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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Florence County
Honorable George M. McFaddin, Jr., Post-Conviction Relief Judge
Honorable William H. Seals, Trial Judge

Appellate Case No. 2025-000180

MYRON A. CANNON, SCDC # 296787,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 7

ARGUMENT

I. Petitioner's appellate argument that trial counsel was ineffective for failing to object to the supplemental instruction as it was incomplete and unconstitutionally commented on the facts was not preserved for appellate review, where this issue was not raised in Petitioner's application for post-conviction relief and was not ruled upon by the post-conviction relief court in its order of dismissal. Notwithstanding any preservation concerns, plea counsel was not ineffective, where the supplemental instruction was a correct statement of the law and the trial court's response was properly limited to the jury's question. 8

II. The post-conviction relief court properly found that trial counsel was not constitutionally ineffective for failing to object to the permissive inference jury instruction, as it was a correct statement of law at the time of Petitioner's trial. Moreover, even if this Court found trial counsel were deficient, the challenged charge is applicable solely to the possession conviction and not to the trafficking conviction, the requested relief having no practical effect on the verdict. 16

CONCLUSION.....20

PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

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 of 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 ocean raises the inferences of an intent to distribute?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I. Whether Petitioner's appellate argument that trial counsel was ineffective for failing to object to the supplemental instruction as it was incomplete and unconstitutionally commented on the facts was preserved for appellate review, where this issue was not raised in Petitioner's application for post-conviction relief and was not ruled upon by the post-conviction relief court in its order of dismissal? Notwithstanding any preservation concerns, was plea counsel not ineffective, where the supplemental instruction was a correct statement of the law and the trial court's response was properly limited to the jury's question?

II. Whether the post-conviction relief court properly found that trial counsel was not constitutionally ineffective for failing to object to the permissive inference jury instruction, as it was a correct statement of law at the time of Petitioner's trial and even if this Court found trial counsel's representation was deficient, is the challenged charge applicable solely to the possession conviction and not to the trafficking conviction, the requested relief having no practical effect on the verdict?

RESPONDENT'S STATEMENT OF THE CASE

Petitioner Myron A. Cannon is presently confined in the South Carolina Department of Corrections. During its March 2016 term, the Florence County Grand Jury indicted Petitioner for Trafficking Cocaine Base, Possession of Cocaine with Intent to Distribute, Failure to Stop for a Blue Light, and Resisting Arrest (2016-GS-21-0415). Grant B. Smaldone, Esquire (trial counsel), represented Petitioner. Twelfth Circuit Deputy Solicitor John C. Jepertinger prosecuted the case.

Petitioner's case proceeded to a jury trial September 6–7, 2016, before the Honorable William H. Seals. The jury convicted Petitioner as indicted on all counts. Judge Seals sentenced Petitioner to concurrent sentences of twenty-five (25) years for Trafficking Cocaine Base, twenty-five (25) years for Possession of Cocaine with Intent to Distribute, five (5) years for Failure to Stop for a Blue Light, and one (1) year for Resisting Arrest.

Petitioner filed a timely notice of appeal. Elizabeth Franklin-Best, Esquire, perfected Petitioner's appeal and presented the following issues:

1. The circuit court judge erred when he denied Cannon's motion for a directed verdict because the State failed to adduce substantial circumstantial evidence to prove that Cannon was guilty of trafficking in cocaine base and possession with intent to distribute cocaine.

2. The circuit court judge erred by allowing Officer Nida to testify to the street value of the drugs that were found in the car Cannon was driving because that testimony was irrelevant and was unduly prejudicial to Cannon pursuant to Rule 403.

Following briefing, the South Carolina Court of Appeals dismissed the appeal in an unpublished decision. State v. Cannon, Op. No. 2019-UP-397 (S.C. Ct. App. filed December 18, 2019). The Remittitur was returned to the circuit court on January 8, 2020.

On December 17, 2020, Petitioner filed a post-conviction relief application, alleging various allegations of ineffective assistance of counsel and violations of due process. Respondent

made its Return and Partial Motion to Dismiss on April 5, 2021, requesting an evidentiary hearing to resolve the claims outlined in the application and amended application.

On December 15, 2022, an evidentiary hearing was held at the Florence County Courthouse before the Honorable George M. McFaddin, Jr. Petitioner was present and represented by Ola A. Johnson, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Petitioner proceeded forward on the following claims:

1. Ineffective Assistance of Trial Counsel:
   a. Counsel was ineffective in failing to object to an instruction to the jury regarding possession of cocaine with the intent to distribute.
   b. Counsel was ineffective in failing to request the court to dismiss, Ms. Shavers, and to sit the alternative juror after, Ms. Shavers had become compromised [sic.] by a phone call.
   c. Counsel was ineffective when making a motion for a directed verdict based on control and dominion of the cocaine.
   d. Trial Counsel failed to review discovery with Applicant.
   e. Trial Counsel failed to investigate the case.
   f. Trial Counsel failed to object to juror 131 following the discovery that someone described as "defendant's girlfriend" contacted this juror.
   g. Trial Counsel failed to object to the testimony of Sgt. William Joe Nida regarding the street value of the drugs in question as improper character evidence and failed to preserve the issue for appeal.

Judge McFaddin denied and dismissed Petitioner's post-conviction relief action by Order of Dismissal filed on January 10, 2025. Petitioner did not file a Rule 59(e), SCRCP, motion. This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

Prior to trial, Petitioner moved to suppress evidence seized from the car he was driving at the time of his arrest. After hearing testimony from the police officers involved in Petitioner's arrest and seizure of the evidence, the trial court denied Petitioner's motion. (App'x pp. 17–27). Petitioner then moved to exclude testimony from the State's proposed expert regarding the street value of cocaine and crack, arguing the testimony was irrelevant because the dollar value was not an element of the offenses charged, and it was more prejudicial than probative. The State argued the testimony was relevant to the issue of whether the drugs found in the car were just for personal use. The trial court denied the motion to exclude the expert's testimony, finding the proposed testimony was relevant because the vehicle Petitioner was driving was a rental car, and the issue of whether someone other than Petitioner left the drugs in the vehicle could arise. (App'x pp. 27–29).

Sergeant Tony Drummond (Sgt. Drummond) with the Florence County Sheriff's Office, testified that on September 12, 2015, he attempted to stop a car traveling at a very high rate of speed. Instead of stopping after Sgt. Drummond activated his blue lights, the driver—later identified as Petitioner—kept driving at a high speed while Sgt. Drummond pursued. During the pursuit, Sgt. Drummond observed Petitioner run stop signs and drive erratically. Finally, after Petitioner almost caused wrecks with other cars, Sgt. Drummond struck the rear of Petitioner's car, which caused it to run off the road, through a ditch, and into a bean field. (App'x pp. 40–45).

After the car came to a stop in the bean field, Sgt. Drummond saw Petitioner open the driver's door, jump out, and run away. Sgt. Drummond determined no one else was inside the car, then pursued Petitioner on foot. Petitioner refused to stop when Sgt. Drummond repeatedly ordered him to do so, and Sgt. Drummond ultimately used a taser to subdue Petitioner and place

him into custody. When Sgt. Drummond took Petitioner back to his car, another officer told Sgt. Drummond that drugs had been found inside the vehicle, which was determined to be an Enterprise rental car. (App'x pp. 46–49).

Corporal Brooks Urqhart (Cpl. Urqhart) with the Florence County Sheriff's Office testified he was the first officer on the scene after Sgt. Drummond started chasing Petitioner on foot. When Cpl. Urqhart approached the car in the bean field, he noticed the driver's side door was open, with two bags, seemingly containing narcotics, clearly visible inside—one on the driver's seat and another on the floorboard. Cpl. Urqhart did not touch anything in the car but secured the scene until other officers could arrive to seize the drugs. (App'x pp. 58–60).

Corporal Jason Bazen (Cpl. Bazen) with the Florence County Sheriff's Office testified he worked narcotics interdictions with an inter-county community team of officers. Cpl. Bazen was working the night of September 12, 2016, and responded to a call for assistance involving Sgt. Drummond's pursuit of Petitioner. Cpl. Bazen assisted Sgt. Drummond in securing Petitioner and walked with them back to the vehicle, where he also saw the bags of drugs in plain view inside the car. Cpl. Bazen secured the narcotics and placed them in evidence bags. Cpl. Bazen also seized a set of digital scales, several cell phones, and two thumb drives from inside the car. Cpl. Bazen testified that digital scales are used to weigh drugs in the drug business. (App'x pp. 63–70).

Detective Mitch Hansen (Det. Hansen) with the Florence County Sheriff's Office testified he is the forensic drug chemist for the Office, which includes testing, weighing, and re-packaging seized narcotics. Det. Hansen analyzed the drugs seized from Petitioner's rental car and determined that one bag contained 6.92 grams of cocaine powder. The other bag contained 38.19 grams of crack (cocaine base). (App'x pp. 77–81).

Sergeant William Nida (Sgt. Nida) with the Florence Police Department testified he had worked with the Department Narcotics Unit for twelve years, which handles anything concerning drugs, including controlled purchases of illegal narcotics. Sgt. Nida stated his unit averages 480 drug cases annually, and as a result of his involvement in controlled purchases and general experience working with drug cases, he was familiar with the street value of narcotics in Florence County. Over Petitioner's relevancy and 403 objections, the trial court qualified Sgt. Nida as an expert in the field of the retail value of cocaine and crack cocaine in the Florence area, finding the information was beyond the knowledge of an ordinary jury, Sgt. Nida had the requisite knowledge and skill, and his testimony was reliable. (App'x pp. 84–87).

Sgt. Nida testified that one gram of crack or cocaine powder was sold for $100. The amount of cocaine powder and crack found in Petitioner's rental vehicle was 45.11 grams, with a street value of $4,511. (App'x pp. 87–91). Petitioner moved for a directed verdict at the close of the State's case, arguing the State presented no evidence that Petitioner had dominion and control over the drugs found in the car he was driving. The trial court denied the motion, finding there was evidence Petitioner was in the car, he got out of the car and ran, the drugs were inside the car, and no one else was inside the car. (App'x p. 92.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Petitioner's appellate argument that trial counsel was ineffective for failing to object to the supplemental instruction as it was incomplete and unconstitutionally commented on the facts was not preserved for appellate review, where this issue was not raised in Petitioner's application for post-conviction relief and was not ruled upon by the post-conviction relief court in its order of dismissal. Notwithstanding any preservation concerns, plea counsel was not ineffective, where the supplemental instruction was a correct statement of the law and the trial court's response was properly limited to the jury's question

On appeal, Petitioner raises for the first time the issue of whether trial counsel's representation was constitutionally ineffective for failing to object to the trial court's supplemental instruction on permissive inference. Specifically, Petitioner argues that there is no permissive inference of intent to distribute based on packaging, the instruction was inadequate to address the jury's question, and the jury instruction was incomplete, thereby confusing the jury and prejudicing Petitioner.

As an initial matter, this issue is not preserved for appellate review because it was neither raised to nor ruled upon by the post-conviction relief court. It is well-settled that an issue that has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but *not ruled upon*, it is not preserved for appellate review. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996) (emphasis added). Only a matter that has been ruled on below can be reviewed; otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. The same standard applies in post-conviction relief actions—for an issue to be properly before an appellate court on post-conviction relief review, it must have been presented to and ruled upon by the post-conviction relief court. Winkler v. State, 418 S.C. 643, 662, 795 S.E.2d 686, 697 (2016), reh'g denied (Feb. 9, 2017) (citing Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (stating

issue preservation rules are "meant to enable the lower court to rule properly after it has considered all relevant facts, laws, and arguments" (quoting I'On, L.L.C. v. Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000))); In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

In the present case, Petitioner failed to raise this issue in his application for post-conviction relief, did not raise it at the evidentiary hearing, and it was likewise never *ruled upon* by the post-conviction relief court.[1] In its Order of Dismissal, the post-conviction relief court made no findings of fact or conclusions of law as to the merits of the claim that Petitioner now raises that trial counsel failed to object to the supplemental instruction. Therefore, this issue is not preserved for this Court's review. Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017) (Refusing to excuse Mangal from his procedural defaults and finding the issue unpreserved where the issue was not raised in the pleadings, Mangal did not indicate to the court he intended to raise the issue at the outset of the hearing or during the hearing, and did not raise the issue with specificity at the close of the hearing). In Petitioner's case, this issue was not raised in the pleadings, at the outset or during the hearing, or at the close of the hearing with any specificity before the post-conviction relief court.

Moreover, Petitioner did not file a Rule 59(e), SCRCP, motion to alter or amend the order, arguing that the court should have addressed the unraised issue. When a party fails to file a Rule

[1] In his application, Petitioner alleged that trial counsel was ineffective for failing to request that the trial court recharge the burden of proof with the supplemental instruction. (App'x pp. 154-55). Petitioner testified to the same at the evidentiary hearing, but did not raise the issue that trial counsel failed to object to the supplemental instruction. (App'x pp. 11, 26-27).

59(e), SCRCP, motion asking the post-conviction relief court "to make specific findings of fact and conclusions of law," the issue on appeal is not preserved for review. Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (2013).

"At minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." Herron, 395 S.C. at 465, 719 S.E.2d at 642. "Either party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." Al-Shabazz v. State, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (holding an issue must be raised to and ruled on by the post-conviction relief court in order to be preserved for review); Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (same)). As this issue was never raised to or ruled upon by the post-conviction relief court and Petitioner failed to file a Rule 59(e), SCRCP, motion, requesting such a ruling, the issue is not preserved for this Court's review.

Notwithstanding the lack of preservation, Petitioner failed to establish that trial counsel was ineffective for failing to object to the supplemental instruction, as it was a correct statement of the law when considered as a whole, was appropriately responsive to the jury's questions, and did not comment on the facts or shift the burden.

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Adkins, 388 S.C. at 318, 577 S.E.2d at 464. "A jury charge that is substantially correct and covers the law does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). See State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986) (Finding that the trial court's supplemental

instruction was responsive to the jury's questions and a correct statement of the law, and therefore, there was no error)); Cf. State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022) (Reversing petitioners conviction where the trial court gave an erroneous initial instruction and supplemental instruction that mutual combat was a defense, but rather, mutual combat negates defense)

Petitioners' claims are similar to the arguments raised in Lowry v. State, where the petitioner asserted that trial counsel was ineffective for failing to object to the supplemental instruction on felony murder, as it created a mandatory presumption and shifted the burden. 376 S.C. 499, 657 S.E.2d 760 (2008). In Lowry, the Supreme Court stated that "[t]he relevant inquiry for the Court in this matter is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." 376 S.C. at 505, 657 S.E.2d at 763. The Lowry Court examined the entire charge and held that the supplemental charge shifted the burden as it contained no permissive language that would prompt the jury to believe they *may* infer malice from Lowry's participation, but rather, the trial court stated the jury *must* find Lowry guilty if they found the killing occurred during the course of the robbery. Id. at 506.

Further, the Lowry Court determined that when viewing the supplemental charge in conjunction with the proper initial charge, that the proper initial charge did not rectify the constitutional error in the supplemental instruction, as it contradicted the initial charge. Id. at 506-507. See United States v. Cantu, 185 F.3d 298 (5th Cir. 1999) (When evaluating a supplemental instruction given in response to a jury question, a reviewing court "seeks to determine whether the court's answer was reasonably responsive to the jury's questions and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it.") (internal quotations omitted).

In Petitioner's case, the trial court gave the following initial charge concerning intent to

distribute:

> 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 the 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'x p. 124). This is a correct statement of the law (discussed *infra*). See State v. Robinson, 344 S.C. 220, 543 S.E.2d 249 (Ct. App. 2001) ("S.C. Code Ann. § 44-53-375(B) (Supp. 1999) creates a permissive inference that possession of more than one gram of crack cocaine constitutes possession with intent to distribute.").

Following the initial instruction, the trial court received the following questions from the jury and responded accordingly:

> We have questions from the jury. All right, everybody have a seat. We have two questions from the jury. The first question is intent -- is intent to distribute based on quantity or the way it is packaged, and I'm going to answer that there may be a permissive inference of intent to distribute if the cocaine weighs over one gram.
>
> They also have another question that says, or any other factors, and I'm going to answer, also the jury may draw a permissive inference of intent to distribute also based on packaging and other factors.

(App'x p. 130).

Petitioner avers that the trial court's supplemental instruction failed to reiterate that the permissive inference need not be accepted and that the burden of proof was on the State to prove intent. However, the jury's question was limited to specific questions concerning the factors they

could consider in determining intent and did not indicate any confusion concerning the burden of proof or the definition of intent. Petitioner cites McKnight; however, McKnight is distinguishable from this case. In McKnight, the jury specifically asked the trial court, "Can we have a definition of criminal intent? If we do have to confirm criminal intent?" McKnight v. State, 378 S.C. 33, 47, 661 S.E.2d 354, 361 (2008). In Petitioner's case, the jury did not express concern about the definition of intent; instead, they focused on the factors they could consider to determine intent. The trial court's instruction was responsive, indicating that they could take into account the amount, packaging, and other factors, and echoed the trial court's initial instruction.

Additionally, Petitioner's claim that the supplemental instruction shifted the burden is not supported. Petitioner essentially argues that trial counsel should have requested that the trial court recharge the full initial charge, and that, because the jury was not fully recharged, this shifted the burden. However, the language of the trial court's supplemental instruction was explicitly permissive and at no point used language that would have created a mandatory presumption indicating that the jury must infer intent from the amount of cocaine or the packaging. Based on this, trial counsel had no reason to object to the supplemental instruction, as it was a correct statement of law, and the mere fact that the jury was not recharged on matters they clearly had no questions about does not, in itself, shift the burden of proof to Petitioner.

This is especially true when considering the initial jury instruction and supplemental jury instruction as a whole, as the trial court had already instructed the jury that they may consider various factors to prove intent, including packaging, that the State bore the burden to prove intent regardless of any inference created by the amount possessed and that the jury need not accept this inference, but it is merely an evidentiary fact to be taken into consideration. State v. Cooper, 279 S.C. 301, 306 S.E.2d 598 (1983) (Holding that the expressions "rebuttable" and "reasonable

explanation" left jury susceptible to improper interpretation that defendant had to rebut or explain his possession, and that possession should be characterized merely as an evidentiary fact). Importantly, the supplemental instruction did not contradict the initial instruction, and therefore, the jury was likely not confused.

Further, Petitioner argues that there is no such thing as a permissive inference arising from packaging, and the trial court's instruction shifted the burden and was an unconstitutional comment on the facts. Permissive inferences leave the trier of fact free to accept or reject the inference, and do not shift the burden of proof, but "it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." Cnty. Ct. of Ulster Cnty., N. Y. v. Allen, 442 U.S. 140, 157 (1979). A presumption must not shift the burden of proof to the person on trial. State v. Lewellyn, 281 S.C. 199, 314 S.E.2d 326 (1984) (Finding that the malice charge shifted the burden where it stated, "until the contrary be proved," and instructed that charges on implied malice not use the expression "rebuttable," "reasonable explanation," or "unless the contrary be proved."); See Francis v. Franklin, 471 U.S. 307 (1985) (holding modified by Boyde v. California, 494 U.S. 370 (1990) (A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury)).

In Allen, the Supreme Court noted that "[i]nferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts." Allen, 442 U.S. at 156. Respondent agrees with Petitioner that there is no statutory presumption based on packaging in S.C. Code Ann. § 44-53-375(B);

however, that does not preclude the trial court from instructing the jury that they *may* infer intent from factors other than the amount. For example, there is no statutory presumption for Receiving, Possessing, Concealing, Selling, or Disposing of Stolen Vehicle (S.C. Code Ann. § 16-21-80), yet it was proper at the time of Petitioner's trial to instruct juries that they could infer guilt where a defendant possesses the recently stolen property. See State v. Williams, 350 S.C. 172, 175, 564 S.E.2d 688, 690 n.6 (Ct. App. 2002); see also State v. Roof, 196 S.C. 204, 12 S.E.2d 705, 708 (1941).

Regardless, an erroneous charge does not automatically require reversal, and the relevant question in establishing prejudice is whether the charge affected the jury's deliberations and contributed to the verdict. State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022). To determine whether the erroneous charge contributed to the verdict, it is appropriate to determine how a reasonable juror would have understood the initial instruction and the trial court's answer to their question. Bowers, 436 S.C. 640, 875 S.E.2d 608. In Petitioner's case, the initial instruction was a correct statement of law, coupled with the supplemental instruction, a reasonable juror would have understood that they could infer intent to distribute based on the amount, manner of packaging, and other factors; not that they were obligated to infer intent based on any one of these factors.

Petitioner is correct that the modern trend is to avoid charges that instruct a jury on how to interpret evidence. However, the cases Petitioner cites occurred well after Petitioner's trial, and trial counsel cannot be constitutionally ineffective for failing to anticipate changes in the law and object to a then-proper instruction. See Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501–02 (Ct. App. 2019) ("For an ineffective assistance claim, the PCR court must 'determine whether counsel was ineffective at the time of the alleged error.' Thus, the court must consider the law as it existed at the time of trial and 'not as it has evolved today. . . .' Accordingly, trial counsel will

not be found deficient for failing "to be clairvoyant or anticipate changes in the law. . . ." (internal citations omitted) (emphasis in original)).

Based on the foregoing, Respondent requests that this Court deny certiorari.

II. The post-conviction relief court properly found that trial counsel was not constitutionally ineffective for failing to object to the permissive inference jury instruction, as it was a correct statement of law at the time of Petitioner's trial. Moreover, even if this Court found trial counsel were deficient, the challenged charge is applicable solely to the possession conviction and not to the trafficking conviction, the requested relief having no practical effect on the verdict.

Petitioner additionally asserts that the post-conviction relief court erred in finding that the "the jury charge was a correct statement of law" and "any objection by Trial Counsel would not have been meritorious." (App'x p. 238). Specifically, Petitioner argues that the statutory presumption does not require that the trial court instruct the jury that there is a permissive inference, and that juries should never be charged that possession of more than one gram creates a permissive inference based on the modern trend to steer away from charges that instruct juries on how to interpret and use evidence. (PWC pp. 14-15). However, as noted *supra*, Petitioner relies on caselaw that is not applicable to his trial, as it was established years later. Moreover, the trial court's initial instruction was a correct statement of law, which advised the jury that they could infer intent from the circumstances surrounding the possession, of the inference created by the possession of more than one gram, and that the amount was simply an evidentiary fact of which the jury could weigh as they saw fit. Considering this, trial counsel had no legal basis to object to the jury instruction, and the post-conviction relief court properly found that trial counsel was not constitutionally ineffective for failing to object to it.

As stated *supra*, a reviewing court considers the jury instruction as a whole in light of the evidence and issues presented at trial, and if the instruction contains a correct definition and

adequately covers the law, reversal is not required. Adkins, Mattison, *supra*. Petitioner seemingly admits that the instruction was a correct statement of the law, but that "[n]ot all correct statements of law should—or can—be charged to juries." (PWC p. 17) (internal quotations omitted). Petitioner relies on a string of cases that came out after his trial to support this contention, namely Burdette[2], Pantovich[3], Stewart[4], Smith[5], and Brown[6]. Respondent readily agrees with Petitioner that there is a modern trend to abandon the use of permissive inferences in jury instructions; however, this string of modern cases does not apply to Petitioner's 2016 trial. Moreover, trial counsel is not expected to anticipate changes in the law. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."); see Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (Refusing to find trial counsel ineffective for failing to present evidence of battered spouse syndrome, which had "only recently been identified by the scientific community" and which Supreme Court only recognized six years after petitioner's trial).

Additionally, Petitioner avers that the existence of a statutory presumption does not require that the inference be charged to the jury. Whether or not charging the inference is required has no bearing on whether the instruction was improper *at the time of Petitioner's trial* to such an extent that it denied Petitioner due process and required trial counsel to object to the instruction. Petitioner cites Brightman; however, Brightman supports the post-conviction relief court's finding that the trial court's instruction was a correct statement of law. Brightman v. State, 336 S.C. 348,

[2] State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).
[3] Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019).
[4] State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021).
[5] State v. Smith, 430 S.C. 226, 845 S.E.2d 495 (2020).
[6] State v. Brown, 443 S.C. 196, 904 S.E.2d 448 (2024).

520 S.E.2d 614 (1999), citing State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987), overruled by Stewart, 433 S.C. 382, 858 S.E.2d 808.

As noted *supra*, the United States Supreme Court acknowledged that "[i]nferences and presumptions are a staple of our adversary system of factfinding" and are often necessary to guide the jury to determine the existence of an element of the crime based on the existence of one or more "evidentiary" or "basic" facts. Allen, 442 U.S. at 156. The relevant question is whether the permissive inference affects the jury's application of the "beyond a reasonable doubt" standard under the facts of the case, *i.e.*, "there is no rational way the trier could make the connection permitted by the inference." Id. at157 (1979).

In Adams, the trial court charged the jury "that articles in a dwelling house '*must* be deemed to be in the constructive possession of the person controlling the *house in the absence of evidence to the contrary*.' " Adams, 291 S.C. at 135, 352 S.E.2d at 486 (emphasis added). The Adams Court determined that this language would have caused the jury to believe Adams was required to rebut the State's evidence, impermissibly shifting the burden of proof to appellant to disprove possession. Id.; see also Lewellyn, *supra*. Additionally, the Adams Court held that the proper charge would be to instruct the jury that possession "may be inferred," and that the trial court should explain that the jury could accept or reject the permissive inference, depending upon its view of the evidence. Id.

In Petitioner's case, the trial court never used mandatory language that would cause a reasonable juror to shift the burden of proof to Petitioner. The trial court's instruction explicitly used permissive language and explained to the jury that the permissive inference of intent to distribute based on the possession of over one gram was an evidentiary fact for them to consider. (App'x p. 124). Additionally, the trial court did not comment on the facts by instructing the jury

accordingly; it clearly indicated that the jury was free to accept or reject the permissive inference and did not directly comment on the evidence or testimony. See State v. Cannon, 49 S.C. 550, 27 S.E. 526 (1897); see also State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954) ("Stating a legal conclusion which would result if the jury found certain facts is not a charge on the facts.").

Moreover, even if this Court were to grant the requested relief, the challenged charge applied solely to Petitioner's conviction for possession with intent to distribute and has no bearing on Petitioner's primary conviction, trafficking. As the overall verdict would not have been affected had trial counsel objected on this basis and been successful, Petitioner cannot show prejudice. State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022) (An erroneous charge does not automatically require reversal, and the relevant question in establishing prejudice is whether the erroneous charge affected the jury's deliberations, contributing to the verdict).

Based on the foregoing, Respondent requests that this Court deny certiorari.

|CONCLUSION & SIGNATURE PAGE FOLLOWS|

CONCLUSION

For all the foregoing reasons, Respondent requests that this Court deny this Petition for Writ of Certiorari and deny Petitioner's request to vacate the post-conviction relief court's order of dismissal.

Respectfully submitted,

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