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

The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Appellant.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned, an attorney in this matter for the Petitioner, certifies that a Petition for Rehearing was filed with, and ruled upon by the Court of Appeals prior to the filing of this Petition for Writ of Certiorari.

QUESTIONS PRESENTED

Pursuant to Rule 242, SCACR, the Petitioner Toaby Alexander Trapp, petitions this Court for a Writ of Certiorari to the Court of Appeals to review that court's decision in this matter. The Petitioner respectfully asserts that the Court of Appeals erred in its Opinion No.: 5487 (filed May 24, 2017), and that this Court should review the following issues:

1. Did the Court of Appeals err in affirming the admission of drug evidence by lowering the proof required for establishing a proper chain of custody where the Respondent failed to reasonably demonstrate the identity of all the persons who handled the items at all times and failed to reasonably demonstrate the manner in which these items was handled at all times?

2. Did the Court of Appeals err in affirming the admission of the search warrant affidavit, the Evidence Log In Form, the Form B, and the SLED Drug Analysis Request Form into evidence in violation of the Petitioner's constitutional right to confront such evidence under *Crawford v. Washington*, 124 S.Ct. 1354, 158 L.Ed.2d 177, 541 U.S. 36 (2004)?

3. Did the Court of Appeals err in affirming the decision of the trial court to not grant the Petitioner a hearing in violation of *Franks v. Delaware* where the Petitioner made a preliminary showing of falsity in the search warrant affidavit?

4. Did the Court of Appeals err in affirming the admission of an alleged statement by the Petitioner where the trial court undertook no analysis of the underlying factual issues

surrounding the providing of *Miranda* or any alleged statement by the Petitioner in violation of *Jackson v. Denno*?

STATEMENT OF THE CASE

This is an appeal from a jury trial of the Circuit Court's denial of the Petitioner's motion to suppress drug evidence pursuant to a defective chain of custody, an appeal of the Circuit Court's admission of testimonial evidence into the record in violation of the Petitioner's right of confrontation, an appeal of the Circuit Court's failure to grant a hearing on a search warrant pursuant to *Franks v. Delaware*, an appeal from the Circuit Court's failure to conduct a fair hearing to examine an alleged statement by the Petitioner under the totality of the circumstances, and an appeal of the Circuit Court's denial of the Petitioner's request for a new trial based upon error of law.

The Petitioner was charged with Trafficking Cocaine on November 21, 2011 under warrant number M481160; he was arrested on that charge on December 15, 2011. The Petitioner was indicted under true bill indictment number 12GS36-0267 for Trafficking Crack Cocaine on March 16, 2012 based upon Investigator Nick Bouknight's testimony.

The Petitioner's jury trial 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 Petitioner's motions were denied by the trial court. The Petitioner 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 Brad Epps, regarding what he observed and did upon arriving at the incident location without objections from the Petitioner. [R. p. 126, line 7 – p. 167, line 25.] Captain Robert Dennis testified to the jury about facts relayed to him by Investigator Robert Spreng, who did not testify or appear at trial, with objections from the Petitioner. Captain Dennis testified to the jury about statements Investigator Bouknight made to the magistrate court judge to secure a search warrant and Captain Dennis also testified to the jury about the testimonial documents of the search warrant affidavit, the Evidence Log In Form, the Form B (Rule 6) form, and the SLED Drug Analysis Request Form, which were all completed by Investigator Bouknight who was deceased at the time the case was called for trial. [R. pp. 308 – 313; 316; 333; 346; 347.] Captain Dennis' testimony was admitted over the numerous objections of the Petitioner who did not have the right of to confront this testimony because Investigator Bouknight was unavailable at trial.

The chemist Lynn D. Black testified about her handling of the drug evidence and the results of the drug analysis. [R. p. 246, line 1 – p. 272, line 5.] The Petitioner continued to object to the admission of the drugs based upon a defective chain of custody. [R. p. 273,

line 20 – p. 284, line 22.] The trial court repeatedly denied the Petitioner's motion to suppress the drug evidence.

The Petitioner's motion for directed verdict at the conclusion of the Respondent's was denied. [R. p. 382, line 6 – p. 384, line 18.] The Petitioner did not present a case nor did he testify at trial.

The case was submitted to the jury and the jury returned a verdict of guilty to one count of Trafficking Cocaine. The Petitioner made a motion for a JNOV and a new trial after the verdict; both motions were denied by the trial court. [R. p. 292, line 18 – p. 296, line 5.] The Petitioner 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.] The Petitioner timely filed an appeal of his conviction and sentence on November 5, 2014. [R. pp. 4-5.]

Oral arguments were heard in this case on December 6, 2016, and the Court of Appeal issued its opinion on May 24, 2017, affirming the trial court's rulings and the Petitioner's conviction. The Petitioner timely filed a Petition for Rehearing, which the Court of Appeals denied in an Order filed on June 23, 2017.

ARGUMENT

I. Chain of Custody Determination

The Petitioner contends that the effect of the Court of Appeals ruling lowers the proof standard required for establishing a proper chain of custody. 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 could have reasonably demonstrated both the identity of all of the individuals who handled the drug

evidence and reasonably demonstrated the manner in which the drug evidence was handled by said individual.

The Court of Appeals erred by not factoring in the discovery of marijuana and additional cocaine in the best evidence bag 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. [R. pp. 348-349.] There was no testimony from either Captain Robert Dennis or Investigator Epps that marijuana was ever observed or seized from the Petitioner'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 testimony on how or when marijuana made its way into the unsealed manila envelopes or best evidence bag. [R. pp. 313; 316; 346-347.]

In reaching its conclusions regarding whether the Respondent established a proper chain of custody, the Court of Appeals stated that it relied upon the following: 1) Ms. Black's testimony in support of its conclusion that items were what they purported to be, 2) The fact that "the items in the SLED report matched the items that Bouknight certified on the Form B that he delivered to SLED;" Captain Dennis' testimony that he was present at the scene and signed off on the return.

The Court of Appeal'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. The Court of Appeals also never considered or addressed what effect did the trial court's suppression of 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 should have had on the trial

court's evaluation of whether there was evidence of tampering or a defective chain of custody. [R. p. 282, lines 5 – p. 284, line 11.] There was no testimony regarding any field testing of the alleged cocaine at the scene to determine weight or to even confirm that the seized items were in fact drugs. This Court of Appeals' opinion will have the negative and erroneous effect of admitting fungible items into evidence even when there is strong indication of tampering with these same items.

The Court of Appeals cited *State v. Hatcher,* 392 S.C. 86,95, 708 S.E.2d 750, 755 (2011) which 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 contest to the chain of custody evidence.

In *Hatcher*, this 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 handled the drug evidence in two sealed bags, and the chemist who 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 found 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 Petitioner's case is easily distinguishable from *Hatcher* in that neither Investigator Spreng, who allegedly discovered the drugs, or Investigator Bouknight, who received the drugs and handled the drugs at the scene and transported some items to SLED for testing thereafter, or either of the two lab technicians (Kinard and Crooks) at SLED testified in this case about the chain of custody and/or their respective handling of the drugs. Captain Dennis never testified that he handled any drug evidence at the scene. The

only chain witness who handled the drugs prior to testing and 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) unsealed 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 or the marijuana or the additional cocaine into four (4) separate unsealed envelopes. [R. p. 268, line 25 – p. 272, line 4.] The Appellate Court erred by not holding that there was a defective chain of custody because the Respondent failed to identify "who" separated these items into four (4) separate unsealed envelopes and also failed to identify "who" added the marijuana and the additional cocaine to the items seized from the Petitioner's residence.

In further support of its conclusion on this issue, the Court of Appeals cited Captain Dennis' testimony that the collected items were placed in the unsealed envelope to be transported to a secure evidence locker; however, the Court of Appeals erred by relying on this testimony because Captain Dennis had no personal knowledge about who handled the drugs. Captain Dennis was not the initial responding officer nor did he prepare any chain of custody reports nor did he have any further contact with the drug evidence after Investigator Bouknight left the scene with it in an unsealed manila envelope. Captain Dennis' testimony about who handled the drugs was limited to the testimonial evidence forms. [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 Petitioner 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 analogous example of the Petitioner'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." This 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*. Upon remand, DSS established a proper chain by providing additional testimony from witnesses who testified how they handled and/or tested the evidence. See *Cochran*.

The Petitioner's case is almost identical to the first *Cochran* trial where the testimony was insufficient to establish a proper chain of custody. The Respondent presented testimony from Captain Dennis who only signed off on the Return at the scene but had no specific knowledge about the handling of the drug evidence after it left the scene; and, the Respondent presented Ms. Black who testified about her analysis 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*, this Court has 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). The Court of Appeals failed to recognize the error in admitting fungible chain of custody evidence where the identity of the person who handled the items after it left the scene and the person who added the marijuana and additional cocaine are left to conjecture.

This 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. 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. This 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. This 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 there was no other person in the room at the time of the transaction with the informant. This 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 was tested SLED; 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 Ben 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.] 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 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, he 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.] The Court of Appeals erred when it 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 Court of Appeals erred in affirming a lower standard of proof for the admission of chain of custody evidence when the trial court abused its discretion in admitting the drugs into evidence when there was a defective chain of custody. The Court of Appeals relied upon the testimony of Captain Dennis and Ms. Black who testified that they had no knowledge about the condition of the drug evidence at all pertinent times. The Respondent failed to establish a complete chain of custody as far as practicable because it could not identity of all of the individuals who handled the drug evidence and could not reasonably

demonstrate the manner in which these same individuals handled the drug evidence. The Respondent failed to fill in the gaps in the chain of custody by providing other evidence which could 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 overwhelmingly clear that some unknown person added both marijuana and additional cocaine to the items seized by the Respondent after it left the Petitioner's residence. There is no explanation has 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 certiorari to consider how evidence of unknown parties handling the seized items and adding marijuana and additional cocaine affects its analysis of whether the chain of custody was defective; thereby, reassessing the proof standard for admitting the drug evidence in this case. Under these circumstances, a new trial is warranted; the Petitioner requests that the Court grant certiorari to reverse the decision below.

II. Right of Confrontation

The Petitioner contends that the Court of Appeals' decision is in direct conflict with the Petitioner's right of confrontation regarding the admission of testimony regarding the search warrant affidavit, 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 Petitioner having a right to confront any of the witnesses presenting evidence against him concerning these testimonial documents and the Petitioner was prejudiced by these admissions. The Respondent could not demonstrate a complete chain of custody or show probable cause to search the Petitioner's residence without these testimonial documents. The documents were prepared by the Respondent to be used as evidence against the Petitioner and generated for the purpose of proving the majority of the evidentiary and chain of custody facts at trial. The Petitioner's right to confrontation was critical in this case because of the discrepancies between the search warrant, the Return, the Evidence Log In Form, and the Form B. [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).

The Court of Appeals erred in concluding that the search warrant, the Evidence Log In Form, the Form B, the SLED Drug Analysis Request Form, and the testimony by Captain Dennis regarding statements made to him by Investigator Spreng were not testimonial and, therefore, not subject to a *Crawford* analysis. The Court of Appeals further erred by concluding 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 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 Petitioner 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

Petitioner. The affidavit in the search warrant is testimonial according to *Melendez-Diaz*; therefore, the Petitioner 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 testified into evidence word for word without an opportunity to cross-examine Investigator Bouknight on the veracity of the documents. Both the search warrant affidavit and Form B were made for the sole purpose of establishing or proving some fact against the Petitioner; therefore, these forms were both testimonial and subject to confrontation by the Petitioner.

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 Petitioner at trial even though these documents may have been kept during the normal course of business. In the Petitioner's case, these documents were used for the purpose of establishing or proving most of the chain 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 Petitioner 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 Petitioner did not have an opportunity to cross-examine any of these witnesses before the admission of their testimonial evidence.

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 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 intended for the primary purpose of presenting evidence against the Petitioner; therefore, all of his statements were testimonial in nature. The Petitioner contends that absent a showing that Investigator Spreng was unavailable to testify at trial and that the Petitioner had a prior opportunity to cross-examine Investigator Spreng, the Petitioner was entitled to confront these statements made against him by Investigator Spreng at trial. The Respondent failed to establish that Investigator Spreng or Judge Ron Halfacre or Patricia Crooks or Selena Kinard were unavailable at trial; therefore, as a matter of law, testimonial evidence from any of these parties should have been excluded since the Petitioner did not have an opportunity to confront their inculpatory testimony.

The Court of Appeals erred in concluding 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; this conclusion 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 Petitioner 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, the conclusion by the Court of Appeals that the search warrant affidavit was not testimonial is inconsistent 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 Court of Appeals conclusion that "even if the search warrant was testimonial in nature ... it was properly before the court as it document why the investigation proceeded as it did" erroneously ignores that Petitioner's right of confrontation still exists as a matter of law.

The Court of Appeals erred in affirming the admission of these testimonial documents and statements without a *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 Petitioner. Accordingly, this Court should grant certiorari, reverse this case on this issue, and remand for a new trial based upon the U.S. Supreme Court's rulings in *Crawford* and *Melendez-Diaz*.

III. Search Warrant

In failing to grant a *Franks v. Delaware* hearing, the Court of Appeals chose to overlook the Petitioner's request for a probable cause determination on the search warrant where 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 Petitioner regarding the probable cause for the search warrant provided by Investigator Spreng; 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 in plain view on the dresser; his testimony was based upon a statement from Investigator Spreng about the probable cause for the search warrant. [R. p. 23, lines 2 - 14.]

The Court of Appeals erred by minimizing the significance of the discrepancies in the photos in light of Captain Dennis testimony concerning the basis for the search warrant. The Court of Appeals appears to ignore Captain Dennis' testimony on the search warrant in favor of the testimonial language in the search warrant; however, the Court of Appeals' opinion erroneously does 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 Petitioner 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.] The Court of Appeals erred by not reversing the decision of the trial court and granting a Frank's hearing because is no explanation as to

why a significant number of the initial photos of the scene showed no pill bottle in plain view either on the dresser or showed a pill bottle in plain view anywhere else in the bedroom.

The Court of Appeals further erred in concluding that the search and seizure of the items was valid because the Petitioner consented to law enforcement presence on this premises. The Petitioner contends that consent to respond to a crime does not equate to blanket consent to search an entire room or home. The Petitioner contends that he is not aware of any case law to support the Court of Appeal's assertion that law enforcement responding to a scene qualifies as an exception to the warrantless search requirements. The Court of Appeal's ruling appears to allow law enforcement in the future to search a home for evidence under the guise of processing a scene. The Petitioner contends that this Court's ruling is inconsistent with our current law on the exceptions to the warrant requirements. Also, there is absolutely nothing in the record that indicates that the Petitioner consented to a search of his home nor did the Respondent argue consent at trial. The Petitioner contends that law enforcement secured a search warrant because they did not have consent to search the premises. The pill bottle and a razor were alleged to have been found in plain view; other items that were seized were not observed in plain view and only could be discovered through the use of a search warrant. This Court should hold that any items found pursuant to a defective search warrant should have been excluded.

The Petitioner 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), our Court of Appeals 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. Our Court of Appeals 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.* Our Court of Appeals in *Jones* determined that removal of the false statement left the remaining affidavit insufficient to establish probable cause.

In this case, the Petitioner met its burden by a preponderance of the evidence that the initial photos of the scene depicted no pill bottle or razor in plain view either on the dresser or in plain view anywhere else in the Appellant's room. Defendant's Exhibits 3, 6, 7, and 13 made a substantial preliminary showing that Investigator Spreng communicated to Investigator Bouknight either a knowing and intentional false statement or a statement with a reckless disregard for the truth into the search warrant affidavit because there was no pill bottle or razor in plain view anywhere in Defendant's Exhibits 3, 6, 7, and 13. [R. p. 301; pp. 304 – 305; p. 314.] The Court of Appeal's assertion that both Deputy Epps and Captain Dennis observed the items on the dresser in plain view after entering the residence is

misplaced and factually incorrect. Deputy Epps testified that he did not see the drugs when he first responded to the scene and that it was in fact Investigator Spreng who first saw and discovered the drugs and that he was "behind him". [R. p. 159, lines 5 - 14.] Captain Dennis testified that he was shown photos of the drug evidence on the dresser before he entered the residence. [R. p. 14, line 21 – p. 15, line 3; p. 21, line 4 - 18.] The only genuine issue before the Court of Appeals concerning *Franks* was whether the Petitioner requested a hearing on the search warrant after making a substantial preliminary showing that a false statement was included in the search warrant affidavit since numerous exhibits showed no pill bottle or razor in plain view either on the Petitioner's dresser or anywhere else in the Petitioner's room. The Court of Appeals erred by not analyzing the above-stated issue.

The trial court erred when it did not grant the Petitioner 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, the Court of Appeals failed to address the main issue of whether the Petitioner met his burden of proof of showing falsity in the search warrant affidavit to entitle him to a hearing under *Franks* as a matter of law and whether he requested a hearing on the matter. The Court of Appeals erred further by confirming the admission of this search 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 to Investigator Bouknight 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 Captain Dennis 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, the Court of Appeals erred in failing to examine Captain Dennis testimony regarding what Investigator Spreng told him under the *Crawford* analysis.

Under the above stated circumstances, the Petitioner was 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. The Petitioner was entitled to confront the proper witness against him regarding the search warrant. Therefore, this Court should grant certiorari to examine whether the Petitioner met his burden in showing falsity in the affidavit to be entitled to a hearing under *Franks* as a matter of law; and this Court should grant certiorari to examine the use of testimonial statements by Investigator Spreng against the Petitioner at trial concerning the search warrant. This Court should grant a certiorari, reverse this case on these issues, and remand for a new trial.

IV. Admission of Alleged Statement of Appellant

The Court of Appeals erred by providing not addressing whether there was sufficient evidence under the totality of circumstances to admit into evidence any alleged statements by the Petitioner. 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; he contends that he never made any statements 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).

The Respondent alleged that the Petitioner was read his Miranda rights by Captain Dennis almost immediately when he arrived at the scene and that the Petitioner told Captain Dennis that he forgot that the drug evidence was in the bedroom. [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.] Captain Dennis testified to it at trial although Captain Dennis had prepared no report of it or any other recollections of this event. [R. p. 27, line 6 - p. 27, line 9; p. 225, lines 4 - 19.] Captain Dennis testified that he *Mirandized* the Petitioner almost immediately after arriving and looking at the photographs of the drug evidence outside. [R. p. 97, lines 2 - 17; p. 172, line 12 - 173, line 24.] Captain Dennis testified that he had "probably" given the *Miranda* warnings to the Petitioner "two-fold." [R. p. 97, line 25 - p. 99, line 11.]; and, that the Petitioner 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 ever reading the Appellant his *Miranda* warnings nor did he recall Captain Dennis ever having a conversation with the Petitioner on the night of this incident. [R. p. 155, lines 4 - 11.] Deputy Epps testified that the Petitioner never confessed in his presence and he was at the scene with

the Petitioner for over five hours. [R. p. 153, line 18 – p. 154, line 7.] Investigator Epps' report contained no information about a confession from the Petitioner.

The Petitioner 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 Petitioner has shown by a preponderance of the evidence that the Petitioner never confessed to this crime because no other officers who were present at the time documented this alleged confession, including Captain Dennis who stated that he received the confession from the Petitioner. This alleged statement is unreliable under the totality of the circumstances because it is based solely upon the testimonial report of Investigator Bouknight (who was not present when Captain Dennis alleged to first encountered the Petitioner) that Captain Dennis read *Miranda* to the Petitioner and that the Petitioner confessed to the crime. Furthermore, Captain Dennis prepared no report of what specific rights he allegedly advised the Petitioner which is required for a determination as to whether sufficient *Miranda* warnings were provided to properly advise him of his rights.

In affirming the trial court's admission of this alleged statement by the Petitioner, the Court of Appeals erred because it failed to examine *Miranda* and 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, the Court of Appeals erred by presuming facts that were not in evidence that it was "plausible" that Investigator Bouknight could have arrived in enough time to hear Captain Dennis read the Petitioner his *Miranda* rights; however, the Court of Appeal's assumption is in direct contradiction to Captain Dennis' own testimony that he *Mirandized* the Petitioner almost immediately upon arriving at the scene [R. p. 172, line 12 – 173, line 24.] The Court of Appeals indicated 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 the Court of Appeals is confounding in light of testimony from Investigator Epps that he did not recall Captain Dennis reading the Petitioner his *Miranda* warnings despite the fact that he was there with the Petitioner for over five (5) hours. [R. p. 155, lines 4 - 11.]

An examination under the totality of the circumstances indicates that this alleged statement is unreliable as there is no proof that *Miranda* warnings was ever provided to the Petitioner, nor is their evidence of what specific rights the Petitioner was provided by Captain Dennis, nor is there reliable evidence that the Petitioner affirmatively responded that he understood any rights alleged to have been provided to him by Captain Dennis, nor is their reliable evidence that a statement was in fact ever made by the Petitioner or that he confessed to any crime. The Court of Appeal's decision erred when under the totality of the circumstances it did incorporate the testimony of Investigator Epps in its consideration of the suppression of this alleged statement. Accordingly, this Court should grant certiorari, reverse this case on this issue, and remand for a new trial.

CONCLUSION

Based on the arguments and authorities set forth above, this Court should grant the petition and review the decision by the Court of Appeals.

Respectfully submitted,

July 20, 2017

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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

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 Writ of Certiorari was served and delivered upon counsels for the Respondent by U.S. mail to: Alan Wilson and William M. Blitch, 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.

July 21, 2017

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July 21, 2017

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211

Re: The State v. Toaby Alexander Trapp
Appellate Case No.: 2014-002358

Dear Ms. Kitchings:

Enclosed please find two (2) copies of the Petitioner Writ for Certiorari and the Proof of Service in the above mentioned case. Please file the one copy and return the other stamped copy to me.

Please feel free to contact me should you have any additional questions.

With kind regards,

Dietrich A. Lake

Enclosures

cc: Alan M. Wilson
William M. Blitch, Jr.
David M. Stumbo