *See Palmer v. Hoffman*, 318 U.S. 109 (1943). The Supreme Court went on to hold that “the analysts’ certificates —like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason.”

Melendez-Diaz further provides guidance to this Court in understanding the relationship between the business record exception and the Confrontation Clause analysis under *Crawford*. The U.S. Supreme Court stated that “business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the

administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.”

The Appellant contends what makes the search warrant, the Evidence Log In Form, the Form B, the SLED Drug Analysis Request Form, and statements alleged to have been made to Captain Dennis by Investigator Spreng testimonial in nature is the trial court's sole reliance on these items to present chain of custody evidence and testimony against the Appellant. The affidavit in the search warrant is testimonial according to *Melendez-Diaz*; therefore, the Appellant was entitled to confront the witness against him on the search warrant as a matter of law. Likewise, the Form B is testimonial as it attempts to affirm all of the items allegedly seized from the Appellant's residence; this document contains an area on the form for the affirming party's signature to be witnessed and notarized by an official notary. The search warrant affidavit and Form B were both 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. Both the search warrant affidavit and Form B were made for the purpose of establishing or proving some fact against the Appellant; therefore, these forms were both testimonial and subject to confrontation by the Appellant.

The search warrant, the Evidence Log In Form, the Form B, the SLED Drug Analysis Request Form were not business records. These documents were created by law enforcement to be used as evidence against the Appellant at trial even though these documents may have been kept during the normal course of business. In the Appellant's case, these documents were used for the purpose of establishing or proving most of the facts at this trial; thereby, making these documents testimonial according to

Melendez-Diaz. All of the above-stated items were out of court testimonial statements and should have been excluded as the Appellant never had a chance to confront any of the witnesses against him regarding those testimonial documents; only Investigator Bouknight was unavailable for trial due to his death. Neither Investigator Spreng or the Honorable Ron Halfacre or Patricia Crooks or Selena Kinard was called to testify at trial although they were available witnesses. The Appellant did not have an opportunity to cross-examine any of these witnesses before the admission of their testimonial evidence nor was the Appellant required to call these parties as witnesses in this case. The need for confrontation is especially paramount in the Appellant's case due to a significant number of discrepancies between all of the documents.

The right of confrontation also applied to statements from Investigator Spreng to Captain Dennis which was allowed into evidence over the Appellant's objections. Specifically, Captain Dennis was allowed to testify that Investigator Spreng told him that he believed that "he had discovered what he thought was some controlled substance;" [R. p. 14, line 12-13.], that these drugs were found "in plain view;" [R. p. 169, line 17 – p. 170, line 7.], and that this information was relayed to him by Investigator Spreng [R. p. 22, line 21- p. 23 – line1; p. 227, line 5 – p. 228, line 6.] Investigator Spreng was a law enforcement officer with the Newberry County Sheriff's Department at the time of this incident; therefore, all of his statements concerning finding drugs in plain view and providing information to Investigator Bouknight to secure the search warrant were clearly for the primary purpose of presenting evidence against the Appellant; therefore, all of his statements were testimonial in nature. The Appellant contends that absent a showing that Investigator Spreng was unavailable to testify at trial and that the

Appellant had a prior opportunity to cross-examine Investigator Spreng, the Appellant was entitled to confront Investigator Spreng as a witness against him at trial. The Respondent failed to establish that either Investigator Spreng or the Honorable Ron Halfacre or Patricia Crooks or Selena Kinard were unavailable at trial; therefore, as a matter of law, any testimonial evidence from either of these parties should have been excluded since the Appellant did not have a right to confront their inculpatory testimony.

The conclusion by this Court that the Evidence Log In Form, the Form B, the SLED Drug Analysis Request Form was either non-testimonial or were merely business records or merely designed to provide testimony regarding the progress and process of the investigation is not consistent with the facts of this case considering that the primary purpose of these items was to establish and prove facts against the Appellant concerning what was found, to establish where drug evidence would likely be found, to authorize the search for such drug evidence, 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. Furthermore, this conclusion by this Court that the search warrant affidavit was not testimonial is not consistent even with this Court's own prior ruling that "affidavits" are testimonial documents. See *State v. Davis*, 613 S.E.2d 760, 364 S.C. 364 (SC, 2005).

The trial court erred in analyzing the admissibility of these documents and statements under the traditional hearsay rules rather than under the *Crawford* analysis as required with testimonial statements. All of the documents and/or statements were testimonial statements from the main investigators in this case whose written

evidentiary documents and verbal evidentiary statements were designed to bear witness against the Appellant. This Court erred in affirming the trial court's decision. Accordingly, this Court should grant a rehearing, reverse this case on this issue, and remand for a new trial based upon the U.S. Supreme Court's ruling in *Melendez-Diaz*.

III. Search Warrant

In failing to grant a *Franks v. Delaware* hearing, this Court chose to overlook the Appellant's request for a probable cause determination on the search warrant where there appeared to be false information contained in the affidavit. In addition, this Court erred in affirming the trial court's admission of testimony from Captain Dennis against the Appellant regarding the probable cause for the search warrant; this is the same testimony the Appellant sought to exclude under *Crawford*.

Our 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 v. Delaware*, 438 U.S. 154 (1978).

Captain Dennis testified that the sole basis of the search warrant was the pill bottle located on the dresser. [R. p. 23, lines 2 - 14.] Captain Dennis testimony was based upon the testimonial statement of Investigator Spreng provided to Captain Dennis at the time of this incident. Captain Dennis testimony was clear at trial that the only reason for the probable cause given to the magistrate was that the pill bottle was located in plain view on the Appellant's dresser. This Court makes reference that the

actual wording of the testimonial affidavit refers to the drug evidence being observed in plain view in the bedroom and “omits any reference to the dresser;” however, this Court’s distinction stands in contrast to Captain Dennis’ own testimony in the record about what was communicated to the magistrate court judge to secure the search warrant.

In affirming the issue of the search warrant, the Court appears to minimize the significance of the discrepancies in the photos in light of Captain Dennis testimony and the language in the search warrant affidavit. This Court’s opinion appears to erroneously not weigh the following in its analysis: **1)** That Investigator 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)** That Investigator Epps testified that it was Investigator Spreng who first saw and discovered the drugs; he was “behind him”. [R. p. 159, lines 5 - 14.]; and **3)** That 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.] This Court should have reversed the decision of the trial court and granted a Frank’s hearing because the Respondent could not explain why a significant number of the initial photos of the scene showed no pill bottle in plain view either on the dresser or in a bedroom in the house.

This Court in error indicated that the Court found the seizure of the items valid because the Appellant consented to law enforcement presence on this premises. The

Appellant contends that this Court is assuming facts that are not in the record at all; consent to enter onto premises does not equate to a blanket consent to search an entire home. The Appellant contends that he is not aware of any case law to support this Court's assertion that responding to a scene to process the scene qualifies as an exception to the warrantless search requirements. This Court's ruling appears to allow law enforcement in the future to search a home for evidence under the guise of processing a scene. The Appellant contends that this Court's ruling is inconsistent with our currently law on the exceptions to the warrant requirement. In fact, there is no evidence in the record that the Respondent processed anything related to the burglary. There is absolutely nothing in the record that indicates that the Appellant consented to a search of his residence nor did the Respondent argue consent at trial. The Appellant contends that law enforcement needed a search warrant because they did not have consent to search the premises; the Respondent never presented any document or record which stated that the Appellant consented to a search of the residence. The pill bottle and a razor were alleged to have been found in plain view while the other items that were seized were not observed in plain view and only could be discovered through the use of a search warrant; therefore, this Court should have at least held that any item that was found pursuant to a defective search warrant should have been excluded.

The Appellant contends that once he made a preliminary showing of falsity in the affidavit, he was entitled to a hearing on the falsity of the warrant with the witnesses who participated in obtaining the search warrant. 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 *State v. Jones*, 331 S.C. 228, 500 S.E.2d

499 (S.C.App. 1998), this 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 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 Court in *Jones* 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 either on the dresser or 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 because there were no pill bottle or razor in plain view in Defendant's

Exhibits 3, 6, 7, and 13. [R. p. 301; pp. 304 – 305; p. 314.] This Court's focus on the fact that Deputy Epps or Captain Dennis eventually observed the items on the dresser after the search warrant had been issued is misplaced; the only genuine issue before this Court was whether the Appellant requested a hearing on the search warrant after making a substantial preliminary showing that a false statement was included by Investigator Bouknight in the warrant affidavit since Defendant's Exhibits 3, 6, 7, and 13 show no pill bottle or razor in plain view on the Appellant's dresser or anywhere else in the Appellant's room; this Court erred by not addressing the above-stated issue.

With regard to the testimonial statements of Investigator Spreng that Captain Dennis was allowed to testify to at trial, the Appellant would renew his arguments as previously stated in Section II of this Petition for Rehearing under the section for the Right of Confrontation.

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. In affirming the trial court's decision, this Court failed to address the main issue that once the Appellant met his burden of proof of showing falsity in the search warrant affidavit and requested a hearing on the matter that he was entitled to a hearing under *Franks* as a matter of law. This Court erred further by seeking to confirm the admission of this evidence under an exception to the warrant requirement despite the fact that the Respondent never argued for an exception to the warrant requirement at trial.

The trial court erred when it allowed the testimonial statements of Investigator Spreng into evidence without determining both whether he was unavailable and whether

the Appellant had an opportunity to cross-examine him as a witness. The State offered an unqualified witness to provide testimonial evidence regarding the search warrant over the objections of the Appellant and the trial court erred by allowing this type of testimonial evidence. The trial court's error was an abuse of discretion which resulted in impermissible testimonial evidence being presented to the jury. In affirming the trial court's decision, this Court erred in failing to examine Captain Dennis testimony regarding what Investigator Spreng told him under the Crawford analysis.

Under the above stated circumstances, the Appellant is entitled to a hearing under the Fourth Amendment to determine whether a false statement in the affidavit was necessary to the finding of probable cause in this case. Furthermore, the Appellant is entitled to confront the proper witness against him regarding the search warrant. Therefore, this Court should grant a rehearing to examine whether the Appellant met his burden in showing falsity in the affidavit to be entitled to a hearing under *Franks*; and this Court should grant a hearing to examine the use of testimonial statements by Investigator Spreng against the Appellant at trial concerning the search warrant. This Court should grant a rehearing, reverse this case on this issue, and remand for a new trial.

IV. Admission of Alleged Statement of Appellant

The Appellant contends that he was entitled to an examination under the totality of the circumstances to determine not only the admissibility of a statement attributed to him but also whether any statement was ever made by the Appellant. The Appellant contends that he never made any statements or admissions to any law enforcement officer nor was he ever read any *Miranda* rights.

“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 by Captain Dennis almost immediately when he arrived at the scene and made contact with the Appellant. It was alleged that the Appellant told 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.]

In examining the totality of the circumstance, the testimony at trial shows that 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.]; that 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.]; and, that Captain Dennis testified that the Appellant was in custody and in handcuffs before he arrived. [R. p. 172, lines 12 - 23.]

Investigator Epps testified that he did not recall Captain Dennis reading the Appellant his *Miranda* warnings nor did he recall Captain Dennis ever having a conversation with the Appellant on the night of this incident. [R. p. 155, lines 4 - 11.] Deputy Epps testified clearly that the Appellant never confessed in his presence and he was at the scene with the Appellant for over five hours. [R. p. 153, line 18 – p. 154, line 7.] Investigator Epps’ report contained no information about a confession from the Appellant.

Although the Appellant has no burden, the Appellant contends that he has demonstrated by a preponderance of the evidence that *Miranda* was never given by Captain Dennis at all through the testimony of Investigator Epps; 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 alleged confession, including Captain Dennis who stated that he received the confession from the Appellant. This alleged statement is unreliable under the totality of the circumstances because it is based solely upon the testimonial statement of Investigator Bouknight in his police report that Captain Dennis read *Miranda* to the Appellant and

that the Appellant confessed to the crime. Furthermore, Captain Dennis prepared no report of what specific rights he advised the Appellant which are necessary for a determination as to whether sufficient *Miranda* warnings were provided to the Appellant to properly advise him of his right; and, Captain Dennis provided no report as to whether any alleged statements by the Appellant were voluntary.

In affirming the trial court's admission of this alleged statement by the Appellant's, this Court erred because it failed to examine and suppress this alleged statement under the totality of the circumstances. Although there is significant testimony in the record from both Captain Dennis and Investigator Epps about who was initially present at the scene, this Court presumes facts that are not in evidence that it was "plausible" that Investigator Bouknight could have arrived in enough time to hear Captain Dennis read the Appellant his *Miranda* rights; however, this Court's assumption is in direct contradiction to Captain Dennis' on testimony that he mirandized the Appellant almost immediately upon arriving at the scene [R. p. 172, line 12 – 173, line 24.] In addition, this Court indicates in its' opinion that it would "find it unlikely that Captain Dennis would have initiated an interrogation with Trapp without reading him his *Miranda* rights" since the Appellant was already handcuffed when Captain Dennis arrived; this contention by this Court is confounding in light of testimony from Investigator Epps that he did not recall Captain Dennis reading the Appellant his *Miranda* warnings nor did he recall Captain Dennis ever having a conversation with the Appellant at the scene despite the fact that he was there with the Appellant for over five (5) hours. [R. p. 155, lines 4 - 11.] There is no testimony in the record from Investigator Epps that he heard the Appellant ever state that he had forgot about any drugs in his

room or that he was instructed not to touch anything by the 911 dispatcher. Captain Dennis did not and could not testify to any other facts about this alleged confession other than what was contained in Investigator Bouknight's testimonial report.

An examination under the totality of the circumstances clearly indicates that this alleged statement is unreliable as there is no proof that Miranda warnings were ever provided to the Appellant, nor is there evidence of what specific rights the Appellant was provided by Captain Dennis, nor is there reliable evidence that the Appellant affirmatively responded that he understood any rights alleged to have been provided to him by Captain Dennis, nor is there reliable evidence that a statement was in fact ever made by the Appellant or that he confessed to any crime. The trial court erred when it failed to suppress this alleged statement under the totality of the circumstances; this Court's decision in error does not appear to incorporate the testimony of Investigator Epps in its consideration of the suppression issue under the totality of the circumstances. Accordingly, this Court should grant a rehearing, reverse this case on this issue, and remand for a new trial.

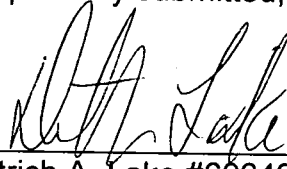
CONCLUSION

Based on the arguments and authorities set forth above, as well as those contained in the Appellant's Brief, the Appellant's Reply Brief, and the Appellant's oral arguments, this Appellate Court should grant the petition, conduct a rehearing in this matter, and reverse the result below.

[Signature next page]

June 7, 2017

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

RECEIVED

JUN 07 2017

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
SC Court of Appeals

Case No.: 2014-002358

The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Appellant.

PROOF OF SERVICE

The undersigned counsel for the Appellant hereby certifies that the Petition for Rehearing was served and delivered upon counsels 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; David M. Stumbo, Eighth Circuit Solicitor's Office, PO Box 516, Greenwood, SC 29648; and Toaby Trapp, Perry Correctional Institution 430 Oaklawn Road, Pelzer, SC 29669.

June 7, 2017



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