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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

SHELLY FAULLING,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2025-000344

REPLY BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

ARGUMENT IN REPLY

I. The trial court erred by trying Appellant in his absence while he was in custody.

a. *The state concedes the trial court made no findings of fact, and thus the trial should not have proceeded in Appellant's absence*

The state virtually conceded the issue: "Admittedly, the trial court did not explicitly state its findings on the record." Resp. Br. 10. The state argues this Court should hold the trial court "implicitly made the requisite findings."[1] Resp. Br. 11. Never before have our appellate courts accepted such an assertion. An "implicit" finding contradicts the terms of the Rule because a trial can proceed in his absence only "upon a finding by the court" that the defendant had been warned about his right to be present and that trial would proceed without him. Rule 16, SCRCrimP. An implicit finding is no finding at all, and certainly not one on the record as required by the Rule. This Court, in *State v. Wrapp*, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017), reversed because the

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[1] The state is wrong to attempt to bolster the unsubstantiated record by pointing to testimony at the PCR hearing. Resp. Br. 11 n.6. This is a belated appeal pursuant to *White v. State* because trial counsel abandoned Appellant after sentencing and did not file a notice of appeal. He was entitled to direct review at the time he was sentenced, and that review would have been based on the record that existed at that time. In considering the belated appeal, this Court should pay no mind to testimony later developed at the PCR hearing, because that is what he was always entitled to.

To the extent this Court will consider testimony from the PCR hearing, Appellant points to the following portion of the solicitor's testimony:

> Q: Would you agree that none of the jail people or anyone with personal knowledge of him refusing to come was on the -- was ever on the record at the trial saying that he refused to come?
>
> A: I don't know what we ever placed it on the record. I do know that there was a conference with Judge Dixon back in chambers where the judge did ask the transport person to tell him what was going on . . . .

App. 370:19-371:2. Thus, even *if* the PCR testimony is relevant, it shows that no one with personal knowledge testified Appellant refused to appear but rather only pure hearsay supports the finding. To the contrary, Appellant testified no one ever came to pick him up. App. 342:3-16.

trial court "erred in trying Wrapp *in absentia* without making specific findings" of fact required by the Rule. 421 S.C. at 536, 808 S.E.2d at 823. Express findings are required, and whenever the trial court has not made express findings, our appellate courts have reversed. *Compare, e.g., State v. Ritch*, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987) ("The trial judge failed to find that appellant had received notice . . . ."), *and State v. Fleming*, 287 S.C. 268, 269, 335 S.E.2d 814, 814 (Ct. App. 1985) ("It appears from the record that the trial judge did not make a finding of fact . . . ."), *with State v. Ravenell*, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010) ("The trial judge noted for the record that he specifically informed Ravenell that if he did not appear the next day, the trial would go forward without him."), *and State v. Castineira*, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000) ("The record establishes the trial judge made the requisite inquiries and findings . . . ."), *aff'd*, 351 S.C. 635, 572 S.E.2d 263 (2002).

b. No evidence supported the ruling because no witnesses testified, and trial counsel did not agree Appellant was warned he would be tried in his absence.

The state insists the "uncontradicted evidence" supported the trial court's decision to try Appellant in his absence, focusing on its claim trial counsel "did not refute the solicitor's statement [that Appellant had been warned he would be tried in his absence] in any way . . . ." Resp. Br. 9. Appellant strongly disagrees trial counsel's silence is tantamount to an admission he had been warned he would be tried in his absence. Trial counsel specifically stated only that "he was put on notice to be here yesterday for a Court appearance." App. 47:16-17. Counsel never admitted he was warned trial would proceed without him, as is required by the Rule 16, SCRCrimP. Although the *solicitor* asserted Appellant "received notice that he could be tried in his absence should he fail to appear," App. 48:22-23, that is a far cry from *the court* remarking it specifically remembered providing that warning to the defendant, as was the case in *State v. Ravenell*, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (Ct. App. 2010).

Without expressly stating its findings on the record, the trial court failed to comply with the requirements of the Rule and therefore incorrectly tried Appellant in his absence. In any event, the state's argument completely disregards one of Appellant's primary points: that, under these circumstances, trial counsel was in no position to waive this right for him but rather he should have been personally brought before the court. Any statements by trial counsel—and certainly not counsel's silence—did not waive Appellant's personal right.

In addition, because the trial court heard absolutely no testimony about Appellant's alleged refusal to appear, its decision to proceed without him is unsupported by the record. Without taking testimony under oath, how could the court have known if the jail guards even approached the correct prisoner for transport? All it had were the non-specific statements from the attorneys in the room, not someone who actually spoke with Appellant or saw his alleged refusal. As he explained at sentencing two days later, he was just waiting at the jail for his sister to come pick him up after he got a bond just a few days before trial. App. 199:16-200:8.

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

Appellant will rest on the arguments made in his initial brief as to his second issue on appeal. App. Br. 15-16. It is an error of law for the court to refuse a continuance where a defendant is held in custody and counsel requests a continuance for the purpose of bringing the defendant to court.

III. The permissive inference of an intent to distribute is an unconstitutional comment on the facts that can be challenged now and was improperly given.

a. The instruction is properly challenged now even without an objection below.

Appellant has no quarrel with the typical requirement that issues must be raised below to be addressed on appeal. Nonetheless, pursuant to *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924),

an unconstitutional comment on the facts can be raised on appeal for the first time because it is a limitation on the judicial power itself.

Appellant asserts the general issue preservation requirement does not and should not apply to a trial court's unconstitutional comment on the facts. This is in part because article V, section 21 of the South Carolina Constitution is clear such comments are outside of the judicial power to make: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision "prohibit[s] courts from commenting to the jury on the facts of a case." *Stukes*, 416 S.C. at 499, 787 S.E.2d at 483. "Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts." *Id.*; *see generally Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797 (1896) (providing a detailed analysis and history of the then-newly adopted strict prohibition on charging the facts in any way and explaining the effect of its amendment from a prior version in which trial courts could "state the testimony").

In *State v. Orr*, 128 S.C. 279, 122 S.E. 771 (1924), the Supreme Court recognized the importance of this rule and its place in the constitution of our state. 128 S.C. at 280, 122 S.E. at 771. Thus, the Court held a challenge concerning the "constitutional prohibition as to a charge on the facts" need not be raised below to be challenged on appeal. 128 S.C. at 280, 122 S.E. at 771. In *Orr* the Court considered an appeal challenging the trial court's instruction on the facts without objection. *Id.* 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 because the constitutional rule outweighs the general issue preservation requirement.

As noted in the initial brief, App. Br. 21 n.11, Appellant recognizes this rule has not been used since *Orr*. However, in virtually all recent comment-on-the-facts cases the jury instruction issue was preserved so the *Orr* rule was unnecessary to consider. *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. Roof*, 298 S.C. 351, 353, 380 S.E.2d 828, 829 (1989); *State v. Grant*, 275 S.C. 404, 406, 272 S.E.2d 169, 170 (1980); *State v. Franks*, 432 S.C. 58, 80, 849 S.E.2d 580, 592 (Ct. App. 2020); *State v. Owens*, 427 S.C. 325, 329, 831 S.E.2d 126, 128 (Ct. App. 2019), *aff'd,* 433 S.C. 482, 860 S.E.2d 357 (2021); *State v. Brooks*, 428 S.C. 618, 626, 837 S.E.2d 236, 240 (Ct. App. 2019); *State v. Huckabee*, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010).

Although not expressly used in modern times, the *Orr* rule is a logical exception to the typical preservation requirements because it is a constitutional restriction directly on the judicial power of the trial courts. Article V establishes the judicial branch, and it empowers and limits the courts in specific ways, such as the prohibition in section 21 on factual commentary by the court. As a restriction on the actual judicial power itself, this constitutional rule must be more closely guarded than any other. *See Orr*, 128 S.C. at 280, 122 S.E. at 771. This is for good reason: "the real object of this clause of the constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge, whose position would

very naturally add great weight to any opinion he might express upon any question of fact arising in a case." *State v. White*, 15 S.C. 381, 392 (1881). The separation of roles between judge and jury is the foundation of our justice system. *See Sumter Tr. Co. v. Holman*, 134 S.C. 412, 132 S.E. 811, 817 (1926) ("The people of South Carolina have said that it is the province of the courts to state the law and of juries to determine the facts."); 64 Corpus Juris, *Trial* § 313, at 299 (1933) ("[I]t is the office of the judge to instruct the jury in points of law and of the jury to decide matters of fact."). Therefore, "the strict prohibition of the constitution" must be enforced because it is that important. *Norris*, 47 S.C. 488, 25 S.E. at 810; *see State v. Kennedy*, 272 S.C. 231, 234, 250 S.E.2d 338, 339 (1978) (applying this provision and stating, "A fundamental concept of our system of justice is that every person charged with a crime has an absolute right to a fair and impartial trial").

The rule also fairly represents modern practice in this area because on multiple occasions the Supreme Court has held a jury charge was or would be a comment on the facts despite the issue not being squarely presented on appeal. For example, in *State v. Cartwright*, 425 S.C. 81, 819 S.E.2d 756 (2018), the Court established a three-part test to determine when evidence of a defendant's attempted suicide is admissible as evidence of guilt, affirming the trial court's admission of the evidence in that case. 425 S.C. at 92-93, 819 S.E.2d at 762. It then went further and held that trial courts should not instruct the jury on evidence of a suicide, even though on appeal the defendant challenged solely the admission of the evidence. 425 S.C. at 90, 93, 819 S.E.2d at 760, 762.

Similarly, in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), the defendant had asserted only that his case fell within the narrower proscription against inferred malice instructions where "there was evidence presented that could reduce, excuse, justify, or mitigate the homicide," which was first established in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). *Burdette*,

427 S.C. at 493-94, 832 S.E.2d at 577. He did not challenge the wholesale impropriety of an inferred malice charge in every case; nonetheless the Court addressed the issue *after* holding there was evidence to reduce or mitigate the homicide and thus the charge was improper under *Belcher*. 427 S.C. at 495, 501-02, 832 S.E.2d at 578, 582. The Court then forbid the implied malice charge in all cases, even though that was not necessary to decide the case *or* raised by the defendant. 427 S.C. at 495, 501-04, 832 S.E.2d at 578, 582-83.

That the state managed to find a single exception to this contemporary backdrop—*State v. Lemire*, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), Resp. Br. 16-17—does not change the analysis.[2] First, with all due respect to this Court, the state is ignoring that the Supreme Court's decision in *Orr* is controlling over any and all contrary case law from this Court. S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Second, the parties in *Lemire* did not inform this Court of the *Orr* rule, and thus the contrary result reached there is of no significance because Lemire made no attempt to argue that a comment-on-the-facts issue need not be argued below to be raised on appeal. Brief for Appellant at 17-21, *State v. Lemire*, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013) (Appellate Case No. 2009–143752).[3]

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[2] In addition to *State v. Lemire*, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), the state cites *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), in support of its contention these types of issues do need to be raised below to be addressed on appeal. Resp. Br. 16. However, *Daniels* concerned an argument that the instruction was burden-shifting or otherwise reduced the required burden of proof *and the majority concluded the issue was preserved. State v. Daniels*, 401 S.C. 251, 256-57, 737 S.E.2d 473, 475-76 (2012) (Toal, C.J., majority opinion). It therefore has no impact on the issue raised here.

[3] According to the records on file with the University of South Carolina Law School Library, Lemire did not file a reply brief addressing issue preservation even after the state raised issue preservation in its response brief.

Thus, the Court in *Lemire* did not have a full opportunity to consider the issue now raised, so this Court is not bound by that decision.[4]

Orr should also be upheld precisely because the typical issue preservation requirement is not new. The Court at the time of *Orr* regularly refused to address exceptions to jury charges—for issues other than comments on the facts—unless raised to the circuit court. *E.g.*, *Stanford v. Cudd*, 93 S.C. 367, 76 S.E. 986, 986 (1913) ("[W]e have frequently held that we can consider no question which was not presented to or decided by the circuit court."); *see Morrison v. Mut. Benev. Ass'n of Chesterfield Cnty.*, 78 S.C. 398, 59 S.E. 27, 28 (1907)); *Smith v. S.C. & Ga. R.R.*, 62 S.C. 322, 324, 40 S.E. 665, 665 (1902); *State v. Chiles*, 58 S.C. 47, 49, 36 S.E. 496, 497 (1900); *Youngblood v. S.C. & Ga. R.R.*, 60 S.C. 9, 22, 38 S.E. 232, 236 (1901). Nonetheless, the Court in *Orr* recognized the general preservation requirement as "a rule of court" that "must give way to the constitutional prohibition" in article V, section 21. 128 S.C. at 280, 122 S.E. at 771. It appears that by "rule of court," the Court was referring to Rule 11 of the Circuit Court Rules (1922), which required parties to submit requests to charge prior to argument. That Rule eventually became Rule 20, SCRCrimP. If the constitutional prohibition prevailed over the old court rule, it prevails over the new one as well. The constitution must be the supreme law; it cannot be altered nor its protections weakened by mere amendment to the rules of court. *Cf. Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750, 751 (1997); *see* 12 Corpus Juris, *Constitutional Law* § 41, at 699 (1917) ("A written constitution is to be interpreted and effect given to it as a paramount law to which all other

[4] In addition, Appellant speculates the possibility exists that the Court in *Orr* actually *was* squarely presented with a recognition the issue was unpreserved and an argument it should be addressed nonetheless. That would help explain why the Court so clearly acknowledged the rule while dispensing with it in that case. Unfortunately, despite considerable effort searching for those records, the briefs filed in *Orr* have almost certainly been lost to history.

laws must yield, and it is equally obligatory on individual citizens and on all departments of the government.").

The Court's decision in *Orr* should not be easily discarded now, and thus appellant can challenge the unconstitutional instruction. *See State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (citing the principle of stare decisis and stating, "we see no reason to revisit [the prior decision] today").

b. State v. Andrews, *324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996), should be overruled to the extent is suggested this instruction*

In a brief footnote, the state argues the merits of Appellant's argument fail because the charge given was that suggested by this Court in *State v. Andrews*, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996). Resp. Br. 17 n.10. As will be explained, *Andrews* does not and should not control the analysis, and to the extent it permits this instruction it should be overruled. Thus, in fairness to the state's response, Appellant admits he is "asking this Court to change South Carolina precedent on an unpreserved issue." Resp. Br. 17 n.10. He does so because he was clearly prejudiced by the charge, because *Andrews* was wrongly decided and has since been severely undermined, and because—for the reasons thoroughly explained above—the issue does not need to be preserved to be raised now.

In *State v. Andrews*, in an opinion written by Judge Anderson, this Court declared section 44-53-370 created "a permissive inference to be considered by the jury in evaluating guilt or innocence in cases where the defendant possesses a certain quantity of marijuana." 324 S.C. at 522, 479 S.E.2d at 812. Other than quotation of the statute, no analysis explained how the statutory language created a "permissive inference" *or* why it should "be considered by the jury." *Id.* *Andrews* continued to hold the trial court erred by charging the jury "that possession of 28 grams or one ounce of marijuana is prima facie evidence that the subsection that I just read to you was

violated." *Andrews*, 324 S.C. at 526, 479 S.E.2d at 812, 814. Relying on *State v. Neva*, 300 S.C. 450, 452, 388 S.E.2d 791, 792 (1990), this Court held the "proper method" for the charge would have been as a permissive inference. 324 S.C. 516, 525, 479 S.E.2d at 813-14. The Court then continued, "[f]or the edification of the Bench and Bar," and "suggest[ed]" the permissive inference charge that is often used today—the charge given by the trial court here, with only minimal difference.

State v. Andrews was wrong to instruct trial courts to give this charge, and subsequent comment-on-the-facts case law has eroded any plausible propriety of the instruction. *See Pantovich*, 427 S.C. at 562, 832 S.E.2d at 600 ("The modern trend . . . has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."). As was explained in the initial brief, App. Br. 18-20, *Andrews* is now bad law in light of *Stewart*, *Cheeks*, *Stukes*, and *Burdette* and its progeny.

i. The decision in State v. Andrews incorrectly applied a directed verdict standard, just as the Supreme Court explained in Stewart.

It is likely *Andrews* was premised on a similar mistake the Supreme Court corrected in *State v. Stewart*, 433 S.C. 382, 858 S.E.2d 808 (2021). The Court's specific holding in *Stewart* explained it had previously erred in *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987), by instructing trial courts to instruct juries there is a permissive inference of possession based on ownership of property. *Stewart*, 433 S.C. at 391, 858 S.E.2d at 813-14. *Adams* had held the "proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." 291 S.C. at 135, 352 S.E.2d at 486 (first citing *State v. Hudson*, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981); then citing *State v. Brown*, 267 S.C. 311, 315-17, 227 S.E.2d 674, 676-77 (1976)). *Stewart* overruled *Adams* because it incorrectly relied on cases on appeal from the denial of a

directed verdict, which considers a totally different question from whether a jury charge is proper. *Stewart*, 433 S.C. at 391, 858 S.E.2d at 812-13 ("Our reliance on *Hudson* and *Brown* was misplaced because neither case approves of the *trial court* explaining the inference of knowledge and possession to the jury."). A similar mistake was made in *Andrews* when it approved of this charge. The *Andrews* Court specifically relied on the "proper method" of giving such instructions as stated in *State v. Neva*, which in turn relied, in part, on the now-overturned *Adams*. *Andrews*, 324 S.C. at 525, 479 S.E.2d at 813-14 (citing *Neva*, 300 S.C. at 452, 388 S.E.2d at 792).

In fairness to the *Andrews* Court, it reviewed the charge as a burden-shifting issue, and relying on *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979), it invalidated the charge given in that case as unconstitutional burden-shifting. *Andrews*, 324 S.C. at 526, 479 S.E.2d at 814. It did not consider the charge as a comment on the facts. *Id.* Nonetheless, section 44-53-370 provides for a prima facie showing of intent to distribute that will, when demonstrated, always suffice to defeat a motion for a directed verdict. It goes no further, however, and that part of *Andrews* instructing courts to give this permissive inference should be overruled.

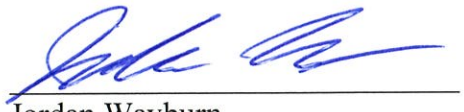
ii. The instruction is not supported by the statute.

The Court in *Andrews* gave no reason for concluding the statute requires this permissive inference instruction, and no reason obviously appears from the statute. Most likely, the statute was written for one of two purposes. First, it could have been an attempt to establish a rebuttable presumption of intent based on weight. That, however, has already been held improper by the Supreme Court as it is impermissible burden shifting. *State v. Key*, 282 S.C. 413, 414, 319 S.E.2d 338, 338 (1984) (first citing *State v. Legette*, 282 S.C. 11, 12, 316 S.E.2d 411, 411 (1984), then citing *State v. Cooper*, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983)); *Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993); *see generally Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979) (addressing the constitutionality of burden-shifting jury instructions.

Second, the rule could be interpreted to serve a purpose in simplifying or standardizing non-jury decision-making. *Cf. Stukes*, 416 S.C. at 499, 787 S.E.2d at 482 (citing favorably prior language that in a criminal sexual conduct case, "the statute [S.C. Code Ann. § 16-3-657 (2015)] 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 also* 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"). Several other effects of the rule could easily justify the statute without requiring—or permitting—trial courts to instruct it to juries. For example, perhaps the provision was written to ensure the sheriff's office charges someone with distribution if they find more than an ounce of marijuana on someone, regardless of the surrounding circumstances. Of course, it allows the solicitor to defeat a directed verdict motion without further evidence of intent. *State v. Goldsmith*, 301 S.C. 463, 466-67, 392 S.E.2d 787, 788-89 (1990); *State v. Elmore*, 368 S.C. 230, 235-37, 628 S.E.2d 271, 273-74 (Ct. App. 2006). Partly, the one-ounce line divides misdemeanor possession triable in magistrates court from felony possession triable in circuit court. § 44-53-370(d)(5). But these other purposes served by the rule are no reason to inform the jury about some claimed inference not actually provided by the statute, one which is in any event an unconstitutional comment on the facts.

CONCLUSION

For the foregoing reasons and those stated in his initial brief, Appellant respectfully requests this Court reverse his conviction.



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This 3rd day of December, 2025.