STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Orangeburg County

Honorable Edgar W. Dickson and
Kristi F. Curtis, Circuit Court Judges

SHELLY FAULLING,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000344

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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2. Did the trial court err by denying Appellant's motion for a continuance due to his absence from court while in custody?

3. Did the trial court make an unconstitutional comment on the facts by instructing the jury that possession of more than one gram of methamphetamine raises the inference of an intent to distribute?

STATEMENT OF THE CASE

On February 2, 2017, Appellant Shelley Faulling was arrested for possession of methamphetamine. App. 206. On December 6, 2017, he was indicted by the Orangeburg County grand jury for possession of methamphetamine with the intent to distribute. App. 206-07. On December 12, 2017, he was tried in his absence before Judge Edgar Dickson and a jury. App. 18, 44:16-18. Appellant was in custody at the local jail at this time. App. 47:16-20, 49:17-21. Appellant was represented by Deborah Butcher, and Ashley Cornwell prosecuted the case. App. 18. Ultimately, the jury convicted him as charged. App. 186:1-6. The trial court sealed its sentence. App. 190:15-20.

Two days later, on December 14, 2017, Appellant was brought before the court and received a sentence of thirty years in prison. App. 193:1-17, 204:1-8. At sentencing, trial counsel was relieved. App. 196:10-13, 198:22-199:7. Appellant then attempted to file a notice of appeal *pro se*, but it was dismissed as untimely. App. 264, 268. At a subsequent PCR hearing, the state conceded he is entitled to a belated appeal pursuant, and the PCR court ruled he was entitled to that appeal. App. 12-13.

Pursuant to Rule 243(i), SCACR, Appellant then filed his petition for a writ of certiorari and this brief.

STATEMENT OF FACTS

When the state called Appellant's case to trial, he was not there. Only after selecting a jury did the trial court address his absence once counsel made a motion for a continuance. App. 44:12-18. Counsel informed the court, without disclosing the source of her information, that Appellant "refused" to attend. App. 44:17-19. She stated he was informed that trial was scheduled. App. 45:9-12, 47:18-23. At the time, he was being held in the local jail. App. 47:16-20. Trial counsel noted for the court, "He, of course, couldn't show up on his own." App. 47:18-19. The solicitor argued that "notice was given." App. 48:16. She asserted without elaboration or explanation, "He knows that he can be tried in his absence." App. 49:17-18. She stated, "the state did arrange for transportation to have him brought here so that he could be present for his trial and he refused." App. 49:17-21. She never explained the source of her information or the nature of Appellant's alleged refusal. App. 48:15-49:24. Ultimately, the trial court denied the motion for a continuance. App. 50:15-17.

Trial proceeded, and in its opening statement the state argued law enforcement officers found "a quantity of methamphetamine that equaled the permissible inference that it was a distribution amount of methamphetamine." App. 75:16-20. Shay Dash testified she was at a gas station on January 7, 2017, when she saw a white male speaking with law enforcement officers who "threw something by the newsstand, and something in the trashcan." App. 80:7-9. She told an officer about this. App. 80:9-13. She identified the surveillance video on State's Exhibit 1 as an accurate representation of what she saw. App. 81:1-25.

Investigator Rob Boyne of the Orangeburg County Sheriff's Office testified he spoke with Appellant at an Easy Gas gas station App. 86:5-21, 88:12-89:19. After Appellant walked away, Boyne found a chrome cigarette case which contained "four green bags of what appeared

to be methamphetamine, ice, and one larger clear plastic bag that contained a larger amount of what appeared to be methamphetamine, ice." App. 90:15-19. In the trashcan next to it he found "a little package" with "those little jewelry bags in it, you know, like the green ones." App. 90:15-21. According to David Martin, a forensic chemist with the City of Orangeburg, the bags contained a total of 9.3 grams of methamphetamine. App. 132:16-22, 139:2-141:9. Lieutenant Marty Journey of the Orangeburg County Sheriff's Office testified that possession of more than one gram of methamphetamine is typically possession with intent to distribute. App. 108:6-15, 109:14-22.

In closing, the state began its argument, "the Defendant in this case, Shelly Thomas Fualling, had in his possession an amount of methamphetamine which showed he had the intent to distribute it." Tr. 143:7-11. The solicitor argued: "And you're gonna hear the Judge tell you, and you heard Lieutenant Journey and Investigator Boyne explain to you that, in South Carolina, anything that is one gram or higher, you are allowed a permissive inference that that is a distribution weight." Tr. 146:8-15. The trial court then did in fact instruct the jury, "The South Carolina Code of Laws creates a permissive inference that possession of one or more grams of methamphetamine constitutes possession with intent to distribute." App. 179:13-16. The jury found Appellant guilty of possession with intent to distribute methamphetamine. App. 186:1-6.

The trial court then issued a sealed sentence due to Appellant's absence. App. 190:15-20. Two days later, on December 14, 2017, Appellant was brought before the trial court for sentencing. App. 193:1-17. Trial counsel requested the court relieve her of representing him on the other charges he had pending at the time. App. 196:10-13. Appellant did not object. App. 198:22-199:7.

Appellant then personally asked the court,

> I was requesting, if you don't mind, if there's any way possible that the Court could we wait till after the first of the year for sentencing so that I can review my paperwork, look at anything. . . . I'm not arguing with the outcome. I just don't know what in the world happened. I was getting bailed out at the time. Next thing I know I got a jury trial going in my absence.

App. 199:11-15. The trial court asked if he was aware the case was proceeding to trial. App. 199:19-20. Appellant explained,

> I was up front getting bailed out. I was -- she told me one day that we was going, one day last week and then she said Monday. Next thing I know I'm up front getting bailed out, and they said that was gonna -- that I had to come over here for GPS monitoring. I'm waiting for that there and they said if you -- I mean hell, Mr. Faulling, you already been found guilty.

App. 199:21-200:2. He expressed, "I don't know what transpired, what happened, and I wasn't even informed by the jail." App. 200:4-5. He thought he was going home and had already called his children after his bench warrant was lifted the Friday before. App. 200:11-21. His sister was helping the Calhoun County Clerk of Court with the paperwork. App. 201:2-6. The solicitor then told Appellant she would keep her plea offer—to run the other charges concurrent with the trial sentence—until January to give him a chance to review the discovery and other documents. App. 201:19-202-13, 203:18-24. The trial court then sentenced him to thirty years in prison. App. 204:1-8.

This appeal pursuant to *White v. State* follows.

STANDARD OF REVIEW

Whether a defendant voluntarily waived his right to be present should be reviewed on appeal de novo as a mixed question of law and fact. *Cf. State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (concerning the right to counsel). "The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant." *Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (citations omitted). Interpretation and application of constitutional provisions are questions of law reviewed de novo on appeal. *City of Rock Hill v. Harris*, 391 S.C. 149, 153, 705 S.E.2d 53, 54 (2011).

ARGUMENT

I. The trial court erred by trying Appellant *in absentia.*

The trial court erred by trying Appellant in his absence for four reasons: (1) it did not make the necessary findings of fact on the record; (2) no evidence demonstrates Appellant had notice he would be tried in his absence; (3) for defendants in custody, waiver of the right to be present must be done personally and on the record; and (4) the trial court selected a jury prior to addressing Appellant's absence.[1]

a. The trial court erred because it did not make the requisite findings of fact before trying Appellant in his absence.

"A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence." *State v. Wrapp*, 421 S.C. 531, 535, 808 S.E.2d 821, 823 (Ct. App. 2017) (quoting *State v. Ravenell*, 387 S.C. 449, 455, 692 S.E.2d 554, 557-58 (Ct. App. 2010)). In general, that means the trial court "must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend." *Id.* (quoting *Ravenell*, 387 S.C. at 456, 692 S.E.2d at 558); *see also* Rule 16, SCRCrimP. Here, the trial court did not do so but instead

[1] Appellant recognizes that, technically speaking, trial counsel requested only a continuance on the basis that he was not present rather than objecting to the trial proceeding in his absence, so the issue is arguably not preserved. *See State v. Williams*, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). However, a separate objection is not necessary where the continuance motion is based on the absence of the defendant. *See State v. Lucker*, 40 S.C. 549, 18 S.E. 797, 797 (1893) (reviewing challenge to trial *in absentia* following only motion for a continuance). Further, when the basis for the continuance is clear, there is simply no point in also objecting to proceeding without the defendant, and further objection would be an exercise in futility while elevating form over substance. *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) ("[I]ssue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue."); *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) (recognizing issue preservation requirements will yield "where it would be futile to raise an objection to the trial judge").

denied the motion for a continuance without making any factual findings at all. App. 50:7-20. That is error. *State v. Patterson*, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) (citations omitted).

Although the *solicitor* addressed the trial court at some length about Appellant's absence and alleged notice, the court itself never expressly accepted those assertions as factual findings. The court stated merely, in response to trial counsel's motion for a continuance, "I'm gonna deny your motion." App. 50:15. It never found Appellant was in fact notified of his trial or warned he would be tried in his absence. Where these findings are not expressly on the record, it is error to try a defendant in his absence. *State v. Jackson*, 288 S.C. 94, 96, 341 S.E.2d 375, 375 (1986) (citing *State v. Fleming*, 287 S.C. 268, 269, 335 S.E.2d 814, 814 (Ct. App. 1985)).

Because the findings are "required," failure to make them mandates reversal. *State v. Ritch*, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987). The trial court's bare-bones denial of the motion for a continuance was insufficient. It needed to specifically find on the record Appellant had notice of his right to be present and was warned his absence would waive it. The trial court did not do so, and now Appellant's conviction must be reversed. *Jackson*, 288 S.C. at 96, 341 S.E.2d at 375; *Wrapp*, 421 S.C. at 536, 808 S.E.2d at 823.

b. The trial court also erred because Appellant was not warned he would be tried in his absence.

In addressing his absence, the solicitor asserted Appellant "received notice that he could be tried in his absence should he fail to appear." App. 48:22-24. She continued, "The state did give notice to the Defendant through defense counsel, which was sent to them." App. 48:24-25. However, there is no evidence in the record—through testimony or otherwise—of such notice.[2]

[2] Conversely, Appellant recognizes there is evidence in the record he was informed he was due to report to court for the term beginning December 11, 2017, when his trial was ultimately heard.

The only indication Appellant was warned is the solicitor's statements with which trial counsel did not expressly agree. The solicitor did not even explain to the court when or how Appellant was warned. Although trial counsel informed the court, "I did tell him it would be tried," that admitted notice only of his trial—not that trial would proceed without him. Any determination Appellant was in fact warned he would be tried in his absence is without factual support in the record.

This case is therefore in many ways similar to *Wrapp*. There the Court wrote that, even if it "construe[d]" the trial court's comment as a finding the defendant was noticed of his right to be present, "there was no finding that Wrapp was informed he could be tried *in absentia*." 421 S.C. at 536, 808 S.E.2d at 823. In a footnote, the Court specified that even if it accepted the fact the defendant's bond form included notice he would be tried *in absentia*, it was still error because "the circuit court made no such finding." 421 S.C. at 536 n.1, 808 S.E.2d 821, 823 n.1. Here, with no evidence at all—other than a bald two sentences from the solicitor—the trial court failed to satisfy the requirement for proceeding to trial without Appellant present.

Critically, the trial court did not hear any testimony from someone who witnessed the alleged refusal. It is also not clear the basis of trial counsel's knowledge admitting his refusal, but if it was based on nothing more than the solicitor's representation, then counsel's concession is of no more value. The point, however, is the record is not clear. Without actual evidence before it in the form of testimony or otherwise, the trial court had no factual basis to conclude Appellant voluntarily waived his right to be present at trial with warning that it would proceed without him. The trial court's determination he waived his right to appear therefore cannot stand.

The December 8, 2017 order granting him bond stated, "Defendant was also informed on the record that his next scheduled court appearance is December 11, 2017 at 9:30." App. 397.

State v. Simmons, 279 S.C. 165, 167, 303 S.E.2d 857, 859 (1983) (reversing where "the record is in all respects void of evidence" the defendant had actual notice of his trial when he failed to appear).

This absence of evidence also wholly compromises any determination that Appellant *voluntarily* chose not to appear. For all the court knew, at least as appeared on the record before it, Appellant was horribly ill and simply unable to come to court. Without on-the-record discussion and testimony about the precise circumstances of his alleged "refusal" to be transported, there is not a satisfactory basis to conclude he voluntarily waived his right. *Cf. Osbey v. State*, 425 S.C. 615, 621, 825 S.E.2d 48, 51 (2019) (holding defendants must be warned on the record about the dangers of self-representation before they can be found to have waived their right to counsel).

"On the subject of waiver, 'it has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' . . . This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.'" *United States v. Gordon*, 829 F.2d 119, 125 (D.C. Cir. 1987) (quoting *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963)) (omission original). Appropriate protections for criminal defendants and every reasonable presumption against waiver of this fundamental right require on-the-record testimony or other evidence to support a finding Appellant voluntarily waived his right to be present. *See State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) ("A defendant's knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record . . . ."). That is not present here, and therefore his purported waiver was not valid.

c. An on-the-record waiver should be required before an in-custody defendant is found to have waived his right to be present at trial.

Appellant's foregoing argument has proceeded as if this is a typical case where a defendant simply fails to appear for trial.[3] To be clear, even under that analysis, the trial court erred. However, this is not a typical case because Appellant was in custody at the time of his trial *in absentia*. Thus, the trial court also erred because it should have required him to come to court for adequate warnings and a personal waiver.

As trial counsel noted, "He was at the jail. He, of course couldn't show up on his own." App. 47:18-19. This fact distinguishes Appellant's case from every other case where trial was permitted to proceed *in absentia*. All other cases of which counsel is aware have concerned defendants out on bond, which is plainly different from defendants in custody. *See, e.g.*, *State v. Jackson*, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986) (out on bond); *Ellis v. State*, 267 S.C. 257, 259, 227 S.E.2d 304, 305 (1976) (same); *Wrapp*, 421 S.C. at 533, 808 S.E.2d at 822 (same); *Ravenell*, 387 S.C. at 453, 692 S.E.2d at 556 (same).[4] The only other cases concern defendants who waive or forfeit their rights by disruptive conduct. *See, e.g.*, *State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 244 (Ct. App. 2006) (citations omitted) ("In some circumstances, a defendant may be presumed to waive or forfeit the right to be present by misbehaving in the courtroom or by voluntarily remaining away from trial."); *see generally Illinois v. Allen*, 397 U.S. 337, 338 (1970). But defendants in custody clearly present a different circumstance, one

[3] For example, in *Ellis v. State*, 267 S.C. 257, 227 S.E.2d 304 (1976), "Appellant admitted knowing which term of court he was scheduled to be tried in before he left for New Orleans." 267 S.C. at 261, 227 S.E.2d at 306. That is clearly a different matter than Appellant who was actively being held in the local jail.

[4] *See also State v. Green*, 269 S.C. 657, 659, 239 S.E.2d 485, 486 (1977) (out on bond); *State v. Fairey*, 374 S.C. 92, 102, 646 S.E.2d 445, 449 (Ct. App. 2007) (same); *City of Aiken v. David Michael Koontz*, 368 S.C. 542, 547-48, 629 S.E.2d 686, 689 (Ct. App. 2006) (same).

where it is not adequate to merely accept the solicitor's or counsel's statement, especially without putting on the record their basis for such belief or properly calling testimony from someone with actual knowledge of the circumstances of a defendant's alleged refusal to appear.

In such cases where the defendant is in custody and readily accessible, the trial court should be required to obtain a waiver from the defendant personally.[5] This is because the right to be present at one's trial is of such importance—it is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912); *see also Lewis v. United States*, 146 U.S. 370, 374-75 (1892) (describing "the peculiar sacredness of this high constitutional right" to be present at trial, and requiring an on-the-record notation that the defendant is or is not present). Moreover, this is a longstanding rule: "It is generally held that a waiver of defendant's right to be present during the trial, when permitted, *must be made by him personally*, and that the right cannot be waived by his counsel, unless the defendant expressly authorizes him to do so." 16 Corpus Juris, *Criminal Law* § 2071, at 818 (1918) (emphasis added); *see also Lewis*, 146 U.S. at 372 ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. . . . [I]in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."). The Supreme Court in *Diaz* long ago recognized that this general rule distinguishes between those in custody and those not, noting those in custody cannot waive the right to be present "because his presence or absence is not within his own control." 223 U.S. at 455. Here, Appellant was confined to his cell a few miles from the courthouse, without ability to bring himself to court. Before the law will presume a

[5] In fact, the Federal Rules of Criminal Procedure go further: a felony trial in federal court *cannot* begin without the defendant present under any circumstances. *Crosby v. United States*, 506 U.S. 255, 258-59 (1993) (quoting Fed. R. Crim. P. 43).

waiver of his right to be present, it should hear from the defendant himself that desire and ensure he is warned that trial will proceed in his absence if he so chooses.

Other jurisdictions have reached this conclusion: "Where the defendant is in custody, the serious and weighty responsibility of determining whether he wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make an intelligent and competent waiver." *United States v. Gordon*, 829 F.2d 119, 125 (D.C. Cir. 1987) (internal quotation marks omitted) (quoting *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963)). In *Gordon* the D.C. Circuit held that trial counsel could not waive the defendant's right to be present and "the court should have held an on-the-record hearing to advise Gordon of his right to be present at voir dire and obtained a personal waiver in open court." *Id.* That on-the-record hearing is what should have occurred here. The trial court should not have accepted the solicitor's and trial counsel's statements that Appellant refused to appear as the end of the discussion. It should have ordered Appellant to be brought to court regardless.[6]

Personal warning of and waiver by the defendant is necessary and proper where the defendant is in custody. This Court is aware of the many difficulties, logistical and otherwise, in managing a courtroom and ensuring defendants and their counsel are present when needed. Sometimes mistakes are made. Appellant thought he was going to make bail and would go see his kids, and instead a jury found him guilty without his knowledge. That should never happen. The risk is too high and too easily addressed to require someone in Appellant's position to wait *years* for the tenuous potential of redress on PCR.

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[6] One additional reason for this rule is that if counsel waives the defendant's right to be present for him, as effectively occurred here, counsel has also waived the defendant's right to testify. This it cannot do. *See Mccoy v. Louisiana*, 584 U.S. 414, 422 (2018) ("[S]ome decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, *testify in one's own behalf*, and forgo an appeal." (emphasis added)).

d. The trial court erred by performing jury selection before addressing Appellant's absence.

A criminal defendant has the right to be present for jury selection. *State v. State v. Whaley*, 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986) (finding error where trial court conducted part of the jury voir dire without defendant present). The "making of challenges" during jury selection is "an essential part of the trial, and . . . one of the substantial rights of the prisoner [is] to be brought face to face with the jurors at the time when the challenges were made . . . ."[7] *Lewis*, 146 U.S. at 376; *see also Rivers*, 294 S.C. 123, 125, 363 S.E.2d 105, 106 (1987) (reversing where defendant was excluded from "voir dire during the course of the trial to determine the jury's continued impartiality"). "[U]nless waiver is permitted and made, defendant must be present at the . . . impaneling and swearing of the jury . . . ." 16 Corpus Juris, *Criminal Law* § 2067, at 814 (1918).

Here, the trial court made no on-the-record determination or inquiry of Appellant's absence until after the jury was selected. In fact, there was no acknowledgement of his absence at all. Nonetheless, the trial court later expressly recognized the importance of his presence: "[Y]ou would think, as a defense attorney, it would be helpful to have your client there to help you picking a jury . . . ." App. 50:9-12. The court erred by proceeding to impanel the jury without the defendant present and without making the "specific findings" on the record that he

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[7] A defendant's presence and assistance during jury selection may be absolutely critical to the outcome of his trial:

> The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only.

Lewis, 146 U.S. at 373-74 (quoting *Hopt v. People*, 110 U.S. 574, 578 (1884)); *accord State v. Atkinson*, 40 S.C. 363, 18 S.E. 1021, 1023 (1894).

"received notice of his right to present" and "was warned he would be tried *in absentia* if he failed to attend." *Wrapp*, 421 S.C. at 536, 808 S.E.2d at 823. That failure violated Appellant's right to be present at his trial.

II. The trial court also erred by denying Appellant's motion for a continuance.

"The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant." *Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (first citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957), then citing *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996)). Appellant accepts this general statement of law, but there are "rare case[s] where the refusal of the continuance . . . have amounted to an abuse of discretion." *Morris*, 371 S.C. at 283, 639 S.E.2d at 56. In *Morris* the defendant, his attorney, and the solicitor signed a sentencing sheet at the beginning of the day indicating his intention to plead guilty to common law assault and battery with intent to kill. 371 S.C. at 280 & n.1 639 S.E.2d at 55 & n.1. He then left the courthouse and was unable to be found. 371 S.C. at 280, 639 S.E.2d at 55. The state then sought to try him in absentia, and trial counsel did not make a motion for a continuance. 371 S.C. 278, 280-81, 639 S.E.2d at 55. He was convicted, and on appeal from the denial of his PCR application, the Supreme Court held trial counsel was ineffective for failing to request a continuance. 371 S.C. at 283, 639 S.E.2d at 56. It held it would have been an error of law to deny the motion for a continuance in such circumstances. *Id.* If it would have been error as a matter of law to deny the motion for a continuance for a defendant out on bond and absent from court without a clear reason, certainly it is error to deny the motion for the absence of someone *being held in custody*.

In *Varn v. Green*, 50 S.C. 403, 27 S.E. 862 (1897), the Court also reversed the denial of a motion for a continuance. 50 S.C. 403, 27 S.E. at 862. There, both of the plaintiff's attorneys were ill on the day of trial and unable to proceed in court. *Id.* A previously unaffiliated attorney "volunteered to take charge of the case, to relieve his sick brother attorneys as far as he could; but, being totally unprepared, the case was tried under circumstances of disadvantage to the defendant." *Id.* The Court reversed: "Considering all the circumstances of this case, we think the defendant was entitled to a continuance of the case on account of the illness of his counsel, and that the circuit judge abused his discretion in forcing the case to trial under the circumstances." *Id.* In much the same way that being forced to trial with unfamiliar, unprepared counsel requires the granting of a continuance, the trial court was obligated here to grant the continuance until such time that Appellant could be brought to court.

III. Juries should not be charged there is a "permissive inference" of intent to distribute based on weight as it is an unconstitutional comment on the facts.

The trial court instructed the jury,

> The South Carolina Code of Laws creates a permissive inference that possession of one or more grams of methamphetamine constitutes possession with intent to distribute. The inference of a violation of the law by possession of one or more grams of methamphetamine may be drawn from proof of the quantity of the drug. The resulting implication only permits rather than requires the jury to infer a violation of the law. This is another piece of evidence for you to consider and evaluate.
>
> 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 . . . this case and to be given the weight you decide it should have. You're free to accept or reject the permissive inference depending on your view of the evidence.

App. 179:13-180:3. The court was referring to subsection 44-53-375(B) which creates the PWID methamphetamine offense and provides in part, "Possession of one or more grams of

methamphetamine . . . is prima facie evidence of a violation of this subsection." S.C. Code Ann. § 44-53-375(B).

Even if the statute does require this instruction,[8] should not be given because it is an unconstitutional comment on the facts.[9] "Judges shall not charge juries in respect to matters of

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[8] Appellant does not concede this point. There is no textual reference in the statute to charging juries with the statute at all, and further, the statute does not mention the "permissive inference" rule. It is likely the "prima facie evidence of a violation" language was added to require courts to instruct juries that defendants who possess more than one gram of methamphetamine are presumptively guilty of PWID unless they affirmatively demonstrate their lack of intent. *See Prima Facie*, BLACK'S LAW DICTIONARY (4th ed. revised 1968) ("[A] fact presumed to be true unless disproved by some evidence to the contrary."); *Prima Facie Case*, BLACK'S LAW DICTIONARY (4th ed. revised 1968) ("Such as will suffice until contradicted and overcome by other evidence."). That charge, however, is unconstitutional. *See State v. Key*, 282 S.C. 413, 414, 319 S.E.2d 338, 338 (1984) (reversing conviction for PWID marijuana where trial court instructed jury the defendant is "prima facie guilty" if he possessed more than one ounce of marijuana); *see generally Sandstrom v. Montana*, 442 U.S. 510 (1979) (reversing conviction based on a jury charge that was either a burden-shifting presumption or mandatory presumption of intent). The instruction in *Key* was derived from subsection 44-53-370(d)(5) which provides someone possessing of more than one ounce of marijuana "is prima facie guilty of" PWID. There is no reason to distinguish between "prima facie evidence of a violation" in section 44-53-375 and "prima facie guilty of [a] violation" in 44-53-375.

The only other plausible interpretation of that statute is that it was intended to guide non-judicial decision-making and to require trial courts to deny motions for a directed verdict, but in that case it should not be charged to juries. *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"). However, Appellant does concede the statutory interpretation issue was not argued below.

[9] Whether a given jury charge is an unconstitutional comment on the facts should be reviewed de novo on appeal. The question is whether the charge given violates Article V, section 21 of the South Carolina Constitution. That section is a limitation on the judicial authority of this state, and as such its application raises a question of law just the same as similar provisions limiting the authority of the General Assembly and Executive. *See, e.g., City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) ("[T]he authority given to the General Assembly by our Constitution is a limitation of legislative power, not a grant." (citing *Moseley v. Welch*, 209 S.C. 19, 27, 39 S.E.2d 133, 137 (1946))). The fact that such a provision applies in a context normally reviewed for the trial court's exercise of discretion (jury charges) does not change the analysis.

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, e.g.*, *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, 577 (2019) (same); *Pantovich*, 427 S.C. at 562, 832 S.E.2d at 600 ("good character" charge); *Stukes*, 416 S.C. at 498-99, 787 S.E.2d at 482-83 (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. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009) (inferred malice instruction).

On drug possession and trafficking, there are two leading comment-on-the-facts cases: *State v. Stewart*, 433 S.C. 382, 386, 858 S.E.2d 808, 810 (2021), and *State v. Cheeks*, 401 S.C. 322, 737 S.E.2d 480 (2013). 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. Giving 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 *Cheeks* overturned prior case law approving the 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)). While that instruction is a correct statement of law which requires the court to deny a defendant's motion for a directed verdict, it has no place as a jury charge: "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt." *Cheeks*, 401 S.C. at 328, 737 S.E.2d at 484. This is because it "is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." *Id.* Instructing the jury there is a permissive inference of intent based on weight is just as flawed as the charges in *Stewart* and *Cheeks*

It is unnecessary for trial courts to instruct the jury this inference may exist. *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))); *see also Sandstrom v. Montana*, 442 U.S. 510, 522 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952)) ("A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition.").

Giving the improper charge requires reversal because "[i]t remains the burden of the State to convince the jury the defendant had the requisite knowledge and intent." *Stewart*, 433 S.C. at 389, 858 S.E.2d at 811. By instructing the jury it can—and by emphasizing the fact, should—infer an intent to distribute, the court relieved the state of meeting its full burden of proof on

every element of the offense. As our Supreme Court has noted, "Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence." *Burdette*, 427 S.C. at 502-03, 832 S.E.2d at 582. Doing so was improper. *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").

Finally, Appellant recognizes there was no objection to the charge below. App. 157:1-158:25, 184:6-13. However, a complaint about the "constitutional prohibition as to a charge on the facts" need not be argued below to be raised on appeal. *State v. Orr*, 128 S.C. 279, 122 S.E. 771, 771 (1924).[10]

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[10] The Court in *Orr* considered an appeal challenging the trial court's instruction without objection. 128 S.C. 279, 122 S.E. at 771. It reversed, holding:

> It is said, however, that, if his honor misstated the issues, it was the duty of the defendant to call the attention of the court to it, and, not having done so, he cannot now complain. That is a rule of court and must give way to the constitutional prohibition as to a charge on the facts. This assignment of error must be sustained.

Id. Therefore, objections to a charge on the facts need not be raised below to be argued on appeal.

Admittedly, this rule has not been utilized since *Orr*. However, in virtually all recent comment-on-the-facts cases, the issue has been preserved so the *Orr* rule was unnecessary. *See State v. Brown*, 443 S.C. 196, 198, 904 S.E.2d 448, 449 (2024); *State v. Stewart*, 433 S.C. 382, 386, 858 S.E.2d 808, 810 (2021); *State v. Smith*, 430 S.C. 226, 229, 845 S.E.2d 495, 496 (2020); *State v. Burdette*, 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019); *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019); *State v. Stukes*, 416 S.C. 493, 497, 787 S.E.2d 480, 482 (2016); *State v. Witherspoon*, 418 S.C. 641, 642, 795 S.E.2d 685, 686 (2016); *State v. Cheeks*, 401 S.C. 322, 327, 737 S.E.2d 480, 483 (2013); *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), *overruled in unrelated part by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Grant*, 275 S.C. 404, 406, 272 S.E.2d 169, 170 (1980); *State v. Owens*, 427 S.C. 325, 329, 831 S.E.2d 126, 128 (Ct.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse his convictions and remand the case for a new trial.

Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of July, 2025.

App. 2019), *aff'd*, 433 S.C. 482, 860 S.E.2d 357 (2021); *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010).