THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JASON ALAN JOHNSON,

APPELLANT

Appellate Case No. 2012-206627

Appeal from York County

Lee S. Alford, Circuit Court Judge

Opinion No. 5246

PETITION FOR REHEARING

Appellant asks this Court to re-examine its opinion in this case and grant rehearing. Respectfully, the Court's opinion errs and does not address crucial portions of appellant's arguments. Appellant asks for rehearing on both issues on appeal.

Issue 1 – The Search

The Court erred in finding this warrantless search was reasonable based on the officers' alleged fear of two men sleeping in their underwear at 8:30 AM on Sunday morning. R. 111, ll. 6 – 16. "The ultimate touchstone of the Fourth Amendment is reasonableness." Riley v. California, 134 S.Ct. 2473, 2482 (2014). "Where a search is undertaken by law enforcement

officials to discover evidence of criminal wrongdoing,... reasonableness generally requires the obtaining of a judicial warrant." Id. The entry into the hotel room was pretext for a search because (1) any perceived threat was not reasonable, and (2) once Brandi was in custody, the officers' business was concluded. The Court even recognized that the officers went to the hotel room looking for drugs as it noted Deputy Gladden's statement that there would probably be drugs in the room. Opinion at 2.

The Court's ruling that a protective sweep justified the warrantless entry, seizure of Johnson, and search of the motel room will allow arrest warrants to be converted into *de facto* search warrants. The officers were there to arrest Brandi. They accomplished their purpose. Whether Brandi backed into the room, as the Court gave great weight to on page 9 of the opinion, is of no consequence. The officers detained Brandi as they moved into the room and could not have gotten past Brandi without first detaining her. Within 20 to 30 seconds, Brandi was arrested, in handcuffs, and outside the room. R. 193, l. 24 – 194, l. 4; R. 33, ll. 5 – 8. Deputy Stagner testified that Brandi "was being placed in handcuffs as we were going in." R. 98, ll. 17 – 24. Deputy Bolin testified that they had already detained Brandi and passed her behind them to Deputy Gladden before they entered the hotel room. R. 34, ll. 2 – 8.

None of the occupants of the room made any threatening moves towards Deputy Bolin. R. 42, ll. 13 – 15. None of the occupants of the room ever made any threatening movements or verbally threatened Deputy Stagner. R. 113, ll. 13 – 18. The occupants of the room had been sleeping. R. 112, ll. 1 – 3. The officers woke them up. R. 112, ll. 4 – 5. Even though the arrest warrant for Brandi had been executed and accomplished, the officers entered and stayed in the room. R. 116, l. 25 – 117, l. 3.

The Court then erroneously found that Johnson and his co-defendant—mostly naked and lying in bed—posed such a credible threat to the police that they were compelled to do a protective sweep for their own safety. This reasoning overlooks the fact that the most rational thing to do for their own safety **was simply to leave.** Brandi was in custody. The police had made the arrest authorized by the arrest warrant. Nothing more was authorized and nothing else was required to protect themselves or accomplish their objective. The police created their own perceived "threat" by entering the room after arresting Brandi. The police may not rely on manufactured exigent circumstances when their presence in a place is unlawful. Since Brandi was in custody, the arrest warrant did not authorize the police to be in the hotel room. United States v. Coles, 437 F.3d 361, 366 (3rd Cir. 2006); see also, Kentucky v. King, 131 S.Ct. 1849, 1858 (2011) (holding that police officers' pre-exigency conduct must be reasonable in order for exception to apply); Johnson v. United States, 333 U.S. 10 (1948) (holding that warrantless entry into a hotel room was unjustified because they could have obtained a warrant). For these reasons, and the reasons cited in appellant's brief, the Court should grant rehearing and reverse Johnson's conviction.

Issue 2 – The Weight of the Methamphetamine and Johnson's Sixth Amendment Rights

Respectfully, the Court erred in several respects in its decision on the issues regarding the weight of the methamphetamine and Johnson's Sixth Amendment rights. First, the Court ended its statutory construction analysis with the determination that code sections 44-53-110, 44-53-210, 44-53-375, and 44-53-392 are plain and unambiguous. The Court misapprehended Johnson's argument that the rules of statutory construction require more specific statutes to control over more general statutes. See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 358 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). The statute criminalizing disposal of methamphetamine waste informs the

general term "mixture." See S.C. Code Ann. § 44-53-376. Section 44-53-376 states, "It is unlawful for a person to knowingly cause to be disposed any waste from the production of methamphetamine or knowingly assist, solicit, or conspire with another to dispose of methamphetamine waste." S.C. Code Ann.§ 44-53-376(A). The enactment of this statute by the Legislature shows its recognition that methamphetamine has significant, inconsumable by-products. When construing this specific provision with the more general statutes criminalizing methamphetamine, it is clear that "any mixture" was not intended to include the waste from the production of methamphetamine.

The Court also erred in determining that "mixture" should not be defined by the market approach. The Court failed to address the ambiguities, overly broad circumstances, and absurd results that could arise from the failure to adopt a market approach as applied to methamphetamine. See United States v. Stewart, 361 F.3d 373, 377-79 (7th Cir. 2004). The Seventh Circuit posited the analogy of a defendant dumping his drugs into a toilet and then being charged with the weight of the water in the bowl. Id. The State had no answer for appellant's hypothetical at oral argument that under its theory of the meaning of "mixture," the weight of the air in the bottle could also be counted against appellant. The reasoning behind the market based approach is sound and would eliminate the vagaries and absurdities that will arise as a result of the Court accepting the State's construction.

The Court also erred in concluding that the trial judge's prohibition on arguing the weight of the drugs did not infringe on appellant's Sixth Amendment right to a jury trial on this all-important element of the offense. See Apprendi v. New Jersey, 530 U.S. 466, 476-78 (2000). Judge Alford ultimately ruled that all of the liquid would count as methamphetamine and that this question was an issue of law. R. 738, l. 4 – 11. Judge Alford also went further and

prohibited the defendant from making any argument to the jury that all of the mixture could not be considered methamphetamine. R. 738, ll. 15 – 22. Defense counsel should have been allowed to argue to the jury that of the 60.9 grams of liquid presented to them, only two or three grams of the substance would have been used or sold as methamphetamine. This argument was supported by the evidence as at most, six grams of useable methamphetamine was in the bottle. R. 484, ll. 14 – 23. R. 257, ll. 2 – 4. R. 257, ll. 14 – 17. Even if the trial judge did not err in refusing to charge the jury on the market approach, his prevention of Johnson arguing to the jury what constituted a mixture deprived him of his right to a jury trial on this element.

Defense counsel's inability to make such an argument prejudiced Johnson. The solicitor was able to argue that the 28 gram threshold amount was met and said that "approximately 70 grams of methamphetamine" was taken out of the bottle from the hotel room. R. 837, ll. 13 – 16. The solicitor said, "It's a mixture and that's what the law in South Carolina says. Methamphetamine is any mixture thereof." R. 837, ll. 16 – 18. The solicitor also told the jury that "[O]nce that substance is methamphetamine in that bottle, [they're] trafficking in methamphetamine period—period. And that amount was over 28 grams." R. 838, ll. 9 – 11. The solicitor was free to argue this crucial fact to the jury while the trial judge's order emasculated any defense rebuttal.

The question of how to consider the amount of liquid in the bottle was foremost in the jury's mind as they sent the judge this question:

> THE COURT: Madame Forelady, members of the jury panel, I got your note out, you want me to re-instruct you on what constitutes the definition of weight of methamphetamine. I have no idea what you're asking me there. Can you clarify what it is you want me to instruct you on?
>
> MADAME FORELADY: You instructed us before about what the methamphetamine, how we judge 28 grams or not. What constitutes the definition of methamphetamine by law, what that includes.

THE COURT: Are you asking me specifically about any evidence that came in or are you just asking me generally?

MADAME FORELADY: **We're asking you about the 60.9.**

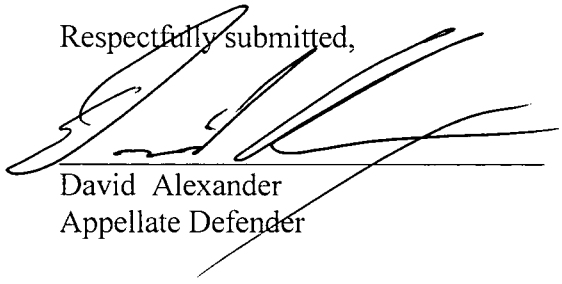
R. 903, l. 23 – 904, l. 11 (emphasis added); R. 905. The court again read the statutory definitions for the jury. R. 904, l. 12 – 906, l. 15. The jury was without the benefit of any argument from the defense concerning whether the entire weight of the liquid qualified under the statute. The closest defense counsel could come to arguing this point was stating that the bottle was an unfinished product that could not be used, but he could not address its weight or purity. R. 868, ll. 14 – 18.

State v. Portee, 278 S.C. 260, 294 S.E.2d 421 (1982) does not support the Court's conclusion that arguing about what constituted a "mixture" would have been improper. In Portee, the prosecutor "told the jury that the reasonable doubt standard in criminal cases was something good defense lawyers use to free guilty defendants." Portee at 261, 294 S.E.2d at 422. He also told the jury that "reasonable doubt is a 'defense' which criminals use when they have no other defenses." Id. These statements were clearly improper and infringed on several constitutional rights of the defendant in Portee. Id. Unlike Portee, it is Johnson's lack of ability to contest the State's case to the jury that is at issue.

Even assuming that "mixture" is not defined by a market approach, Johnson should have been allowed to argue to the jury his interpretation of "mixture" based on the facts of the case. This *de facto* directed verdict and charge on the facts deprived Johnson of his right to a trial by jury and requires reversal of his conviction and the grant of a new trial. For these reasons, and

the reasons cited in appellant's brief, the Court should grant rehearing and reverse Johnson's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

This 14th day of July, 2014.

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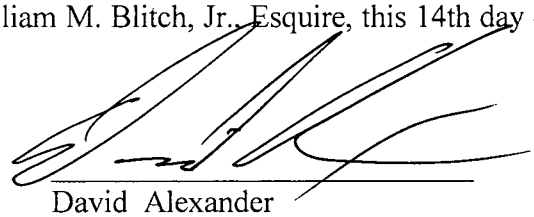
CERTIFICATE OF SERVICE

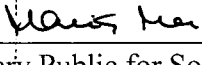
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, this 14th day of July, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day
of July, 2014.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.