THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2014-001407

Christopher W. Ashe, ... Petitioner,

vs.

The State .... Respondent.

PETITION FOR WRIT OF CERTIORARI

C. RAUCH WISE
Attorney at Law

305 Main Street
Greenwood, SC 29646
(864) 229-5010
SC Bar #: 006188

Attorney for Petitioner

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Statement of the Case

Procedural History

On October 25, 2006, the State convicted Christopher Ashe of possession of pseudoephedrine more than 200 grams and less than 400 grams, possession of crank and manufacturing methamphetamine. He was sentenced to 25 years for the possession of pseudoephedrine, three years for possession of crank and 15 years for manufacturing methamphetamine. All sentences were concurrent. He appealed his conviction and sentence. The South Supreme Court affirmed the convictions and sentence on November 6, 2008.

On March 17, 2009, Mr. Ashe filed his Post Conviction Relief petition alleging several grounds for ineffective assistance of counsel. His petition for Post Conviction Relief was denied by the order of the Honorable Alexander S. Macaulay on June 2, 2014. Mr. Ashe filed his Notice of Intent to Appeal on June 26, 2014.

Factual History

The Lexington County Sheriff's Office arrested Christopher Ashe on December 22, 2005 when they found him at an unoccupied house which contained, on the second floor, the ingredients for making methamphetamine. Included in the ingredients were crushed up pills that contained pseudoephedrine. A small amount of methamphetamine (crank) was also found at the location. The officer testified he saw Mr. Ashe at the second floor window near where they found the ingredients to make methamphetamine.

Mr. Ashe defended the case by contending that he was merely at the house helping a friend, Bryan Jenkins, move some items into the house. He testified that Mr. Jenkins lived in a trailer next door. The trailer and unoccupied house were located on property belonging to Mr.

Jenkins' family. He denied ever being in the house. When the officers advised him that he was being placed in investigative detention due to the suspected methamphetamine lab, be broke and ran. He testified that he ran because he had a small amount of marijuana in his pocket. Prior to fleeing the police, he had given them, upon their request, his driver's license. He was captured about an hour later. Mr. Jenkins was not arrested nor did he testify at the trial.

Argument

Question I

Did the Post Conviction Relief judge err in holding trial counsel was not ineffective for the failure of trial counsel to object to the opinion testimony of Officer Thomas Hamilton as to the presence of Christopher Ashe being near the lab was sufficient to prove dominion and control over the methamphetamine lab and drugs found in a duffel bag?

At trial, Officer Thomas Hamilton was asked the following questions:

> Q. Going back to State's One, if somebody were up there were they in very close dominion and control or proximity?
> A. Yes Sir. You could observe from standing up there.
> App. at 234, ll 16-20
>
> Q. The only thing I'd like to ask you, if somebody was standing at this window, would they have dominion and control over the meth lab as well as the drugs that were found in the duffel bag?
> A. Yes, sir. They were within close proximity to that window, sir.
> App. at 300, ll 3-8.

Trial Counsel testified that he did not believe the question was improper. App. at 607, ll 6-21. This statement by Officer Hamilton was an opinion. He was never qualified as an expert to render such an opinion under Rule 702 of the South Carolina Rules of evidence.

The statement also does not qualify as a lay opinion statement under Rule 701 of the rules. Rule 701 requires that the witness first not be an expert. Rule 701 says the testimony must not "require specialized knowledge, skills, experience or training." Here the testimony was elicited because the officer had specialized knowledge, skills, experience and training. Thus, it was not admissible as a law opinion under Rule 701. While Rule 701 does require that the testimony be rationally based upon the perception of the witness, the testimony must be helpful and not "little more than the witnesses' choosing sides as to how the case should be decided." *Gross v. State*, 730 S.W.2d 104, 106 (Tex. Ct. App. 1987).

Our Supreme Court has held that a witness in a criminal case should not testify as to the ultimate fact before the jury. *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001)("In effect, Sergeant Walters was allowed to give his opinion on the ultimate issue: Whether appellant was acting in self-defense when he shot and killed the victim. This was error.") Here, Officer Hamilton was permitted to testify to the ultimate issue - did Christopher Ashe have dominion and control over the methamphetamine lab and the drugs found there.

Even if he were testifying as a lay witness, this testimony was not helpful to the jury and was certainly more prejudicial than probative under an analysis using Rules 701 and 403. The testimony was not helpful because the jury was to determine if Mr. Ashe exercised dominion and control over the lab and drugs. From the pictures and testimony the jury was in an equal position to make the legal conclusion as to dominion and control as was Officer Hamilton. As stated by the Second Circuit in *United States v. Rea*, 958 F.2d 1206, 1216 (2nd Cir. 1992) "when a witness has fully described what a defendant was in a position to observe, what the defendant was told, and what the defendant said or did, the witness's opinion as to the

defendant's knowledge will often not be 'helpful' within the meaning of Rule 701 because the jury will be in as good a position as the witness to draw the inference as to whether or not the defendant knew." The testimony was prejudicial because it came from a law enforcement agent who was experienced in drug cases. Thus, the jury would tend to defer to his judgment and opinion. He in essence became a thirteenth juror helping the other twelve in deciding how to interpret the facts of the case.

Trial counsel did not testify that he did not object as part of any trial strategy, but because he believed the testimony was proper. He was not able to cite any authority as to why the testimony was admissible nor did he explain why the statement was admissible.

The Post Conviction Relief judge found that because Mr. Hamilton was found qualified as an expert in detection of methamphetamine labs and the production of such labs, that he was qualified to give an opinion on the ultimate issue. But this is precisely what *Ellis* prohibits. The Post Conviction Relief judge erred as a matter of law in holding that trial counsel was not ineffective in failing to object to the opinion of Officer Hamilton on the ultimate issue the jury was to decide.

Question II

Did the Post Conviction Relief judge err in holding trial counsel was not ineffective for his failure to object to a charge to the jury that "knowledge and possession may be inferred when a substance is found on the property under the defendant's control."?

No case in South Carolina has ever held knowledge and possession of a drug may be inferred as to a person who is not the owner of the building where drugs are found. No

objection by trial counsel was made to this charge. The charge was in essence a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina.

Over the years the appellate courts in South Carolina have retreated from judicially suggested inferences and presumptions. In *State v. Cooper,* 279 S.C. 301, 306 S.E.2d 598 (1983) the South Carolina Supreme Court overturned its previous position concerning a presumption or reputable inference that a person in possession of recently stolen goods is the thief. Since 1983 no reported case appears which even discusses the concept of a charge based upon recently stolen goods. In *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980) the South Carolina Supreme Court completely abolished the previously judicially recognized charge that a jury may infer guilt from flight.

The use of judicially recognized inferences frequently arises when a trial court, and at times an appellate court, takes a statement made by an appellate court in reviewing the sufficiency of the evidence and turning it into a charge to the jury. For example, in *State v. Adam*, 291 S.C. 132, 352 S.E.2d 483 (1987) the South Carolina Supreme Court held a trial judge may properly charge a jury in a drug possession case that the jury may infer possession from the fact that the defendant is the owner of the premises where the drugs are found. In support of the position the Court cited *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981) and *State v. Brown,* 267 S.C.311, 227 S.E.2d 674 (1976). But in neither of the cases cited did the Court hold that a charge to the jury as to the inference was proper. The Court in *Adams* noted that the charge of the trial judge tracked the language used in *State v. Ellis*, 263 S.C. 12, 207 S.E.2d 408 (1974) but held that the language used in *Ellis* impermissibly shifted the burden to the defendant. But even in *Ellis* the Court did not recognize a charge to the jury as to any inference or presumption

arising from the ownership of the property where drugs were found. All the Court held in *Ellis* was that as a reviewing court, they found that the jury could, under the facts presented, conclude possession of the drugs from the fact the defendant owned the premises where the drugs were found.[1] At no time did *Ellis* ever state such a charge to the jury was even suggested.

Logic and common sense would tell one that if a defendant smelled of alcohol, was unsteady on his feet and had blood shot eyes, one could infer that he was under the influence of alcohol. But no court has ever held or suggested that if the state proves those facts, the trial court should charge the jury that they may infer from those facts that a person is under the influence of alcohol[2] Logic and common sense would also say that if a person enters another's house without permission late at night they did so with the intent of committing a crime. But again, a court should not charge a jury that they may infer the defendant entered the house for the purpose of committing a crime if those facts are proven.

In *Leary v. United States*, 385 U.S. 6 (1969) the United States Supreme Court addressed the question of whether Congress could constitutionally pass a statute that established a presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana. In rejecting such a presumption the Court held "Such

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[1] It is doubtful the Court would have made the same statement if the facts had been that the defendant owned the house, but had been letting someone "house sit" it while he was out of the country.

[2] Properly understood the inference passed by the legislature that creates an inference at a blood alcohol level at .08 is not a charge on the facts. What the legislature found in creating the inference is that some people are in fact under the influence at .08. What the legislature did not find, for such a fact would not be supported by logic or science, is that a jury can infer that a particular defendant is under the influence at .08. But the question of the constitutionality of that statute is not before the court.

information is 'not within specialized judicial competence or completely common place.'" *Id.* at 38. Likewise, under the facts of this case, it is not commonplace to infer knowledge and possession from the mere presence of Mr. Ashe at a building he does not own or rent.

In *Yarborough v. Southern Ry,* 78 S.C. 103, 58 S.E. 936 (1907) the South Carolina Supreme Court discussed the issue of the trial judge giving a charge to a jury which permits them to infer a certain fact. The Court held "The circuit judge laid down in the charge the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the facts that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts." *Id.* at ___, 58 S.E. at 937.

In *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (1992) the defendant requested that a charge to the jury simply stating that the absence of motive "is to be duly considered by you in weighing the question of guilt regarding him." *Id.* at 240, 414 S.E.2d at 183. The South Carolina Supreme Court held that such a charge was improper as it was a charge on the facts in violation of the state constitution. As the Court held "Thus, the trial judge was requested, in effect, to charge that particular evidence (*i.e.* evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is clearly a charge on the fact that the jury was to determine." *Id.* at 241, 414 S.E.2d at 184.

The inference charge in this case is legally no different. The judge in essence told the jury that particular evidence is entitled to receive weight or consideration. In fact, he told the jury that a certain fact is entitled to special weight or consideration. No court would charge a jury the inverse of this charge - you may infer the defendant does not have dominion and control

over the drugs if he does not have control over the building but is merely present.

In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)[3] the defendant had requested a simple charge that the testimony of a co-defendant was to be "received by the jury with caution and should be scrutinized by the jury with great caution." *Id.* at ___, 23 S.E.2d at 249. In holding the trial court did not commit error, the South Carolina Supreme Court said "A judge cannot express in his charge, or intimate any opinion as to the *weight or sufficiency* of testimony of accomplice without violating the prohibition of the Constitution as to charging upon the facts." *Id.* (emphasis added). When a judge instructs a jury that they may infer guilt from the proof of certain facts that judge is both expressing and intimating an opinion as to the weight and sufficiency of the evidence. He is making a comment on the facts.

Recently the South Carolina Supreme Court discussed the use of inferences in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). While the Court decided the case based upon the common law and not as a violation of the state constitution, the case does indicate the view our Supreme Court takes on inference. The above discussion shows that the charge was improper. The charge was prejudicial to the applicant.

The Post Conviction Relief judge found this charge to be proper. He cited no authority for his position. He merely concluded "The trial court instructed the jury that any inference was simply an evidentiary fact to be taken into consideration along with the rest of the evidence in the case." App. at 673. The Post Conviction Relief judge erred as a matter of law in holding the charge was proper under existing South Carolina law.

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[3] T. FELDOR DORN, GUNS OF MEETING STREET (The University of South Carolina Press 2006) chronicles this murder and trial in great detail.

Question III

Did the Post Conviction Relief judge err in holding trial counsel was not ineffective for his failure to investigate the background and arrest record of Brian Jenkins for impeachment purposes?

During the testimony of Officer Chris Stout defense counsel made a cursory cross examination concerning Brian Jenkins. App. at 134, ll 20-25 - 135, ll 1-18. During this cross-examination when the witness was asked about Brian Jenkins, he stated "I've heard of him, yes sir." App. at 134, l 21. The officer was not positive about his arrest record. Defense counsel thought the record was important. He asked the officer to check the record and report back[4]. App. at 135, ll 22-24. When Officer Jimmy Gleaton was asked about Brian Jenkins, he said "I know that he has been the subject of investigations." App. at 71, ll 24-25. He was specifically asked if he knew Mr. Jenkins had been arrested for operating a methamphetamine lab. Mr. Gleaton's response was "I do not know." App. at 72, l 3.

If trial counsel had spent a minimum amount of time researching the background of Brian Jenkins he would have had the information he needed to defend Mr. Ashe. The information would have included the fact that Mr. Jenkins had an extensive background of involvement with methamphetamine including a charge of possession of a methamphetamine lab. As Mr. Ashe's defense was the lab was not his but Brian Jenkins' lab, the information would have been helpful to the defense.

The South Carolina Supreme Court in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) set forth the obligation of defense counsel to investigate the case for his client. The

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[4] The officer never "reported back" with the arrest record.

Court said "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." *Id.* at 331-332, 642 S.E.2d at 597(emphasis in original). Quoting from the American Bar Association guidelines the *Ard* court held "Counsel at every stage have an obligation to conduct thorough **and independent** investigations relating to the issue of both guilt and penalty." *Id.* (emphasis in original). Defense counsel cannot presume that an investigation of the background of people involved will not be helpful. *See, also, Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008)

Checking the background of Brian Jenkins was needed to adequately prepare for trial. Defense counsel did not know if the state would call Mr. Jenkins. He also knew that his client would contend that the drugs and methamphetamine lab belonged to Mr. Jenkins. Had counsel adequately prepared for the trial by investigating the background of Mr. Jenkins, he would have been prepared for the cross examination of Officers Stout and Gleaton. He could have presented to the jury an effective argument as to third party guilty.

The Post Conviction Relief judge in holding trial counsel was not ineffective in failing to completely investigate Mr. Jenkins background, concluded "Trial counsel tactically decided to utilize this information to show the arresting narcotics officer failed to adequately investigate Jenkins' involvement in the offense when they brought charges against applicant." App. at 669. The conclusion simply ignores the facts presented at the hearing. Granted trial counsel wanted to portray that the investigating officers failed to properly look at Jenkins as a suspect. To effectively do this trial counsel would have been required to obtain the very records which the Post Conviction Relief judge found trial counsel was not ineffective in failing to obtain. Trial counsel could not have effectively advanced his trial strategy without the records he

failed to obtain. Thus, the conclusion by the trial judge is not supported by the facts in the record.

Question IV

Did the Post Conviction Relief judge err in holding trial counsel was not ineffective due to his failure to object on double jeopardy grounds to the charges of possession of pseudoephedrine and manufacturing methamphetamine in that the possession of pseudoephedrine is a fact needed to prove manufacturing methamphetamine?

The state charged Christopher Ashe with the crimes of manufacturing methamphetamine and possession of more than 200 grams of pseudoephedrine. Both charges arose out of the same factual situation when Mr. Ashe was found at a methamphetamine lab. The ingredients for making methamphetamine, including the pseudoephedrine, were found at the scene. The state introduced the pseudoephedrine to prove the crime of manufacturing methamphetamine. Without the pseudoephedrine, an essential ingredient in the making of methamphetamine, the state could not have proven the case. The state then used the same pseudoephedrine to prove Mr. Ashe possessed more than 200 grams of pseudoephedrine.

To understand the double jeopardy argument in this case, one need look no further than *Blockburger v. United States*, 284 U.S. 299 (1932). In *Blockburger* the United States Supreme Court in conducting an analysis as to double jeopardy said "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. As the proof of manufacturing methamphetamine included the proof of the possession of pseudoephedrine, then

to punish Mr. Ashe again for possessing the same pseudoephedrine would be double jeopardy.

In *Harris v. Oklahoma*, 433 U.S. 682 (1977) the United States Supreme Court recognized that when a greater crime includes all the elements of the lesser crime, double jeopardy precludes the prosecution for the second offense. As the court in *Harris* said "When, as here, conviction of a greater crime, murder, cannot be had without the conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one." *Id.* at 682.

The same principle was applied by the United States Supreme Court in *Ex parte Nielsen*, 131 U.S. 176 (1889). In *Neilsen*, the defendant pled guilty to a charge of unlawful cohabitation. The facts were that he was living with Anna Lavinia and Caroline Nielsen, claiming both to be his wife. He was subsequently charge with adultery by living with and cohabiting "with one Caroline Neilsen, he being a married man and having a lawful wife, and not being married to Caroline." *Id.* at 177. In ruling that the conviction of the crime of cohabitation was a bar to the charge of adultery, the United States Supreme Court said "[I]t seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.* at 188.

The same principles apply in this case. A conviction or acquittal of the possession of pseudoephedrine precludes the conviction of the same possession when it is used to prove manufacturing methamphetamine. This was the basic holding of *Harris*

While the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508 (1990) was rejected in *United States. v. Dixon*, 509 U.S. 688 (1993), a proper reading of *Dixon* supports the

position of the Applicant. *Dixon* rejected the "same conduct," analysis but it did not reject a "same evidence" analysis. Indeed it could not reject such an analysis because *Blockburger* itself uses a "same facts" analysis.[5] In *Dixon*, Justice Scalia, made reference to an older English case that permitted a second trial of a defendant. His first trial for breaking and entering and stealing goods was stopped when it was discovered that no goods had in fact been stolen. The second trial was for breaking and entering with intent to steal. Justice Scalia then quoted with approval the following from the English case. "[T]hese two offenses are so distinct in their nature, that *evidence* of one of them will not support an indictment for the other." *Dixon,* at 710 (emphasis added).

Dixon was charged with the violation of a court order that prohibited him, as a condition of his bond, from committing any criminal act. While on bond he was found in possession of drugs. Based upon that factual finding the trial judge found him to possess the drugs with intent to distribute and held him in criminal contempt. When he was subsequently tried for possession of the same drugs with intent to distribute, he contended that the prosecution violated double jeopardy. The United States Supreme Court held that the conviction did violate double jeopardy. Technically the same elements were not present as one involved the possession of drugs and the other involved a violation of a court order. But the Court found that the

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[5] *Blockburger*, notwithstanding frequent pronouncements to the contrary, is not a "same elements" test. "Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at ___. This is the only time the word "element" appears in *Blockburger*. As shown in the quote, "elements" is used in the sense of "facts."

"elements" of the contempt charge included the "elements" of the drug charge.[6]

The statutes involved in this case have no indication that the legislature intended for separate punishment to be provided for a conviction on each crime. Thus, there is no basis for contending in this case that the legislature intended successive punishment for a violation of the two statutes.[7]

This case should be controlled by *Rutledge v. United States*, 517 U.S. 292 (1996), which was decided three years after *Dixon.* In *Rutledge*, the defendant was convicted of violating 21 U.S.C. § 846 (conspiracy to distribute controlled substances) and 21 U.S.C. § 848 (conducting a continuing criminal enterprise). "The 'in concert' element of his CCE offense was based on the same agreement as the § 846 conspiracy." *Id.* at 294. The United States Supreme Court, in holding that the two convictions violated the Double jeopardy clause, said:

> In this case it is perfectly clear that the CCE offense requires proof of a number of elements that need not be established in a conspiracy case. The *Blockburger* test requires us to consider whether the converse is also true - whether the § 846 conspiracy offense requires proof of any element that is not a part of the CCE offense. *Id.* at 298.

The Court ruled that the "in concert" portion of the CCE offense was the same

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[6] Surely the United States Supreme Court does not mean "elements" in the strict sense. If they do, then the protections afforded by the Double Jeopardy Clause can be defeated by an imaginative legislature that could find different "elements" for the same facts and therefore subject a defendant to multiple punishments. As originally used in *Blockburger*, the focus should be on the facts to be proven, if double jeopardy is to afford a citizen any protection from an overly zealous and overly imaginative legislature.

[7] The theory that if the legislature intended successive punishment, there is no double jeopardy violation but if they did not intend successive punishment there is a double jeopardy violation is questionable at best. Surely the United States Supreme Court did not mean that if the legislature intended to violate double jeopardy there is no violation but if they did not intend to violate the provision, there is a violation.

facts as the "conspiracy" portion of the conspiracy count. The Court then held the two convictions violated the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States of America. The Court focused upon the facts that were necessary to prove the elements of the crime and not what the elements had been named by congress. While the manufacturing of methamphetamine may require the proof of other facts than the possession of pseoudephedrine, the possession of pseudoephedrine in this case was needed to prove manufacturing.

Under the principle set forth in *Blockburger, Dixon, Harris,* and *Rutledge,* the state cannot convict Mr. Ashe for manufacturing methamphetamine by proving the possession of pseudoephedrine and also convict him of possessing the same pseudoephedrine.

The Post Conviction Relief judge erred as a matter of law in ruling against Mr. Ashe on this issue. He attempts to distinguish this case by saying the manufacturing of methamphetamine requires the proof of a certain amount of pseudoephedrine. The conclusion does not change the fact that the state in this case used the possession of the same pseudoepherine, regardless of the amount, to convict Mr. Ashe of both crimes.

The Post Conviction Relief judge further said "This Court finds the applicant's statutory interpretation certainly novel and creative; however it's inappropriate to apply in finding a reasonable attorney under the prevailing professional norms would have made an objection based upon such argument at trial." App. at 670. What the Post Conviction Relief judge failed to consider is that all of the cases cited were decided long before this case was tried. Even a casual reading of *Blockburger* would have alerted any trial lawyer to the double jeopardy issues involved in this case.

Question V

Did the Post Conviction Relief judge err in holding trial counsel was not ineffective for his failure to object to the amount of pseudoephedrine as including the substances with which it was mixed and not the pure amount of pseudoephedrine?

The testimony at the post conviction relief hearing established that the weight for the pseudoephedrine included the inert ingredients of the crushed pills. Emily Homer testified that she does not do a quantitative analysis which would have provided the court with the exact weight of pure pseudoephedrine.

Mr. Ashe urges that a proper reading of the statutes shows that the intent of the legislature was to prohibit the possession of pure pseudoephedrine. S.C. Code § 44-53-370 provides "The weight of any controlled substance in this subsection includes the substance in pure form or any compound or mixture of the substance." An identical provision is also found in S.C. Code § 44-53-392. Thus a product that is not a controlled substance is weighed by the amount of pure product that is contained in what a person possesses. Under S. C. Code § 44-53-110 the words "controlled substance" are defined as "a drug, or immediate precursor in Schedules I through V in Sections 44-53-190, 44-53-210, 44-53-250, and 44-53-270." Pseudoephedrine is not named in any of those sections. The fact should be noted that the definition of controlled substance requires that the substance be actually named in one of the sections listed. The statute does not say "a precursor of a substance listed Schedules I through V in Sections 44-53-190, 44-53-210, 44-53-250 and 44-53-270." If the law had been so written the definition would be of serious constitutionally validity as it would have included the possession of many everyday items that can be used to make methamphetamine. The legislature simply

cannot pass a law that prohibits the possession of "something that can be used to make methamphetamine."

If the legislature had intended for the term "precursor" to include pseudoephedrine then S. C. Code § 44-53-365 would not make any sense. That section makes illegal for a person "to take or exercise control over a controlled substance, the immediate precursor of a controlled substance, or ephedrine, pseudoephedrine, or phenylpropanolamine belonging to another person with the intent to deprive the person or entity of the controlled substance . . . ." If "precursor of a controlled substance" includes pseudoephedrine, then there would not have been a need to include pseudoephedrine as a separate item as it would have been included as a precursor.

If the weight of pseudoephedrine includes the total weight of the pill, including the inert ingredients or other active ingredients, then no one would know when they violate S. C. Code § 44-53-398(B). That section prohibits the selling to any one customer packages that contain more than nine grams of pseudoephedrine. Sudafed contains pseudoephedrine in amounts ranging from 30 mg per tablet to 240 mg per tablet. (See, http://www.sudafed.com/products). However, the weight of an individual tablet is not given on any package label. Thus, a pharmacist will not know when they have surpassed the nine gram limit as they do not know the total weight of the pills including the inert ingredients.

If pseudoephedrine is a controlled substance, then some very absurd results occur under the laws of South Carolina. S.C. Code § 12-21-5090 requires that a tax stamp in the amount of Two-hundred dollars per gram be obtained for a controlled substance. Does that mean when a person purchases Sudafed they must also purchase a controlled substance stamp? If they do not, they are subject to a penalty under S.C. Code § 12-21-6000. S.C. Code § 23-31-400

prohibits a person from using a firearm while under the influence of a controlled substance. Can a person who uses Sudafed now be prohibited from using a firearm? The legislature could not have intended these results.

At the best, whether pseudoephedrine includes the inert ingredients or not is ambiguous. When a statute is ambiguous, the principle of the rule of lenity requires that the definition most favorable to the defendant be used. *Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009)(Moreover, in construing a criminal statute, we are guided by the rule of lenity - - the principle that any ambiguity be resolved in favor of the accused.) This court should rule that counsel was not effective when he failed to object to the failure of the state to prove the pure amount of pseudoephedrine.

In ruling against Mr. Ashe on this issue the Post Convection Relief judge, quoting *Thornes v. State*, 310 S.C. 306, 309-310, 426 S.E.2d 764, 765 (1993) said "An attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." App. at 671. Mr. Ashe is not asking his trial counsel to anticipate a change in the law. He is simply asking his trial counsel to read and understand the law as written at the time of his trial. The fact that no agency tested a drug for a quantitative analysis is simply not relevant. If the law required that a quantitative analysis be made, failure to make such an analysis is not excused. And the failure of trial counsel to bring this to the attention of the trial court is also not excused.

Grounds for Granting Relief

Under *Strickland v. Washington*, 466 U.S. 668 (1984) an applicant in a post conviction relief case must show both error by trial counsel and prejudice to the applicant. In the

present case the applicant has presented five grounds upon which he asks for relief. The first three grounds relate to the actual conduct of the trial. The fourth ground relates to a double jeopardy claim. The fifth claim relates to how much pseudoephedrine the applicant possessed as would relate to sentencing.

Considering the evidence presented in this case, including a review of the transcript of the trial testimony, the first three grounds should be sufficient to grant a new trial on the ground of ineffective assistance of counsel. The testimony of officer Hamilton, as noted above, was a conclusion on the ultimate issue which was the applicant exercising dominion and control over the methamphetamine lab in question. An objection should have been raised to this question. Defense counsel did not offer an adequate explanation as to why an objection was not raised. The jury by this testimony had opinion evidence form officer Thomas Hamilton that Mr. Ashe was in dominion and control of the methamphetamine lab. The failure to object to the testimony was error. As the issue of who had dominion and control over the lab was a contested issue the failure to object was prejudicial. Further, the testimony in the case was that the house belonged to Brian Jenkins. The state presented no testimony that Mr. Ashe had even spent one night in the house. The testimony that Mr. Ashe had actual dominion and control over the lab was not strong. His testimony was that he had just arrived at the house. The improper testimony of Officer Hamilton easily could have been the deciding factor by the jury.

The trial judge told the jury that "knowledge and possession may be inferred when a substance is found on the property under the defendant's control." This was clearly a charge on the facts. First, the charge tells the jury what to infer and secondly the charge assumes Mr. Ashe had control of the property, which was a contested issue. Mr. Ashe was prejudiced by this charge

because it was a charge on the facts as to the only seriously contested issue in the trial - did Mr. Ashe have control of the lab in question. Mr. Ashe did not defend the case based upon an argument that a methamphetamine lab did not exist.

Brian Jenkins' family owned the property. Mr. Ashe in his defense tried to place the blame on Mr. Jenkins. A background check of Mr. Jenkins would have shown his prior involvement in the manufacturing of methamphetamine. When the officer was permitted to testify they did not know of the back ground of Mr. Jenkins, Mr. Ashe was prejudiced as the jury did not know the true background of Mr. Jenkins. Had the jury known the true facts the verdict well may have been different.

As noted above, the first three issues relate to the conduct of the trial. South Carolina has not determined if cumulative error is sufficient to grant a post conviction relief petition. *See, Lorenzen v. State*, 376 S.C. 521 657 S.E.2d 771 (2008). Under the facts of this case, if the individual errors are not sufficient, then the cumulative errors should be sufficient to grant a new trial. If this Court concludes these incidents, standing alone, are insufficient to order a new trial, then this Court must apply a cumulative error analysis because the incidents taken together deny Mr. Ashe a fair trial. *Kyles v. Whitley*, 514 U.S 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (considered "the entire post-conviction record as a whole"); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"); and *State v. Blurton,* 342 S.C. 500, 537 S.E.2d 291 (Ct. App.

2000) (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

The double jeopardy issue and the issue concerning the amount of pseudoephedrine are prejudicial to Mr. Ashe as a matter of law. Both the state and federal constitutions prohibit a defendant from being twice punished for the same crime. Here Mr. Ashe was punished for the act of possession of pseudoephedrine and again punished for the possession of the same pseudoephedrine when he was convicted of manufacturing methamphetamine. As a matter of law both convictions cannot stand.

Mr. Ashe was also sentenced to 25 years in prison for the possession of more than 200 grams but less than 400 grams of pseudoephedrine, a crime for which there was no proof. Because the chemist who did the analysis did not do a quantitative analysis, there is no proof that the pseudoephedrine was more than 200 grams. She included the inert ingredients with her weight. She did not determine the amount of pure pseudoephedrine as required by the statute. App. at 571, ll 2-7. As the State produced no proof of the actual amount of pseudoephedrine, Mr. Ashe is prejudiced.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and reverse the Order of the Post Conviction Relief judge and grant Christopher Ashe a new trial.

September 16, 2014

C. RAUCH WISE
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauch@simplepc.net
S. C. Bar № 06188

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
SEP 18 2014
S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Alexander S. Macaulay, Circuit Court Judge

Case No.2014-001407

Christopher W. Ashe, ... **Petitioner,**

vs.

The State .... **Respondent.**

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on September 16, 2014, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to J. Walt Whitmire, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211, and The SC Court of Appeals, P.O. Box 11330, Columbia, South Carolina, 29211.

SWORN to and Subscribed

Sandy Trayhnam

before me this 16 day

of September, 2014.

Mary Anne Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22

RECEIVED

SEP 18 2014

S.C. Supreme Court

LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646
email rauch@simplepc.net

C. Rauch Wise

Telephone
(864) 229-5010
Facsimile
(864) 229-2665

September 16, 2014

Daniel E. Shearouse
SC Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Christopher W. Ashe vs. The State

Dear Mr. Shearouse:

Enclosed herewith are the original and six copies of the Petition for Writ of Certiorari concerning the above referenced matter, together with two copies of the Appendix and the original Affidavit of Service.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/mjh
cc: J. Walt Whitmire
Jenny Abbott Kitchings, Clerk