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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Florence County

Honorable George M. McFaddin, Circuit Court Judge

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MYRON A. CANNON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000180

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PETITION FOR WRIT OF CERTIORARI

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JORDAN WAYBURN  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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## **ISSUES PRESENTED**

- I. Was trial counsel ineffective for failing to object to the trial court's incomplete supplemental instruction that there may be permissive inferences of an intent to distribute based on weight and packaging?
  
- II. Was trial counsel ineffective for failing to object to the unnecessary and unconstitutional jury instruction that possession of more than one gram of cocaine raises the inference of an intent to distribute?

## STATEMENT

Petitioner was indicted by the Florence County grand jury on March 10, 2016 on the following charges: trafficking in cocaine base, possession with intent to distribute cocaine, failure to stop for a blue light, and resisting arrest. App. 139-141. He went to trial before Judge William Seals and a jury. App. 1. He was represented by Grant Smaldone, and John Jepertinger prosecuted the case. App. 1.

The state presented testimony from Wayne Drummond that he saw Petitioner speeding down Pamplico Highway at ninety miles per hour. App. 41:2-42:19. Petitioner's vehicle was a rental from Enterprise. App. 49:5-13. When Drummond turned on his blue lights, Petitioner sped away. App. 42:20-43:16. Drummond eventually rammed his car, Petitioner's vehicle went "into the bean field," and then Petitioner hopped out of the driver's side of the car and began running across the field. App. 45:11-22. Drummond eventually caught him. App. 47:2-22. Petitioner had been alone in the car. App. 46:13:16. Other law enforcement officers found two bags of what turned out to be cocaine and crack in the driver's area of the car. App. 59:15-20, 64:19-65:1, 80:19-81:15. Drummond testified, "[Petitioner] was the driver so he was responsible for the vehicle and anything in the vehicle." App. 51:18-19.

Generally speaking, as trial counsel later testified at the PCR hearing, Petitioner's defense at trial was "the flying drugs defense." App. 208:10-22. He argued law enforcement officers "did nothing in the case to show that [the drugs were] his," that there was "nothing that ties the drugs to Myron." App. 112:3-4, 116:1. He closed his argument to the jury: "We found drugs strewn about in a car after a car accident. Who knows where they came from?" App. 116:6-7.

On possession with intent to distribute, the trial court instructed the jury:

[T]he State must prove beyond a reasonable doubt that the Defendant possessed cocaine with the intent to distribute it. To

prove possession, the State must prove beyond a reasonable doubt that the Defendant had both the power and the intent to control the disposition or use of the cocaine.

...

Mere presence at the scene where the drugs were found is not enough to prove possession. The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control.

However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and be given the weigh you decide it should have.

...

Intent may be shown by acts and conduct of the Defendant and other circumstances from which you may naturally and reasonably infer intent.

In determining whether the Defendant had the intent to distribute the cocaine, you may consider the circumstances surrounding the Defendant's alleged possession. You may consider the amount of the substance alleged to have been possessed, the manner in which it was allegedly possessed, the place where it was allegedly possessed, and other factors which you consider to be important.

You must find that a Defendant did not intend to have cocaine solely for his own use. Possession of more than one gram of cocaine creates an inference that the Defendant possessed the cocaine with intent to distribute it.

This inference does not relieve the State from proving beyond a reasonable doubt that the Defendant had the intent to distribute.

It is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and be given the weight you decide it should have.

App. 122:24-124:17. Trial counsel did not object to the jury charges. App. 96:2-9, 129:22-130:1. In its closing argument, the state expressly used the "permissive inference" to prove its case. App. 106:4-7.

During its deliberations the jury sent the trial court a note. App. 130:10-16, 138. It asked: "Is intent to distribute based on quantity or the way it is packaged?" and, "Or any other factors?" App. 138. The trial court gave a written answer:

There may be a permissive inference of intent to distribute if the cocaine weighs over 1 gram. Also, the jury may draw a permissive inference of intent to distribute also based on packaging and other factors.

App. 138; 130:12-20. Trial counsel did not object to the answer. App. 130:21-24. Including the time the jury took to ask its question and for the court to answer, the jury deliberated for fifty minutes. App. 130:7-131:2. The jury convicted Petitioner on all charges, and the trial court issued twenty-five-year concurrent sentences on the drug charges, a five-year sentence for the failure to stop, and a one-year sentence for resisting arrest. App. 131:12-132:7, 135:16-24.

Petitioner was represented on appeal by Elizabeth Franklin-Best. App. 224. The Court of Appeals affirmed the convictions in an unpublished opinion. *State v. Cannon*, Op. No. 2019-UP-397 (S.C. Ct. App. filed Dec. 18, 2019).

Petitioner filed an application for post-conviction relief on December 17, 2020. App. 146-51. He alleged, among other things, that trial counsel was ineffective for "failing to object to an instruction to the jury regarding possession of cocaine with intent to distribute." App. 154. This allegation concerned both the initial jury instruction and the response to the jury's question during its deliberations. App. 154-56. In the initial application, Petitioner specifically alleged trial counsel should have "requested[ed] the court to reinstruct that the state has the burden of proving all elements beyond a reasonable doubt and that the burden of proof is always on the state." App. 156. The state filed its return on April 5, 2021. App. 162. Petitioner filed an amended application through counsel Ola Johnson on October 11, 2022. App. 174. Judge

George McFaddin held an evidentiary hearing on December 15, 2022. App. 178. Russ Barlow represented the state. App. 178.

At the hearing Petitioner testified trial counsel should have objected to the inference based on weight and to recharge the jury in response to its question. App. 187:15-189:23. Trial counsel testified he did not object to the inference on weight instruction because he did not think that was necessary. App. 210:10-14. He continued, however, and stated that now he "absolutely would object to that because that is a garbage statute." App. 210:14-16. Trial counsel thought "even today that's the law." App. 210:19-21. Trial counsel gave no reason for failing to object to the supplemental instruction.

Ultimately the PCR court entered an order dismissing the application on January 5, 2025. App. 223. It ruled trial counsel was not deficient "where when considered as a whole, the jury charge was a correct statement of the law," and that "any objection by Trial Counsel would not have been meritorious." App. 238.

This petition follows.

## STANDARD OF REVIEW

"The Sixth Amendment guarantees every criminal defendant the reasonably effective assistance of counsel." *Stone v. State*, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017) (citations omitted). A PCR applicant proves ineffectiveness in two prongs: "(1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005)).

Whether a given set of facts meets a constitutional standard is a question of law this Court reviews without deference to the PCR court. *See Smalls v. State*, 422 S.C. 174, 180-81 & n.2, 810 S.E.2d 836, 839 & n.2 (2018); *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (stating appellate courts review with deference findings of fact but de novo whether those facts legally constitute waiver of right to counsel). Therefore, accepting the PCR court's factual findings, whether counsel's conduct and stated strategy were deficient is reviewed de novo. For the same reasons, whether Petitioner was prejudiced by the conduct is reviewed without deference to the PCR court's ultimate conclusion.

## ARGUMENT

### **I. The trial court's supplemental instruction was incomplete and unconstitutionally commented on the facts, and counsel was ineffective by failing to object.**

During its deliberations the jury asked: "Is intent to distribute based on quantity or the way it is packaged? Or some other factors?" The trial court then erred by: (1) providing an incomplete instruction on intent, (2) instructing a nonexistent permissive inference that is a direct comment on the facts, and (3) failing to resolve the jury's confusion. Any reasonable counsel would have recognized the severe errors with the instruction, and trial counsel could have successfully objected on any one of those grounds yet failed to do so. That failure constitutes deficient performance, and when considered in context of a jury question, it clearly prejudiced Petitioner.

#### *a. Deficiency*

##### *i. The response was grossly incomplete.*

The trial court's response to the jury was insufficient and required objection because it failed to make clear and repeat to the jury that the "permissive inference" need not be accepted, that Petitioner did not need to rebut or disprove the inference, and that the state bore the ultimate burden of proving Petitioner's intent beyond a reasonable doubt. This failure was egregious. Any reasonable counsel paying attention should have immediately objected to this incomplete charge because as given, the only likely outcome was for the jury to do exactly what it was told: infer Petitioner intended to distribute the drugs.

Supplemental instructions are particularly important in guiding the jury to correctly analyze the questions presented to it. *State v. Blassingame*, 271 S.C. 44, 46, 244 S.E.2d 528, 530 (1978) (explaining that when the jury asks a question, "[i]t is reasonable to assume that the jury had, at this point, focused critical attention" on the issue about which it asked). "As is the case with instructions originally given, additional instructions should not ignore or exclude from the

consideration of the jury material issues covered by the instructions originally given . . . ." 64 Corpus Juris, *Trial* § 838, p. 1041 (1933) (footnotes omitted). For the trial court to reply to a jury's question that goes right to the heart of the case with such brevity and little detail is entirely insufficient. The jury needed to be re-instructed that the inferences could be rejected and the state still needed to prove beyond a reasonable doubt Petitioner intended to distribute the drugs regardless of its quantity or packaging.<sup>1</sup> Those were "material issues covered by the instructions originally given . . . ." *Id.*

Counsel renders deficient performance by failing to object to supplemental instructions that do not fully address the jury's question because they are incomplete. *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361-62 (2008); see *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."). In *McKnight* the trial court initially instructed the jury in a homicide by child abuse case the state must prove the "death occurred in circumstances showing extreme indifference to human life." 378 S.C. at 47, 661 S.E.2d at 361. It also provided the general criminal intent charge, including that such intent can arise "from negligence, recklessness or indifference to duty or consequences therefore." *Id.* During deliberations the jury asked the court, "Can we have a definition of criminal intent? If we do have to confirm criminal intent?" *Id.* The trial court recharged the jury with the general intent charge, and trial counsel did not object. *Id.* The Court held counsel was ineffective because while the general intent charge was an accurate statement of the law for homicide by child abuse, "the trial court's recitation of the general criminal intent charge alone in response to the jury's inquiry only served to further confuse the jury by referencing mere negligence and otherwise failing to clarify the particular

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<sup>1</sup> Below, Petitioner challenges the propriety of giving this charge at all. For purposes of this issue though, whether the trial court gave an adequate supplemental instruction can assume the permissive inference charge may be permissible. Of course, if the charge was improper in the first instance, trial counsel was required to object to it in the supplemental instruction as well.

mental state required for a conviction of homicide by child abuse." 378 S.C. at 48, 661 S.E.2d at 361.

The result in this case should be even more clear than *McKnight*. The re-charged instruction in *McKnight* was still a thorough explanation of criminal intent and recited the state's burden of proof. Here, not only was this an incomplete definition of the intent necessary to find Petitioner guilty beyond a reasonable doubt, it did not recite that the State bears the burden of demonstrating proof to such a level nor did it make certain the jury understood the permissive inferences could be rejected. As given, the supplemental charge was woefully incomplete, and trial counsel needed to object and request a complete instruction, something that would not have been difficult to provide. There is no plausible legitimate strategic reason for trial counsel to fail to request and obtain a complete instruction, and trial counsel did not articulate any reason for this failure at the PCR hearing. *See Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted) ("Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.").

*ii. There is no "permissive inference of intent . . . based on packaging," and the bcharge was an unconstitutional comment on the facts.*

Under no circumstances should a court ever instruct the jury it "may draw a permissive inference of intent to distribute . . . based on packaging . . . ." App. 138; 130:12-20. First, this instruction is not a correct statement of the law. There is no such "permissive inference" arising from packaging. As addressed further below, the only permissive inference arises from the weight of the drugs, and that is provided and defined by statute. S.C. Code Ann. § 44-53-370(d)(5); *Brightman v. State*, 336 S.C. 348, 351, 520 S.E.2d 614, 615 (1999). In *State v. Elmore*, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006), the Court of Appeals affirmed the denial of a directed verdict because evidence the defendant had several small bags of marijuana was "reasonably susceptible of two inferences"—that he intended to sell the bags of marijuana or had

purchased marijuana in the bags. 368 S.C. at 233, 237, 628 S.E.2d at 272, 274. There is no "permissive inference" that can be drawn from the packaging of drugs, and trial counsel needed to object to this incorrect statement of the law. *See* 16 Corpus Juris, *Criminal Law* § 2387, at 983 (1918) (explaining that in giving jury instructions, "it is error to state a presumption which does not exist in law").

Second, "The modern trend . . . has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence." *Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019). Such charges are impermissible comments on the fact forbidden by the South Carolina Constitution. S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). By telling the jury it "may draw a permissive inference of intent to distribute . . . based on packaging," App. 138; 130:12-20, the trial court "directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." *State v. Burdette*, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019). Whether Petitioner intended to distribute the drugs or possess them merely for personal use was the "critical element of the charge," so this instruction inherently influenced the jury's deliberations and determination. *Id.*; *see State v. James*, 362 S.C. 557, 561-62, 608 S.E.2d 455, 457 (Ct. App. 2004) ("Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute." (citing *Matthews v. State*, 300 S.C. 238, 239, 387 S.E.2d 258, 259 (1990))).

In *Burdette* the Court was clear that the impropriety of these permissive inference charges—there, an inference of malice in a murder case—is not cured by the court informing the jury the evidence should receive "only the weight the jury determines it should be given." 427 S.C. at 502, 832 S.E.2d at 582. Such an additional instruction "does not remove the taint of the trial court's injection of its commentary upon that evidence." 427 S.C. at 502-03, 832 S.E.2d at 582. Here, however, there is not even such an ineffective attempt to ameliorate the harm. The

trial court told the jury there is this nonexistent permissive inference of intent, and that was the last thing it heard on the matter. That instruction was absolutely improper, and reasonable trial counsel would have objected to it.

*iii. The response did not inform the jury how it was to determine intent.*

A trial court must carefully evaluate any question from the jury in order to determine its intent in the context of the case so that proper instructions on the law are given. *See State v. Hewitt*, 205 S.C. 207, 31 S.E.2d 257, 259 (1944) ("The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict."); *Corpus Juris, supra, Trial* § 838 ("Care should be taken clearly to define the scope and object of additional instructions given to the jury after submission of the cause."). The trial court here failed to understand and respond to the question asked by the jury. The real heart of the jury's question was this: "How do we decide if the defendant intended to distribute the drugs?" Neither the quantity of drugs nor their packaging is an element of the offense. Intent to distribute was plainly the question with which the jury struggled, likely in part because of the original permissive inference instruction. The jury wanted further direction from the court how it was to determine Petitioner's intent. The trial court failed to provide this in an adequate way.

When properly framed, the correct response would have been to recharge the court's initial instruction on intent:

Intent may be shown by acts and conduct of the Defendant and other circumstances from which you may naturally and reasonably infer intent.

In determining whether the Defendant had the intent to distribute the cocaine, you may consider the circumstances surrounding the Defendant's alleged possession.

App. 123:23-124:3. *That* was the answer to the question the jury intended. *That* is how the jury was supposed to determine if Petitioner intended to distribute the drugs. The permissive inference instructions given did not genuinely answer the question with which the jury struggled.

Instead it told them to infer Petitioner's guilt based on weight and packaging, with no further explanation of all the proper bases for that determination.

b. Prejudice

"To satisfy the prejudice prong, an applicant must demonstrate 'there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). *But see Taylor v. State*, 312 S.C. 179, 183, 439 S.E.2d 820, 822 (1993) (applying "harmless beyond a reasonable doubt" standard to burden-shifting instruction in a drug possession with intent to distribute case on PCR).

An incomplete supplemental instruction which serves to confuse or mislead the jury is especially likely to be prejudicial. *See Lowry v. State*, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) (holding trial counsel was ineffective for failing to object to erroneous supplemental charge because it "was the last thing the jurors heard" and "its brevity was likely received by the jurors with 'heightened alertness rather than the normal attentiveness which may well flag from time to time during the lengthy initial charge.'" (quoting *Arroyo v. Jones*, 685 F.2d 35, 39 (2d Cir. 1982))). Jurors inherently pay close attention to supplemental instructions; they have just asked a question about something they are confused by or struggling with. *See McKnight*, 378 S.C. at 48-49, 661 S.E.2d at 362 (holding trial counsel was ineffective because the incomplete "charge occurred in a supplemental instruction and likely attained a special significance in the minds of the jurors"); *State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978) (reversing conviction and refusing to find error harmless because the supplemental instructions "would be given special consideration by the jury since they were in response to its own inquiry").

The numerous errors and patent insufficiency of the supplemental instruction prejudiced Petitioner. The jury clearly struggled with determining whether Petitioner intended to distribute

the drugs. There is more than a reasonable probability that had counsel objected to the supplemental instruction, the jury would not have concluded he intended to distribute them. The trial court told the jury it can infer an intent to distribute based on packaging with no further instruction that this inference can be rejected or that the state still bears the burden of proof, and while impermissibly highlighting certain facts to the jury in the middle of its deliberations. It cannot be assumed the prior, more complete charge resolved the issue. *See Lowry*, 376 S.C. at 506, 657 S.E.2d at 764. While there was enough evidence to reach the jury on the possession charge given the quantity involved, the circumstances were not so clear that the jury invariably would have found Petitioner guilty without this failure of trial counsel. Because these permissive inferences were the last thing the jury heard, it cannot be said with confidence that "the adversarial testing process work[ed] in th[is] particular case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

**II. An inference of intent to distribute based on weight is not a proper jury charge, and counsel was ineffective for failing to object to the instruction.**

*a. Juries should never be charged possession of more than a gram of cocaine creates a permissible inference of an intent to distribute.*

The PCR Court erred in concluding "the jury charge was a correct statement of the law" and "any objection by Trial Counsel would not have been meritorious." App. 238. The "permissive inference" rule inferred from section 44-53-370 of the South Carolina Code should not be given as a jury instruction.

In virtually all cases analyzing section 44-53-370, the courts have noted, correctly, that "possession of more than[] one gram of cocaine . . . is prima facie" evidence of possession with intent to distribute, and so a directed verdict is improper where there is evidence the defendant possessed drugs in excess of the given weight. S.C. Code Ann § 44-53-370(d)(5); *see, e.g., State v. Burgess*, 408 S.C. 421, 439, 759 S.E.2d 407, 417 (2014); *State v. Goldsmith*, 301 S.C. 463, 466, 392 S.E.2d 787, 788 (1990); *Elmore*, 368 S.C. at 235, 628 S.E.2d at 273 (concerning

marijuana).<sup>2</sup> However, the statute says nothing about instructing the jury with this prima facie showing. Rather, the likely purpose of the provision is to simplify and standardize non-jury decision-making.<sup>3</sup> Cf. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (citing favorably prior language that in a CSC case, "the statute [S.C. Code Ann. § 16-3-657] is not the proper subject of a charge, but merely serves to guide trial and appellate courts in analyzing the sufficiency of evidence" (citing *State v. Rayfield*, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006) (Pleicones, J., dissenting))); see 16 Corpus Juris, *Criminal Law* § 1005, at 534 (1918) (explaining that presumptions are "merely an administrative assumption for procedural purposes" and "only make[] a prima facie case"). It was written to ensure the sheriff's office charges someone with distribution if they find more than a gram of cocaine on someone, regardless of the surrounding circumstances; it allows the solicitor to defeat a directed verdict motion without further evidence of intent; and it requires courts to send such cases to the jury. The language of the statute does not require the court to instruct the jury that it can, if it chooses to do so, assume an intention to distribute based simply on the weight involved.

The first case to describe section 44-53-370 as "create[ing] a permissible inference" was *Brightman v. State*, 336 S.C. 348, 351, 520 S.E.2d 614, 615 (1999).<sup>4</sup> *Brightman* was a PCR case

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<sup>2</sup> There appears to be but a single exception to this broad statement: *State v. Andrews*, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996). *Andrews* is the only instance where an appellate court considered the "permissive inference" rule as a jury instruction. 324 S.C. 516, 479 S.E.2d at 814.

<sup>3</sup> If the purpose of the statute is not to allow the state to defeat a motion for directed verdict, or in other ways guide pre-trial decision-making, then the apparent purpose was to intentionally shift the burden of proof to the defendant—something that is of course not allowed under the law. See *State v. Burriss*, 281 S.C. 47, 49, 314 S.E.2d 316, 318 (1984) (holding unconstitutional statute providing a "person wilfully concealing unpurchased goods" in a store "shall be prima facie presumed to have so concealed such article with the intention of converting" the goods).

<sup>4</sup> Before *Brightman* the South Carolina Supreme Court had already held it was not permissible to charge juries that the statute created a "*rebuttable presumption*" because such a charge "was an impermissible shifting of the burden of proof from the State to the defendant." *Taylor*, 312 S.C. at 181, 439 S.E.2d at 821.

following his conviction for possession with intent to distribute, and the issue was whether he should have received a charge on the lesser-included offense of simple possession.<sup>5</sup> 336 S.C. at 350, 520 S.E.2d at 615. The court found trial counsel ineffective for not requesting the charge: "Because the jury was free to reject the permissible statutory inference, the jury could have found petitioner guilty of the lesser included offense of simple possession." 336 S.C. at 351, 520 S.E.2d at 615. This is a true statement and correct use of the statute: the amount in question was prima facie evidence of guilt—though not absolute evidence—so the court could not determine as a matter of law that Brightman was or was not guilty of simple possession or possession with intent to distribute. Thus, it was necessary to charge the jury on simple possession. But nothing in *Brightman* requires the inference be charged to the jury. It stands only for the proposition that the inference or prima facie case described in the statute constitutes some evidence sufficient to reach the jury on both simple possession and possession with intent to distribute.

Even if the statute did require such an instruction, that would be unconstitutional because "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. All other challenges to various legal "inferences" as improper comments on the facts have reached the same conclusion: informing juries that certain facts raise an inference satisfying an element of the crime is impermissible. *Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) ("The modern trend . . . has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."); see *State v. Brown*, 443 S.C. 196, 198-199, 904 S.E.2d 448, 449-50 (2024) (inferred malice instruction); *State v. Smith*, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020) (same); *State v. Burdette*, 427 S.C. 490, 494, 832 S.E.2d 575,

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<sup>5</sup> More specifically, the issue was whether he was entitled to the reasonable doubt charge from *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930). That turned, however, on whether he was entitled to the lesser-included charge at all. *Brightman*, 336 S.C. at 350, 520 S.E.2d at 615 ("[T]he State contends petitioner has not shown trial counsel was ineffective for failing to request a *King* charge because petitioner was not entitled to the charge on simple possession.").

577 (2019) (same); *Pantovich*, 427 S.C. at 562, 832 S.E.2d at 600 ("good character" charge); *State v. Stukes*, 416 S.C. 493, 498-99, 787 S.E.2d 480, 482-83 (2016) (statutory rule that CSC "victim's testimony need not be corroborated with additional evidence"); *State v. Witherspoon*, 418 S.C. 641, 642, 795 S.E.2d 685, 686 (2016) (applying *Stukes*); *State v. Cheeks*, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013) ("[A]ctual knowledge [of the possession of drugs] is strong evidence of intent to control its disposition or use." (alteration original)); *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009) (inferred malice charge). These cases make it abundantly clear to the trial courts, solicitors, and all practicing defense attorneys that such inference instructions are not permitted.

On drug possession and trafficking, the leading case is *State v. Stewart*, 433 S.C. 382, 386, 858 S.E.2d 808, 810 (2021). In *Stewart* the Court unequivocally held: "The jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given." 433 S.C. at 391, 858 S.E.2d at 813. That charge was error because "the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." 433 S.C. at 392, 858 S.E.2d at 813 (quoting *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582. Such a permissive inference charge "unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence." *Id.* (quoting *Cheeks*, 401 S.C. at 328, 737 S.E.2d at 484).

The Court in *Stewart* held it had previously erred by instructing trial courts to give a charge on a permissive inference of possession in *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987). *Stewart* explained *Adams* relied on prior cases concerning directed verdicts holding the fact drugs "are found on the premises under the control of an accused . . . gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury . . . ." 433 S.C. at 390, 858 S.E.2d at 812 (quoting *State v. Ellis*, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974)). *Adams* was mistaken to extend that sufficiency of the evidence principle to

jury charges. *Stewart*, 433 S.C. at 391, 858 S.E.2d at 812-13 ("Our reliance on [the prior cases] was misplaced because neither case approves of the *trial court* explaining the inference of knowledge and possession to the jury.")

The PCR court here made the exact same error in concluding "the jury charge was a correct statement of the law." App. 238. Not all "correct statements of the law" should—or can—be charged to juries. *Stukes*, 416 S.C. at 498, 787 S.E.2d at 482 (citing *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)) (holding trial court erred by charging language of a statute to the jury because it was an impermissible comment on the facts); *see also Cone v. State*, 443 S.C. 487, 495, 905 S.E.2d 368, 373 (2024) (extending *Stukes* to jury argument by the parties and stating, "The State argues it is always proper for a party to argue to the jury a correct statement of the law. We disagree . . ."). There was no valid basis for the trial court to tell the jury this inference may arise because that is something it cannot and need not do. *See Burdette*, 427 S.C. at 503, 832 S.E.2d at 583 ("It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" (quoting *State v. Belcher*, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009))). "Simply because certain facts may be considered by the jury as evidence of guilt . . ., it does not follow . . . juries should be charged that these facts are probative of guilt." *Cheeks*, 401 S.C. at 328, 737 S.E.2d at 484.

This jury charge is neither warranted by the statute nor tolerated by the constitution. The PCR court erred by holding "any objection by Trial Counsel would not have been meritorious." App. 238. Even if counsel's motion was denied at trial, the issue could have been brought on appeal and challenged at that time.

- b. Trial counsel was deficient for failing to object to the initial charge and to the court's answer to the jury's question, and that deficiency prejudiced Petitioner because the charge directly contradicted his entire defense.

Of course, trial counsel is not required "to be clairvoyant" and anticipate changes to the law. *Pantovich*, 427 S.C. at 563, 832 S.E.2d at 600. However, where Petitioner's entire case and the whole defense theory depends on convincing the jury that the mere proximity of defendant to the drugs was not enough proof of his possession or intent to distribute, reasonable trial counsel should have challenged the trial court's decision to instruct the jury it can infer the opposite.

*Cheeks* demonstrates this is not a new proposition. The Court in *Cheeks* overturned prior case law approving the trial court's instruction, "actual knowledge of the presence of a drug is strong evidence of intent to control its disposition or use." 401 S.C. at 328-29, 737 S.E.2d at 484 (overturning *Solomon v. State*, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994)). It is no significant extrapolation to conclude courts should not instruct juries that "[p]ossession of more than one gram of cocaine creates an inference that the Defendant possessed the cocaine with intent to distribute it." In a more general way, the more modern cases about inferences reflect a longstanding facet of the law, that specific intent crimes must be carefully charged to the jury to avoid misunderstandings and improperly prejudicing them towards a finding of intent. *See* 16 Corpus Juris, *Criminal Law* § 2390, at 985 (1918) (stating general rule that presumption of intention for one's actions should not be charged "where a specific intent is the gist of the offense charged").

Trial counsel was deficient for failing to object because trial counsel's strategy did not conflict with his factual "flying drugs" defense. Counsel could have continued to challenge possession without allowing the court to comment on facts with this inference of intent. At the PCR hearing, trial counsel articulated no strategy for not objecting but merely a belief he did not need to because the charge was a correct statement of the law. This is not the type of strategy to which reviewing courts owe deference, because it is not a strategy at all but rather a

misunderstanding of the law. As explained above, "It is axiomatic that some matters appropriate for jury argument are not proper for charging." *Burdette*, 427 S.C. at 503, 832 S.E.2d at 583. Trial counsel's belief the instruction was a correct statement of the law is of no moment when that belief is erroneous.

c. *Petitioner was prejudiced by this deficiency because the entire theory of his defense was defeated by the inference.*

Petitioner was prejudiced by trial counsel's failure for two reasons. First, the charge is too likely to draw the jury's attention to specific evidence at issue and therefore puts the court's thumb on the scale, thus making the jury more likely to find the "permissive inference" does in fact mean Petitioner had an intent to distribute. Second, the charge is likely to confuse the jury and make it believe the question was not Petitioner's intent but rather simply the weight involved, as it apparently believed and which was only amplified by the supplemental instruction.

The court "directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582. Given the jury's question, it clearly struggled with Petitioner's specific intent to distribute. Informing the jury it could infer that intent based merely on the weight is going to encourage it to do so, and there is a reasonable probability that changed the outcome of the case. Additionally, it only served to confuse the jury and enable the erroneous supplemental instruction. Clearly the jury thought it might be required to find Petitioner intended to distribute the drugs based merely on the weight involved. That is incorrect, and if it did so—which the supplemental instruction did not correct—that is prejudice to Petitioner for purposes of *Strickland*. Given that the jury returned a verdict in less than an hour, there is certainly a "reasonable" chance it believed so.

**CONCLUSION**

Petitioner respectfully requests this Court grant his petition for a writ of certiorari to review the PCR court's denial of his application and allow further briefing.



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Jordan Wayburn  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6<sup>th</sup> day of June, 2025.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”



Jordan Wayburn  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 6<sup>th</sup> day of June, 2025.