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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

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

Indictment No.: 2012-GS-36-0267

The State,.....Respondent,

v.

Toaby Alexander Trapp,.....Petitioner.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In its' Return to Petition, the Respondent failed to address significant issues raised in the Petitioner's Writ of Certiorari. The Petitioner seeks to highlight those issues before this Court for consideration.

I. Chain of Custody

In its' Return, the Respondent completely ignores that marijuana and additional cocaine were found in the best evidence bag. Marijuana, Item 1.42, was submitted to SLED for testing under SLED LAB NO. L11-11971. [R. pp. 348-349.] There was no testimony from any of the Respondent's witnesses that marijuana was ever observed or seized at the Petitioner's residence nor was there any testimony from the Respondent's witnesses about how or when the marijuana made it into the best evidence bag. Marijuana was not listed by Captain Dennis on his Return in the search warrant nor was marijuana listed by Investigator Bouknight on his Form B Form or his Evidence Log In Form or his SLED Drug Analysis Request Form. There is no analysis by either the Court of Appeals or the Respondent about whether the marijuana found in the best evidence bag is evidence of tampering and/or a defective chain of custody. This Court should review the Court of Appeals' decision to consider whether this marijuana found in the best evidence bag was evidence of tampering and/or a defective chain of custody.

In addition, the Respondent never addressed whether the trial court's suppression of the cocaine (Item 1.6) which was in the best evidence bag along with the other seized items was evidence of tampering and/or a defective chain of custody. This additional cocaine was another item that was not listed by Captain Dennis on his Return in the search warrant nor was this additional cocaine listed by Investigator Bouknight on his Form B Form or his Evidence Log In Form or his SLED Drug Analysis Request Form. [R. pp. 348-349.] This Court

should review the Court of Appeals' decision to consider whether this cocaine (Item 1.6) found in the best evidence bag was evidence of tampering and/or a defective chain of custody.

The Respondent argues that the State presented a sufficient chain of custody as far as practicable by citing the testimony of either Captain Dennis or Lynn Black (SLED drug chemist) or Investigator Chapman; however, the Respondent ignores the following testimony from these witnesses on the issue of identifying all of the parties who handled the drugs and the manner in which those drugs were handled:

1) Captain Dennis testified he had no 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, [R. p. 79, lines 6 - p. 80, line 12; p. 232, line 13 - p. 233, line 24.] Captain Dennis never saw the seized items again until trial after the items left the Petitioner's residence. [R. p. 80, lines 2 - 12.]
2) Ms. Black testified that she had no knowledge about what happened with the drugs before they got to her. [R. p. 234, lines 5 - 22; p. 238, line 24 - p. 240, line 3; p. 268, line 17 - p. 269, line 11.]
3) Investigator Chapman testified he had no knowledge 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.]

None of the three witnesses cited by the Respondent in its' Return filled in the gaps in the chain of custody by providing other evidence which could have reasonably demonstrated the identity of all of the individuals who both handled the drug evidence and reasonably

demonstrated the manner in which the drug evidence was handled by the same identified individuals.

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). In addition, this Court has held that the State's proof of chain of custody is defective when it fails to establish the identity of each custodian who handled the evidence ...*State v. Sweet*, 374 SC. 1, 647 S.E.2d 202 (S.C. 2007).

The Respondent continues to cite *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011) which held that the goal of chain of custody is simply ensure that "the item is what it is purported to be;" but the Respondent fails to highlight that *Hatcher* also states 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.

Two (2) different items (marijuana and cocaine) were added to an unsealed envelope when it left the Petitioner's residence; there is no evidence that the items that were seized at the scene were what they were purported to be when the items arrived at SLED or when these items arrived at trial. None of the items seized at the Petitioner's residence were field tested to determine if the seized items were in fact drugs nor did anyone weigh the seized items to confirm that the amount of the seized items qualified under the trafficking of drugs statute. The aforesaid stated facts raise the following questions:

1) Who all handled the one (1) envelope after it left the Petitioner's

residence?

2) Who separated the items into four (4) separate envelopes?

3) Who handled the items from October 9, 2011 and October 21, 2017?

4) Who added the marijuana to the best evidence bag?

5) Where did the marijuana come from that made it into the best evidence bag?

6) Who added the additional cocaine to the best evidence bag?

7) Where did the additional cocaine come from that made it into the best evidence bag?

8) Were the items that were seized at Petitioner' residence the same items that were taken to SLED for testing?

9) Who handled these seized items when the Sheriff's Department moved several times as Investigator Dennis testified to at trial?

10) Who handled these seized items after Investigator Bouknight's death and before these items came into Investigator Chapman's possession?

11) What was the manner in which these seized items were handled before the items arrived at SLED?

12) What was the manner in which these seized items were handled after Investigator Bouknight's death and before these items came into Investigator Chapman's possession?

13) What was the actual weight of the seized items at the scene?

These are **thirteen** (13) questions that were never answered by the State at trial or addressed by the Respondent in its' Return or addressed by the Court of Appeal in its' opinion. All of these unanswered questions go to the identity of the person in the chain of custody or to the manner in which these fungible items were handled by the person in the chain of custody. These thirteen (13) questions remain unanswered to this very day. This Court should review the Court of Appeals' decision to consider why the Court of Appeals' opinion did not address the State's failure to answer the above-listed questions.

The Petitioner agrees that his case is almost identical to the first case in *South Carolina Department of Social Services v. Cochran*, 364 S.C. 621, 614 S.E.2d 642 (2005) where the testimony was insufficient to establish a strict chain of custody. Like, *Cochran*, the State presented witnesses that did not fill in the gaps to establish a proper chain of custody. Captain Dennis only knew what he was told by other witnesses who did not appear at court and Ms. Black testified about what the items were but who also testified that she had no specific knowledge about the possessor or 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 <u>and</u> the manner in which the evidence was handled <u>must not</u> be left to conjecture. *See also. Williams*. There is no doubt in this case that the identity of the person who handled the seized items and added the marijuana and cocaine to the best evidence bag is unknown; the Respondent refuses to say who did it and refuses to acknowledge that it even happened.

This Court should consider whether the marijuana found in the best evidence bag and/or whether the trial court's suppression of the cocaine (Item 1.6) was evidence of

tampering and/or a defective chain of custody. The Court of Appeals published opinion never addressed the above-stated contested issues. This published opinion could serve to lower the standard of proof for the admissibility of fungible items into evidence.

Preservation of Record

Counsel for the Respondent's argument that the Petitioner did not preserve this issue for review and waived his right to object to the drug evidence is again without merit. The Petitioner stated several times that he was challenging the admission of the drug evidence [R. p. 187, lines 5 – 10; p. 188, lines 25 – p. 195, line 3; p. 255, lines 18 - 21.] The Petitioner specifically disputed the chain of custody evidence and evidence that drugs were in his residence before law enforcement arrived at the scene throughout the trial. The Court of Appeals correctly found that the Petitioner preserved the record with his objections.

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, our 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 Petitioner'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 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.] This Court should find no error in the Court of Appeals determination that the record was properly preserved for review.

Convictions should not be achieved by lowering the standard of proof for the admission of chain of custody evidence. The evidence in this case shows that two (2) additional items (marijuana and cocaine) were added to the best evidence bag and no one from the State could testify as to how this happened or who added these items to the best evidence bag. The suppression of the cocaine (Item 1.6) in the evidence bag should have resulted in the suppression of all the items in the bag since there was evidence of tampering; the State did not seek to introduce the marijuana also found in the best evidence bag into evidence because the State also did not know where the marijuana came from in this case. This Court should grant certiorari to consider whether the Court of Appeal's published opinion impermissibly lowered the standard of proof for admitting fungible items into evidence. This Court, by reviewing the Court of Appeals' decision, can provide guidance to the trial courts on this issue by restoring the standard of proof necessary to establish a complete chain of custody.

II. Right of Confrontation

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).

The Respondent in its' Return never addresses the Petitioner's issue regarding the search warrant. The Petitioner contends that the "affidavit" in the search warrant which was read into the record at trial was testimonial; therefore, the Petitioner was entitled to confront Investigator Bouknight concerning the affidavit because he was the affiant on the affidavit. The Petitioner never had a previous opportunity to cross examine Investigator Bouknight on either the search warrant affidavit or any other testimonial document that the State

introduced at trial that was completed by Investigator Bouknight.

Our U.S. Supreme Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), 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.* This Court should clearly recognize that the Court of Appeals' opinion regarding the search warrant affidavit is inconsistent with its' own prior ruling that "affidavits" are testimonial documents. See *State v. Davis*, 613 S.E.2d 760, 364 S.C. 364 (SC, 2005). For this reason, this Court should review the Court of Appeals opinion regarding the search warrant affidavit to re-affirm our case law that the Petitioner's right of confrontation existed as a matter of law regarding the word for word testimony from this testimonial affidavit.

The Respondent's claim that Captain Dennis' testimony at trial, regarding what Investigator Spreng told him, was not testimonial completely conflicts with the facts in this case and *Crawford*. Both Captain Dennis and Investigator Spreng are law enforcement officers; Captain Dennis' testified that Investigator Spreng told him where "he discovered what he thought was some controlled substance," [R. p. 14, line 12-13.]; and Captain Dennis' testified that Investigator Spreng told him that these drugs were found "in plain view;" [R. p. 169, line 17 – p. 170, line 7.] Investigator Spreng's statements concerning finding drugs in plain view and his statements to Investigator Bouknight to help secure the search warrant were clearly intended for the primary purpose of presenting evidence against the Petitioner at court. Investigator Spreng was not unavailable to testify at trial; the State failed to subpoena him and call him as a witness at trial. The Petitioner had no prior opportunity to cross-examine Investigator Spreng regarding the statements that Captain Dennis testified to at trial nor the Petitioner have an opportunity to cross-examine

Investigator Spreng regarding his statements to Investigator Bouknight. The trial court let Captain Dennis testify to all of these out of court statements attributed to Investigator Spreng. Both the Court of Appeals and the Respondent failed to recognize the point that the Petitioner had a right to confront this type of testimony. For this reason, this Court should review the Court of Appeals' decision regarding Captain Dennis' testimony at trial about what Investigator Spreng related to both him and to Investigator Bouknight.

One central question regarding the Evidence Log In Form, the Form B, and the SLED Analysis Request Form that the Respondent never answered in its' Return was whether the State could have established a complete chain of custody without the Evidence Log In Form or the Form B or the SLED Analysis Request Form considering the fact that neither Investigator Bouknight or Investigator Spreng or Patricia Crooks or Selena Kinard testified at trial. This case gives this Court an opportunity to answer this question. The Petitioner respectfully contends that the Court of Appeals' opinion could have the effect of lowering the standard of proof for admitting testimonial statements into evidence at trial. This Court, by reviewing the Court of Appeals' decision, can provide further clarity to the trial courts on the issue of affidavits as it relates to testimonial evidence and the right of confrontation by an accused.

Preservation of Record

Counsel for the Respondent erroneously asserts that the *Crawford* issue was not preserved for review and that the Petitioner's *Crawford* objection was not made during trial; these arguments are again 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.]

Impermissible testimonial evidence should never be presented to the jury nor should it have provided the basis for the Petitioner's conviction. The Respondent's claim that these

documents were merely "to provide testimony regarding the progress and process of the investigation" is not credible considering that the State had no other way of proving chain of custody without Captain Dennis being allowed to testify to the jury about what Investigator Spreng told both him and Investigator Bouknight. The State had no other way of proving chain of custody without these testimonial documents being admitted or testified into evidence. This Court has the opportunity to correct a wrong since this issue was preserved for the Court of Appeals and this Court.

The Petitioner received a twenty-five (25) year sentence; therefore, this error was not harmless and was extremely prejudicial to the Petitioner. The prejudice from the admission of this testimonial evidence without the Petitioner having an opportunity to confront this evidence resulted in the Petitioner's conviction. For this reason, the Court should review the Court of Appeals' decision in this case.

III. 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 Respondent ignores the fundamental element of the Petitioner's argument that the discrepancies in the photographs is prima facie evidence of the falsity in the search warrant because there were no drugs found in plain view anywhere in the room when the photographs were first taken. Investigator Epps never testified that he observed drugs in plain view anywhere in that bedroom when he first arrived at the Petitioner's residence.

Investigator Epps testified that Defendant's Exhibits 3, 6, 7, and 13 illustrated how the bedroom looked when he arrived; and he was the first responding officer. [R. p. 301; pp. 304 - 305; p. 314.] There is no more substantial evidence than seeing no drugs anywhere in plain view in Defendant's Exhibits 3, 6, 7, and 13 because Investigator Epps testified that those photos illustrated how the bedroom looked when he arrived. [R. p. 138, line 17 - p. 143, line 22.] The State could have testified about the sequence of the photos if it either called Investigator Spreng as a witness or brought the digital camera to trial for further examination. The Court of Appeals and the Respondent seek to somehow shift the burden to the Petitioner to prove the sequence of the photos; the State maintained all of the evidence in this case and could have easily cleared up this issue by producing the digital camera; however the State chose not to the detriment of the Petitioner. The Court of Appeals, in its' opinion, appeared troubled with the many discrepancies in the photographs; however, the Court of Appeals did not act to correct the error. This Court has the opportunity to revisit the issue to require a hearing to determine the sequence of photos on the digital camera from this incident. The Respondent would not be prejudiced by this review and hearing; but, the Petitioner would be prejudiced and punished if this type of review and hearing is not undertaken by this Court.

In addition, the Court of Appeals in its opinion appears to have inadvertently redefined the exceptions to the warrantless requirements for search and seizure to now allow blanket searches of residences anytime law enforcement responds to a person's residence because of a 911 call. The Respondent cited no case law for this premise that law enforcement responding to a scene can now exercise an exception to the warrantless search requirements to do blanket searches of a citizen's entire residence. This Court should examine the Court of Appeals' opinion to determine if that opinion impermissibly

broadens exceptions to the warrantless search requirements to allow law enforcement responding to a scene to search a complete residence without first securing a probable cause search warrant or qualifying for an exception to the warrantless search requirements. The Court of Appeal's ruling appears to open a paradox box that could lead to giving law enforcement the right to search a home for evidence under the guise of processing a scene. The Petitioner respectfully contends that the Court of Appeals' ruling is inconsistent with our current law on the exceptions to the warrantless search requirements. This Court should grant the petition to determine whether there is any current state or federal case law to support the Court of Appeals' and the Respondent's contention that law enforcement by merely responding to a scene investigation constitutes blanket consent to search the parties entire residence. The Petitioner contends that law enforcement secured a search warrant because they did not have consent to search the premises; furthermore, the search warrant does not state that consent was given as a basis of probable cause for the search warrant. This Court should grant this petition to examine the record to determine if consent was ever argued at trial and whether the issue of consent should have been considered by the Court of Appeals and/or can now be argued to this Court by the Petitioner.

This Court should grant this petition to determine whether the Petitioner met his burden by a preponderance of the evidence that the initial photos of the bedroom showed no pill bottle or razor in plain view either on the dresser or in plain view anywhere else in the Appellant's room. This Court has an opportunity to determine if Defendant's Exhibits 3, 6, 7, and 13 made a substantial preliminary showing that Investigator Spreng communicated to Investigator Bouknight either a knowing and intentional false statement or a statement with a reckless disregard for the truth into the search warrant affidavit. This Court again has an opportunity to determine if what Captain Dennis testified to at trial about what Investigator

Spreng told him and Investigator Bouknight regarding the search warrant was testimonial evidence in violation of *Crawford*.

IV. Admission of Alleged Statement of Appellant

In its' Return, the Respondent does not address the Petitioner's primary argument regarding this alleged statement: the trial court failed to examine the issue regarding the mere existence of this alleged statement under the totality of the circumstances before admitting the statement into evidence. The Petitioner contends that there is sufficient evidence in the record to back his claim that he never made any statement to law enforcement.

The Court of Appeals' in its' opinion failed to recognize the significance of Investigator Epps testimony who stated that he was present at the scene with the Petitioner for over five (5) hours. Investigator Epps testified that he did not recall Captain Dennis ever reading the Appellant his *Miranda* warnings nor did he recall Captain Dennis ever having a conversation with the Petitioner on the night of this incident. [R. p. 155, lines 4 - 11.] Deputy Epps testified that the Petitioner never confessed in his presence. [R. p. 153, line 18 – p. 154, line 7.] Investigator Epps' report contained no information about a confession from the Petitioner which would have been something that he would have documented for his report.

This Court should grant this petition to examine several assumptions by the Court of Appeals in its' opinion. The Court of Appeals asserted that it was "plausible" that Investigator Bouknight could have arrived in enough time to hear Captain Dennis read the Petitioner his *Miranda* rights. The Court of Appeals also stated in its' opinion that it would "find it unlikely that Captain Dennis would have initiated an interrogation with Trapp without reading him his *Miranda* rights" since the Appellant was already handcuffed when Captain

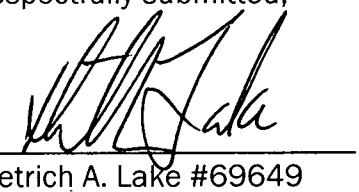
Dennis arrived. This contention by the Court of Appeals appears to draw factual conclusions that were not in evidence and that also directly contradicts other witness testimony. Captain Dennis testified that he *Mirandized* the Petitioner almost immediately upon arriving at the scene and other testimony indicated that Investigator Bouknight had not arrived with the search warrant at that time. [R. p. 172, line 12 - 173, line 24.] The Petitioner was extremely prejudiced by this statement as it also contributed to his conviction in this case and a twenty-five (25) year sentence.

Investigator Epps' testimony regarding neither hearing a confession from the Petitioner or observing Captain Dennis speaking to the Petitioner at the scene warrant an examination by this Court under the totality of the circumstances as to the veracity of this allegation that the Petitioner ever was *Mirandized* or confessed to possessing drugs. This type of examination was never conducted by either the trial court or the Court of Appeals. Both the trial court and the Court of Appeals inadvertently focused on the issue of voluntariness of a statement when both courts should have been examining whether a statement actually was ever made by the Petitioner under the totality of the circumstances. The Court of Appeals' opinion provides this Court with a novel question to answer about whether the courts should not only examine the voluntariness of a statement under the totality of the circumstances standard but also whether the courts should examine the veracity of whether a statement was ever made under the totality of the circumstances standard. For this reason, this Court should review the Court of Appeals' decision in this case. This case gives this Court a unique opportunity to address this novel issue and provide some guidance to the trial courts on this issue.

CONCLUSION

The errors by the trial court resulted in impermissible evidence before the jury which resulted in the Petitioner's conviction and sentence; none of these errors were harmless. The Court of Appeals erred by failing to recognize a defective chain of custody; by failing to distinguish between testimonial and non-testimonial evidence; by failing to examine under the preponderance standard whether the Petitioner had presented sufficient evidence at trial to show falsity in the affidavit to warrant a hearing; by failing to determine whether Captain Dennis was a qualified witness to testify about the search warrant; and by failing to examine the veracity of whether a statement was ever made under the totality of the circumstances standard. None of these errors were harmless and resulted in the Petitioner's conviction. For all of the above-stated reasons and the reasons stated in the Petitioner's Writ of Certiorari, this Court should grant the petition and review the Court of Appeals' decision.

Respectfully submitted,



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PROOF OF SERVICE

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

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