

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

S.C. SUPREME COURT

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

Indictment No.: 2012-GS-36-0267

The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Petitioner.

APPENDIX
Volume 2 of 2

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APPENDIX TO THE RECORD ON APPEAL

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1 (Whereupon, the jury came into open court at
2 approximately 5:13 p.m.)

3 THE COURT: Before we start closings I have selected
4 Ms. Hedgepeth to be our foreperson. And she is going to
5 do an excellent job. You don't get paid extra. Trick or
6 treat, you are it. I always select the foreperson. All
7 right. Are you going to open first or waive that?

8 MR. SCOTT: I will just waive it, Judge, and close
9 all together.

10 THE COURT: All right. Mr. Lake.

11 MR. LAKE: Thank you, Judge. Another word for
12 justice is fairness. Fairness isn't a process. You sat
13 there and I want to thank y'all again. This is the last
14 place you want to be and the last place I want to be also.
15 But, I really appreciate you all taking the time to come
16 here and listen to this particular case. As I told you at
17 the beginning, things aren't necessarily all as they
18 appear. And you had an opportunity to listen to very
19 skint, limited evidence. There is really only one person
20 who was there at the scene, Investigator Epps, Captain
21 Dennis. You heard from investigator, now, Captain Dennis
22 regarding what happened on that particular night. Very
23 limited information. And it is unfortunate that
24 Investigator Bouknight is not here. And I am quite sure
25 that all of the investigators, the Judge, prosecutors and

1 everybody including myself wish he was here. But I ask
2 you to set aside all of those things, those personal
3 feelings as to why he is not here and simply look at the
4 facts of the case. We never got the one explanation or
5 the one answer that I would ask someone who was a former
6 prosecutor, I never got the answer to one question that I
7 wanted to hear. And that question is, why would I look at
8 the photograph of number 6 that has the T.V., the
9 Alka-Seltzer thing, you see the white little envelope, you
10 actually see the ashtray. Investigator Spreng, because
11 you heard Officer Epps, he went in and the condition was
12 the same as when I went in there. Because he identified
13 those initial photographs. And when you look at these
14 particular photographs, you will get a chance to look at
15 them. And when you see, you just walk into a room and you
16 are trying to take pictures of everything that is around
17 here, you do not see the pill bottle. And I never got an
18 explanation. The only person that gave it really,
19 Investigator Epps said, I didn't see it. He didn't see it
20 until Investigator Spreng said, oh, I found this. They
21 didn't see it simultaneously. He couldn't even testify to
22 that. And Captain Dennis never said why, like I said, a
23 picture is worth a thousand words. Somebody has got to
24 explain why as in these particular photographs, you see no
25 pill bottle, what would be number 13 also. And remember

1 when we asked Investigator Epps, did he see anything, did
2 he see that same pill bottle in there. No. You don't see
3 it in those particular photographs. Another panned out
4 photograph where you don't see the pill bottle and as you
5 get to exhibit number 8, then all of a sudden it
6 disappears. This is not something that is hard to miss
7 when you are kind of looking into the room. You have got
8 a view looking in and you have got a view looking right
9 here, an upclose picture of it. Where is that little
10 white top, where is that little orange pill bottle that
11 you would expect to see on this particular photograph.
12 Where is it. Why didn't Captain Dennis tell us where it
13 was in these photographs. We never got that explanation.
14 Because something can't be, you know, it is not there one
15 minute and then all of a sudden when you get a little
16 closer it just miraculously appears. Things just don't
17 happen that way. They don't miraculously just show up
18 just because you get closer to it. It is either there or
19 it is not there. And thank God, I wish he was here so I
20 could ask him some questions, Investigator Spreng, and
21 explain to us why the pill bottle is not in these
22 photographs. All of the boxes are still there. You can
23 see that the burglary has already occurred. Every one of
24 these photographs, you can see in this particular area, is
25 an undisturbed area where the burglary has occurred. No

1 one has crossed on it, no one has stepped on these items.
2 It is in the same condition as they saw it when they first
3 got there. And in these photographs you see no pill
4 bottle. They allege that they now have found some crack
5 right here and some crack right here. And think about
6 this right here. They want you to believe that there is
7 crack right here. There has been no testimony as to how
8 these items got here, they just got there accidentally,
9 were they placed down there or anything. They want you to
10 believe that all of these items just kind of landed. They
11 want you to believe that these items appear in a
12 photograph and then somehow it disappeared in a
13 photograph. How can things all of a sudden move. There
14 is an item right here where they allege the drugs are
15 suppose to be at. This is some sort of container at the
16 very spot where they allege that this item is. Now, where
17 is this item at now. That is what happens when you take
18 photographs first. How drugs can be changed. They can be
19 manipulated. You will see again, look at these
20 photographs closely and they appear and they disappear in
21 a photograph without any explanation as to how these got
22 there, alleging my client, alleged that my client somehow
23 confessed, that he somehow remembered that three years
24 later. He remembered reading the Miranda rights. You had
25 an opportunity to hear Deputy Epps. Take away that report

1 from three years ago, nothing. He did not remember
2 anything. The sole purpose of taking a report is so that
3 you can remember three years later what you did, what you
4 saw, who was where, whether someone gave a confession. I
5 have never heard in my entire life, I have been
6 practicing, I have been a prosecutor, I have never in my
7 entire life, when you bring a guy in here, the only
8 witness, the main witness, the supervisor, the person who
9 said that someone has confessed to me and admitted
10 something to us. But there is absolutely not one document
11 from him to verify that. The only document that he has is
12 when my client called and tells them, I think I have got a
13 name. But did he do anything about that, not one single
14 thing, that is the only report. That is because my client
15 said that to him. Don't you think that would be
16 important. Don't you think it would be important to know
17 exactly what rights you advised my client if you are going
18 to allege that he made a statement. We don't have that.
19 Everybody has the same responsibility, same duties, to be
20 held to the same standards, professionalism, the way you
21 do your job. And the way they did their job is
22 despicable. It is embarrassing. To come in here and to
23 have a guy exposed to this right here because one witness,
24 and the very thing they testified, he testified he gave
25 Investigator Bouknight several things. One of the things

1 wasn't an extra quantity of white residue. I asked him
2 specifically, how did it get here. No one that gave an
3 explanation as to why this item or how it actually got
4 here. No one. I asked the chemist, she indicated, it was
5 in a bag. Described it as a rock. And he described it as
6 a residue. He didn't mention anything about a bag. Was
7 it something that he talked about or was it something
8 different, is it something new. They have already added
9 something new. We don't know and they are asking you to
10 come in here and convict him. Your presumption of
11 innocence is like a robe of righteousness. That is how
12 our Supreme Court is describing it. And it actually stays
13 with you and remains with you throughout this entire
14 process. And the only people that can remove that robe
15 are you, the jury. You can't scratch at it, you can't
16 claw at it, it actually has to be removed. You have to be
17 firmly convinced in order to convict him. You have to be
18 firmly convinced that your eyes are playing tricks on you
19 and that somehow that bottle is there but you don't see it
20 in this picture. That is what you need to do to be able
21 to convict him. The bottle is not there. And then
22 suddenly it appears. Now, the State bears the burden this
23 entire time. You know, when you are accused of something,
24 you don't have to prove yourself innocent. That is why
25 the State doesn't require you to do that, the government

1 doesn't require you to do that. Really, someone accuses
2 you of something there is really no other evidence out
3 there, no reports, no nothing. How can you defend
4 yourself. You are stuck. You have to come in here and
5 let the jury listen and hope that you listen to the facts
6 and take into consideration the facts that you didn't hear
7 and from the people that you didn't hear from. Don't be
8 fooled by this, we tried to call this case because it is a
9 Friday. We have been here all day. This case could have
10 been called here any time before Officer Spreng left.
11 They could have taken the time to call Investigator Spreng
12 or track him down. It is amazing how, when he was
13 testifying on direct, Captain Dennis said something, I
14 know he has got a home down there in Florida and he has
15 got family in Puerto Rico. Maybe he knows where he is at.
16 There was no attempt to get him here to testify. Why is
17 he not here. You have got to listen to all of the facts,
18 ladies and gentlemen of the jury, consider all of the
19 evidence. You know, you heard the witnesses testify. I
20 think each one of these witnesses testified. Some
21 questions you have to ask because they involve chain. You
22 remember a chain, what does that mean. A chain is
23 important. It is important especially in fungible type
24 cases. And fungible things are things that can be moved
25 around. You typically find that, you find a lot of times

1 with drugs. And the reason why that is important is
2 because if an item is fungible then the State has to
3 establish a complete chain. And they have to establish a
4 complete chain to show that there is no possibility in the
5 world that these drugs haven't been manipulated. Well,
6 ladies and gentlemen of the jury, here is what we have
7 got. We have got an additional item which no one can
8 explain how it got there. That is scary. That is scary
9 that all of a sudden that evidence can appear and you have
10 no way to defend yourself against it. It is hard. That
11 is why he has to put his hands, put his faith with you all
12 as a jury to see whether they have met their burden. And
13 it is a substantial burden. I submit to you, ladies and
14 gentlemen of the jury, they have not met that particular
15 burden in this particular case. And as you go back there
16 in that jury, examine and scrutinize those photographs,
17 look as hard as you want at those photographs of the area
18 before, while the, you know the scene has been kind of
19 undisturbed. And try as hard as you can to see that pill
20 bottle in front of that white piece of paper that you
21 don't see, we know it is suppose to be in front of. Now,
22 ladies and gentlemen, if you do not find that I think we
23 know what that is evidence of. Now, we are not coming in
24 here saying what burden it is. I am telling you that
25 right now, I am not saying that. They said, oh, no, the

1 drugs are there. That is not what it is, there ain't
2 nothing there. I am saying those drugs were placed there
3 after Deputy Epps got there. By who, I don't know. Well,
4 we know it is not by Mr. Trapp because what did Deputy
5 Epps say. I was with him, he didn't add nothing, he
6 didn't touch nothing, he did nothing. He was with him the
7 entire time until the officers got there. So the only
8 people that can really know what happens after that
9 particular point when you got Investigator Epps and Mr.
10 Trapp together, there are only two people that are there.
11 He said he didn't know. That is Investigator Spreng and
12 Investigator Bouknight. And neither of them are not here.
13 Ladies and gentlemen of the jury, they have not met their
14 burden of showing possession, showing knowledge, showing
15 that he had dominion and control of those particular
16 items. And I ask that you discount that alleged statement
17 that there seems to be no report of. Not only did he not
18 do a report, but Investigator Spreng didn't do a report.
19 And neither one of them did a report that said that Mr.
20 Trapp confessed. Mr. Epps said that, even though he left
21 the scene and all of these other guys maybe came back. He
22 never said that he heard any kind of admission or he never
23 said that Mr. Trapp ever admitted that there is some drugs
24 in there or anything like that. The only person that
25 comes in here and says this is Captain Dennis who says

1 that, oh, Mr. Bouknight said that I said this. I don't
2 know if that is double hearsay or hearsay or what it is.
3 But I know it doesn't smell right, it doesn't pass the
4 smell test as far as I am concerned. How are you going to
5 remember exactly what you said, what you did three years
6 later. Now, what Investigator Epps said, when you look at
7 these photographs. You jurors are the fact finders when
8 you look at these items. He said I couldn't get in the
9 Trapp room due to the shoeboxes being all over the floor.
10 That is what you see right here. The only thing that you
11 also don't see is that pill bottle. Think about that,
12 ladies and gentlemen of the jury, when you go back there
13 to that jury. My time is over, I think I have said all
14 the things that I can say, I think you have heard all the
15 evidence that there is. I think you are going to be able
16 to consider the things that have been presented before
17 you. I ask, don't hold anything that I have done against
18 my client. I will tell you, I think I told you from the
19 very beginning, I will fight for my client. I believe in
20 him. And I am not going to let anybody get up there and
21 testify to things that they don't have any personal
22 knowledge about. I am going to fight hard. The Judge is
23 the final decider of the rules. And I respect that, we
24 all have to respect that. I am going to fight for my
25 client and I have fought for my client this entire day.

1 The fact that I have fought for my client and fought
2 aggressively I ask that you not hold that against him.
3 Because I think the only things that you as a jury should
4 consider is where a person had a personal knowledge, they
5 observe and what they knew and things that are admissible.
6 Again, ladies and gentlemen of the jury, my name is
7 Dietrich Lake. On behalf of my client, Mr. Trapp, I ask
8 that when you return from the jury room that you will find
9 my client not guilty of this particular offense. Thank
10 you.

11 THE COURT: Mr. Scott.

12 MR. SCOTT: Thank you, Your Honor. May it please the
13 Court.

14 THE COURT: Yes, sir.

15 MR. SCOTT: Ladies and gentlemen of the jury, Madam
16 Forelady, as you heard, October the 8th of 2011 I think we
17 all can agree was a bad day for Toaby Trapp. His house
18 was broke into, \$7,000.00 dollars in cash that he keeps in
19 a shoebox was stolen from him. So he is probably upset
20 about that. If you had \$7,000.00 dollars in cash in your
21 room and somebody broke in and stole it, somebody breaks
22 into your house to steal \$7,000.00 dollars cash you would
23 be upset as well. So he did and probably as most people
24 would do, the best chance you can get to recover your
25 \$7,000.00 dollars in cash money is to call law

1 enforcement. His day got a little bit worse because when
2 law enforcement gets there and they begin looking through
3 the rooms and walking through the mess that was made, it
4 was testified that it was ransacked, comes across that
5 pill bottle. Call in other officers, confronted him about
6 it. Mr. Trapp says, you got me, I forgot it was in there.
7 You got me. It was a bad day. That is what happened. I
8 mean, this trial, it was a three witness trial guys. I
9 had no clue we would have drug it out this far, I really
10 had no clue. But we are through with it now. I am going
11 to be very short. I just want to note a few things. The
12 defense, they tell you it is a prosecutor don't, really go
13 back over the defense, because if anything you are lending
14 some kind of credence to it. But I am not trying to do
15 that, I only bring it up to show really how preposterous
16 it has been. And I don't blame Mr. Lake for fighting for
17 his client. I don't. Every defendant I prosecute I think
18 deserves a robust defense. But that was fairly shameful
19 because what he just did was get in front of you people
20 and try to convince you that two deputies in this county
21 planted evidence on a person. That is what he just
22 insinuated to you all. He would have you believe that
23 these deputies went to a man's house, a man who called
24 them to his house over a burglary call. And before they
25 left the station they grabbed some crack cocaine in a pill

1 bottle and put it in a pocket and they put it on his
2 counter. Then they blamed him for it. It sounds great
3 for a Hollywood movie. But that is basically, he just
4 pulled that out of the air and tried to sell it to you
5 people. And I hope that is not lost on you. I am not
6 going to forget it. And the thing that really was just
7 kind of odd to me as I was trying to convince myself that
8 I was really hearing that. Did they plant the other two
9 bags of crack too that were found in Mr. Trapp's room.
10 What about the scale, did they plant that there too. I
11 mean, this was a really grand conspiracy theory. They all
12 came up with, they are called out to this man's house over
13 a burglary. And there were multiple people in on it. Are
14 we really going to suspend our logic and are we really
15 going, let's don't look at what the evidence is showing
16 here. Let's junk this crazy conclusion over here. Let's
17 believe this. No, because that defies reason and you all
18 aren't going to do that. And what about his own
19 statement. Robert Dennis, law enforcement here in
20 Newberry in your community for over 20 years, familiar
21 with Mr. Trapp, they are both from Newberry, they have
22 known each other years on a firsthand basis. Tooby, what
23 is this about. Honestly I forgot it was there. I wasn't
24 even thinking about it, I am thinking about my house
25 getting broken into, I am thinking about the \$7 grand

1 being missed. I am not thinking about a couple of crack
2 rocks sitting on my dresser in my room. But did Robert
3 Dennis make it up. You know, if you don't have a real
4 good answer for something just throw the kitchen sink in
5 there, just throw whatever you can against that wall and
6 just see what sticks. Because now we have gone from
7 officers who planted it and here is how we are going to
8 explain his statement that Robert Dennis just testified to
9 under oath. He made it up. Because this is the third
10 crooked cop we have got now. We have got Nick Bouknight
11 who has passed on. We have got Robert Spreng who is in
12 Florida. They are the ones that planted the drug
13 evidence. And Robert Dennis comes in, he concocts this
14 statement from Mr. Trapp. This is the defense so far,
15 y'all. That is what you just heard, is it not. He can't
16 remember, he can't remember that. He didn't do a report.
17 What do y'all think we were all shuffling around this
18 whole time, what do you think that Mr. Lake was up here
19 shuffling through. There were reports with this case. It
20 is a documented case. All cases are documented through
21 warrants, there are incident reports, there are
22 supplementals. But, no, we can't trust them either, he
23 made that statement up. The third defense is the chain
24 defense. That was the thing that was dragging us on so
25 long and we had to talk about, well, after Nick took it be

1 put it here and then he took it here and then SLED got it
2 and they moved it here. And we had to go through all of
3 that and it was painful. It was painful for me too. But
4 that was the chain argument that he is talking about that
5 is so important. And we covered it. But what occurred to
6 me that I guess you could bog down in it and you wonder,
7 and they throwed the kitchen sink defense at you. I have
8 got to answer this, and this and this and this. And then
9 when we are getting bogged down in the chain Dietrich
10 Lake's own words came to my mind. And he said these words
11 just this morning. And he said these words in his opening
12 statement to you all. We are not going to contest that
13 that was crack cocaine. This is a shotgun approach, this
14 is the kitchen sink defense. Let me see if I can convince
15 them about the planted evidence. If that doesn't work I
16 am going to challenge the chain. It is inconsistent
17 because he is saying it is not my crack. It is crack but
18 I am going to challenge the fact that it has been tampered
19 with and now it is something else. It is completely
20 inconsistent. If you don't have a clear answer just throw
21 the kitchen sink at the jury, confuse them enough for with
22 the writing on the wall you are going to convince at least
23 one or two of them that they don't see what all the
24 evidence shows you. I don't know what your thoughts on
25 drugs are. It is not really that important to me. This

1 is a case, possessing crack cocaine and possessing it, an
2 amount over 10 grams. And the evidence showed and the
3 chemist weighed all of those three samples out, it is 21
4 something grams and a little bit over twice as much as the
5 threshold, the 10 gram threshold. That takes it from
6 being like a possession to a trafficking. Essentially
7 what he is accused of is possessing over 10 grams of crack
8 cocaine. I don't know how you all feel about that. The
9 fact is it is against the law. And the only reason we are
10 here, if you possess more than 10 grams of crack it is
11 against the law. I could sit here and argue to you that
12 is crack, it is led to decay, the downfall of many a life.
13 It is really not why we are here. I am not going to
14 preach to y'all about drugs and whether they are right or
15 wrong. The fact is it is against the law. And if you
16 find that the evidence has shown that Mr. Trapp, I have
17 got nothing personal against Mr. Trapp, okay. My job here
18 is when a crime is committed, law enforcement says a crime
19 is committed and I review the evidence and I have to
20 present it to a jury of his peers from this community and
21 I have got to prove it beyond a reasonable doubt. So the
22 elements that I have got to prove to you that he possessed
23 it. It is on his counter in his bedroom in his house. It
24 is on the floor in his bedroom in his house. That is
25 called constructive possession. He doesn't have to have

1 it in his pocket, in his hands, it is in his control and
2 dominion as in legal terms. Now, when you go in your
3 bedroom and you put your purse on the nightstand at night,
4 it is not on your shoulder but it is in your possession,
5 it is in your control. That is kind of the idea of what
6 constructive possession is. To show a quantity of crack
7 in your bedroom that is constructive possession. We have
8 got that. We have got to show you it is crack cocaine,
9 that is why the chemist was up there talking about it.
10 And then we have got to show that it is more than 10
11 grams. I know she tested it for three samples that we
12 introduced into evidence, 21.3 grams. I say if you find
13 all three of those things and you find that it is proven
14 to you beyond a reasonable doubt, reasonable doubt the
15 Judge is going to tell you leaves you firmly convinced.
16 It doesn't mean you can't have some doubt here or there.
17 It doesn't mean you have to know everything about this
18 case with one-hundred percent certainty. It is just
19 firmly convinced. And you can play the Dietrich Lake game
20 of, why, the picture, look at this, here is the crack here
21 but I can't see it from this angle. You can play that
22 game all you want and if that in your head is enough to
23 make you believe just forget everything else for this
24 case. Just because one of these pictures you can see it
25 and then from this other angle you can't see it. If that

1 is enough for you to kind of focus in on that and discount
2 everything else you have heard then find him not guilty.
3 If the picture trick is enough for you guys, I don't think
4 it is, but if it is enough for you that you are not firmly
5 convinced that he is guilty of that the Judge is going to
6 tell you you have got to find him not guilty. I submit to
7 you you are not going to fall for the picture trick. If
8 you look through all of the pictures you will see things
9 are moved. How do you think the drugs got here today. At
10 some point somebody has got to pick up the evidence, put
11 it in a bag and bring it to court, take it to the evidence
12 locker at the sheriffs department. It is going to have to
13 be moved at some point. His logic is so flawed here.
14 Because he is saying in one of these pictures I can't see
15 it and the other I can. A cop had to pick it up at some
16 point, that is how it got here. I am sorry, I have spoken
17 longer than I thought I would. I ask you to go back
18 there, consider the evidence as a whole and come to the
19 only really logical conclusion you can and that is he is
20 guilty. I mean, I don't see any other way. Let's just,
21 for argument sake, Dietrich Lake theory. Pill bottle,
22 what about the rest of the crack, that is still over 10
23 grams. I may have spoken too much. I see this to be a
24 very clearcut, very easy case to decide. I thank you for
25 your time. I am going to sit down. I ask you to go back

1 there and deliberate and come back with the verdict of
2 guilty. Thank you.

3 THE COURT: All right. Do y'all need a couple of
4 minutes or are you okay. My instructions will take about
5 fifteen minutes.

6 (No response.)

7 THE COURT: Ms. Hedgepeth and members of the jury, I
8 will now instruct you on the law of this case. As I told
9 you earlier, the State of South Carolina has charged Toaby
10 Trapp with the offense of trafficking in crack cocaine.
11 Bear in mind he has pled not guilty and by that plea he
12 has denied all of the allegations in that indictment and
13 that places the burden of proving his guilt upon the
14 State. Mr. Trapp comes into this court clothed with the
15 presumption of innocence. And that presumption stays with
16 him throughout the case and entitles him to a verdict of
17 not guilty unless and until it is dispelled by the
18 evidence satisfying you twelve beyond a reasonable doubt
19 of his guilt of the offense charged. The State must prove
20 each and every element of these charges beyond a
21 reasonable doubt. Now, the same constitution of laws
22 which makes you the finders of fact, which I discussed
23 with you earlier on, makes you the finder of facts on the
24 evidence, makes me the Judge sole and instructor of the
25 law. Y'all as a group must accept the law as correct

1 which I am stating to you now and accept it as I am
2 stating it to you and disregard any belief or
3 understanding or what you may have heard on the street
4 corner or read on the internet or saw on TV. I am
5 instructing you the law of South Caroline and you must
6 accept that law under your oath. If I should make an
7 error in applying the law there is another time and there
8 is another place for that error to be considered and if
9 necessary corrected. But for the matter here before us
10 today you must accept it as I am instructing it.

11 Now, as I told you every criminal prosecution in
12 South Caroline and other states as I am aware, the State
13 has the burden of proof. The defendant, Mr. Trapp, has no
14 burden whatsoever as he comes to court presumed innocent.
15 So, the prosecution must prove their case to the standard
16 called beyond a reasonable doubt before a finding of guilt
17 can occur. So if the State fails to meet that burden then
18 the defendant will be entitled to a verdict of an
19 acquittal or not guilty, which is the same thing.

20 Now, since y'all as a group are the judges of the
21 facts of the case you must evaluate the credibility of the
22 witnesses who have testified. And credibility is
23 believability. You must pass upon their credibility, you
24 can take things that you use every day, particuarly your
25 common sense and your good judgment. But also in passing

1 on the credibility you can take into consideration other
2 things such as the manner and appearance of the witness
3 who testified. Was the witness straightforward or not.
4 Was the witness hesitant in answering. How did the
5 witness come to know the facts to which he or she
6 testified. How was their ability to know these facts. Is
7 there some reason a witness would want to give testimony
8 which would help or hurt one side or the other. In other
9 words, was a witness biased or prejudiced one way or the
10 other. Was the testimony of a witness strengthened or
11 weakened by testimony of other witnesses. You, the jury,
12 may believe as much of one witness or of all the witnesses
13 you deem appropriate. You can believe some of the
14 testimony of a witness and disregard the rest. You can
15 believe one witness over that of the others or just the
16 opposite. The fact that testimony is not controverted
17 does not mean you must accept it as true, as y'all are
18 still gauging the credibility of all the witnesses who
19 have testified and offered facts for your consideration.

20 Now, I told you during the trial there is one, I call
21 it an exception to the rules of evidence. An expert or a
22 witness to testify as to opinions and conclusions and that
23 is an expert witness. One witness was qualified as an
24 expert in this trial and that witness would be one whom by
25 education, experience has become an expert in some art,

1 science or profession. And so that witness could state an
2 opinion as to a relevant or material matter in which the
3 witness claims to be an expert. Now, you can consider the
4 expert opinion received in the case as evidence just like
5 the other evidence. If you decide that the opinion of the
6 expert is not based upon sufficient education and
7 experience or if you conclude that reasons given in
8 support of the opinion are not sound or that the opinion
9 is outweighed by the other evidence you may disregard the
10 expert's opinion. An expert's opinion is just testimony
11 that is to be given no greater weight or less weight than
12 that of lay witnesses. You are not required to accept an
13 expert's opinion even though it is not contradicted.

14 Now, as the sole fact finders you should have
15 listened to the evidence testified to closely. I observed
16 you to do that. Weighing evidence is entirely a mental
17 process. You do not put it on a scale, you put it in your
18 minds eye scale. You must weigh the evidence using these
19 instructions, your good judgment and your common sense:

20 Now, there are generally two types of evidence
21 presented in trials and in this case there were both
22 types. There is direct evidence and there is
23 circumstantial evidence.

24 Direct evidence is testimony of a person who has or
25 asserts a claim to have actual knowledge of a fact such as

1 an eyewitness. Circumstantial evidence on the other hand
2 is proof of a chain of facts and circumstances indicating
3 the existence of another fact. Our law makes no
4 distinction between the weight or value to be given to
5 either direct or circumstantial evidence. Nor is a
6 greater degree of certainty required of direct evidence or
7 circumstantial evidence. You should just weigh all the
8 evidence presented to you in this trial. And after
9 weighing all the evidence if you are not convinced of the
10 guilt of Mr. Trapp beyond a reasonable doubt you must find
11 him not guilty.

12 Now, the term reasonable doubt has been used quite a
13 great deal. Reasonable doubt is simply this. It is the
14 kind of doubt which would cause a reasonable person to
15 hesitate to act. Reasonable doubt may arise from evidence
16 which is in the case or the lack or absence of evidence in
17 this case. Proof beyond a reasonable doubt is proof that
18 leaves you firmly convinced of the defendant's guilt. It
19 is the kind of doubt which one can assign a reason, if the
20 assignment can be done reasonably, firmly and
21 convincingly.

22 Now, I charge you that the defendant is entitled to
23 every reasonable doubt that may arise in this case. And
24 what that means is, if any of you including the alternate
25 has any doubt about anything during the trial you will be

1 required to resolve that doubt in Mr. Trapp's favor. I
2 also instruct you that the jury will partake, enjoy a full
3 and free discussion on the issue of guilt and not guilt.
4 That does not automatically mean that a reasonable doubt
5 exist. You, the jury, must make the determination of
6 whether or not a reasonable doubt exist as to the guilt of
7 Mr. Trapp. If you find that the State has not met the
8 burden of proof beyond a reasonable doubt then he would be
9 entitled to a verdict of not guilty.

10 Now, specifics of the law regarding his charge are
11 codified, are written in the State code under section
12 44-53-375(c). It is trafficking in crack cocaine. In
13 order to sustain a conviction for that offense, that is
14 written in the indictment, the elements, the State must
15 prove beyond a reasonable doubt that Mr. Trapp knowingly
16 sold, manufactured, cultivated, delivered, purchased,
17 brought into this State, provided financial assistance to
18 or otherwise aided, abetted, attempted or conspired to
19 sell, manufacture, cultivate, deliver, purchase or bring
20 into the State and was knowingly in actual or constructive
21 possession. Knowingly attempt to become in actual or
22 constructive possession of crack cocaine. The State must
23 also prove an additional element beyond a reasonable doubt
24 that the amount of crack cocaine was more than 10 grams
25 but less than 28 grams. To prove possession the State

1 must prove beyond a reasonable doubt that Mr. Trapp had
2 both the power and intent to control, the disposition or
3 use of the crack cocaine. Possession may be either actual
4 or constructive. Actual possession means the crack
5 cocaine was in actual, physical custody of the defendant.
6 Constructive possession means that the defendant had
7 dominion and control or the right to exercise dominion and
8 control of either the crack cocaine itself or the property
9 on which the crack cocaine was found. Mere presence at
10 the scene where the drugs were found is not enough to
11 prove possession. A defendant's knowledge and possession
12 may be inferred when the substance is found on the
13 property under his control. However, this inference is
14 simply an evidentiary fact to be taken into consideration
15 by you along with the other evidence presented to you in
16 this trial.

17 Now, I instruct and I emphasize to you that Mr. Trapp
18 comes into this court presumed innocent. He has the
19 constitutional right to remain silent and he has exercised
20 that right and has not testified. The fact that he did
21 not testify is not a factor to be considered by you in any
22 way in your deliberations and in your consideration of the
23 question of the guilt or innocence of him. It must not be
24 considered by you in any manner whatsoever. A defendant
25 has this constitutional right to remain silent and his

1 assertion of this right must not be considered or even
2 discussed by you in your deliberations. So under your
3 oath you are not to draw any conclusion whatsoever from
4 the fact that he exercised this right and chose to not
5 testify. The fact that he did not testify should not even
6 be discussed in the jury room. The burden of proof is
7 upon the State and you must consider that issue based on
8 what has been presented to you. A defendant is not
9 required to prove his innocence. The burden remains upon
10 the State to prove the guilt of the defendant beyond a
11 reasonable doubt.

12 Now, Ms. Hedgepeth and members of the jury, as y'all
13 retire to begin your deliberations I am going to express
14 the hope each of you will be mindful of the importance of
15 your duty here today. It is late in the afternoon,
16 Halloween night, but you are not called very often to
17 serve as jurors very often. You and I both are acting for
18 this community and for this State. It has been my job to
19 preside over two trials here in this county this week,
20 this being the second one. It is my job to see that the
21 legal issues were ruled upon fairly and justly according
22 to the law as I understand it and to see that Mr. Trapp
23 and the State receives fair and impartial justice. It is
24 your job as jurors to make ceratin that your verdict is
25 just and according to my instructions. Try and suggest

1 how you should decide the case, either way, it would be
2 improper for me to try to influence you in your duty in
3 finding the facts. But I must tell you that I am
4 convinced of whatever verdict y'all do reach will be from
5 the confining your deliberations to the evidence
6 presented, discussing it thoroughly, weighing it fairly
7 and impartially and reaching a unanimous verdict. And I
8 am convinced that y'all will do just that.

9 Now, the indictment will come back in the jury room
10 with you which is what we discussed. All of the evidence
11 which has been introduced will come back in the jury room
12 with you. And I tell you this, that if you need
13 additional instructions on any area of the law which I
14 have gone over write it on a note. Say, Judge, we would
15 like to hear the definition of reasonable doubt once more
16 or can we hear the elements of trafficking in crack
17 cocaine. I will be happy to reinstruct you on any part of
18 the law from which I have done in the last fifteen minutes
19 and I will reinstruct you if need be. Additionally, if
20 you would like to hear any testimony replayed, Ms. Holston
21 has made an audio recording of the testimony. You can say
22 we would like to hear a witness and just tell me who it
23 was. A witness who said such and such, or his name, her
24 name and we will replay that for you here in the
25 courtroom. So, if you have any questions, you need

1 additional instructions or you would like to hear the
2 testimony a second time through, you may get to
3 discussions and say this witness said thus and so. And
4 another juror may say, I thought he said that and so.
5 That is the purpose for your abilities to have the
6 testimony replayed if you so choose. Now, I need to go
7 over my instructions with the lawyers so I am going to
8 send you to the jury room. And so if my instructions were
9 complete and the lawyers are satisfied with my
10 instructions and I hope they are. But if they are not, I
11 may have omitted something. And if I did I will bring you
12 back in here and instruct you on that area. But if I was
13 complete in my instructions I will send you the evidence
14 and the indictment and it is then you can begin your
15 deliberations. All right. Now, once you reach a
16 unanimous verdict notify the bailiff and then I will show
17 you, I will show the indictment, Ms. Folk will show you
18 here where to write your verdict and to sign your name
19 right here when she brings it to you. All right, with
20 that all thirteen step in the jury room. Once
21 deliberations begin I will retrieve the alternate out.
22 Okay.

23 (Whereupon, the jury was excused from open court at
24 approximately 6:09 p.m.)

25 THE COURT: All right, any exceptions to the

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Indictment No.: 2012-GS-36-0267

The State, ... Respondent,

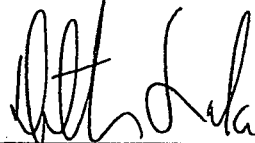
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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,



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APPENDIX TO THE RECORD ON APPEAL

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1 Q What about Jerry Wright, retired Jerry Wright, did
2 you take over for him?

3 A Yes.

4 Q October 8th of 2011 was it you or Jerry Wright who
5 was over the non-narcotic evidence?

6 A The non-narcotic evidence would have been Jerry
7 Wright.

8 Q And what were you doing then?

9 A I was the training officer at that time.

10 Q Who was in charge at that time of the narcotics
11 evidence?

12 A Investigator Bouknight.

13 Q Okay. So he was the Evidence Custodian for all the
14 drug related evidence that was kept at the sheriffs
15 department?

16 A Yes.

17 Q And where did he keep all of the drug evidence?

18 A At that particular time the evidence was kept in a
19 secured building behind the trailers that we were
20 presiding in at the time.

21 Q Outdoor unit storage building?

22 A Yes.

23 Q Was it climate controlled?

24 A It was not.

25 Q You remember Nick passed away?

1 A Yes.

2 Q And what would become of all the evidence that was in
3 the locker?

4 A When Nick passed away, being that I was the Evidence
5 Custodian over the other evidence, I took control over all
6 evidence including the narcotic evidence at that time.

7 Q I am confused. You were a training officer under
8 Jerry, how does that work?

9 A October of 2011 I was the training officer. I became
10 the Evidence Custodian when Jerry left December the 31st
11 of 2012. So, I took over the evidence December of 2012.
12 And I took over the narcotic evidence when Nick passed
13 away in May of 2013.

14 Q Got you, okay. And now the two are the, are
15 narcotics pieces of evidence still kept separately from
16 other, I guess, non-narcotic evidence?

17 A Yes. I am in control of all of the evidence but the
18 narcotic evidence is kept separate from the other
19 evidence.

20 Q It is only like one room though, isn't it?

21 A It is in a room inside a room.

22 Q But before, I guess, in early October, October 8th,
23 2011 you would have had your drug evidence in one unit,
24 storage unit outside back behind the trailers of the old
25 sheriffs department?

1 A Correct.

2 Q And then where would the other stuff be?

3 A It was in a different building.

4 Q Okay.

5 A In the same general area.

6 Q I am sorry, I think I asked you this or you started
7 on it. But when Nick passed who was it that went in and
8 inventoried the evidence he had collected in his evidence
9 locker?

10 A That was me.

11 Q All right. And what did you do with it?

12 A I went in and inventoried it and made sure it was
13 there. And until we moved into the new building and it
14 stayed in that building.

15 Q Do you recognize this piece of evidence right here,
16 it is State's number 30, it has got the various contents
17 in it. Do you recognize that?

18 A I do.

19 Q When was the, I guess, did you bring that to court
20 yesterday?

21 A I did.

22 Q And how did it appear then?

23 A It was sealed, this bag was sealed across here.

24 Q And after the day was over yesterday what did you do
25 with it?

1 all you are going to hear from the State. I will hear a
2 few motions and y'all step in the jury room and I will get
3 you right back in, don't discuss the case.

4 (Whereupon, the jury was excused from open court.)

5 THE COURT: All right, Mr. Lake.

6 MR. LAKE: At this time the Defense would make a
7 motion for directed verdict in this particular case. I
8 don't think there has been no, there has been insufficient
9 information, no substantial evidence to for this case to
10 go back to the jury. There hasn't been any evidence of
11 any type of possession. What you essentially have is an
12 uncorroborated alleged statement of an item that was found
13 in the household. This is after an arrest has occurred.
14 Your Honor, I think at this particular time, again, you
15 are really looking at speculation as to, you know, whether
16 he in fact possessed these particular drugs. Again, you
17 know, if you look at what would be Captain Dennis'
18 testimony. I think the Court has an opportunity, I guess,
19 to weigh that. I know you can argue constructive
20 possession and dominion and control based upon the fact
21 that it was at a place where he resided. The State hasn't
22 even established that he actually owned that particular
23 home, whether he was renting it or that someone else
24 presided in that household with him, they haven't
25 established anything. The only thing that we know is that

1 a burglary has occurred and some items are alleged to be
2 found in that particular room. There is absolutely no
3 testimony essentially to corroborate essentially Captain
4 Dennis' testimony. I think you have to look in the
5 totality in terms of the fact that weighing the
6 credibility of it. Again, I go back to the point that Mr.
7 Trapp wasn't arrested that particular night. They never
8 testified to it, I guess we never introduced that
9 information also. But the Court has heard that proffered
10 testimony and things of that particular sort, consider as
11 it relates to our directed verdict motion. But I do think
12 there is some serious and significant questions as whether
13 that alleged statement was made under duress, under any
14 kind of threat. Most certainly the fact that he was
15 arrested until months later, actually was allowed to turn
16 himself in, you know, appears to be at least at a minimum
17 a promise. So if you take that particular testimony out
18 then what you have got is a mere presence case or you have
19 got an intervening factor of a burglary that occurred at
20 that location. But based upon the insufficient evidence
21 of possession, insufficient evidence of knowledge. I will
22 tell you, Your Honor, some of the testimony I got a little
23 confused on in terms of when Miranda occurred, when it
24 didn't occur. But I thought initially it started when he
25 first got there outside and then the next thing I know it

1 is on the porch and then it was inside the location. Did
2 it occur before or after these items are found and things
3 of that sort which was not clear. So, you know, I think
4 what you really have is just a suspicion of guilt. So,
5 based upon that, Your Honor, I ask for a directed verdict.

6 THE COURT: All right, I understand your argument.
7 But the testimony in light to the State would be the
8 officers are out there on the scene, observe drugs in
9 plain view, get a search warrant, provide Miranda, get an
10 admission. There is constructive possession, perhaps even
11 dominion and control of the bedroom. I think that gets
12 you by directed verdict so respectfully I deny that. Now,
13 any other motions?

14 MR. LAKE: Nothing else.

15 THE COURT: Are you going to put anything up?

16 MR. LAKE: No, sir.

17 THE COURT: I didn't think you would. That would be
18 my guess. Okay. Are y'all ready to go on?

19 MR. SCOTT: Yes, sir.

20 MR. LAKE: Your Honor, give me a minute to grab a few
21 things.

22 THE COURT: Is there anything that y'all want in, I
23 think y'all can stipulate that it is in.

24 (Whereupon, a short break was taken.)

25 THE COURT: Let's bring the jury in.

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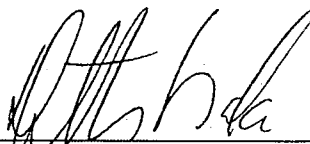
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Respectfully submitted,



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Toaby Alexander Trapp.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

recovered all of the items seized pursuant to the search warrant, he completed the Evidence Log In Form, he completed the Form B (Rule 6) chain form, he completed the SLED Drug Analysis Request Form, and he handled the evidence after it left the scene of the incident until an unknown date in time. [R. pp. 308 – 313; 316; 333; 346; 347.]

None of the testimonial statements made by Investigator Bouknight during the Appellant's trial was subject to prior cross examination by the Petitioner.

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

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

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

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

ARGUMENT

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

make it into the best evidence bag as listed on the Form B Form. The straw from the Return and the two (2) razor blades did not make it into the best evidence bag. [R. p. 203, lines 4 -14.] In addition, the Best Evidence Bag now contained a quantity of a white substance which no one could testify as to how it got there, no one could testify about the parties who handled the drug residue evidence, and no one could testify about the manner in which this drug residue evidence was handled before it made it to SLED for analysis. [R. p. 77, line 9 – p. 78, line 14; p. 232, line 6 – p. 233, line 17.] This new drug evidence in the best evidence bag is clear evidence of tampering because there was no record of it ever being collected by any of the officers who were present at the scene nor was there any record of this new drug being placed in the unsealed manila envelope that Captain Dennis handed over to Investigator Bouknight. Investigator Ben Chapman, the current evidence custodian, could provide no testimony about either the possession or care of any of the drug evidence before the items entered the best evidence bag. [R. p. 286, line 19 – p. 287, line 8; p. 289, line 8 – p. 290, line 19.] Investigator Chapman did clarify that the drug evidence in this case was stored in a card box on a shelf thereby contradicting the trial testimony of Captain Dennis that this drug evidence was placed in a secure lock box. [R. p. 196, line 13 – p. 197, line 13; p. 204, lines 10 – 23; p. 209, line 14 – p. 210, line 12; p. 287, line 9 – p. 289, line 7.] The drug evidence was not contained in a bag or condition that would prevent tampering up until the point where the drug evidence was handled by the forensic scientist Lynn Black who tested the drugs.

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

III.

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

WARRANT.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

IV.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

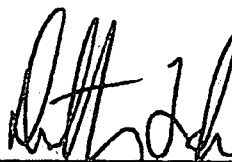
The trial court erred when it failed to suppress this alleged statement under the totality of the circumstances. There was no credible evidence that *Miranda* warnings were provided to the Appellant nor was there any credible evidence that the Appellant actually gave any statements or admitted to this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

CONCLUSION

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

Respectfully submitted,

November 27, 2015



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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

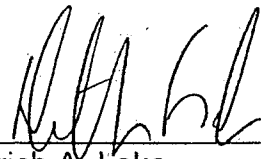
The State, ... Respondent,

v.

Toaby Alexander Trapp, ... Appellant.

CERTIFICATE OF COMPLIANCE

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



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002358

The State,

Respondent,

vs.

Toaby Alexander Trapp,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly admitted the analyst's results of testing and the drugs into evidence because the State presented a proper chain of custody. Further, the issue is not preserved for review on appeal. Finally, Appellant specifically waived any objection to the results of the test by stating he did not object to the analyst's testimony, and only objecting to the admission of the drugs based on the failure to call an individual handling the drugs after testing.
- II. The trial court did not err in admitting testimony regarding the search warrant, an evidence log form, a Form B provided with the evidence taken to SLED, the SLED Drug Analysis Request Form, or other testimony about the investigation into the record. The issue of a violation of the Confrontation Clause is not preserved for review on appeal. Further, none of the evidence was testimonial in nature and, therefore, Appellant's right to confrontation was not violated.
- III. The trial court did not err in denying Appellant's motion to suppress as the search warrant was valid and properly supported by probable cause. Further, Appellant had a Franks v. Delaware hearing and failed to establish any falsity in the search warrant's affidavit, nor did he establish if there was a falsity its removal would have eliminated the probable cause for the warrant.
- IV. The trial court did not err in suppressing Appellant's knowing and voluntary statement.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

- I. **The trial court properly admitted the analyst's results of testing and the drugs into evidence because the State presented a proper chain of custody. Further, the issue is not preserved for review on appeal. Finally, Appellant specifically waived any objection to the results of the test by stating he did not object to the analyst's testimony, and only objecting to the admission of the drugs based on the failure to call an individual handling the drugs after testing.**

Appellant contends the trial court erred in finding the State presented a sufficient chain of custody for the admission of the drugs into evidence. First, the issue is not preserved because Appellant did not timely make an objection. Second, Appellant waived his objection to the admissibility of the analyst's report by specifically indicating he had no objection to her testimony. Third, the State did produce a proper and sufficient chain of custody as far as practicable for the admission of the analyst's test results and the drugs themselves. Finally, any error in admitting the drugs is entirely harmless given the cumulative nature to the testimony by the SLED drug analyst to which Appellant specifically indicated he had no objection.

Preservation

First, the issue is not properly preserved for review on appeal because Appellant did not renew his objection when the drug analyst presented her results. This issue is not properly preserved for review on appeal. In order to preserve an evidentiary issue for review on appeal, a contemporaneous objection must be made when the testimony is offered. See State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court), see also, State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)

(holding ordinarily an evidentiary ruling in limine is not final and an objection contemporaneous with the evidence's admission is required to preserve the issue for appeal). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Johnson, 363 S.C. at 58-59, 609 S.E.2d at 523. In the instant case, the relevant testimony requiring a proper chain of custody is the admission of the SLED drug analyst's testimony the contents of the bags and pill bottle were crack cocaine and provided the crack cocaine's weight. See e.g., State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) (finding "the ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be" and items received for testing were items taken from defendant); Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) (finding a chain of custody is required from the time the specimen is taken to the final custodian by whom it is analyzed).

Counsel did not contemporaneously object when the results of the SLED lab testing were admitted. The State is required to establish the chain of custody prior to admitting evidence regarding the crack cocaine or the analysis of the substance. Once the forensic analyst testified without objection that the substance analyzed in the first plastic bag was 10.0 grams of crack cocaine, any subsequent objection would be untimely. In this case, Appellant waited until the State offered the actual drugs into evidence to object, instead of objecting when the analysis of those drugs was admitted. (T.276-279; R. 252-255). As a result, the objection was not timely and the issue is not preserved for review on appeal.

Further, counsel for Appellant waived any issue regarding the sufficiency of the chain of custody when he stated: "I don't have an objection to her testifying as what she

found was crack.” (T.279; R. 255). Once he waived his objection to her testimony regarding the test results, he waived any objection to the sufficiency of the chain of custody.

Merits

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

In order to admit the drug evidence:

[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.

State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007) (emphasis added) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)); see also State v. Kahan, 268 S.C. 240, 244-45, 233 S.E.2d 293, 294 (1977) (holding the standard stated in Benton v. Pellum had been met where the evidence was transported in accordance with normal protocol, even

though every person who may have handled it was not personally identified and there was no testimony regarding the care and handling of the item for an interval when it was being stored).

“South Carolina law does not require testimony as to the exclusion of any possibility of tampering.” State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Cl. App. 2004). The Courts of this State have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the evidence was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). When the identity of persons handling the specimen is established, evidence regarding its care goes only to the weight of the evidence and not its admissibility. Id.

In South Carolina Dep’t of Soc. Servs. v. Cochran, the South Carolina Supreme Court stated “we have never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case.” South Carolina Dep’t of Soc. Servs. v. Cochran, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005). The Court in Cochran found: “Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified.” Id. Importantly, the Court noted: “Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case.” Cochran, 364 S.C. at 629 n. 1, 614 S.E.2d at 646 n. 1.

In State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011), the Supreme Court found the chain of custody was sufficiently established even though no testimony linked the

Officers who transported the drugs to SLED and the agent who analyzed the drugs. The Court found the failure to personally identify the technician at SLED that received the evidence as well as the exact handling of the evidence while in SLED's custody was not required to establish a chain of custody as far as practicable. See Hatcher, 392 S.C. at 95, 708 S.E.2d at 755. The Supreme Court stated:

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

Hatcher, 392 S.C. at 94-95, 708 S.E.2d at 754-55.

The Court in Hatcher concluded: "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be. The record here indicates the drugs received for testing were in fact, those taken from Hatcher without any alteration, tampering, or substitution." Id. Similarly, the Court previously has held: "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." Carter, 344 S.C. at 424, 544 S.E.2d at 837.

In the instant case, the State presented a full chain of custody as far as practicable establishing the drugs, which were seized from Appellant's residence, were the drugs that SLED tested and found to be approximately 21 grams of crack cocaine. While Investigator Bouknight, the narcotics officer and evidence custodian at the time the drugs were seized, had passed away prior to trial, the State presented ample evidence regarding

the individuals involved in the chain of custody as well as the manner in which the drugs were handled. (T.193; R. 169).

Captain Dennis, the supervising officer present at the scene and operating in a supervising role over Investigator Bouknight, testified Bouknight collected the drugs and other items found at Appellant's residence and Captain Dennis documented the items on the Return to the Search Warrant. (T.204-205; 253-254; R. 180-181; 229-230). He explained Bouknight acted as the narcotics evidence custodian during the time drugs were seized from Appellant's home. Captain Dennis testified the policy was for Bouknight to take charge of the evidence, including logging it into his evidence locker area which was secured. Captain Dennis explained only Investigator Bouknight had a key to the evidence locker so no one could access it without Bouknight. (T.233-234; R. 209-210).

According to Captain Dennis, Bouknight collected the drugs and other paraphernalia and placed them in manila envelopes. Lynn Black, the SLED drug analyst, testified the drugs she retrieved from the Best Evidence Bags for testing were inside manila envelopes. (T.292-293; R. 268-269). Captain Dennis testified the envelopes used to collect the bags and pill bottle containing crack cocaine were still within the Best Evidence Bags brought to court. (T.257-258; R. 223-234).

Captain Dennis also explained the routine procedure regarding drug evidence was to complete a Form B. He indicated the form was completed in the ordinary course of work when collecting and transporting drugs. (T.234-235; State's Exhibit 2; R. 210-211; 316). Bouknight completed a Form B in this case. Captain Dennis, who indicated he worked with Bouknight for ten years and knew his handwriting, identified the

handwriting on the Form as Bouknight's. (T.222; 236; R. 198; 212). The Form B contained a control number, which correlated with the Best Evidence Kit and was used for identification of the drugs to be taken to SLED for analysis.

On the Form B, Investigator Bouknight certified on October 9, 2011, he received from Appellant at Appellant's residence the following items:

1) plastic bag containing a quantity of white cookie-like substance; 2) plastic baggie containing a quantity of white cookie substance; 3) orange pill bottle containing a quantity of white cookie substance; 4) scale containing a quantity of white residue on it; 5) spoon with a quantity of white residue on it; and 6) quantity of white residue.

(T.236-237; State's Exhibit 2; R. 212-213; 316). Bouknight further certified: "On 10/21/11, I made delivery of the above-described substance or container to SLED of SLED in substantially the same condition as when I received it." The Form is signed by Bouknight. (T.237; State's Exhibit 2; R. 213; 316).

Investigator Bouknight transported the drugs in the Best Evidence Kit to SLED for analysis. According to Black, the drugs arrived on October 21, 2011, and were taken by Selena Kinard, a forensic technician with SLED. (T.271-272; R. 247-248). Ms. Kinard received the evidence, recorded it, and placed a bar code for identification within the lab. (T.272; R. 248). Black testified Kinard then placed the evidence in their evidence vault, roughly one minute after receiving it. (T.275; R. 251). Black testified SLED's policy would be to return evidence if at the time it is received it appears to have tampered with or was open. (T.274; R. 250).

Black testified the next person in the chain of custody was Patricia Crooks. Ms. Crooks, another forensic technician, retrieved the drug evidence from the storage area and took it to Black for analysis. She retrieved it on October 25, 2011. (T.276; R. 252).

Black identified the Best Evidence Bag and its contents at trial. She identified the lab number assigned to the first bag containing crack cocaine and identified her initials on the item number. She testified without objection the first bag contained 10 grams of crack cocaine. She verified the lab number she identified was the one designated earlier when Kinard took possession of the drugs from Bouknight.

After Appellant's counsel indicated he had no objection to Black testifying as what she found was crack, Black continued her identification and description of the items. (T.279; R. 255). She identified the second plastic bag containing crack cocaine by its lab number and her initials. She indicated the bag contained 7.3 grams of crack cocaine. (T.281-282; R. 257-258). Black then identified the orange plastic prescription bottle, indicated its lab number, and identified her initials. She then testified the bottle contained 4.0 grams of crack cocaine. (T.282; R. 258). Black testified without objection the total weight of crack cocaine identified was 21.3 grams. (T.282; R. 258).

Black stated after she tested the substances, she placed the Best Evidence Kit and contents into another plastic bag called a KPac. It was then heat sealed and a bar code was placed on the plastic bag along with Black's initials. (T.283; R. 259). Black indicated she maintained the evidence in a drug vault in her lab until November 2, 2011, when she took it back to Patricia Crooks. At trial, she identified the bag she heat sealed on October 25, 2011. She testified prior to the bag being opened at trial, it had remained in the same condition as when she sealed it. (T.284; R. 260).

Ben Chapman, the evidence custodian at the time of trial, testified he received the plastic bag containing the drug evidence when he became evidence custodian. He

indicated he brought it from evidence for trial and it was heat sealed until opened at trial. (T.298-300; R. App. 380- 381; R. 273).

Based on the above testimony and evidence, the State presented a sufficient chain of custody as far as practicable for the drug evidence collected. The State identified every person who handled the drugs, as well as the manner in which they were handled and the protocols under which all persons operated. It is clear from the testimony the drugs obtained from Appellant's residence were the same drugs tested by Black at SLED, and were the same drug evidence brought to trial.

The State is not required to present the testimony of every person who handled the drugs, nor must the State completely eliminate all possibility of tampering. Any issue with regard to the manner in which the evidence was handled went to the weight of the evidence to be assigned by the jury and not to its admissibility. There is no missing link in the chain of custody presented by the State. Every hour of the drug's whereabouts cannot be accounted for because Investigator Bouknight has passed away, but that has never been the standard to which the chain of custody is held. The State presented, as far as practicable, a chain of custody which identified every person who handled the drugs and the manner in which the drugs were handled. The evidence presented ensures the drugs seized from Appellant's residence were the same drugs tested by Black, and were the same drugs brought to trial by Chapman. Accordingly, the trial court did not abuse its discretion in admitting the testimony of the SLED analysts or the drugs into evidence.

II. The trial court did not err in admitting testimony regarding the search warrant, an evidence log form, a Form B provided with the evidence taken to SLED, the SLED Drug Analysis Request Form, or other testimony about the investigation into the record. The issue of a violation of the Confrontation Clause is not preserved for review on appeal. Further, none of the evidence was testimonial in nature and, therefore, Appellant's right to confrontation was not violated.

Appellant maintains the trial court erred in admitting various pieces of evidence as well as testimony because its admission violated Appellant's right to confrontation under the Sixth Amendment to the United States Constitution. The issue regarding a violation of the Confrontation Clause is not preserved for review on appeal. Further, none of the evidence was testimonial in nature, and much of it was presented during proffered testimony and not testimony before the jury at trial.

Preservation

Appellant contends several pieces of evidence were admitted in violation of his right to confrontation pursuant to the Sixth Amendment to the United States Constitution. Appellant never raised this issue at trial. At no time during the admission of any of the testimony he contends was wrongly admitted, nor during admission of any evidence, did he raise the issue of the confrontation clause. Appellant cites to numerous pages in the record in which he contends evidence was admitted in violation of his right to confrontation. However, none of those pages contain the requisite objection to the admission of the testimony based on his right to confront the witness. As a result, the issue is not preserved for review on appeal. . See State v. Langford, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012) ("Constitutional issues are not exempt from issue preservation requirements."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741

(2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Merits

On the merits, much of the testimony and exhibits were admitted during pre-trial suppression and other hearings, which do not implicate the Confrontation Clause. Further, even if the Confrontation Clause applies, none of the testimony admitted is testimonial in nature and, therefore, its admission does not violate Appellant's rights under the Confrontation Clause.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987) (citing California v. Green, 399 U.S. 149 (1970); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)).

The United States Supreme Court (USSC) explained the Confrontation Clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” Crawford v. Washington, 541 U.S. 36, 51 (2004). The Court then defined testimony as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Id.

Applicability of Confrontation Clause at Pre-trial Hearing

The Confrontation Clause is a trial right, and should not be applicable to pre-trial hearings such as the suppression hearing in this case. “This constitutional right, which applies to the states through the Fourteenth Amendment, guarantees a defendant in a criminal trial the right to cross-examine the witnesses against him.” State v. Henson, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014) (emphasis added) (citing Pointer v. Texas, 380 U.S. 400, 403–04 (1965)). “The right to confrontation has been referred to as a ‘trial right.’” Starnes v. State, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991) (emphasis added) (quoting Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)); see also, Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (“opinions of this Court show that the right to confrontation is a *trial* right”) (italics in original). “[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses **appearing before the trier of fact.**” Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (emphasis added). South Carolina many years ago acknowledged the importance of the right to confrontation **at trial** stating: “And one of the indispensable conditions of such due course of law is, that **prosecutions** be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.” State v. Campbell, 30 S.C.L. (1 Rich.) 124, 125 (Ct. App. 1844) (emphasis added).

Multiple Courts considering the issue have found the Confrontation Clause is solely a trial right and does not apply to pre-trial hearings. See Ebert v. Gaetz, 610 F.3d 404, 414 (7th Cir. 2010) (“because the court considered the statement at a suppression hearing, not Ebert’s trial; the Confrontation Clause was not implicated”); United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (holding “Crawford does not apply to the foundational evidence authenticating business records in preliminary determinations of the admissibility of evidence”); Vanmeter v. State, 165 S.W.3d 68, 74-75 (Tex. App. 2005) (concluding “Crawford did not change prior law that the constitutional right of confrontation is a trial right, not a pretrial right which would transform it into a ‘constitutionally compelled rule of discovery.’”); State v. Woinarowicz, 720 N.W.2d 635 (N.D. 2006); People v. Brink, 31 A.D.3d 1139 (N.Y.A.D. 2006); People v. Felder, 129 P.3d 1072 (Colo. App. 2005) (all of which held that Crawford is not applicable to pretrial suppression hearing because right of confrontation is a trial right).

The USSC has explained the “purposes of confrontation” in California v. Green.

The Court explained, confrontation:

- (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
- (2) forces the witness to submit to cross examination, the “greatest legal engine ever invented for the discovery of truth”; [and]
- (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009) (quoting California v. Green, 399 U.S. 149 (1970) (footnote omitted)). The considerations explained by the

USSC are most applicable at trial and not during a suppression hearing. Even Crawford, when analyzing the historical importance of the right to confront witnesses, indicates it is to prevent evidence being used against a defendant to determine his guilt when he did not have the ability to put that evidence to the test of cross-examination.

Additionally, pre-trial hearings are not bound by the same rules and restrictions as trial. For example, pursuant to Rule 104(a), SCORE: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court In making its determination it is not bound by the rules of evidence except those with respect to privileges."¹ As a result, it would seem illogical to apply Confrontation Clause requirements to the pre-trial hearing when hearsay can be considered under the Rules.

Initially, most of the testimony and discussion of other evidence, such as the search warrant, complained of by Appellant as violating his constitutional right to confront witnesses occurred during pre-trial hearings out of the presence of the jury. The testimony was not admitted during trial in front of the trier of fact, but was merely admitted to address the admissibility of the drugs and other evidence which would be admitted at trial to establish Appellant's guilt. As a result, the Confrontation Clause requirements for admissibility of the evidence did not apply and the trial court did not err in allowing the testimony during a pre-trial hearing.

Application of Confrontation Clause

Even assuming the testimony and evidence admitted during a pre-trial hearing could invoke the Confrontation Clause, none of the testimony or evidence admitted violated the Confrontation Clause. Crawford prohibits the admission of testimonial, out-of-court statements unless two conditions are met: the witness is unavailable at trial

¹ This Rule is identical to the Federal Rule. See Rule 104(a), FRE.

and the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 68.² The USSC further articulated: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law.” As a result, the Court “exempted [nontestimonial] statements from Confrontation Clause scrutiny altogether.” Id. Only testimonial statements “cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.” Davis v. Washington, 547 U.S. 813, 821 (2006) (citing Crawford, 541 U.S. at 51). “It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” Id.

In Davis, 547 U.S. 813 (2006), the USSC announced the “primary purpose” test for determining whether an out-of-court statement is testimonial in nature. The Court explained statements are testimonial where their primary purpose “is to establish or prove past events potentially relevant to later criminal prosecution.” Id., at 822. In Michigan v. Bryant, 562 U.S. 344 (2011), the USSC further expounded on the primary purpose test, indicating the Court must consider “all of the relevant circumstances.” Id. at 369. The Court found where an out-of-court statement’s primary purpose is “to create a record for trial” or “creating an out-of-court substitute for trial testimony” then the statement is testimonial and falls within the requirements of Crawford and the Confrontation Clause.

In Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173 (2015), the USSC explained: “Our Confrontation Clause decisions . . . do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of

² Of course if the declarant testifies at trial, and is subject to cross-examination, there can be no violation of the Confrontation Clause in the admission of prior, out-of-court statements.

in-court testimony.” Id. at 2183. The Court stated: “We have never suggested . . . that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution’s case. Instead, we ask whether a statement was given with the ‘primary purpose of creating an out-of-court substitute for trial testimony.’” Id. (citing Bryant, 562 U.S. at 358).

Appellant contends testimony by Captain Dennis violated the Confrontation Clause because he was relaying information learned from another investigator, Investigator Sprengs. This information was not testimonial in nature, but was instead information between an investigator and his supervisor during the course of the investigation. It is not information clearly intended for later criminal prosecution, but instead, was information necessary for a determination of the next steps to be taken during the ongoing investigation. The statements were not attempts to establish evidence to prove some past occurrence, but instead were statements about events actually occurring at the time of the statements. See e.g., Davis v. Washington, 547 U.S. 813, 827 (2006) (911 call non-testimonial in part because it describes ongoing events and not an attempt to prove prior events). Additionally, the evidence was not admitted for the truth of the matter asserted, and Crawford only applies to hearsay statements not ones admitted for a reason other than the truth of the matter asserted. See Crawford, 541 U.S. at 59 n.9 (“The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”)(citing Tennessee v. Street, 471 U.S. 409, 414 (1985)); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that agent's testimony concerning information received from another agent “was offered not

for its truth but only to explain why the officers and agents made the preparations that they did in anticipation of the appellant's arrest.”).

Appellant further contends the evidence log and Form B created as part of the chain of custody of the drugs in this case are testimonial and their admission violated the Confrontation Clause.³ However, as the USSC has explicated: “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. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009). As detailed by Captain Dennis the Form B is created as part of the routine business practice of the Sheriff's Department. (T.235-236; R. 211-212). Further, the SLED analyst testified the chain of custody evidence log was maintained in the regular course of business by SLED. (T.271; R. 247).

Additionally, the South Carolina Supreme Court analyzed a similar evidence log or chain of custody printout in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013). The Court found:

Indeed, the evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their “primary purpose” is not to constitute evidence in a criminal trial.

Id. at 352, 751 S.E.2d at 660. The same analysis and result apply in the instant case regarding the evidence log and the Form B.

³ It should be noted the evidence log was never admitted into evidence. While it was discussed by the SLED drug analyst regarding who handled the drugs at SLED, the report was never admitted.

Finally, Appellant seems to contend references to the search warrant obtained were testimonial and, therefore, violated the Confrontation Clause.⁴ The search warrant, like the evidence logs, was not primarily prepared for purpose of creating evidence at trial. It was created to assist law enforcement during the investigation, and does not have as its primary purpose proving any fact necessary to show Appellant's guilt or creating a substitute for trial testimony.⁵ As a result, a search warrant, and the references to it, are not testimonial in nature and, therefore, do not implicate the Confrontation Clause.

Further, any discussion of the search warrant was not for the truth of the matter asserted, but was to provide testimony regarding the progress and process of the investigation as well as to address challenges to the admissibility of evidence raised by Appellant. As a result, the testimony was properly admitted as it would not raise Confrontation Clause scrutiny. See Crawford, 541 U.S. at 59 n. 9 (The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

Accordingly, the trial court did not err in admitting testimony from Captain Dennis regarding what he learned from Investigator Sprengs, testimony about the evidence log from SLED, the Form B certification prepared by Investigator Bouknight, or the testimony regarding the search warrant and its return.

⁴ It is also important to note the search warrant was never admitted into evidence at trial, and was marked as Defendant's Exhibit 11 for identification because the main consideration of the search warrant came during pre-trial hearings related to Appellant's Franks v. Delaware argument which will be addressed in a subsequent issue.

⁵ The Return to the search warrant was a primary point of discussion during the hearings regarding the admissibility of the drugs. The Return was created by Captain Dennis, who was present to testify and be cross-examined so there is no Confrontation Clause implication by the discussion of the Return. See State v. Anderson, Op. No. 27558 (S.C. Sup. Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30) (right to confront witness satisfied when witness testified at trial and was subject to cross-examination, so no Confrontation Clause violation could occur).

III. The trial court did not err in denying Appellant's motion to suppress as the search warrant was valid and properly supported by probable cause. Further, Appellant had a Franks v. Delaware hearing and failed to establish any falsity in the search warrant's affidavit, nor did he establish if there was a falsity its removal would have eliminated the probable cause for the warrant.

Appellant contends the trial court erred in failing to grant Appellant a hearing and to suppress the evidence seized pursuant to the search warrant based on a lack of probable cause. Appellant clearly had a hearing on the issue, as the State presented testimony from Captain Dennis and both the State and Appellant's counsel made significant arguments. Further, Appellant failed to demonstrate any falsity in the affidavit presented to the magistrate to obtain the search warrant, and he did not establish any alleged falsity would have eliminated probable cause for the warrant. Finally, the officers were in the house pursuant to Appellant's invitation to investigate a burglary, and, therefore, had a right to search the premises as part of the investigation.

In order to obtain a search warrant in South Carolina, an affiant must present a sworn affidavit to a judge establishing the grounds for the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."). "A search warrant may issue only upon a finding of probable cause." Bellamy, 336 S.C. at 143, 519 S.E.2d at 349; see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). "A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or

evidence of a crime will be found in a particular place.” State v. Kinloch, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014).

Under the Fourth and Fourteenth Amendment of the United States Constitution, a defendant has a right “to challenge misstatements in a search warrant affidavit” even after a search warrant is issued. State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court identified the process for raising such a challenge. Pursuant to the process identified in Franks, a defendant is constitutionally entitled to a hearing on the validity of a search warrant affidavit if “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[.]” Id. at 155-156. Then, if such a preliminary showing is made, the defendant is entitled to a hearing where he must prove his allegations of falsity or a reckless disregard for the truth by a preponderance of the evidence. Id. at 156. Assuming the allegations are proven during the hearing and the search warrant affidavit’s remaining content is insufficient to establish probable cause, the trial judge should then void the search warrant and exclude the evidence discovered during the search “to the same extent as if probable cause was lacking on the face of the affidavit.” Id.

In the instant case, the trial judge committed no error in denying Appellant’s suppression motion because Appellant failed to establish the search warrant affidavit contained any false information. Appellant attempted to argue that photographs which showed Appellant’s bedroom and dresser first showed the dresser without the pill bottle

containing crack cocaine, and later photographs showed the pill bottle sitting on the dresser. First, there is no evidence supporting Appellant's claim the pill bottle was not originally located on the dresser. No testimony established the sequence of the photographs, and it is just as likely the photographs with the pill bottle on the dresser were taken before the subsequent pictures after the evidence was seized by the officers. Additionally, Captain Dennis testified he arrived, and was shown the bottle by Investigator Sprengs. The bottle was sitting on the dresser when he saw it. (T.30; R. 15). The location of the pill bottle was further corroborated at trial by the testimony of Deputy Epps who indicated Investigator Sprengs walked into the bedroom "looked on the dresser which I believe was to the right of the door and noticed a large amount of crack in a pill bottle." Deputy Epps also observed the crack in the pill bottle on the dresser. (T.154-155; R. 134-135).

Additionally, even if the pill bottle was not located originally on the dresser it does not render the affidavit provided to the magistrate false. The affidavit specifically indicated: "Once arriving and officers started processing the scene, a bottle containing a quantity of a white rock like substance believed to be crack cocaine and a razor blade with a white residue on it was observed in plain view in a bedroom of the residence." (Search Warrant Affidavit, Defendant's Exhibit 11; R. 308-313). The affidavit does not specify the pill bottle was found on top of the dresser. It merely indicates it was found in plain view in the bedroom. As a result, even if the officer saw the pill bottle on the floor or in some other location in the bedroom and subsequently moved it to the dresser to obtain better pictures, it does not render the affidavit false. No testimony or evidence indicates the bottle was not found in plain view in the bedroom, even if the photographs

and argument of counsel regarding their order are sufficient to show the bottle was not found on the dresser.

Even if the statement in the Affidavit that “a bottle containing a quantity of a white rock like substance believed to be crack cocaine and a razor blade with a white residue on it was observed in plain view in a bedroom of the residence” is false in the sense the pill bottle was not seen in plain view, the removal of the fact it was found in plain view does not eliminate probable cause. The Affidavit specifically explained the officers were present at Appellant’s house responding to a call regarding a break in and the theft of \$7,000.00 in cash. The Affidavit further established the officers started processing the scene, and it was in processing the crime scene they located the drugs. (Search Warrant Affidavit, Defendant’s Exhibit 11; R. 308-313). There is no contention the officers were not entitled to enter the bedroom to process the scene pursuant to Appellant’s report of a burglary. As a result, whether the drugs were found in plain view, or were found anywhere in the bedroom pursuant to the processing of the scene as a result of the call to the scene regarding a burglary, the magistrate had probable cause to issue the search warrant.

Finally, even if the search warrant is deemed invalid, the officers could search the property and seize the drugs pursuant to the consent granted by Appellant when he called asking for officers to respond to his residence to investigate a burglary. “Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. These exceptions include the following: . . . (6) consent” State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266, (2012) (internal citation and quotation marks omitted). Here Appellant called officers to his house to conduct an investigation

into a burglary. It is clear the officers would have to process the scene, including the bedroom, in order to investigate the burglary. Appellant placed no limitation on the consent he gave officers to enter his property and investigate the burglary. As a result, the search and seizure of the drugs was proper even absent a warrant supported by probable cause.

Accordingly, the trial court did not err in concluding Appellant failed to demonstrate any false statement in the Affidavit and in denying Appellant's motion to suppress the drugs seized as a result of the search warrant.

IV. The trial court did not err in suppressing Appellant's knowing and voluntary statement.

Appellant contends the trial court erred in admitting Appellant's statement to Captain Dennis regarding the drugs found in Appellant's bedroom. He contends the trial court did not properly analyze the facts presented under a totality of the circumstances. Further, he maintains there is no credible evidence Miranda⁶ was given to Appellant, and no evidence Appellant gave a statement. The facts presented at the Jackson v. Denno⁷ hearing completely belie the arguments presented by Appellant.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The circuit court must examine the totality of circumstances surrounding the statement and determine whether the State has carried its burden of proving the statement was given voluntarily. State v. Miller, 375 S.C. 370, 382, 652 S.E.2d 444, 450 (Ct. App. 2007). The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). When reviewing a trial court's ruling concerning voluntariness, the appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda. In order to

⁶ Miranda v. Arizona, 384 U.S. 436 (1966).

⁷ Jackson v. Denno, 378 U.S. 368 (1964).

introduce into evidence a confession, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and, if the result of custodial interrogation, was taken in compliance with Miranda v. Arizona, 384 U.S. 436 (1966). See State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). "The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

In Miranda v. Arizona, the United States Supreme Court (USSC) created procedural safeguards to protect an individual's right against compelled self-incrimination, holding:

[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. 436, 478–79. Failure to comply with these constitutional safeguards renders the person's statements inadmissible against that person. Id. The USSC has

embraced a flexible approach regarding Miranda warnings whereby courts consider the totality of the circumstances. See Wyrick v. Fields, 459 U.S. 42, 47-49 (1982).

In the instant case, the trial court conducted a Jackson v. Denno hearing outside the presence of the jury. (T.111; R.96). The State called Captain Dennis to testify regarding the statement given by Appellant. Captain Dennis indicated he arrived to the scene, was briefed about the drugs, and then spoke with Appellant. At the time, Appellant was handcuffed and there is no contention he was not in custody. (T.112; R. 97).

Captain Dennis indicated he provided Appellant with his Miranda warnings. He testified he told Appellant:

He was advised that he had the right to remain silent. That anything you say or did could be used against him in a court of law. That he had the right to an attorney, to have him or her present with him during any type of questioning. He also was advised if he did not have any money for questioning, that the Court would provide an attorney to him without cost to him. I always stop at that point and advise, you know, at some point they could possibly end up paying \$40.00 dollars or whatever later on down the road for an attorney if they so desire to get one. And then the last thing that I advise them is, is that anytime during the questioning if they don't want to answer any more questions, they can say Robert, I don't want to talk to you anymore until I talk with my attorney.

(T.113-114; R. 98-99). Captain Dennis asked Appellant if he understood his rights and Appellant indicated he did. Appellant then indicated he wished to talk with Captain Dennis about the drugs in the pill bottle found in the bedroom. (T.114; R. 99).

Captain Dennis testified Appellant did not appear to have any difficulty understanding the rights read to him. He further explained Appellant did not appear

intoxicated or otherwise unable to understand his rights. (T.114-115; R. 99-100). Captain Dennis indicated Appellant voluntarily spoke with him about the drugs. (T.115; R. 100).

Captain Dennis then testified:

I asked him, I said, you know, what about the drugs that we found in your room. And he was like, Man, I forgot about those. And I said, Well, how could you forget about something like that. And he said, well, he said, whenever I called 911 the dispatcher told us, you know, don't touch anything, don't go back in the house, wait for law enforcement. And he said, that's what I did. So we, you know, during that time we just pretty much continued to talk kind of back and forth.

(T.115; R. 100). Captain Dennis then explained the search warrant to Appellant. Appellant also indicated the drugs that would be found would be crack cocaine. (T.116; R. 101).

Appellant did not testify or put up evidence at the Jackson v. Denno hearing. After the hearing, the trial court allowed both parties to present argument regarding the statement. The trial court found Miranda was properly read and the statement given was voluntary. (T.123; R. 108).

While Appellant's counsel may have a different opinion regarding the evidence and may wish this Court agree with his evidence, this Court is not to reweigh the evidence but only to determine whether there is evidence to support the trial court's conclusion the statement was knowing and voluntary and was given after the appropriate warnings were read. Captain Dennis' testimony established Miranda warnings were read prior to the statement, and Appellant voluntarily talked with Captain Dennis about the drugs in the pill bottle. Any issues regarding whether a report was created or the exact

timing of the questioning inure to the weight to be given the evidence by the jury, not its admissibility.

Accordingly, the trial court's decision the statement was knowingly and voluntarily made is supported by the evidence presented at the Jackson v. Denno hearing, and the admission of the statement should be affirmed.

CONCLUSION

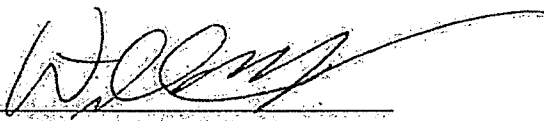
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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December 2, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002358

The State,

Respondent,

vs.

Tooby Alexander Trapp,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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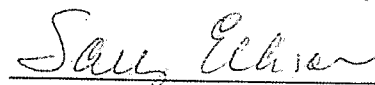
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 2nd day of December, 2015.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

FINAL REPLY BRIEF

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ARGUMENT

In her brief, the Respondent asserts some positions which are inconsistent with the record. The Appellant seeks to clarify those issues to comport with the record.

I. The trial court erred in admitting the drugs into evidence as the Respondent failed to establish a strict chain of custody. This issue was preserved for review by this appellate court and the Appellant did not waive any objections to the admission of this drug evidence.

The trial court admitted drug evidence into evidence over the repeated objections of the Appellant; the Appellant challenged the evidence for tampering. "A party offering fungible items, such as drugs, as evidence must establish a chain of custody as far as practicable," because fungible evidence can be easily tampered with and manipulated. *State v. Sweet*, 374 S.C. 1, 647 S.E.2d 202 (S.C. 2007).

A decision regarding the admissibility of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006). This abuse occurs when the trial court lacks either evidentiary support for its decision or the decision is controlled by an error of law. See, *Pagan*. Our Supreme Court held in *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) that 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 the investigator (Bouknight) who received the drugs from the first investigator and handled the drugs thereafter, or either of the two lab technicians (Kinard and Crooks) that received and handled the drugs from Bouknight testified in this case about the chain of custody and their handling of the drugs. The only true chain witness who testified at trial was the chemist Ms. Black and she testified she had no knowledge as to 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 separate unsealed envelopes and that multiple items that were in the only one envelope collected by Investigator Bouknight at the scene were not received or tested by her in the best evidence kit; Ms. Black's testimony confirms that not only was the original one envelope from the scene not sealed, but also confirms that some unknown person added and took away items from the original evidence collected at the scene and confirmed that some unknown person took and added things from the sealed envelope after it left SLED's custody. [R. p. 268, line 25 - p. 272, line 4.]

Counsel for the Respondent failed to respond in its brief to the effect on the chain

of custody when someone added and who took away items from the original evidence collected at the scene and the effect of when someone took and who added things from the sealed envelope after it left SLED's custody. Counsel for the Respondent failed to respond in his brief to the State's argument in court that "We don't know what happened those five days they were in the locker room. You know, somebody else could have gone in there and added something or taken something from them." [R. p. 185, lines 16 - 25.] The Appellant contends that it's the State's burden to reasonably show the manner in which the drug evidence was stored before and after testing up until trial; furthermore, the Appellant contends the above-stated comments by the State at trial confirms that the State had no knowledge about either the identities of all the parties who handled the drug evidence, nor did the State have any knowledge about the manner in which this drug evidence was handled, and nor did the State have any knowledge about the rule of law concerning fungible evidence and the need to eliminate conjecture.

The trial court suppressed a drug item (1.6) from the same best evidence kit where all of the drug evidence was placed. [R. p. 282, line 5 – p. 284, line 22.] Counsel for the Respondent failed to indicate how the suppression of Item 1.6 in the best evidence kit affected the chain of custody for the remaining items in the kit. Item 1.6 drug evidence was added to the best evidence kit after the drug evidence was seized from the residence; Item 1.6 was not evidence handed to Investigator Bouknight by Captain Dennis nor was it on the Return from the search warrant. [R. p. 232, line 13 – p. 233, line 17.] The adding of drug evidence clearly indicates that the drug evidence seized at the scene has been "changed in important respects;" and therefore the trial

court erred and abused its discretion in admitting this evidence under the determination factors stated in *Hatcher*. The State argued at trial "who cares if we tamper with it now. We need to get it to her testing it." [R. p. 256, lines 11 - 14.] It is clear that our Supreme Court in *Hatcher* cares and requires that this evidence be without any alteration, tampering, or substitution; furthermore, it is clear that the above-stated comments should never be uttered in a trial by the State as it indicates a lack of concern for criminal justice.

Counsel for the Respondent cites *South Carolina Department of Social Services v. Cochran*, 364 S.C. 621, 614 S.E.2d 642 (2005) in his argument that the courts have never held that a chain of custody rule requires every person in the chain to testify. The Appellant has never sought to challenge that long held view of establishing chain of custody evidence as far as practicable; however, the Appellant clearly states that the State in this case presented insufficient testimony to establish chain of custody so far as practicable.

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). The trial court erred in admitting this fungible chain of custody evidence because it left the identity of who handled and added to the drug evidence to conjecture and also left to conjecture the manner in which this drug evidence was handled.

Counsel for the Respondent's argument that the Appellant did not preserve this issue for review and waived his right to object to the drug evidence is without merit. The Appellant clearly stated that he was challenging the admission of the drug evidence [R. p. 187, lines 5 – 10; p. 255, lines 18 - 21.] The Appellant specifically disputed chain of custody evidence and evidence that drug evidence was in fact in his residence before

law enforcement arrived at the scene throughout the trial; the Appellant never sought to challenge that the items tested were not drugs, but the Appellant sought to challenge that he in fact possessed the drug evidence before Investigator Spreng arrived at the scene and the Appellant further sought to challenge the chain of custody thereafter.

Our Supreme Court has held that a failure to timely object does not waive an issue when further objections would have been futile. *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994). Furthermore, this appellate court has held that there is no need to repeat objections after a trial court overrules the objection. *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 883 (Ct. App. 1995). In *McDaniel* the court stated that "as long as the judge had an opportunity to rule on an issue, and did so, it not incumbent upon defense counsel to harass the judge by parading the issue before him again.

In the Appellant's case, the trial court had already ruled before that it would allow the drugs into evidence after numerous objections. [R. p. 254, lines 10 – 17.] The Appellant in addition to his previous objections on the record to the admission of the chain evidence was merely pointing out that the State had also not presented an additional witness to allow the admission of the drugs into evidence. [R. p. 254, line 18 – p. 256, line 4.] The trial court in this case had an opportunity to rule on the issue and did so by overruling the Appellant's objections numerous times. [R. p. 54, line 13 – p. 94, line 20; p. 180, line 15 – p. 208, line 14.]

The trial court abused its discretion in admitting drug evidence seized from the Appellant's residence 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 demonstrate the manner in which the drug evidence was handled. The Appellant did not waive his right to challenge the admission of such drug evidence and timely objected throughout the trial in this case.

II. The trial court erred in admitting testimonial evidence in violation of the Appellant's right of confrontation and this issue was preserved.

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 trial court erred in admitting Form B chain of custody form into evidence and erred in allowing testimonial evidence about the search warrant, the Evidence Log In Form, the Form B, and the SLED Analysis Request Form into evidence at trial. The Appellant contends that the above-listed items met the criteria for all three factors under the *Davis* test and objected to the admission of all of the above-mentioned items throughout the trial. [R. p. 189, line 13 – p. 208, line 14; p. 273, line 20 – p. 275, line 20; p. 276, line 7 – p. 284, line 22; p. 292, line 21 – p. 296, line 4.] In addition, what makes these documents testimonial in nature is the trial court's reliance on these documents and the fact that without these testimonial documents the State would have no chain of custody evidence testimony regarding the identity of a handler of the drug evidence either before or after the drug evidence was tested at SLED; these testimonial documents still failed to answer or describe the manner in which the drug evidence was handled by either Investigator Spreng or Investigator Bouknight or Patricia Crooks or Selena Kinard.

Counsel for the Respondent erroneously asserts that the *Crawford* issue was not preserved for review and that the Appellant's *Crawford* objection was not made during trial; these arguments are without merit as the trial court returned the jury to the jury room each time the parties argued *Crawford* issues. [R. p. 275, line 22 – p. 280, line

20.]

The trial court erred and abused its discretion in admitting testimonial evidence from the search warrant, the Evidence Log In Form, the Form B (Rule 6) and the SLED Drug Analysis Request Form. The primary purpose of the above listed documents at the Appellant's trial was to establish and prove facts concerning where drug evidence would likely be found, to 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. All of the documents 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 death. Neither Investigator Spreng or the Honorable Ron Halfacre or Patricia Crooks or Selena Kinard were called to testified at trial although they were available witnesses and the Appellant did not have an opportunity to cross-examine any of these witnesses before the admission of their testimonial evidence. The assertions by Counsel for the Respondent that these documents were merely "to provide testimony regarding the progress and process of the investigation" is not plausible considering that the State had no other way of proving chain of custody without these documents or proving probable cause to search the residence where this incident occurred.

The trial court's error was an abuse of discretion which resulted in numerous impermissible testimonial evidence being presented to the jury. This error was not harmless, and was extremely prejudicial to the Appellant. The prejudice from the

admission of this evidence resulted in the Appellant's conviction.

III. The trial court erred in admitting evidence of the search warrant without a *Franks v. Delaware* hearing.

The United States Supreme Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request." *Franks v. Delaware*, 438 U.S. 154 (1978).

The Appellant requested a hearing on the admissibility of the search warrant pursuant to *Franks v. Delaware* and objected to the State's use of Captain Dennis for purpose of this hearing. [R. p. 6, line 21 – p. 13, line 11.] It was clear from his testimony that Captain Dennis had no personal knowledge about the search warrant or about what information was communicated to the magistrate court judge (Judge Halfacre). [R. p. 20, line 24 – p. 23, line 14; p. 68, lines 3 – 10; p. 227, line 5 – p. 228, line 6.] The Appellant was essentially denied a hearing on the search warrant because none of the witnesses who were involved in the determination of the probable cause for the search warrant testified at a pretrial hearing or at the trial. The trial court erred by allowing Captain Dennis to provide testimonial evidence as to all the facts regarding the search warrant even though Captain Dennis acknowledged that he played no role in the search warrant or in the communications between Investigator Spreng, Investigator Bouknight, and Judge Halfacre regarding probable cause; Captain Dennis also acknowledged that Investigator Bouknight brought the search warrant to the residence just shortly after he arrived at the scene. The Appellant made a preliminary showing of

the falsity of the statement because initial photos of the ransacked bedroom taken before law enforcement entered the bedroom and before Captain Dennis arrived showed a dresser which contained no pill bottle or razor. [R. p. 17, line 13 – p. 18, line 1; p. 41, lines 4 - 15.] When the Appellant made that preliminary showing, he was entitled to a hearing on the falsity of the warrant with the witnesses who participated in obtaining the search warrant; however, the only information that Captain Dennis knew was that the search warrant was based solely on the alleged pill bottle on the dresser; [R. p. 20, line 24 – p. 21, line 3; p. 23, lines 10 - 14.] Captain Dennis was not qualified to testify about the search warrant for purposes of a *Franks v. Delaware* hearing and the trial court erred in relying upon its determination as to the admissibility of the search warrant.

Counsel for the Respondent's argument that the Appellant consented to the search of the residence is without merit. There is nothing in the record that indicates that the Appellant consented to a search of the residence nor did the State argue consent in the discovery and admission of the drug evidence. The Appellant contends that a lack of consent to search the residence is clear and evident when it is considered that law enforcement obtained a search warrant; the affidavit in the search warrant does not indicate that the Appellant consented to a search of the residence and a search warrant would not have been necessary if the Appellant in fact consented to a search of the residence.

The trial court erred in failing to grant a hearing on the admissibility of the search warrant. The State offered an unqualified witness to provide testimonial evidence regarding the search warrant over the objections of the Appellant and the trial court

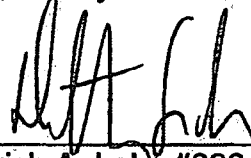
erred by allowing this type of testimonial evidence. The trial court's error was an abuse of discretion which resulted in impermissible testimonial evidence being presented to the jury. This error was not harmless, and the prejudice from the admission of this evidence resulted in the Appellant's conviction.

CONCLUSION

For all of the above-stated reasons and the reasons stated in the Appellant's primary brief, this court should reverse the result below and remand with instructions to suppress all of the drug evidence due to a defective chain of custody, to exclude all testimonial evidence regarding the Form B chain of custody form, the search warrant, the Evidence Log In Form, the Form B, and the SLED Analysis Request Form, and to suppress the search warrant and the fruits of that search warrant under the *Franks v. Delaware* analysis indicating that upon setting aside the false statement that a pill bottle and razor were located in plain view on the dresser that the affidavits remaining content is insufficient to establish probable cause.

November 27, 2015

Respectfully submitted,



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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

Indictment No.: 2012-GS-36-0267

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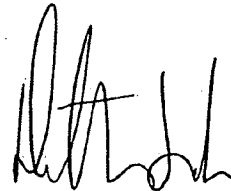
The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Appellant.

CERTIFICATE OF COMPLIANCE

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



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

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings (st)
CLERK

cc: Alan McCrory Wilson, Esquire
David Matthew Stumbo, Esquire
The Honorable Eugene C. Griffith, Jr.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Toaby Alexander Trapp, Appellant.

Appellate Case No. 2014-002358

Appeal From Newberry County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5487
Heard December 6, 2016 – Filed May 24, 2017

AFFIRMED

Dietrich André Lake, of The Lake Law Firm, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General William M. Blicht, Jr., both of
Columbia; and Solicitor David Matthew Stumbo, of
Greenwood, for Respondent.

WILLIAMS, J.: In this criminal appeal, Toaby Trapp appeals his conviction for trafficking crack cocaine, arguing the circuit court erred in (1) admitting drug evidence when the State failed to establish a strict chain of custody; (2) admitting testimonial evidence in violation of the Confrontation Clause; (3) failing to grant a *Franks v. Delaware*¹ hearing and subsequently refusing to suppress evidence

¹ 438 U.S. 154 (1978).

obtained as a result of the invalid search warrant; and (4) admitting Trapp's alleged confession without a *Jackson v. Denno*² hearing when the totality of circumstances demonstrated Trapp's statements were involuntary and thus inadmissible. We affirm.

FACTS

On October 8, 2011, Trapp called police when he discovered someone had burglarized his home and stole \$7,000 in cash from a shoebox in his bedroom closet. During the burglary investigation, crack cocaine was discovered in Trapp's bedroom. A search warrant was executed and other contraband was seized from his home. Trapp was not arrested that evening but was eventually charged and later indicted by a grand jury for trafficking crack cocaine.

A two-day jury trial was conducted from October 30–31, 2014. Prior to trial, Trapp moved to suppress the drug evidence based upon an insufficient chain of custody and an invalid search warrant. Trapp also moved to suppress his alleged confession pursuant to *Jackson v. Denno*. At the conclusion of the pre-trial hearing, Trapp moved to continue the trial. After hearing arguments from both parties on the respective issues, the circuit court denied all of Trapp's motions.

At trial, the State first called Deputy Brad Epps of the Newberry County sheriff's department to testify regarding his involvement that evening. Deputy Epps was the first officer to respond to the scene. Deputy Epps stated he immediately called Investigator Robert Spreng once he confirmed Trapp's home had been burglarized. Once Investigator Spreng arrived, Deputy Epps recollected that Investigator Spreng took photographs of the incident location and assisted in documenting evidence. During Investigator Spreng's investigation, Deputy Epps followed him into Trapp's bedroom where they noticed a large amount of crack cocaine in a pill bottle. Deputy Epps confirmed he personally observed the pill bottle but admitted he failed to notate this observation in his police report. According to Deputy Epps, the details in his report pertained only to the burglary.

The State then called Captain Robert Dennis to testify. Captain Dennis stated he arrived last on the scene after being contacted by Investigator Spreng. Captain Dennis testified he arrived at Trapp's residence "maybe five or six minutes" before

² 378 U.S. 368 (1964).

Investigator Nick Bouknight returned with a search warrant.³ According to Captain Dennis, he entered Trapp's residence and observed the pill bottle on Trapp's bedroom dresser. After searching the remainder of Trapp's home, Captain Dennis questioned Trapp. Captain Dennis stated Trapp was handcuffed at that time as part of their "investigative detention." According to Captain Dennis, he read Trapp his *Miranda* rights, and Trapp agreed to waive his rights. Captain Dennis then recounted that Trapp admitted there was crack in the pill bottle but stated he had forgotten it was in his bedroom and was merely heeding the police dispatcher's instructions not to re-enter his house or disturb its contents prior to police responding to the burglary.

After talking to Trapp, Captain Dennis stated he signed off on the return to the search warrant, logged in the time he received the search warrant, and personally documented the items seized from the residence. Captain Dennis affirmed that Investigator Bouknight, as the narcotics officer for the sheriff's department, personally seized and handled all the drug evidence at Trapp's residence in the presence of both Investigator Spreng and himself. Specifically, Captain Dennis recounted the following inventory was listed in the return and taken pursuant to the search warrant: (1) pictures of the incident location taken by Investigator Spreng; (2) two plastic bags containing a white, solid substance located on the floor in front of the dresser in the master bedroom; (2) a pill bottle on the master bedroom dresser containing a white, solid substance; (3) a CD case scale; (4) a spoon and razor blade with residue; and (5) a straw.

Trapp objected to any testimony from Captain Dennis regarding Investigator Bouknight's role in the chain of custody for the drug evidence.⁴ Outside the presence of the jury, Captain Dennis proffered testimony regarding office policy for the collection and storage of drug evidence as well as its submission to the South Carolina Law Enforcement Division (SLED). After extensive arguments regarding the propriety of Captain Dennis's testimony, the court stated, "And I think the State barely gets by it, but they get by it and it gives [Trapp] the

³ Investigator Bouknight's affidavit contained six reasons in support of the search warrant, namely that "a bottle containing a quantity of white rock like substance [sic] believed to be crack cocaine and a razor blade with white residue on it was observed in plain view in a bedroom of the residence."

⁴ Investigator Bouknight passed away prior to trial.

opportunity to argue your weight or credibility of the chain but not admissibility. I'm going to allow it."

Captain Dennis then acknowledged that Investigator Bouknight was also the narcotics evidence custodian, and as part of his duties as custodian, he completed an evidence log-in form and a Form B/Rule 6 form (Form B) to certify the chain of physical custody of the drug evidence. Captain Dennis stated the Form B was produced by SLED and certifies which officer seized the evidence, the type of arrest, and from whom the evidence was seized. Captain Dennis then enumerated the items listed by Investigator Bouknight on the Form B for transport to SLED as follows: "(1) plastic bag containing a quantity of cookie-like substance; (2) plastic baggie containing a quantity of white cookie substance; (3) orange pill bottle containing a quantity of white cookie substance; (4) scale containing a quantity of white residue on it; (5) spoon with a quantity of white residue on it; (6) quantity of white residue." Captain Dennis went on to read Bouknight's affirmation that he received this evidence on October 9, 2011, and delivered "the above-described substance or container to SLED in substantially the same condition as when [he] received it" on October 21, 2011. When questioned by Trapp, Captain Dennis could not explain the discrepancy in items on the return to the search warrant and the Form B, stating he had no knowledge what happened to the razor blade and straw that were seized from Trapp's residence but were not submitted to SLED for testing.

In addition to Deputy Epps and Captain Dennis,⁵ the State called Lynn Black, a forensic chemist with SLED, who testified regarding the chain of custody from the sheriff's department to SLED. Black stated Selena Kinard, a forensic technician at SLED, received drug evidence from Investigator Bouknight on October 21, 2011, logged in the evidence, placed a bar code on it for identification within the lab, and immediately transferred it to SLED's secure storage room. Black also testified SLED's policy was to return evidence if it appeared to have been tampered with prior to delivery.

On October 25, 2011, Patricia Crooks, a forensic technician at SLED, transferred the evidence from the secured storage room to Black for testing. Black stated that within the best evidence kit were four unsealed manila envelopes and two plastic

⁵ Investigator Spreng was no longer employed with the sheriff's department at the time of trial, and therefore, was not present at trial.

Ziploc bags.⁶ Black affirmed that she had no knowledge of what happened to the drug evidence between its seizure at Trapp's residence and its delivery to SLED. After she tested the substances, Black testified she placed the items into another plastic bag that she heat-sealed, bar-coded, dated, and initialed.

Trapp did not present a case or testify at trial. The jury found Trapp guilty of trafficking crack cocaine. Trapp moved for judgment notwithstanding the verdict (JNOV) and a new trial, and the circuit court denied both of these motions. Because it was Trapp's third offense, the circuit court sentenced Trapp to a mandatory minimum of twenty-five years imprisonment and issued a mandatory fine of \$50,000. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Therefore, an appellate court "is bound by the [circuit] court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829.

"The admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion." *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Chain of Custody

⁶ According to the SLED lab report, of the four manila envelopes in the Best Evidence Kit, two envelopes contained plastic bags holding a "rock substance," one envelope contained the pill bottle, and one envelope contained a digital scale with a white residue on it. SLED also received a Ziploc bag containing a silver metal spoon with a white residue on it and a Ziploc bag containing a "rock substance." When questioned by Trapp as to whether she tested any straws or razor blades—two items that were listed on the return to the search warrant but not in the SLED report—she stated she had no knowledge of these items.

Trapp first contends the circuit court erred in admitting the drug evidence because the State failed to establish a strict chain of custody. We disagree.

As an initial matter, the State argues Trapp waived any argument regarding the sufficiency of the chain of custody because Trapp did not contemporaneously object when the forensic chemist, Lynn Black, presented her results at trial. Because the State is required to establish the chain of custody prior to admitting drug evidence, the State contends Trapp's failure to object to the results of the SLED analysis effectively waived any complaints on appeal regarding the chain of custody and the ensuing admission of the drug evidence.

"To [properly] preserve an issue for review[,] there must be a contemporaneous objection that is ruled upon by the [circuit] court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). However, once the court has an opportunity to rule on an issue, and does so, it is unnecessary for trial counsel to continually renew the same objection. See *Bennett v. State*, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (finding it unnecessary for trial counsel to renew his objection to continuing objectionable testimony when the circuit court had already ruled on the issue).

During trial, Trapp challenged the admission of the drug evidence based upon an incomplete chain of custody on several occasions prior to Black's testimony. Specifically, Trapp objected to the State's line of questioning with Captain Dennis, arguing the State was trying to "backdoor" chain of custody evidence for the drugs through Captain Dennis because Investigator Bouknight had passed away. Trapp argued Investigator Bouknight was the only individual who could testify as to the condition of the drugs prior to their delivery to SLED, and without Bouknight's testimony, the chain was incomplete. The circuit court acknowledged Trapp's objection, stating, "All right. All right. Enough, I understand your argument." When the State then asked the court, "Didn't in his opening [Trapp say] we're not going to contest the fact that it's crack cocaine?," Trapp responded that agreeing to testimony about the type of drug that was seized from Trapp's home was a "totally different argument" from the chain of custody argument before the court. Further, during Black's testimony, Trapp again reiterated that he was not objecting to the identification of the drugs as crack cocaine; rather, he was objecting to the "admissibility of the actual drugs into evidence" based upon an incomplete chain of custody. We find these objections, and the court's rulings on the objections, to sufficiently preserve this issue for this court's review.

On the merits, we find the State presented sufficient evidence to reasonably demonstrate a complete chain of custody. A party offering into evidence fungible

items such as drugs or blood samples must establish a complete chain of custody as far as practicable. *Benton v. Pellum*, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957). When an analyzed substance has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. *Id.* at 33–34, 100 S.E.2d at 537. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, the circuit court does not abuse its discretion in admitting the evidence absent proof of tampering, bad faith, or ill-motive. *State v. Taylor*, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004).

"Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *State v. Sweet*, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007). "Whe[n] other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id.* "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011).

Considering these factors, we find the circuit court did not abuse its discretion in finding the State established a sufficient chain of custody. Specifically, Captain Dennis was present at the incident location and observed all the items that were seized from Trapp's residence. Further, Captain Dennis signed the return to the search warrant and testified under oath that Investigator Bouknight collected these items at the scene and placed them in manila envelopes for transport to the secured evidence locker at the sheriff's department. Captain Dennis went on to testify how drug evidence was routinely handled at the sheriff's department, stating that, as evidence custodian, Investigator Bouknight would have placed the items inside a best evidence kit prior to storing them in a secure evidence locker, to which only Bouknight had access. Although Bouknight was deceased at the time of trial, the State presented documentation that Bouknight transported the seized items to SLED.

We also find support for our conclusion by reference to Black's testimony. She stated the items were still inside manila envelopes when she removed them from the best evidence kit for testing. The items in the SLED report matched the items that Bouknight certified on the Form B that he delivered to SLED. We find this is evidence from which a juror could reasonably conclude the item was what the State purported it to be. *See id.* Although we are aware that two of the items—a straw and one razor blade—were documented by Bouknight on the evidence log-in

form but not delivered to SLED, we find the care given to these pieces of evidence goes only to the weight of the evidence as opposed to its admissibility. *See State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) ("Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete. . . . [w]here the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence. . . . [W]here there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility." (citations omitted)).

Once Bouknight delivered the evidence to SLED, Black testified regarding the chain of custody within SLED and identified and described each item she tested. Black confirmed that, after she tested all of the substances she received, she placed the items into another plastic bag, which she then heat-sealed, bar-coded, dated, and initialed. When the State presented this bag to her at trial, she identified the bag and testified that it had remained in the same condition as when she sealed it at SLED. Ben Chapman, the evidence custodian at the time of trial, testified he received the bag containing the drug evidence when he became custodian and transported it to trial in the same packaging and in the same condition as it was when given to the sheriff's department from SLED.

Based on the foregoing, we find the State identified every individual that handled the evidence. We recognize Investigator Bouknight was deceased at the time of trial, but we find Captain Dennis's involvement the night of the incident as well as his supervisory role over Investigator Bouknight sufficiently connected any missing links that Bouknight's testimony would have provided. Further, precedent does not require the court to account for every minute of the custody and control of the evidence. Rather, we must view the evidence and ascertain whether the State identified the individuals involved in handling the evidence, reasonably demonstrated that the evidence was handled properly, and established that the evidence seized was the same evidence tested. Despite the less-than-perfect chain of custody, we find the supreme court's reasoning in *Hatcher* to be instructive:

Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: ' . . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" "If upon the consideration of such

factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence."

392 S.C. at 94–95, 708 S.E.2d at 754–55 (citations omitted). Based on the aforementioned circumstances in this case, we find the circuit court did not abuse its discretion in admitting the drug evidence. Therefore, we affirm the circuit court on this issue.

II. Testimonial Evidence

Trapp argues the circuit court erred in admitting testimonial evidence in violation of his confrontation rights. We disagree.

As an initial matter, the State argues Trapp failed to lodge the requisite objection to the admission of these documents and testimony, and therefore, we should not address the merits of this issue. We disagree and find Trapp contested the admission of the search warrant, the evidence log-in form, the Form B, and the SLED analysis request as well as testimony from Investigator Spreng and Investigator Bouknight at trial. Although the State seems to take issue with Trapp's failure to expressly state "Confrontation Clause," we hold Trapp properly articulated his objections to the circuit court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (per curiam) ("A party need not use the exact name of a legal doctrine . . . to preserve it, but it must be clear that the argument has been presented on that ground").

Specifically, Trapp argued against the admission of the Form B based on Investigator's Bouknight's unavailability at trial, stating, "Your Honor, but that also goes into play of right of confrontation that we get an opportunity to confront the witness about the voracity [sic] of that particular document and statement." Later at trial when the State sought to introduce the testimony of Ben Chapman, the current evidence custodian for the sheriff's department, Trapp also objected, stating, "And the problem is I have no right or my client has no right to confront any of this. I mean he basically has no right, has not been afforded the right to confront any of the witnesses that this information has come in on." Accordingly, we find this issue preserved for our review.

On the merits, Trapp contests the admission of the evidence log-in form, the Form B, and a SLED drug analysis request form, stating Investigator Bouknight prepared these forms and they were testimonial in nature. Because Trapp could not cross-examine Bouknight regarding these documents, Trapp claims these documents are

prohibited because they fail the *Crawford*⁷ test. Furthermore, Trapp contends the circuit court erred when it permitted Captain Dennis to testify about their contents because he had no personal knowledge about these documents. In response, the State argues the Confrontation Clause does not apply because much of the objectionable testimony and exhibits were admitted during pre-trial suppression hearings and, thus, do not trigger the Confrontation Clause. In the alternative, the State claims the evidence is nontestimonial and, thus, does not trigger the Confrontation Clause because the "primary purpose" for the creation of these documents was to determine "the next steps to be taken during the ongoing investigation."

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This bedrock procedural guarantee is applicable to the states under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

The United States Supreme Court has held the Confrontation Clause prohibits the admission of out-of-court testimonial statements of a witness unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68. The *Crawford* Court stated the "core class of testimonial statements" includes: (1) "ex parte in-court testimony or its functional equivalent;" (2) "extrajudicial statements contained in formalized testimonial materials;" (3) "statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial;" and (4) "statements taken by police officers in the course of interrogations." *State v. Ladner*, 373 S.C. 103, 112, 644 S.E.2d 684, 688–89 (2007) (citing *Crawford*, 541 U.S. at 51–52).

The South Carolina Supreme Court has recognized the Sixth Amendment is not implicated by nontestimonial hearsay. *See id.* at 113, 644 S.E.2d at 689 (noting the Sixth Amendment does not apply when testimonial hearsay is not at issue). "However, the fact that the Sixth Amendment is not implicated by nontestimonial hearsay does not mandate the evidence be admitted." *State v. Garner*, 389 S.C. 61, 66, 697 S.E.2d 615, 618 (Ct. App. 2010).

Regarding the applicability of the Confrontation Clause in pre-trial settings, we acknowledge the State's citation to case law and the notion that the Sixth Amendment's protection is one that attaches during a trial. However, the State also

⁷ *Crawford v. Washington*, 541 U.S. 36 (2004).

introduced the objectionable evidence at trial and used it to establish the State's chain of custody. Because this evidence was considered not only at the pre-trial hearings but at Trapp's trial as well, we are not swayed by the State's argument in this respect.

We find the dispositive question in the resolution of this issue hinges on whether Bouknight's statements and the evidence in controversy were testimonial or nontestimonial. As our courts have reiterated, the Sixth Amendment's protections only attach when hearsay is testimonial. See *Ladner*, 373 S.C. at 113, 644 S.E.2d at 689. Under the primary purpose analysis required by the Sixth Amendment's Confrontation Clause, when the out-of-court statement's primary purpose is to serve as evidence or "an out-of-court substitute for trial testimony," the statement is considered testimonial. *State v. Brockmeyer*, 406 S.C. 324, 342, 751 S.E.2d 645, 654 (2013) (citing *Bullcoming v. N.M.*, 564 U.S. 647, 670 (2011) (Sotomayor, J., concurring)). However, "[w]he[n] no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.* at 342, 751 S.E.2d at 654–55 (first alteration in original) (quoting *Michigan v. Bryant*, 562 U.S. 344, 359 (2011)).

Reviewing these documents and the relevant case law, we find these documents are nontestimonial and, thus, do not trigger a *Crawford* Sixth Amendment analysis. Rather, we find the "primary purpose" for their creation and maintenance was to document seized evidence and attempt to accurately account for the items as they were transferred from the incident location to the sheriff's department and ultimately to SLED for testing.

In coming to this conclusion, we find these documents and their purposes are similar to evidence logs that our supreme court held were nontestimonial in nature—and, thus, not subject to the Confrontation Clause—in *State v. Brockmeyer*, 406 S.C. 324, 751 S.E.2d 645 (2013). In *Brockmeyer*, the defendant challenged certain evidence because various law enforcement personnel listed within the chain of custody logs were not present to testify at trial. 406 S.C. at 350, 751 S.E.2d at 659. Although the supreme court ruled the defendant failed to properly preserve the issue for appeal, it went on to hold "the challenged testimony referring to certain statements of other non-testifying evidence custodians in the chain-of-custody logs was admissible as a matter of state law and would not raise Confrontation Clause concerns." *Id.* at 351, 751 S.E.2d at 659.

The supreme court recounted the testimony of an evidence custodian from the sheriff's department who documented the purpose of an evidence log and stated "the chain of custody form [was] 'basically . . . keeping track of who touches it and

what happens to the evidence,' and that the custody forms and data [were] maintained in the normal course of business." *Id.* at 351, 751 S.E.2d at 660. The court then recounted the testimony of a forensic technician at SLED who testified it was "SLED's practice to maintain electronic chain-of-custody records which document every location and person that handles or touches evidence." *Id.* at 352, 751 S.E.2d at 660.

The court concluded the evidence logs were nontestimonial and were properly admitted as a business record under Rule 803(6), SCRE. *Id.* Specifically, the supreme court held as follows:

We find the facts of this case demonstrate that the evidence logs were kept as business records for the purpose of identifying and storing evidentiary items. We find the [circuit court] properly determined the chain-of-custody reports fall within the hearsay exception in Rule 803(6), SCRE, and that the evidence custodians' testimony about the chains of custody was admissible. Critical to admissibility of the chain-of-custody records here is their non-testimonial nature. Regarding the Confrontation Clause analysis, these chains of custody were not created "for the *sole purpose* of providing evidence against the defendant." Indeed, the evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their "primary purpose" is not to constitute evidence in a criminal trial. Because we find these statements are not testimonial, they are exempt from Confrontation Clause scrutiny.

Id. (citation omitted).

Similar to the supreme court in *Brockmeyer*, we conclude the evidence log-in form, the Form B, and the SLED drug analysis request form were all nontestimonial evidence. First, the Form B is the "initial custody form" and by its own language is expressly created to be a "certificate of proof of chain of physical custody or control." Black's testimony corroborates the purpose of the Form B. At trial, she testified,

The Form B is one of the documents that comes in a Best Kit that we provide, that SLED provides to law enforcement personnel and it [] kind of starts the chain-of-custody for us. . . . And then we use that information to confirm the person who brought it in and also sometimes the evidence.

Next, the evidence log-in form⁸ is a document generated by the sheriff's department and includes information such as the incident date, the officer in control of the chain of custody, the suspect, and a description of the evidence seized and transported to the sheriff's department. Last, the SLED Drug Analysis Request form is a document generated by SLED and requests information regarding the incident, the defendant, and which specimens are being submitted for examination to SLED. Considering the primary purpose behind these documents, we find they are similarly admissible pursuant to the business records exception found in Rule 803(6), SCRE. *See* Rule 803(6), SCRE ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible."). As such, we hold they do not implicate the Confrontation Clause.

Regarding the search warrant, we find that the "primary purpose" of the search warrant was to assist the police in their investigation. We are not persuaded by Trapp's argument that its primary purpose was to prove any facts necessary to establish Trapp's guilt or to be used as a substitute for trial testimony.⁹ Even if the search warrant was testimonial in nature, we hold it was properly before the court as it documented why the investigation proceeded as it did at Trapp's residence. *See Crawford*, 541 U.S. at 59 n.9 (noting the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of

⁸ The State notes the evidence log-in form was never admitted into evidence, and was only discussed by the SLED drug analyst who handled the drugs at SLED.

⁹ The parties disagree over whether the search warrant was actually admitted into evidence.

the matter asserted"); *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) ("[A]n out-of-court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." (citing *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985))).

Trapp also takes issue with Captain Dennis's testimony regarding certain facts relayed to him by Investigator Spreng. Trapp argues those statements were testimonial in nature and should have been inadmissible at trial. Trapp fails to specifically reference which testimony he finds objectionable, only citing to page and line numbers in the record. Further, we are not convinced that Captain Dennis's recollection of Investigator Spreng's testimony was intended to prove the truth of Spreng's statements; rather, we find his testimony was to document why the police proceeded as they did in their investigation. Accordingly, we affirm the circuit court's ruling on this issue.

III. Search Warrant

Trapp next contends the circuit court erred in failing to grant a *Franks v. Delaware* hearing and subsequently refusing to suppress evidence obtained as a result of the invalid search warrant. We disagree.

"A search warrant may [be issued] only upon a finding of probable cause." *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). Search warrants may be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant." S.C. Code Ann. § 17-13-140 (2014). "A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014).

"In *Franks v. Delaware*, the United States Supreme Court held the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). The following two-part test is used to determine whether a hearing is warranted:

- (1) To mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of

reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and

(2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Id. at 554, 524 S.E.2d at 397 (quoting *Franks*, 438 U.S. at 171–72). Additionally, the defendant must "establish the falsity by a preponderance of the evidence." *State v. Robinson*, 415 S.C. 600, 606, 785 S.E.2d 335, 358 (2016).

Trapp contends the basis for issuing the search warrant was the statement in Investigator Bouknight's affidavit that "a bottle containing a quantity of white rock like substance believed to be crack cocaine and a razor blade with white residue on it was observed in plain view in a bedroom of the residence." According to Trapp, the pictures of Trapp's bedroom clearly show that a pill bottle was not on his dresser when police first entered his residence to investigate the burglary and it was not until *after* the police returned with a search warrant that the pill bottle appeared in pictures. As a result, Trapp contends this statement in the affidavit was false and entitled him to a *Franks* hearing.

We find the apparent discrepancies in the photos troublesome; however, we find the magistrate properly issued the search warrant. First, there was no testimony that conclusively established the timing of the photographs. The State argues it "is just as likely the photographs with the pill bottle on the dresser were taken before the subsequent pictures after the evidence was seized by the officers." While we are not overly persuaded by the State's argument, we give weight to the fact that both Deputy Epps and Captain Dennis testified they observed the pill bottle on the dresser in the master bedroom when they first entered the house. Further, the parties focus on the location of the pill bottle on the dresser, but the actual wording of the affidavit omits any reference to the dresser, instead stating a pill bottle was observed in plain view in a bedroom of the residence. When the magistrate decided to issue the search warrant, he was not privy to any photographs, so we are not convinced the magistrate relied on any "false statements" in issuing the search warrant. As the affidavit never specified the precise location of the pill bottle, we find the deciding factor in the execution of the warrant to be whether the drugs were in plain view.

Even assuming the statement that the pill bottle was in plain view was false, the officers still could have legally found the drug evidence and, thus, established probable cause for a warrantless search. "Warrantless searches are per se unreasonable unless an exception to the warrant requirement is presented." *State v. Bailey*, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981). "The burden is upon the State to justify the warrantless search." *Id.* Our courts have specifically recognized several exceptions to the warrant requirement, including the following: "(1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, and (6) consent." *State v. Morris*, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015) (quoting *State v. Bailey*, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981)).

The affidavit stated the police were at Trapp's residence as a result of Trapp's report of a burglary and located the drugs when the police were processing the scene. We also note the State's argument, and the circuit court's discussion, of consent as an exception to a warrantless search. Even if this court were to find the search warrant invalid, the seizure would still be valid based upon Trapp's consent for police to be on his premises. Trapp called police to report a burglary in his home, specifically telling the police that \$7,000 in cash was stolen from a shoebox in his master bedroom closet. As a result, the police entered his home to investigate the burglary, and in so doing, they necessarily processed the scene, including his bedroom. Trapp presented no evidence that he limited the consent he gave to the police in their investigation. As a result, the State established the police had probable cause to conduct a warrantless search based on Trapp's consent to be inside his home. *See Bailey*, 276 S.C. at 36, 274 S.E.2d at 915 (finding warrantless search of residence was proper based on the consent exception to the warrant requirement when resident had authority to consent to the search of the premises).

Based on the foregoing, we find the circuit court did not err in failing to grant a *Franks v. Delaware* hearing.¹⁰

IV. Confession

¹⁰ Additionally, we note the circuit court engaged in an extensive in-camera colloquy, arguably akin to a *Franks* hearing, with both parties that spans almost forty pages of the record. The court permitted counsel for both Trapp and the State to thoroughly argue both positions, asked counsel numerous questions, and received a proffer from Captain Dennis prior to ruling upon whether the statement in the affidavit was false.

Last, Trapp argues the circuit court erred in admitting his alleged confession into evidence. We disagree.

"Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the [circuit court] conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish circumstances under which it was gained." *State v. Creech*, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct. App. 1993). A criminal defendant is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury. *Jackson*, 378 U.S. at 376.

When conflicting evidence exists as to whether a defendant's statement is voluntary, the circuit court must determine this factual issue in the first instance by the preponderance of the evidence. *State v. Howard*, 296 S.C. 481, 492, 374 S.E.2d 284, 290 (1988). In its review, the circuit court "must examine the totality of the circumstances surrounding the statement" and decide whether the State has carried its burden in proving the statement was knowingly, intelligibly, and voluntarily given. *State v. Miller*, 375 S.C. 370, 383, 652 S.E.2d 444, 450 (Ct. App. 2007). "This voluntariness requirement is in addition to the intelligent waiver mandate of *Miranda*." *Id.* at 380, 652 S.E.2d at 449. Under *Miranda*, a statement obtained as a result of a custodial interrogation is inadmissible unless the defendant was advised of and voluntarily waived his rights. 384 U.S. 436, 498–99 (1966).

Reviewing the totality of circumstances, as we must, we find Trapp's statement was knowingly, intelligibly, and voluntarily given. Furthermore, we hold the testimony establishes that Trapp voluntarily waived his *Miranda* rights. See *Miller*, 375 S.C. at 380, 652 S.E.2d at 449 (stating the voluntariness requirement is in addition to the intelligent waiver mandate of *Miranda*).

As an initial matter, it is unclear whether Trapp argues the circuit court failed to grant him a *Jackson v. Denno* hearing. He alleges in his brief that "he was entitled to an examination on the admissibility of his statement under the totality of circumstances" and "unlike the defendant in [*Miller*] who received a *Denno* hearing, [Trapp's] statement was not examined under a totality of the circumstances standard as required by *Denno*." Based upon our review of the record, we hold the circuit court afforded Trapp a *Denno* hearing. Specifically, prior to any testimony regarding his confession before the jury, the State says, "All right, well, Judge, I'm going to proffer Captain Dennis' testimony for the purposes of *Jackson v. Denno*." In response, the court states, "All right, come forward, Captain Dennis." At this point, the State questioned Captain Dennis, Trapp cross-

examined Captain Dennis, and then Trapp argued to the circuit court as to why he believed his confession should be suppressed. After his argument, the court concluded Trapp's statement to Captain Dennis was voluntary, and the jury returned to the courtroom. As a result, we find the court afforded Trapp a *Denno* hearing prior to permitting this testimony. See *Creech*, 314 S.C. at 84, 441 S.E.2d at 639 ("Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish circumstances under which it was gained.").

As to Trapp's *Miranda* rights, Trapp contends Captain Dennis's testimony was unreliable because of his inconsistencies as to when he Mirandized Trapp. Trapp highlights Captain Dennis's statement that he Mirandized Trapp almost immediately after arriving at the scene in the presence of Investigator Bouknight who documented the confession. However, Trapp states this testimony is inconsistent with Captain Dennis's testimony that Investigator Bouknight was not present when he arrived on the scene, and because Investigator Bouknight was not at trial, there is no way to confirm the reliability of Captain Dennis's statement.

Aware of Trapp's argument, we conclude the circuit court did not abuse its discretion in finding Captain Dennis's testimony credible and reliable. We also find Captain Dennis's explanation plausible as to why he did not separately document the confession, as he stated, "Although it was not done by my hand, it was documented by Investigator Bouknight who was there with me whenever the *Miranda* rights were given to him and the statement was made. I would only be duplicating what Investigator Bouknight put down." Captain Dennis also affirmed that he reviewed Bouknight's report. Trapp focuses on the discrepancy in the testimony about whether Investigator Bouknight was present, but we find any conflict on the timing goes to the weight afforded by the jury to the evidence.¹¹

¹¹ Reviewing the testimony, we also find it plausible that Investigator Bouknight was present when Captain Dennis read Trapp his *Miranda* rights as Captain Dennis stated at trial. Captain Dennis testified to the following sequence of events: (1) Captain Dennis arrived on the scene; (2) Trapp was handcuffed in the front yard; (3) Captain Dennis began to talk to Trapp in the front yard; (4) Captain Dennis and Trapp walked onto the porch; (5) and then they moved inside to the living room "because we knew we were going to be there for a little bit once the search warrant got there." Because Investigator Bouknight was only "five to six minutes" behind Captain Dennis, it is possible all of this could have transpired during this

Captain Dennis routinely Mirandized individuals based on his role in the sheriff's department and understood the importance of an individual's *Miranda* rights. He was also aware of the suspected drug evidence at Trapp's home prior to arriving on the scene. Furthermore, Trapp was already handcuffed when Captain Dennis arrived, so we find it unlikely that Captain Dennis would have initiated an interrogation with Trapp without reading him his *Miranda* rights. Captain Dennis stated Trapp did not appear to have any difficulty understanding his rights or to be intoxicated and Trapp willingly agreed to speak with him about the drugs. As a result, we find Trapp was properly Mirandized and voluntarily waived his *Miranda* rights.

In addition, looking at the totality of circumstances, we find the evidence demonstrates that Trapp's confession was knowingly, intelligibly, and voluntarily given. After Captain Dennis stated Trapp agreed to waive his *Miranda* rights, he testified as follows:

I asked him, I said, you know what about the drugs that we found in your room. And he was like, man, I forgot about those. And I said, well, how could you forget about something like that. And he said, well, he said, whenever I called 911 the dispatcher told us, you know, don't touch anything, don't go back in the house, wait for law enforcement. And he said, that's what I did. So we, you know, during that time we just pretty much continued to talk kind of back and forth.

Considering the circumstances surrounding the police's arrival at Trapp's residence—namely that they were there at Trapp's request—and Trapp's apparent explanation that he merely forgot the location of the drugs upon discovering that a large sum of money had been stolen from his residence, we find the circuit court properly found by a preponderance of the evidence that Trapp's confession was freely, intelligibly, and voluntarily given. Accordingly, we affirm the circuit court's decision on this issue.

CONCLUSION

Based on the foregoing, Trapp's conviction is

timeframe and that Investigator Bouknight could have returned and been present by the time Captain Dennis read Trapp his *Miranda* rights.

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

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 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 SC. 1, 647 S.E.2d 202 (S.C. 2007). In *Sweet*, the Defendant was charged with distribution of drugs received from an informant and possession of drugs that were found on him. The trial court admitted the drugs received from the informant into evidence over the objections of the Defendant although the informant did not testify at trial. Our Supreme Court held that the State failed to establish a complete chain of custody without the testimony of the informant because none of the State's witnesses were able to testify as to how the informant came into possession of the drug evidence. Our Supreme Court held that the State failed to establish the identity of a party in the chain even though the State offered circumstantial evidence to show that the Defendant was the only other person in the room at the time of the transaction with the informant. Our Supreme Court determined that "the officer's

testimony did not fill the gap in the chain left by the unavailable informant;" therefore, "the trial court erred in admitting the drug evidence received by the confidential informant."

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 – line 1; 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' own 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.

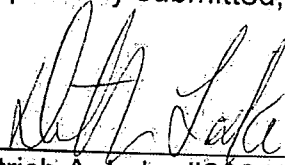
CONCLUSION

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,

A handwritten signature in cursive script, appearing to read "Dietrich A. Lake", written over a horizontal line.

Dietrich A. Lake #69649

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

JUN 07 2017

SC Court of Appeals

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 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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The South Carolina Court of Appeals

The State, Respondent,

v.

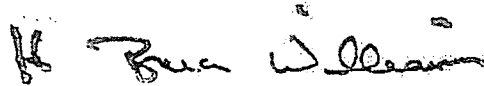
Toaby Alexander Trapp, Appellant.

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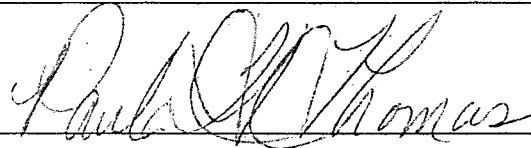
ORDER

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

The Court has also reviewed Appellant's counsel's motion to be relieved as counsel. Because counsel has already submitted a petition for rehearing on Appellant's behalf, the Court finds that granting counsel's motion to be relieved is not appropriate at this time. Accordingly, the motion to be relieved as counsel is denied.



J.



J.



J.

Columbia, South Carolina

FILED

June 23, 2017

cc:

Alan McCrory Wilson, Esquire
Dietrich Andre' Lake, Esquire
William M. Blicht, Jr., Esquire
David Matthew Stumbo, Esquire
