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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In The Supreme Court

On Writ of Certiorari to the Court of Appeals  
Appeal from Charleston County  
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2018-000967

THE STATE,

Respondent,

v.

MARK LORENZO BLAKE, JR.,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF ISSUES ON APPEAL

### I.

Whether the trial court abused its discretion by admitting a chemist's report, related testimony, and drugs where the drugs had previously been analyzed by another chemist but the State established a complete chain of custody.

### II.

Whether the trial court abused its discretion by denying Petitioner's motion to suppress the evidence obtained during a search of his home where the search was conducted reasonably.

## STATEMENT OF THE CASE

A Charleston County grand jury indicted Petitioner for possession with intent to distribute heroin. On June 14–15, 2016, Petitioner proceeded to jury trial before the Honorable D. Garrison Hill. Petitioner was convicted and sentenced to twelve years' imprisonment with credit for time served. The court of appeals affirmed his conviction in a *per curiam* opinion, *State v. Blake*, Op. No. 2018-UP-111 (S.C. Ct. App. filed March 14, 2018), and denied his petition for rehearing on April 26, 2018. Petitioner filed this petition on May 25, 2018.

## STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *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.*

## STATEMENT OF FACTS

As part of an ongoing drug investigation, officers from the Charleston County Sheriff's Office conducted surveillance on Petitioner based on information received from a confidential informant and obtained a search warrant for Petitioner's residence. (R. 18, line 18- R. 19, line 13). After taking into consideration Petitioner's criminal history, which included drug and weapons charges, a tip that a child may be in the home, and the nexus between drugs and weapons<sup>1</sup>, law enforcement decided to take Petitioner into custody by conducting a felony traffic stop. (R. 20, lines 5–19). A felony traffic stop involves officers "pinching" in the suspect's vehicle to prevent escape by maneuvering law enforcement vehicles in front and behind; exiting with weapons drawn; commanding loudly for the suspect to show his hands, exit the vehicle, and get on the ground; and then handcuffing the suspect when he complies. (R. 20, line 22–R. 21, line 9).

On February 22, 2013, officers followed Petitioner from his residence to the workplace of his girlfriend, where they conducted the felony traffic stop. (R. 18, lines 18–19; R. 22, lines 1–19). The officers pinched in Petitioner's vehicle, exited with their guns drawn, and ordered him to show his hands and exit his vehicle. (R. 22, line 20–R. 23, line 5). He did not comply, so the officers removed him from his vehicle and took him to the ground. (R. 23 lines 5–12). He was placed under arrest for drug distribution charges, handcuffed, and secured in an officer's vehicle. (R. 23, line 21–R. 24, line 2). The officers drove Petitioner to his home following the arrest and used his keys to gain access and execute the search warrant. (R. 25, line 6–R. 26, line 4). In the kitchen, officers found a bowl of rice containing many small packages of heroin bundled together, a whisk, mixing bowl, and scales. (R. 168, lines 1–4).

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<sup>1</sup> See *State v. Banda*, 371 S.C. 245, 253–54, 639 S.E.2d 36, 40–41 (2006).

Before trial, Petitioner moved to suppress the evidence found during the search. (R. 13, lines 3–11). He challenged the constitutionality of the search and asked that the State demonstrate the search was executed in a reasonable manner. (R. 13, lines 15–19). The State called Detective Frank Waddell of the Charleston County Sheriff’s Office to testify regarding the felony traffic stop and arrest. (R. 14, line 3). Detective Waddell testified that following Petitioner’s arrest, the officers had also arrested his girlfriend and then headed to Petitioner’s residence to conduct the search. (R. 24, line 3–R. 25, line 8). He advised Petitioner he had a lawful search warrant signed by a judge to search his residence. (R. 25, lines 6–8). He explained they did not use a ram to get into the apartment, but instead used Petitioner’s keys. (R. 25, line 16–R. 26, line 4).

Petitioner was detained on the front stoop while officers conducted the search. He was very agitated, speaking loudly and aggressively. (R. 27, line 1–R. 28, line 3). Det. Waddell testified he even had to restrain Petitioner because he continued to stand up after being ordered to stay seated. (R. 38, line 14–R. 39, line 3). Det. Waddell stated they kept Petitioner in the presence of law enforcement personnel instead of leaving him unattended because it was a safety issue. (R. 35, lines 9–20). Det. Waddell testified that he tried to explain to Petitioner the reason for the search. (R. 28, lines 13–16). On cross-examination, defense counsel asked whether Det. Waddell gave Petitioner a copy of the search warrant, to which he replied that he left a copy at the residence. (R. 36, lines 7–13).<sup>1</sup> He testified that Petitioner “made vague inquiries as to what’s going on, I haven’t done anything, this is private property, what are y’all doing, general inquiries of that nature,” but did not say that Petitioner asked to see the search warrant. (R. 36, lines 19–24). He further explained Petitioner was handcuffed sitting in a chair so he was not handed a copy as he would not have been able to hold it and read it behind his back, but he was

advised of his warrants and the nature of the search warrant and what led to it. (R. 37, line 20–R. 38, line 5). He denied telling Petitioner not to worry about where the search warrant was; rather, he stated that Petitioner would have been advised that a copy was being left at the residence as standard practice. (R. 38, lines 6–11).

Defense counsel introduced a copy of the search warrant statute, S.C. Code section 17-13-150, as Defendant’s Exhibit #1 and asked Det. Waddell to read it. (R. 39, lines 7–20). The statute provides in part: “When any person is served with a search warrant such person shall be furnished with a copy of the warrant along with the affidavit upon which such warrant was issued.” (R. 39, lines 15–18). He also introduced a copy of the search warrant as Defendant’s Exhibit #2. (R. 40, lines 1–9). Defense counsel pointed out that the search warrant contained a phrase that read: “copy of this search warrant shall be delivered to the person in charge of the premises searched at the time of search if practical.” (R. 40, lines 15–23). Sergeant Mark Bryant also testified regarding his involvement in the felony traffic stop and search warrant. (R. 45, line 2–R. 49, line 10). He testified Petitioner had “a bit of an attitude,” was talking back and raising his voice, and was not calm while the search was in progress. (R. 49, lines 11–21). On cross-examination, he admitted he did not give Petitioner a copy of the search warrant. (R. 54, lines 15–17).

Next, Detective Andrew Miller testified that while the officers were conducting the search, Petitioner asked repeatedly why he was being arrested even though Det. Miller said it was explained to him at the time. (R. 58, lines 2–10). On cross-examination, he testified he did not give Petitioner a copy of the search warrant and did not recall him asking for one. (R. 60, lines 17–22). The defense then called Petitioner, who offered a slightly different version of events. He claimed he stepped out of the car and was tackled. (R. 70, lines 2–18). He also

testified that he asked for the search warrant but the detectives told him, “Don’t worry about that.” (R. 71, lines 3–16). On cross-examination, the State showed Petitioner his statement and asked him to read a portion that stated: “Up the stairs and told us we were both under arrest for distribution of heroin and we sold over two ounces . . . .” (R. 78, lines 3–23). Petitioner confirmed Det. Waddell told him why he was under arrest and why the search was happening. (R. 81, lines 6–11).

Defense counsel argued based on *United States v. Thompson*, 667 F. Supp. 2d 758, 763 (2009), that the search was unreasonable because officers did not give Petitioner a copy of the search warrant, and he moved to suppress all the evidence. (R. 83, lines 4–R. 86, line 4). He argued the statute requires officers to serve a copy on the defendant, not just leave a copy at the residence. He claimed they could only leave a copy at the residence if no one was there, which was not the case here. (R. 84, lines 1–8). He further argued the felony traffic stop was a factor in the unreasonableness of the execution of the search. (R. 85, lines 15–22).

The State argued the circumstances in *Thompson* were different because a woman who was not part of the investigation was left outside in the heat for five hours with only a shirt on, and law enforcement did not identify themselves or explain what they were doing. (R. 86, lines 10–21). The solicitor argued that in this case the felony traffic stop was necessary—based on the information officers had about Petitioner’s prior conviction and pending charges for guns and drugs—to minimize danger of taking Petitioner into custody. (R. 87, lines 1–15). She referred to the testimony by officers that Petitioner was informed why he was being arrested and that a search was going to be executed at his residence. (R. 87, lines 16–20; R. 88, lines 22–25). She further argued that a copy of the search warrant could not be handed to him because he was belligerent and had his hands cuffed behind his back such that it would have been impossible for

him to hold the copy. (R. 90, lines 8–23). Finally, she pointed out that the rationale behind suppressing evidence is to deter unlawful government behavior and because the government behaved lawfully and reasonably here while taking into consideration the safety of the community, suppression would not deter unlawful behavior. (R. 90, line 24–R. 91, line 8).

The trial judge distinguished the *Thompson* case and ultimately found the search was reasonable. He found the testimony of the officers established justifiable reasons for the way the arrest and search were conducted. (R. 95, lines 18–25). He took into consideration the risk to officer safety based on Petitioner’s criminal history and found that the failure to give a copy of the search warrant to Petitioner while his hands were cuffed behind his back was not “enough in and of itself to deem the search unreasonable within the meaning of the Fourth Amendment.” (R. 96, lines 1–13). He therefore denied the motion to suppress. (R. 98, lines 1–3).

At trial, Detective Frank Waddell testified consistently with his pretrial testimony. The State then called Philip Roberson, a sergeant with the Charleston County Sheriff’s Office who was involved in executing the search warrant at Petitioner’s residence. (R. 164, line 16–R. 166, line 12). His role was to search the kitchen and part of the bedroom. (R. 167, lines 18–21). He testified that in the kitchen he found a bowl in the refrigerator that contained rice and drugs; he also found a whisk, mixing bowl, and scales. (R. 168, lines 1–4). He explained that the drugs he found were in bindles, which he said were packaged similarly to headache powder, and ten of them make up a bundle. (R. 168, lines 7–16). On cross-examination, Roberson testified that he recalled getting into the apartment not by forced entry but by using a key. (R. 176, lines 11–18).

Deputy Andrew Miller testified next regarding his role in the search as evidence custodian. (R. 179, lines 1–21). He collected all evidence found on the scene, took photographs of it, and transported it back to headquarters. (R. 179, line 24–R. 180, line 13; R. 189, lines 1–6).

He also field-tested a sample, which tested positive for heroin. (R. 187, lines 9-14). He verified at trial that the bowls the drugs were found in were in the same condition as the day of the search except for the addition of fingerprint powder. (R. 189, line 7–R. 190, line 22). On cross-examination, defense counsel questioned him about a photograph of the door, and Dep. Miller testified he did not remember whether a key was used for entry. (R. 200, lines 15–20). He admitted the door looked like it had been busted open, but on redirect, he said it did not look like the door had been rammed because there was no large round mark on the door and the handle was not broken. (R. 200, lines 15–23; R. 204, lines 2–17). When defense counsel asked him on recross, “Isn’t this just a photograph of the door before it was busted open?” he answered that he would not take a photograph before entry because it would put him at risk. (R. 205, lines 14–24).

Jason Riley then testified as a forensic technician for the sheriff’s department and went through the evidence storage process and explained chain of custody. (R. 212, line 9–250, line 2). He recalled that Dep. Miller submitted a sealed package containing the bindles of heroin into evidence to him. (R. 217, line 23–R. 218, line 7). He testified he would not have accepted them into evidence if they had been tampered with. (R. 220, lines 21–25). The items were inventoried by evidence technicians and stored in a secure location. (R. 214). He transported the evidence on several occasions, taking it to the City of Charleston’s drug lab, and testified that it appeared to be in substantially the same condition as when he first saw it. (R. 221, lines 1–14). He named two other people in his unit who also touched the evidence: Investigators Mark Watson and Aaron Meyer. (R. 222, lines 12–18). On cross-examination, he went over the dates the evidence was signed in and out and testified it was outside of his control three times. (R. 223, line 4–R. 225, line 17).

Next, Susan Payne testified as the evidence custodian in the forensic services division of the City of Charleston Police Department. (R. 226, lines 2–16). She testified she received the drug evidence at the city’s lab, that the evidence had not been tampered with, and that she would not have transported the evidence at any time if it had appeared to be tampered with. (R. 227, line 20–R. 228, line 7). Payne identified State’s Exhibit # 50 as the sample she first received from Jason Riley on March 1, 2013 (R. 227; R. 230, line 3– R. 231, line 11). Payne testified she placed it in a safe until it went to Elizabeth Mitchell for analysis. (R. 231, lines 2-4). The lab’s chain of custody report confirms Mitchell retrieved the package from the safe on March 11, 2013, and returned it to the safe on March 28, 2013. (Defendant’s Exhibit # 10). Payne confirmed that when she received it back from Mitchell on June 1, 2015, the bag had been opened. (R. 232, lines 8–14). Although Payne was not asked specifically about how the package was sealed upon return, she testified she only transported evidence that had been properly sealed and initialed. (R. 227). The sample was returned to the sheriff’s office and stayed there until it was brought back to the lab on June 1, 2015. (R. 231). It stayed at the lab for seven days, from June 1–8, 2015, before going back to the sheriff’s office. (R. 231, lines 12–18). During an *in camera* hearing, the prosecutor explained the evidence was not tested at this time because of a miscommunication between the lab and the sheriff’s office— because the sample had already been tested, the lab returned it to the sheriff’s office assuming they had sent it by accident. (R. 255, lines 14-20). Payne received it again on November 23, 2015, and it went to Renee Hilton for retesting. (R. 231, lines 19–22).

Hilton, a criminalist and laboratory manager at the City of Charleston Police Department, testified next. (R. 233, lines 8–20). As lab manager, Hilton was responsible for the upkeep and management of the lab’s equipment and personnel. (R. 267, lines 1-5). The trial court qualified

her as an expert in drug analysis without objection. (R. 236, lines 14–21). Hilton explained that the police department’s lab was nationally accredited and followed strict standards of operation. (R. 238-39). Hilton testified she analyzed the substances in this case and prepared a report on December 1, 2015. (R. 240-41). She testified the same sample had previously been tested by Elizabeth Mitchell. She knew this because she performed the technical review of the previous analysis. (R. 237, line 20–R. 238, line 14). She testified the drugs were retested because the Mitchell was no longer employed at the lab and was not available to testify. (R. 239, lines 13–18). When she received the drugs for testing, the package was sealed with Elizabeth Mitchell’s initials intact. (R. 272, lines 1-8). She testified each time a substance is tested there is an amount removed for testing that changes the weight and that temperature can also affect weight. (R. 239, line 24–R. 240, line 14). When the State tried to admit the report, defense counsel objected and the jury was excused. (R. 241, lines 9–20).

Petitioner objected to the chain of custody based on the fact that the State did not call Elizabeth Mitchell to testify, citing *State v. Joseph*, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997). (R. 242, lines 5–21). He also objected on the basis that Ashley Earl and Mark Watson, two people who were identified as having had possession of the drugs at some point, did not testify. (R. 242, line 22–R. 243, line 9). Petitioner moved to exclude the drugs based on the chain of custody, claiming Mitchell was a crucial element. (R. 243, lines 14–16). The State argued that it had presented a sufficient chain of custody. (R. 243, line 17–R. 246, line 23). After arguments from both parties, the trial judge ruled the chain of custody had been sufficiently established, noting that the purpose of a chain of custody is to ensure an item is what it is purported to be. (R. 266, line 15–R. 267, line 8). He found the chain had been established as far as practicable, the identity of all people who handled the evidence had been established, and

there was no evidence of tampering. (R. 267, lines 8–16). Finally, he determined that any discrepancies were certainly grounds the defense could pursue on cross-examination regarding credibility, but did not change his ruling on admissibility. (R. 267, lines 17–20). Following the court’s ruling, Hilton testified to the results of her analysis. She tested eleven separate samples contained within the sealed package. Each was found to be heroin. (R. 273; State’s Exhibit # 58). Defense counsel attacked the credibility of the chain of custody during his cross examination of Hilton and his closing argument. (R. 281-82; 319-20).

After the State rested, the trial judge clarified his ruling after realizing he had misnamed the case he was relying on. He explained he was relying on *State v. Hatcher* and *State v. Taylor*. He noted “[t]here was expert testimony by Ms. Hilton that the State presented that demonstrates the likely and probable manner in which Ms. Mitchell tested and resealed this fungible item. And the identity of the people who transported it and had control at various times was established as far as practicable.” (R. 286, lines 1–21). Defense counsel renewed his motions to suppress based on the search and chain of custody and moved for a directed verdict. The trial judge denied the motions. (R. 286, line 22–R. 287, line 11).

## ARGUMENT

### I.

**The court of appeals correctly found the trial court did not err by admitting a chemist's report, related testimony, and drugs where drugs had previously been analyzed by another chemist but the State established a complete chain of custody.**

Petitioner argues the trial court erred by admitting Renee Hilton's drug analysis report, testimony, and the drugs, claiming the State failed to establish an adequate chain of custody for the substances tested. However, the record shows the trial court properly determined the State had demonstrated a complete chain of custody as far as practicable based on South Carolina case law and properly admitted the evidence. The court of appeals correctly affirmed and this Court should deny certiorari.

The admissibility of evidence is a preliminary question to be decided by the trial court. SCRE 104(a). Though a piece of evidence is admitted, a party may still argue the weight of the evidence. SCRE 104(e). 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. *State v. Hatcher*, 392 S.C. 86, 93, 708 S.E.2d 750, 754 (2011) (citing *United States v. De Larosa*, 450 F.2d 1057, 1068 (3d Cir.1971)). A party offering into evidence fungible items such as drugs must establish a complete chain of custody as far as practicable. *Hatcher*, 392 S.C. at 91. "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." *Id.* However, testimony from each custodian of the evidence is not required to establish a chain of custody sufficient for admissibility. *Id.* "Where 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.* In proving chain of custody, the State need not negate all possibility of tampering so long as the chain of possession is complete. *Id.* at 92, 708 S.E.2d at 753. “In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable.*” *Id.* (emphasis in original). “The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be.” *Id.* at 95, 708 S.E.2d at 755. “Where there is evidence to establish the identity of those who have handled the evidence and the manner in which it was handled, a weakness in the chain merely raises a question of credibility, not admissibility.” *State v. Taylor*, 360 S.C. 18, 24, 598 S.E.2d 735, 737 (Ct. App. 2004). The *Taylor* Court pointed out that our Supreme Court noted this distinction between credibility and admissibility in *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837–38 (2001), when it stated: “[w]e 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 . . . . On the other hand, *where 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.*” *Id.* at 25, 598 S.E.2d at 738 (emphasis added). This Court held, “We believe it is clear from these decisions that if the identity of each person in the chain handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, *absent proof of tampering, bad faith, or ill-motive.*” *Id.* (emphasis added). “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 (citations omitted and emphasis added).

As an initial matter, Petitioner’s contention that the trial court erred by not considering Rule 804 SCRE to determine whether Mitchell was unavailable to testify is misguided. Trial courts are not bound by the rules of evidence when making preliminary determinations about the admissibility of evidence, so Rule 804’s definition of unavailability is irrelevant to the court’s decision. SCRE 104(a). Though the trial court could have been more inquisitive as to the reasons for Mitchell’s unavailability, Petitioner did not question the prosecutor’s explanation or inquire into the issue at trial. Therefore, the argument is not preserved for appeal. *Ex parte McMillan*, 319 S.C. 331, 334, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial, but then complain on appeal); *Jackson v. Speed*, 326 S.C. 289, 306 S.E.2d 750, 759 (1997) (“[I]t is the responsibility of trial counsel to preserve issues for appellate review.”); *Stephens v. CSX Transportation, Inc.*, 400 S.C. 503, 514, 735 S.E.2d 505, 511 (Ct. App. 2012) (finding “[b]ecause Stephens did not present this argument to the trial court, the court was not given the opportunity to exercise its discretion as to that argument, and the argument is not preserved for appeal”).

Petitioner argues this case is controlled by *State v. Joseph*, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), where a divided court of appeals found the trial court erred in admitting drug evidence because of defects in the chain of custody. However, this case is distinguishable from *Joseph*. *Joseph* involved a similar scenario where the chemist who originally tested drug evidence left the lab and moved to another state. The State had another chemist retest the drugs and did not call the first chemist at trial, instead relying on an affidavit pursuant to Rule 6, SCRCrimP. Over defense counsel’s objection, the trial court erroneously admitted the affidavit

to establish chain of custody. In the present case, the State did not rely on an affidavit to establish chain of custody. Instead, the State filled the gap with other witnesses, as allowed by *Hatcher*. Renee Hilton, the lab manager, testified she peer-reviewed the first analysis and thus had personal knowledge of it. Hilton also explained that as supervisor, she oversaw the lab's protocols governing how chemists handle evidence during testing. Combined with the testimony of the lab's evidence custodian, the State showed how Mitchell obtained the sample (from Payne with an intact seal), how lab protocol dictated she handle it (by cutting it open for testing and then resealing it with initials on the seal), and that her seal was intact when received by Hilton. All of this testimony is corroborated by a detailed chain of custody report. (Defendant's Exhibit 10). In *Joseph*, the State apparently relied on the first chemist's affidavit to establish these facts. Here, the State did not rely on an affidavit, instead establishing these facts through other witnesses.

Two other facts distinguish this case from *Joseph*. In *Joseph*, the first chemist had possession of the drugs for six months. *Joseph*, 328 S.C. at 356. This unusually prolonged period of possession increased the chance that the sample could have been accessed by a third party, thereby breaking the known chain of possession. Instead of the drugs being in the secure hands of an evidence custodian, they were stored in an unspecified location by the chemist who had already tested the drugs but didn't promptly return them. This left open the possibility that someone could have swapped or corrupted the drugs in the meantime. In this case, Mitchell only had possession of the drugs for seventeen days, and then promptly returned them to the evidence custodian. Additionally, in *Joseph* there was a discrepancy about when the test occurred. *Joseph*, 328 S.C. at 365 n. 3. The drug report and chemist's affidavit had conflicting dates, raising the possibility that a mix-up occurred. Here, there was no such discrepancy.

Other jurisdictions have allowed the admission of drug evidence that was tested twice without the testimony of the chemist who performed the first analysis. *Commonwealth v. Curry*, 35 N.E.3d 435 (Mass. App. 2015), is illustrative. In that case, the chemist who originally tested a heroin sample had been fired for misconduct at the time of Curry’s trial.<sup>2</sup> The chemist had fabricated the results of some analyses in order to increase her productivity, but had not adulterated any of the samples. The State retested the sample and presented a complete chain of custody. The chain of custody and the first chemist’s handling of the evidence was “fully explored” at trial and formed the crux of Curry’s defense. *Curry*, 35 N.E.3d at 437. The Massachusetts appellate court found the trial court did not err in admitting the evidence because a jury could find the State established a complete chain of custody and evidence of the first chemist’s misconduct went to the weight of the evidence, not its admissibility. *Curry*, 35 N.E.3d at 439. Courts in other jurisdictions have reached the same conclusion. *See e.g., Ashley v. State*, 728 S.E.2d 706, 709 (Ga. App. 2012) (finding no error because “Ashley presented no evidence of tampering, only mere speculation that because the initial handling of the drugs at the crime lab was unknown, tampering could have occurred”); *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997) (finding “no reason to prohibit the admission of properly identified evidence just because it has been kept in an evidence room for an extended period of time and undergone prior forensic testing”); *People v. Olin*, 186 A.D.2d 74, 75 (N.Y. App. Div. 1992) ( finding no error where “retest was done because the chemist who first tested the vials was on vacation and out of the State at the time of the trial”). This Court should follow the same rule: where drug evidence has been tested twice and the chemist who performed the first test is unavailable,

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<sup>2</sup> For a detailed discussion of the chemist’s actions and their effects on related cases, see *Commonwealth v. Scott*, 467 Mass. 336, 5 N.E.3d 530 (2014).

results of the second analysis are admissible absent evidence of tampering if the State establishes a chain of custody and manner of handling as far as practicable.

These decisions and this Court's precedents illustrate that the central tenet of chain of custody law is found in its very name: chain of *custody*. The primary question is whether the evidence is sufficient to allow jurors to be reasonably certain that the evidence presented at trial is the *same evidence* collected by law enforcement. Hence the emphasis on custody and possession. This is not a case where the sample was left sitting on a desk, *see Benton v. Pellum*, 232 S.C. 25, 100 S.E.2d 534 (1957), or the hood of a car, *see State v. Pulley*, Op. No. 27811 (S.C. Sup. Ct. filed June 6, 2018) (Shearhouse Adv.Sh. No. 23 at 21), with no explanation how it ended up at its destination. The drugs in this case were accounted for at all times, and each person in the chain of custody was identified. There is no mystery or conjecture that the drugs tested by Hilton were the same drugs seized by law enforcement. Furthermore, Hilton's testimony regarding the lab's protocols and her personal knowledge of the first test gained from her peer review established how the drugs were handled while in Mitchell's possession. There was no evidence of tampering, bad faith, or ill motive, particularly given the circumstances in which the drugs were found and the fact that they field-tested positive for heroin. (R. 187). Because the State need not negate all possibility of tampering, *see Hatcher, supra* p. 14, where the method of handling is reasonably demonstrated, mere speculation that the sample could have been tampered with is an insufficient reason to exclude the evidence. *See Ashley, supra* p. 17. The evidence amply demonstrated a "reasonable probability the article [had] not been changed in important respects[.]" *Hatcher*, 392 S.C. at 94–95. The court of appeals correctly found the trial court did not abuse its discretion in admitting the evidence. This Court should deny certiorari.

## II.

**The court of appeals correctly found the trial judge did not err by denying Petitioner's motion to suppress evidence obtained during search of his home because the search was reasonable.**

Petitioner argues the trial judge erred in denying his motion to suppress the evidence obtained as a result of the search of his residence, claiming the search violated the Fourth Amendment and the South Carolina Constitution because it was conducted unreasonably. Specifically, he argues the officers used excessive force during the felony traffic stop and that combined with the officers' actions during the search and their failure to hand Petitioner a copy of the search warrant rendered the execution of the search warrant unreasonable. Thus, he argues the evidence obtained during the search should have been suppressed. However, the trial court properly denied the motion to suppress, finding the search was not conducted unreasonably. The court of appeals correctly affirmed and this Court should deny certiorari.

"The reasonableness of a search and seizure is evaluated based upon the totality of the circumstances." *United States v. Thompson*, 667 F. Supp. 2d 758, 763 (S.D. Ohio 2009). In order to satisfy the reasonableness factor, officers must both obtain a valid warrant and conduct the search in a reasonable manner. *Id.* "The willingness (or unwillingness) of officers to present a warrant to an occupant when asked goes to the reasonableness of a search." *Id.* The federal district court acknowledged in *Thompson* that the Fourth Amendment does not require the executing officer to present a copy of the search warrant before conducting the search. *Id.* *Thompson* answered the question left open by the United States Supreme Court in *Groh v. Ramirez*—"whether it would be unreasonable under the Fourth Amendment for an executing officer to refuse to produce a warrant at the outset of a search *upon the request* of an occupant." *Id.* Specifically, the *Groh* Court stated: "Whether it would be unreasonable to refuse a request to

furnish the warrant at the outset of the search when, as in this case, an occupant of the premises is present **and poses no threat to the officers' safe and effective performance of their mission**, is a question that this case does not present.” *Id.* (quoting *Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004)).

Here, Petitioner did pose a threat to officer safety as attested to by the officers' testimony. Det. Waddell testified Petitioner was agitated, speaking loudly and repeatedly in an aggressive manner. (R. 27, line 1–R. 28, line 3). He even had to restrain Petitioner when he continued to stand up after being ordered to sit back down. (R. 38, line 14–R. 39, line 3). Det. Waddell further stated that after being taken into custody, Petitioner was not cooperative; rather, he indicated they kept Petitioner in the presence of law enforcement personnel instead of leaving him unattended because it was a safety issue. (R. 35, lines 9–20). Sergeant Mark Bryant testified that Petitioner had “a bit of an attitude,” was talking back and raising his voice, and was not calm while the search was in progress. (R. 49, lines 11–21). Even Petitioner himself testified he got agitated and got an attitude with the officers. (R. 71, lines 10–13). He described getting into a verbal dispute with Det. Waddell and admitted he stood up and Det. Waddell pushed him back down into the chair. (R. 71, line 23–R. 72, line 10). This testimony shows that Petitioner did pose a “threat to the officers' safe and effective performance of their mission” and, thus, distinguishes this case from the question left open in *Groh* and answered in part by *Thompson*.

In *Thompson*, one of the factors the court considered was the officers' refusal to provide Mrs. Thompson with a copy of the search warrant. However, the Court focused on the fact that she asked for a copy. Here, the only evidence indicating Petitioner asked for a copy is his own self-serving testimony. Det. Waddell testified that Petitioner did not ask to see the search

warrant but merely made vague inquiries about what was going on. (R. 36, lines 19–24). Det. Miller testified that Petitioner kept asking why he was being arrested but did not remember him asking for a copy of the arrest warrant or search warrant. (R. 58, lines 2–10; R. 60, lines 20–22). The other factors in *Thompson* that made the search unreasonable included the fact that she was naked when officers arrived, they only allowed her to put on a shirt, they made her wait outside in the heat for five hours, she remained naked from the waist down in view of fourteen officers, and she went without food and water.

As the trial judge pointed out, the case at hand is quite different from *Thompson*. He found the officers presented credible testimony giving justifiable reasons for the way the arrest was conducted, that there was no question the arrest was valid, no question the search warrant was valid, and no issue about probable cause. Due to Petitioner’s prior convictions for violent offenses involving weapons, the trial judge found there was a risk to officer safety that made the entire arrest and search sequence reasonable. He specifically found the failure to put a copy of the search warrant in Petitioner’s hand when he was handcuffed behind his back was not enough, in and of itself, to deem the search unseasonable within the meaning of the Fourth Amendment. Because Petitioner became agitated, hostile, uncooperative, and non-compliant, he put the officers’ safety at risk. The trial judge noted that “[i]f they had to constantly protect themselves and [the] integrity of the search against [Petitioner]’s outburst and statements then that may be a reason why they were not able to give him a copy of the warrant.” (R. 97, lines 5–9). He found the search was conducted reasonably within the Fourth Amendment and properly denied the motion to suppress. (R. 93–98). To the extent Petitioner argues a state constitutional violation, this issue is not preserved for appeal. Although Petitioner argued at trial that the search violated both the United States and South Carolina Constitutions, the trial judge did not rule on whether a

violation of the State constitution occurred. Thus, this issue is not preserved for this Court's review. *See State v. Dunbar*, 356 S.C. 138, 140, 587 S.E.2d 691, 693–94 (2003) (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.”). This Court should deny certiorari.

**CONCLUSION**

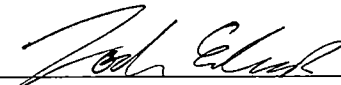
For all the foregoing reasons, it is respectfully submitted that certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 25, 2018

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

D. Garrison Hill, Circuit Court Judge

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Appellate Case No. 2018-000967

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**RECEIVED**

JUN 25 2018

**S.C. SUPREME COURT**

THE STATE,

Petitioner,

v.

MARK LORENZO BLAKE,

Respondent.

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**PROOF OF SERVICE**

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I, Anne Mueller, certify that I have served the within Return to the Petition for Writ of Certiorari on Petitioner by delivering a copy to Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.  
This 25<sup>th</sup> day of June, 2018.



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