

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

SEP 18 2014

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. Supreme Court

Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2014-001407

Christopher W. Ashe, ... Petitioner,

vs.

The State Respondent.

APPENDIX VOLUME TWO
Pages 499-679

HENRY DARGAN McMASTER
Attorney General

C. RAUCH WISE
Attorney at Law

JOHN W. McINTOSH
Chief Deputy Attorney General

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

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

Attorney for Petitioner

J. WALT WHITMIRE
Office of the Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

DONALD V. MYERS
Solicitor, Eleventh Juicial Circuit

Lexington County Judicial Center
205 East Main Street
Lexington, SC 29072
(803) 359-8352

Attorneys for Respondent

INDEX

Trial Transcript	1-454
Trial Exhibits	455-480
Indictments, Arrest Warrants, Sentencing Sheets	481-498
Direct Appeal Records	
Final Brief of Appellant	499-515
Final Brief of Respondent	516-545
PCR Application	547
Return to PCR Application	554
PCR Hearing Transcript	559-657
PCR Exhibits - Applicant	658
PCR Exhibits - State	659
Order denying PCR	666
Notice of Appeal	679

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUN 14 2007

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

SC Court of Appeals

R. FERRELL COTHRAN, CIRCUIT COURT JUDGE

Indictments Nos. 2006-GS-32-2155, 2006-GS-32-2156, 2006-GS-32-2157

The State of South Carolina Respondent,

v.

Christopher W. Ashe Appellant.

FINAL BRIEF OF APPELLANT

Robert T. Williams, Sr.
Williams, Hendrix, Steigner & Brink, P.A.
P.O. Box 849
200 East Main Street
Lexington, South Carolina 29071
(803) 359-1550
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
ARGUMENT	3-11
1. THE SEARCH OF APPELLANT'S VEHICLE WAS ILLEGAL AND THIS RESULTED IN THE INTRODUCTION OF IMPROPERLY OBTAINED EVIDENCE AND GAVE APPELLANT AN UNFAIR TRIAL.. ..	3
2. THE TRIAL JUDGE ERRED IN FAILING TO GRANT THE DEFENDANT'S DIRECTED VERDICT MOTION OF NOT GUILTY AS IT RELATED TO INDICTMENT 2006-GS-32-2156, POSSESSION OF CRANK, WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT	9
CONCLUSION	12

TABLE OF AUTHORITIES

Constitutional Amendments:

U.S.C.A. Const. Amend 4.	4
----------------------------------	---

Statutes:

S.C. Code Section 44-53-375(A)	9, 11
S.C. Code Section 17-13-140	6

Federal Cases:

<u>United States v. Carroll</u> , 267 U.S. 132, 45 S.Ct. 280 (1925)	4
<u>United States v. Mejia</u> , 69 F.3d 309 (9th Cir.1995)	7
<u>United States v. Ross</u> , 456 U.S. 798, 102 S.Ct 2157 (1982)	6
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407 (1963)	7
<u>Wyoming v. Houghton</u> , 526 U.S. 295, 119 S.Ct. 1297 (1999)	5

State Cases:

<u>State v. Arnold</u> , 351 S.C. 302, 569 S.E.2d 379 (S.C.App 2002)	9
<u>State v. Bultron</u> , 318 S.C. 323, 457 S.E.2d 616 (1995)	5
<u>State v. Cherry</u> , 361 S.C. 588, 606 S.E.2d 475 (2004)	10
<u>State v. Covert</u> 368 S.C. 188, 628 S.E.2d 482 (S.C.App. 2006)	6
<u>State v. Cox</u> , 290 S.C. 489, 351 S.E.2d 570 (1986)	4, 5
<u>State v. Jihad</u> , 347 S.C. 12, 553 S.E.2d 249 (2001)	7
<u>State v. Jones</u> , 342 S.C. 121, 536 S.E.2d 675 (2000)	6
<u>State v. Muhammed</u> , 338 S.C. 22, 524 S.E.2d 637 (S.C.App. 1999)	9
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E.2d 450 (1984)	9
<u>State v. Taylor</u> , 323 S.C. 162, 473 S.E.2d 817 (S.C. App. 1996)	11

STATEMENT OF ISSUES ON APPEAL

- 1. WAS THE SEARCH OF APPELLANT'S VEHICLE ILLEGAL AND DID THE RESULTING INTRODUCTION OF IMPROPERLY OBTAINED EVIDENCE GIVE APPELLANT AN UNFAIR TRIAL?**
- 2. DID THE TRIAL JUDGE ERR BY FAILING TO GRANT APPELLANT'S MOTIONS FOR DIRECTED VERDICT OF NOT GUILTY AS TO INDICTMENT 2006-GS-32-2156, POSSESSION OF CRANK, WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT?**

STATEMENT OF THE CASE

Appellant was indicted on Indictments Nos. 2006-GS-32-2155, 2006-GS-32-2156 and 2006-GS-32-2157 by the Lexington County Grand Jury for Unlawful Possession of Pseudoephedrine, 200 grams or more, but less than 400 grams; Possession of Crank; and Manufacturing Methamphetamine. (R. pp. 6-11).

He was tried in the Lexington County Court of General Sessions, on October 23, 24, 25, 2006, before the Honorable R. Ferrell Cothran. Appellant was convicted and sentenced to Twenty-Five (25) years on indictment 2006-GS-32-2155; Three (3) years on indictment 2006-GS-32-2156, and Fifteen (15) years on indictment 2006-GS-32-2157, with all sentences are to be served concurrently. (R. pp. 2-4).

Appellant timely filed and served his Notice of Intent to Appeal on October 31, 2006. (R. p. 16). Appellant was granted an extension of time to file and serve his Initial Brief and Designation of Matter until March 9, 2007. (R. p. 5).

ARGUMENT

I. THE SEARCH OF APPELLANT'S VEHICLE WAS ILLEGAL AND THIS RESULTED IN THE INTRODUCTION OF IMPROPERLY OBTAINED EVIDENCE AND GAVE APPELLANT AN UNFAIR TRIAL.

Appellant's counsel moved to suppress the introduction of any items retrieved from the truck located at the drug scene prior to the introduction of any evidence in the case. (R. p. 17, l. 6-l.20). The search warrant issued in this case specifically refers to the dwelling without any reference to any vehicles parked there. (R. pp. 12, 13, 14). Indeed, the Solicitor consented (agreed) that the Search Warrant does not reference the truck. (R. p. 17, l. 21-22). The Return dated the same date as the Search Warrant, December 22, 2005, states that the "four boxes of sudofedrine, electronic scale, rifle (Ruger) cal. 243 were all found in the truck . . ." and were "... taken pursuant to the warrant". (R. pp. 12-15).

The Assistant Solicitor first argued that the items were seized pursuant to a "search incident to an arrest." (R. p. 19, l. 3-11). Next the State contended that the items were seized based on an inventory search. (R. p. 21, l. 21 - p. 22, l. 3). Next, the State contended that they did not have to have a Search Warrant because there was probable cause to believe the vehicle contained evidence of a crime. (R. p. 24, l. 2-7).

The Court finally settles on allowing the items seized in the Appellant's truck to be placed into evidence on the basis that these items "would have inevitably been discovered on an inventory search". (R. p. 39, l. 9-17). The Court determined this after it discounted all of the other arguments presented by the State as to why the evidence should be allowed into evidence. (R. p. 38, l. 15 - p. 39, l. 22).

A review of the issues dealing with searches is helpful in making a correct assessment as to whether the evidence stated should come in or not.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend 4.

The crux of the err committed by the Trial Judge lies in the allowance evidence obtained from the Defendant's vehicle without securing a search warrant, or following additional appropriate Constitutional guidelines. Carved into the requirements for a search warrant, the Courts have allowed several exceptions when dealing with an automobile. In United States v. Carroll, 267 U.S. 132, 45 S.Ct. 280 (1925), the Courts recognized that these "special circumstances" exist and must be addressed when weighing Fourth Amendment protections against illegal search and seizure and privacy rights relating to automobiles. The original concern addressed more than 80 years ago focused increased concern of mobility, specifically that "a ship, motor boat, wagon, or automobile" provide mediums where it is often not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. Id. at 153.

Today the Courts rely on two bases for the "automobile exception". First, the ready mobility of the automobile creates a potential for a loss of evidence before a warrant can be obtained; and second, there exists a lessened expectation of privacy in motor vehicles because they are a subject to stringent governmental regulation. State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986). Key to the Defendant's appeal is not the issue of the existence of an "automobile

exception,” but rather that the exception would not apply in current situation. Central issues essential to address the illegality of the search and seizure of the Defendant’s Pick-up are as follows:

- A. The Vehicle was located on private property and not on “public highways”;
- B. The Defendant was not arrested within immediate proximity of the vehicle and the search was not incident to a traffic stop, thus removing the possibility of flight of the vehicle;
- C. There was ample time to secure a search warrant without any risk to evidence loss or destruction.

The Defendant’s first challenge to the admissibility of evidence obtained from his vehicle, absent a search warrant, stems from the fact the vehicle was not in operation and was located on private property, not upon the public highways of the State of South Carolina. (R. p. 43, l. 14-21) (R. p. 47, l. 14-16). In State v. Cox, the South Carolina Supreme Court recognized the long standing federal consensus that there has been carved a specific vehicle exception for those vehicles being actively operated on a public highway. Id. The automobile exception, has been further examined on the state and federal level, but thus far only in the context of a vehicle that has been lawfully stopped. Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297, (1999); see also State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (1995).

This case is unique in that the search of the Defendant’s vehicle was in no manner incident to a traffic stop. Had the Defendant been located in his vehicle on public highways of the State of South Carolina, the search may have been proper.

A secondary consideration of the automobile exception deals with the risk of flight enhanced by the mobility of an automobile. In this matter the Defendant was arrested in a large tract of woods away from the location of his vehicle. (R. p. 79, l. 2-12) There was no risk of the Defendant exercising dominion and control over his vehicle when he was encountered by the arresting officer. There was no risk that he would utilize the vehicle for flight, or otherwise attempt to gain access to the vehicle or it's contents to the detriment of officer or public safety. The ruling in United States v. Ross, 456 U.S. 798, 102 S.Ct 2157 (1982) contemplated the transitory nature of the automobile and the exigent circumstances thus created. The exception's concerns over mobility, safety from a potential weapon, or insufficient time to secure a warrant, would not apply in this matter.

Finally, the vehicle was located at a secured location where there was no risk of flight. Had the State wished to search the vehicle it would have been proper to procure a search warrant if probable cause existed at that time. There was no urgency and no exigent circumstances mandating the State search the Defendant's vehicle without a search warrant. This argument is bolstered by the fact the State secured a search warrant for the residence. (R. p. 26, l. 9-24) The solicitor indicated that the failure to secure a warrant to search the truck was merely unnecessary and constituted harmless error, (R. p. 29, l. 24- p. 30, l. 2). This, however, is grossly inaccurate.

As previously stated, the Fourth Amendment to the United States Constitution ensures that a person shall be protected from unlawful search and seizure. Furthermore, our Court as well as Section 17-13-140 of the South Carolina Code of Laws of 1976 as amended, reveals this similar standard provided by our United States Constitution. State v. Covert 368 S.C. 188, 628 S.E.2d 482 (S.C.App., 2006); State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). The failure

of the State to obtain a search warrant is more than a procedural mistake, it rises to a level where it violates Constitutional protections.

There was every opportunity for the State to secure a warrant for the Defendant's vehicle, assuming that they had probable cause, which the Defendant maintains they did not. There was no special circumstance giving rise to the automobile exception, which should not apply in this matter regardless, as shown by the first two arguments.

The long standing precedent established in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963), created the term of art: "fruit of the poisonous tree." Specifically, evidence obtained as a result of an illegal police action, a search or seizure, must be excluded barring a specifically carved exception. *Id.* See also State v. Jihad 347 S.C. 12, 553 S.E.2d 249 (2001).

The Trial Court rested its final determination on the third argument offered by the Solicitor that the evidence would have been found through inevitable discovery with the vehicle being inventoried. (R. p. 39, l. 9-15) There was, however, no sworn testimony that the vehicle would have been subject to impound and inventoried nor was there any evidence as to on what basis the vehicle would have been impounded. This ruling goes directly in the face of the findings in United States v. Mejia, 69 F.3d 309, 319 (9th Cir.1995), where the court found:

"We reject the contention that [the inevitable discovery] doctrine applies where the police had probable cause to conduct a search but simply failed to obtain a warrant.... If evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be any reason for officers to seek a warrant."

The Solicitor's statement, referring to the acquisition of a search warrant, "we could have done it, but it wasn't necessary", is the exact action, or inaction that is referenced above. (R. p. 29, l. 24- p. 30, l. 2). If the State were afforded the "we could have, but did not" defense it would

completely circumvent the necessity of a search warrant and destroy the Constitutional protections of the Fourth Amendment.

The pseudoephedrine and scales should not have been seized from the Defendant's vehicle absent a properly issued search warrant. They became fruit of the poisonous tree from the taint of the police action and do not fall properly within any clearly stated exception.

The Appellant acknowledges that a second prong exists when addressing wrongfully obtained, and subsequently admitted evidence, in that upon appeal he must make a showing that the admission of the evidence created irreparable and reversible harm. This question is particularly important to the issues addressed by the Appellant upon appeal. Absent the admission of the quantity of pseudoephedrine, which constituted a legal amount (R. p. 124, l. 3-17), located in the Appellant's vehicle, it is the Appellant's position that the Jury would have lacked sufficient direct or circumstantial evidence to return a guilty verdict.

Evidence presented by the State showed that when the Defendant was arrested by the Police, he had neither pseudoephedrine, in any quantity, any paraphernalia associated with methamphetamine, or methamphetamine on his person, or immediately within his dominion and control. (R. p. 80, l. 2 - p. 83, l. 15; R. p. 163, l. 15-17) The admittance of the boxes of pseudoephedrine and the "American Way" scale from the Appellant's vehicle (R. p. 121, l. 11-16, p. 123, l. 4-10, p. 197, l. 8-16) created a circumstantial link between the Appellant and the evidence obtained from Mr. Jenkins' residence. The trier of the facts was presented with a tainted image of evidence, which should have been excluded from an illegal search.

The admittance of said evidence created an irreparable harm to the Defendant and denied him Due Process of law. The actions of the Court should be reversed and a new trial ordered

without the admission of any items obtained from the Defendant's vehicle.

2. THE TRIAL JUDGE ERRED IN FAILING TO GRANT THE APPELLANT'S DIRECTED VERDICT MOTION OF NOT GUILTY AS IT RELATED TO INDICTMENT 2006-GS-32-2156, POSSESSION OF CRANK, WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT.

Indictment 2006-GS-32-2156 states that the Defendant did knowingly and intentionally possess a controlled substance, to wit: crank in violation of S.C. Code Section 44-53-375 (A). (R. P. 3). To sustain a conviction of possession of crank or a like substance, South Carolina Code Section 44-53-375 requires proof of possession, either actual or constructive, coupled with knowledge of its presence. State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637, (S.C.App. 1999) *rehearing denied, certiorari denied*.

A directed verdict should be granted when evidence presented by the State only establishes circumstances that are suspicious, but ultimately falls short of providing a basis upon which a jury could reasonably determine the Defendant's guilt. State v. Arnold, 351 S.C. 302, 569 S.E.2d 379 (S.C.App 2002) Further, the State bears the burden of demonstrating that the Defendant was not only at the scene of a crime, but actually committed the criminal act to withstand a directed verdict challenge. State v. Schrock, 283 S.C. 129, 32 S.E.2d 450 (1984)

In the current matter, the only testimony offered regarding potentially illicit substances located on the Appellant's person came by way of the State's Chemical expert who stated that in the bag found on the defendant marked Exhibit 21-A (R. p. 80, l. 4-23) did not include any illegal or controlled substances as defined by the South Carolina Code. (R. p. 163, l. 15-17). At no time was any additional evidence offered that the Defendant was in possession of Methamphetamine. Officer Hamilton, a State witness, testified that no illegal substances were found on the Appellant

(R. p. 252, l. 17-21).

In the present matter with the evidence taken most favorably for the State, Appellant is placed merely at the scene where drugs were found, upstairs in a building, which was owned by another individual, contained in a little bag within a larger duffle bag. (R. p. 108, l. 8-20). The evidence offered by the State does no more than raise a circumstantial suspicion and clearly fails to meet the required burden to go to a jury, even when evidence is considered in the light most favorable to the prosecution. State v. Cherry 361 S.C. 588, 606 S.E.2d 475 (2001) The circumstantial link between the Appellant and alleged dominion and control over items found in a duffle bag, located in the residence of a different individual, which was not fingerprinted and was in fact destroyed prior to the Appellant's ability to examine it (R. p. 143, l. 17-23) leaves a nebulous connection, one that fails to uphold the State's appropriate threshold to withstand a directed verdict motion.

The Appellant's argument is further bolstered by the fact that within the police report, the officers indicated they believed that a second, and different individual, was in the building at the time they made initial contact with the Defendant outside. (R. p. 65, l. 4-23). It was clearly established that the property was owned by a second individual, specifically Mr. Brian Jenkins. (R. p. 55, l. 7-11). The owner of the property, Mr. Jenkins, was actively investigated by the Lexington County Sheriff's office for methamphetamine-related offences prior to the events that occurred on December 22, 2005. (R. p. 55, l. 19-25) Mr. Jenkins is an individual who was described with similar characteristics to the Appellant; specifically a white male, with facial hair, and similar hair color to the Appellant. (R. p. 267, l. 3-7)

If the Court were to accept the idea that evidence was reasonably sufficient to establish a

real possibility that the Appellant could have constructively possessed the methamphetamine, by way of dominion and control, the second element of the Statute is still lacking. For a conviction under Section 44-53-375(A), a second prong requires that possession must be "coupled with knowledge of its presence". As stated, the State's evidence at no time places the duffle bag containing the drugs in the possession of the Appellant. There is no testimony offered as to the location of the drugs within the bag. There were no prints lifted from the bag to indicate that the defendant ever touched or looked into the bag. In State v. Taylor, the Court found a Defendant who was negligent in the possession of, but without knowledge could not be convicted under the statute. State v. Taylor, 323 S.C. 162, 473 S.E.2d 817 (S.C. App. 1996).

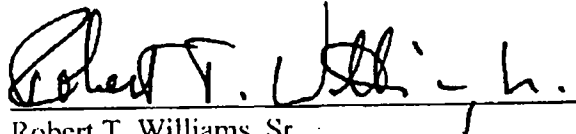
Totaling all circumstantial evidence presented by the State in its case in chief, they can place the Defendant at a residence, owned by a man who has been investigated for similar offenses, where a small quantity of methamphetamine is found located within a bag, located within a larger non-transparent bag, upstairs in that man's house. This demonstration of mere presence accompanied by, at best, a suspicion of guilt was insufficient to withstand a directed verdict motion.

CONCLUSION

The Trial Judge erred by refusing to suppress any and all evidence obtained from the Appellant's vehicle. It was improper to search and seize items from the Defendant's vehicle absent a search warrant. This evidence wrongfully obtained and presented at trial created an unfair inference and prejudiced the Appellant to an extent by which his due process rights were violated.

Further, the Trial Judge erred in failing to grant the Appellant's Motion for Directed Verdict at the end of the State's case and Appellant's case. Even considered in a light most favorable to the State, evidence presented failed to meet the required prongs of the statute and created mere suspicion not a reasonable indica of guilt.

Respectfully submitted,



Robert T. Williams, Sr.
WILLIAMS, HENDRIX, STEIGNER & BRINK, P.A.
200 East Main Street
Post Office Box 849
Lexington, South Carolina 29071
(803) 359-1550
Attorneys for Appellant

Lexington, South Carolina

June 14, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. FERRELL COTHRAN, CIRCUIT COURT JUDGE

Indictments Nos. 2006-GS-32-2155, 2006-GS-32-2156, 2006-GS-32-2157

The State of South Carolina Respondent,

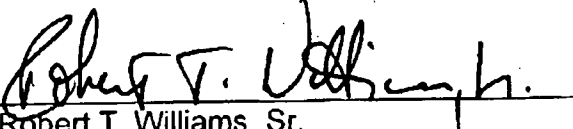
v.

Christopher W. Ashe Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211 (b).

June 14, 2007


Robert T. Williams, Sr.
Williams, Hendrix, Steigner & Brink, P.A.
Post Office Box 849
200 East Main Street
Lexington, South Carolina 29071
(803) 359-1550
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. FERRELL COTHRAN, CIRCUIT COURT JUDGE

Indictments Nos. 2006-GS-32-2155, 2006-GS-32-2156, 2006-GS-32-2157

The State of South Carolina Respondent,

v.

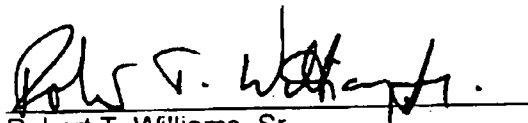
Christopher W. Ashe Appellant.

PROOF OF SERVICE

I certify that I have this day served the within **Final Brief of Appellant** on the individual(s) named below by placing three (3) copies of same in the United States Mail, postage prepaid and return address clearly indicated to the address(es) below:

Norman Mark Rapoport, Senior Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
1000 Assembly Street
Columbia, South Carolina 29211

Donald V. Myers, Solicitor
Eleventh Judicial Circuit
205 East Main Street
Lexington, South Carolina 29072


Robert T. Williams, Sr.
Williams, Hendrix, Steigner & Brink, P.A.
P.O. Box 849
200 East Main Street
Lexington, South Carolina 29071
(803) 359-1550
ATTORNEYS FOR APPELLANT

June 14, 2007

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
R. Ferrell Cothran, Circuit Court Judge

THE STATE,

Respondent,

vs.

CHRISTOPHER W. ASHE,

Appellant.

FINAL BRIEF OF RESPONDENT

RECEIVED

JUN 18 2007

SC Court of Appeals

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

Lexington County Judicial Center
205 East Main Street
Lexington, SC 29072-3490
(803) 359-8352

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
R. Ferrell Cothran, Circuit Court Judge

THE STATE,

Respondent,

vs.

CHRISTOPHER W. ASHE,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

Lexington County Judicial Center
205 East Main Street
Lexington, SC 29072-3490
(803) 359-8352

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	
I. The trial judge did not err by denying Ashe's motion to suppress the evidence seized from his truck	7
II. The trial judge properly denied Ashe's motion for a directed verdict for the offense of possession of crank	19
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:

<u>Brightman v. State</u> , 336 S.C. 348, 520 S.E.2d 614 (1999)	17
<u>California v. Carney</u> , 471 U.S. 386 (1985)	10-13
<u>Carroll v. United States</u> , 267 U.S. 132 (1925)	13
<u>Chambers v. Maroney</u> , 399 U.S. 42 (1970)	13
<u>Colorado v. Bertine</u> , 479 U.S. 367 (1987)	15
<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	12
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	9, 10
<u>Maryland v. Dyson</u> , 527 U.S. 465 (1999)	10
<u>Michigan v. Thomas</u> , 458 U.S. 259 (1982)	13
<u>Nix v. Williams</u> , 467 U.S. 431 (1984)	15, 16
<u>Pennsylvania v. Labron</u> , 518 U.S. 938 (1996)	10-12
<u>South Dakota v. Opperman</u> , 428 U.S. 364 (1976)	12, 15
<u>State v. Arnold</u> , 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995)	9
<u>State v. Attardo</u> , 263 S.C. 546, 211 S.E.2d 868 (1975)	21
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006)	16, 18
<u>State v. Bailey</u> , 276 S.C. 32, 274 S.E.2d 913 (1981)	23
<u>State v. Ballenger</u> , 322 S.C. 196, 470 S.E.2d 851 (1996)	19-22
<u>State v. Beckham</u> , 334 S.C. 302, 513 S.E.2d 606 (1999)	22
<u>State v. Benton</u> , 338 S.C. 151, 526 S.E.2d 228 (2000)	14
<u>State v. Bernotas</u> , 277 S.C. 106, 283 S.E.2d 580 (1981)	17

<u>State v. Boyd</u> , 288 S.C. 206, 341 S.E.2d 144 (Ct. App. 1986)	15
<u>State v. Brockman</u> , 339 S.C. 57, 528 S.E.2d 661 (2000)	8
<u>State v. Brown</u> , 267 S.C. 311, 227 S.E.2d 674 (1976)	20
<u>State v. Brown</u> , 319 S.C. 400, 461 S.E.2d 828 (Ct. App. 1995)	21
<u>State v. Condrey</u> , 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002)	19
<u>State v. Cox</u> , 290 S.C. 489, 351 S.E.2d 570 (1986)	11, 12
<u>State v. Darby</u> , 297 S.C. 459, 377 S.E.2d 340 (1989)	17
<u>State v. Davis</u> , 309 S.C. 326, 422 S.E.2d 133 (1992)	17
<u>State v. Davis</u> , 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003)	12
<u>State v. Dupree</u> , 319 S.C. 454, 462 S.E.2d 279 (1995)	9
<u>State v. Ellis</u> , 263 S.C. 12, 207 S.E.2d 408 (1974)	21
<u>State v. Ezell</u> , 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996)	22
<u>State v. Freely</u> , 105 S.C. 243, 89 S.E. 643 (1916)	22
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002)	19
<u>State v. Grant</u> , 275 S.C. 404, 272 S.E.2d 169 (1980)	22
<u>State v. Green</u> , 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000)	9
<u>State v. Harris</u> , 351 S.C. 643, 572 S.E.2d 267 (2002)	19
<u>State v. Haselden</u> , 353 S.C. 190, 577 S.E.2d 445 (2003)	17
<u>State v. Hudson</u> , 277 S.C. 200, 284 S.E.2d 773 (1981)	20, 23
<u>State v. Khingratsaiphon</u> , 352 S.C. 62, 572 S.E.2d 456 (2002)	8
<u>State v. Kimbrell</u> , 294 S.C. 51, 363 S.E.2d 630 (1987)	21
<u>State v. Lemacks</u> , 275 S.C. 181, 268 S.E.2d 285 (1980)	15

<u>State v. Lewis</u> , 277 S.C. 234, 285 S.E.2d 354 (1981)	23
<u>State v. Littlejohn</u> , 228 S.C. 324, 89 S.E.2d 924 (1955)	20
<u>State v. Livingston</u> , 282 S.C. 1, 317 S.E.2d 129 (1984)	16
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	19
<u>State v. McKnight</u> , 352 S.C. 635, 576 S.E.2d 168 (2003)	19
<u>State v. McLauren</u> , 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002)	19
<u>State v. Missouri</u> , 361 S.C. 107, 603 S.E. 2d 594 (2004)	8
<u>State v. Morgan</u> , 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002)	19
<u>State v. Muhammed</u> , 338 S.C. 22, 524 S.E.2d 637 (Ct. App.1999)	20-23
<u>State v. Tabor</u> , 260 S.C. 355, 196 S.E.2d 111 (1973)	21
<u>State v. Tench</u> , 353 S.C. 531, 579 S.E.2d 314 (2003)	17
<u>State v. Thompson</u> , 278 S.C. 1, 292 S.E.2d 581 (1982)	22
<u>State v. Thompson</u> , 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003)	17
<u>State v. Torrence</u> , 305 S.C. 45, 406 S.E.2d 315 (1991)	22
<u>State v. Walker</u> , 349 S.C. 49, 562 S.E.2d 313 (2002)	19
<u>State v. Weaver</u> , 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004)	13
<u>State v. Williams</u> , 350 S.C. 172, 564 S.E.2d 688 (Ct. App. 2002)	23
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001)	8
<u>Texas v. White</u> , 423 U.S. 67 (1975)	13
<u>United States v. Johns</u> , 469 U.S. 478 (1985)	13
<u>United States v. Seals</u> , 987 F.2d 1102 (5th Cir.1993)	15

Other Authorities:

U.S. Const., amend. IV	8-13, 15
Rule 208(b)(2), SCACR	10
Rule 220(c), SCACR	9
S.C. Code Ann. §44-53-375(A) (2002)	20
6 W. LaFave, <u>Search and Seizure</u> , §11.4(a), at 278-79 (4th ed. 2004)	15

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge err by denying Ashe's motion to suppress the evidence seized from his truck?

II.

Did the trial judge properly deny Ashe's motion for a directed verdict for the offense of possession of crank?

of junk, old tools, things of that nature. The walls are not finished. Basically, they're just stud two-by-fours where walls would be, nothing on them, no flooring other than a subfloor, which in areas was weak and appeared to have been damaged by water or some other type of environment." (R. 129-30).⁵

Upstairs on the second floor of the structure the officers discovered numerous items, including hazardous materials, used for the manufacture of methamphetamine. (R. 106-09, 130-32, 139-40, 185-89, 192, 198-225). They seized 94.5 grams of Pseudoephedrine in a bag in the duffel bag on the second floor. They also seized 193.3 grams of Pseudoephedrine in a bag on the floor next to the duffel bag. (R. 107-08, 131-32, 163-65, 169). In addition to these items, the officers seized .05 grams of methamphetamine from inside the same duffel bag. (R. 108-09, 132, 163, 173).⁶ The duffel bag was "within close proximity" to the open second floor window where Ashe was initially observed. (R. 253).

Hamilton testified he noticed a strong odor of ether and ammonia immediately upon his arrival at the scene. He said the odor was so strong outside the structure that they donned protective gear at the back of the truck and would not approach the structure without it. (R. 187, 189-90). Hamilton explained "it would be an impossibility" for anyone upstairs in the two-story structure not to smell the ether or ammonia from the methamphetamine lab. (R. 190).

⁵Gleaton also testified about the run-down condition of the two-story structure. He said it did not appear to be inhabited. (R. 75).

⁶The police also searched the trailer. Hamilton testified the interior of the trailer was "in great disarray. Much like it would look after a tornado had hit . . ." There was trash and plates everywhere and "just thrown stuff around like you would find in an abandoned place." (R. 137-38). Nothing of evidentiary value was found inside the trailer. (R. 140, 251).

When the officers searched Ashe's truck after his arrest, they seized four boxes of decongestant pills and a set of scales.⁷ (R. 119, 121, 123). Hamilton explained that the type of cold medicine found in the truck is crushed to extract Pseudoephedrine, which is then used to produce the methamphetamine. (R. 226-35, 238).

⁷The trial judge suppressed the introduction of a rifle seized from the truck, because he determined it was irrelevant to the charges. (R. 39).

ARGUMENT

I.

The trial judge did not err by denying Ashe's motion to suppress the evidence seized from his truck. (Issue 1).

On December 22, 2005, the police obtained a search warrant for the "two story dwelling" at 1208 Daralynn Drive in Red Bank. (R. 12-14). In addition to the evidence seized inside the structure, the officers seized four boxes of cold medicine and a set of scales from Ashe's truck. (R. 15).

Prior to trial, Ashe moved to suppress the evidence seized from his truck. He argued the search was unlawful, because the truck was not listed in the warrant to be searched. (R. 17-19). The assistant solicitor conceded the warrant did not list the truck to be searched. (R. 17, lines 20-22). However, he argued the items were properly seized incident to Ashe's arrest and there was probable cause to search the truck under the circumstances. Finally, the assistant solicitor contended the items were seized pursuant to a lawful inventory search and the inevitable discovery doctrine. (R. 17-24, 36, 38).

The trial judge ruled the evidence was not properly seized incident to Ashe's arrest and he also rejected the automobile exception theory. He held, "even though you may have had probable cause at the time," the truck was on private property when it was searched and "the exigent circumstances surrounding automobiles don't exist" in the case. (R. 38-39). However, the trial judge denied Ashe's motion to suppress, because there was a valid inventory search conducted, "that in the inevitable discovery rule on an inventory search, that the items would have been discovered." (R. 39).

On appeal, Ashe contends the trial judge erred by admitting the evidence pursuant to the inevitable discovery doctrine, because there was no testimony the truck was subject to impoundment. He further argues the automobile exception was inapplicable in the absence of exigent circumstances and because the truck was parked in a private driveway. Ashe argues there was time for the officers to obtain a search warrant for the truck, as they did before searching the structure.

APPELLATE STANDARD

When reviewing a Fourth Amendment search and seizure case, the appellate court cannot review the trial judge's ultimate determination *de novo*. The court must apply a deferential standard. State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456, 459-60 (2002). The appellate court must review the trial judge's ruling like any other factual finding, and may reverse only if there is clear error. Id. Therefore, the appellate court must affirm if any evidence exists to support the trial judge's ruling. Id.; see also State v. Missouri, 361 S.C. 107, 603 S.E. 2d 594, 596 (2004) ["When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error"]; State v. Wilson, 345 S.C. 1, 545 S.E.2d 827, 829 (2001) [holding in a criminal case the appellate court is bound by the trial court's preliminary factual findings in determining the admissibility of certain evidence unless the findings are clearly erroneous, and its review extends only to determining whether the trial judge abused his discretion]; State v. Brockman, 339 S.C. 57, 528 S.E.2d 661, 666 (2000) [explaining that an appellate court reviews the circuit court's Fourth Amendment ruling like any other factual finding and reverses if there is clear error

but affirms if there is any evidence to support the trial judge]; State v. Green, 341 S.C. 214, 532 S.E.2d 896, 898 n.3 (Ct. App. 2000)[holding “the appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error”].

EXCEPTIONS TO THE WARRANT REQUIREMENT

Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995). However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement. Id., 462 S.E.2d at 281. These exceptions include: (1) search incident to a lawful arrest; (2) “hot pursuit”; (3) stop and frisk; (4) automobile exception; (5) “plain view” doctrine; (6) consent; and (7) abandonment. Id. The burden of establishing probable cause and the existence of circumstances constituting an exception to the general prohibition against warrantless searches is upon the State. Id.

A. Automobile Exception

Although the trial judge ruled the automobile exception inapplicable in this case, this Court may still affirm the admission of the evidence seized in the truck pursuant to that exception. See Rule 220(c), SCACR [“The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal”]; State v. Arnold, 319 S.C. 256, 460 S.E.2d 403, 405 n.3 (Ct. App. 1995)[holding Rule 220(c) allows the court of appeals to affirm on any ground appearing in the record]; see also I’On, L.L.C. v. Town of

Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)[holding under Appellate Court Rules 208(b)(2) and 220(c), a respondent, as a prevailing party in the trial court, may raise on appeal any additional reasons the appellate court should affirm the trial judge regardless of whether the reasons were presented to or ruled on by the trial judge, provided the respondent's additional sustaining grounds appear in the record on appeal].

As previously noted, the trial judge determined there was probable cause to search the truck. In fact, Ashe readily conceded at trial that there was probable cause. (R. 24-25). However, the trial judge rejected the application of the automobile exception, because the truck was on private property when it was searched and "the exigent circumstances surrounding automobiles don't exist" in this case. The State agrees there was probable cause, but notes the reliance by the trial judge and Ashe on the absence of exigent circumstances and the location of the truck on private property is erroneous. Therefore, as an additional sustaining ground, the State would maintain the evidence was lawfully seized from Ashe's truck pursuant to the automobile exception.

Under the automobile exception, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." Pennsylvania v. Labron, 518 U.S. 938, 940 (1996)[citing California v. Carney, 471 U.S. 386, 393 (1985)]. If the automobile exception applies, there is no requirement of a separate exigency. Maryland v. Dyson, 527 U.S. 465, 467 (1999); Labron, 518 U.S. at 940. In Labron, the United States Supreme Court reversed the lower court's holding that the warrantless search of a vehicle parked in the driveway of a farmhouse was invalid under the automobile exception to the warrant requirement absent exigent

circumstances, on the ground that the holding “rest[ed] on an incorrect reading of the automobile exception to the Fourth Amendment’s warrant requirement.” Id. at 939. While the location of the vehicle did not appear to have been a specific issue in the case, it is nevertheless instructive that the Labron Court held the search was valid based on probable cause alone and absent any additional exigent circumstances.

In fact, the Supreme Court in State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986) rejected a similar interpretation of the automobile exception relied upon by the trial judge and as argued by Ashe. In reversing the prior decision by this Court, the Supreme Court noted:

In a plurality opinion the Court [of Appeals of South Carolina] held the ‘automobile exception’ to the warrant requirement was not applicable because Cox’s car was found at his residence. The Court, relying upon [Carney], concluded that ‘an automobile found parked at a person’s home is protected from warrantless searches.’ 287 S.C. [260,] 264, 335 S.E.2d [809,] 811 [(Ct. App.1985)].

Cox, 351 S.E.2d at 571. The Supreme Court found this Court misinterpreted Carney to mean the automobile exception did not apply to any vehicle parked at a residence, where a close reading of Carney, in context, made it clear the Carney Court only addressed the inapplicability of the exception as to motor homes set up on a site and used as a residence.

Id. The Supreme Court held in Cox:

No prior Supreme Court cases have recognized a distinction between vehicles parked in public and private places. Indeed, such a distinction would not harmonize with the Court’s reasoning in automobile search cases.

The Carney Court makes clear that under the automobile exception, probable cause alone is sufficient to justify a warrantless search. As the Court stated, ‘the pervasive

schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of vehicles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.' [471 U.S. at 392].

Id., 351 S.E.2d at 571-72. Thus, the Cox decision makes it quite clear the inherent mobility of automobiles provides the requisite exigency, regardless of where the vehicle is parked, and that probable cause alone is sufficient to warrant the search pursuant to the automobile exception.

The reasons for the automobile exception are twofold: mobility and reduced expectations of privacy. "Besides the element of mobility, less rigorous warrant requirements govern [an automobile search] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." Carney, 471 U.S. at 391 [quoting South Dakota v. Opperman, 428 U.S. 364 (1976)]: "These reduced expectations . . . 'justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.' " Carney, 471 U.S. at 392.

The Labron Court further rejected the trial court's ruling which had found the automobile exception did not apply because the officers had time to obtain a warrant. The Court stated that, provided "a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." Labron, 518 U.S. at 940.

Probable cause exists when, under the totality of the circumstances, a reasonable person could believe that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983); State v.

Davis, 354 S.C. 348, 580 S.E.2d 778, 782 (Ct. App. 2003). For purposes of the automobile exception, probable cause to conduct “a warrantless search does not vanish once the car has been immobilized.” Michigan v. Thomas, 458 U.S. 259, 261 (1982)(per curiam); Chambers v. Maroney, 399 U.S. 42, 52 (1970)[same]. As long as probable cause exists, the search need not occur contemporaneously with its lawful seizure. United States v. Johns, 469 U.S. 478, 484 (1985)[citing Texas v. White, 423 U.S. 67, 68 (1975) (per curiam); Chambers, 399 U.S. at 52]. Thus, even if an automobile has been impounded or is not otherwise “immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justifie[s] application of the vehicular exception” so long as there was probable cause. Carney, 471 U.S. at 391; see also Johns, 469 U.S. at 484-88 [holding a vehicle lawfully seized and in police custody may be searched on the basis of probable cause to believe that it contains contraband, without the need to show exigent circumstances]; Carroll v. United States, 267 U.S. 132, 153 (1925)[holding the automobile exception has no separate exigency requirement]; cf. State v. Weaver, 361 S.C. 73, 602 S.E.2d 786, 791 (Ct. App. 2004)(cert. granted, March 23, 2006)[noting if there is probable cause to search a vehicle at the time it is seized, this rationale does not disappear merely because the vehicle is taken into police custody].

On the merits of this case, the trial judge held there was probable cause to search Ashe’s truck for contraband. This finding alone satisfied the automobile exception to the Fourth Amendment’s warrant requirement to search the truck, regardless of whether the officers had time to obtain a search warrant for the truck. When the officers arrived at the location to investigate reports of a methamphetamine lab, they observed Ashe at an upstairs

window. Ashe opened the door for the officers and they detected the odor of ether, a chemical used in the manufacture of methamphetamine. The officers requested identification, and Ashe went into his truck to retrieve it. He then ran away. The officers thought someone else might be inside the structure, so they conducted a protective sweep. Nobody was there, but the officers observed the methamphetamine lab and contraband upstairs. The HAZMAT team arrived and re-entered the structure. The officers seized items relating to the manufacture of methamphetamine. Under the circumstances presented, the officers clearly had probable cause to believe other evidence of Ashe's illegal drug activities could be found inside his truck parked near the structure, a matter readily conceded by Ashe at trial. See State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)[holding an issue conceded in the trial court cannot be argued on appeal]. Accordingly, the warrantless search of the truck was proper under the automobile exception, regardless of the location of the truck on the property and the existence of exigent circumstances. The evidence seized was properly admitted at trial.

B. Inventory search

At the pretrial motion to suppress the evidence and after conferring with the officers, the assistant solicitor explained: "their procedure is on the scene they do a complete inventory of the vehicle, inside and out. And then they do a sheet and fill it out on who the owner of the vehicle was, the driver of the vehicle was, and anything found in it, and they do an inventory of that. Then they call a wrecker service, and they tow it, and they impound it." He said this was done in this case. (R. 34-35). The assistant solicitor noted the truck was impounded and was searched in the field, but only after the police executed a warrant to

search the structure and had dismantled the methamphetamine lab, and after Ashe was apprehended about "thirty minutes, 45 minutes" later. (R. 26-30, 33-34). The truck was later towed. (R. 22, 34). The State provided the trial judge with the inventory sheet. (R. 35-36).

The trial judge denied Ashe's motion to suppress, finding there was a valid inventory search and "that in the inevitable discovery rule on an inventory search, that the items would have been discovered." (R. 39).

The search here could be validated as an inventory search under the inevitable-discovery doctrine. Inventory searches are legal under certain circumstances set forth in South Dakota v. Opperman, 428 U.S. 364 (1976), and State v. Lemacks, 275 S.C. 181, 268 S.E.2d 285 (1980). See State v. Boyd, 288 S.C. 206, 341 S.E.2d 144, 145-46 (Ct. App. 1986). The United States Supreme Court found inventory searches serve to protect the vehicle owner's property while it is in the custody of the police. Opperman, 428 U.S. at 372. These searches serve to "insure against claims of lost, stolen or vandalized property and to guard the police from danger." Colorado v. Bertine, 479 U.S. 367, 372 (1987). This exception also extends to containers located in the vehicle. Id. at 374. Further, the United States Supreme Court held that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment[.]" Id.

Likewise, the courts have upheld the admission of evidence that the police would have "inevitably discovered" during such a search. See, e.g., Id. at 372-73; United States v. Seals, 987 F.2d 1102, 1107-08 (5th Cir.1993); see also Nix v. Williams, 467 U.S. 431, 440 (1984)[noting that the "vast majority of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule"]; 6 W. LaFare, Search and Seizure,

§11.4(a), at 278-79 (4th ed. 2004)[noting that “[c]ircumstances justifying application of the ‘inevitable-discovery’ rule are most likely to be present” where evidence would have been revealed pursuant to standardized procedures or established routines].

The doctrine has application here, because the decision to impound the truck and to inventory its contents was made following Ashe's lawful arrest and after the search of the structure pursuant to a valid warrant.⁸ Accordingly, there was a legal basis to impound the truck and inventory its contents, and to apply the inevitable-discovery doctrine. The suppression of the evidence from the truck in these circumstances would do nothing whatsoever to promote the integrity of the trial process. Instead, suppression would inflict a wholly unacceptable burden on the administration of criminal justice. *Nix*, 467 U.S. at 446-47. There is no evidence the inventory search was used as a subterfuge to rummage through Ashe's truck without a warrant to search for illegal drugs, particularly where the police had obtained a lawful search warrant for the structure before conducting an inventory of the contents of the truck. There is no indication in the record the instant search was anything other than an inventory search, at which time the evidence would have been discovered in any event. The evidence seized was thus properly admitted into evidence by the trial judge.

HARMLESS ERROR

When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors

⁸ Ashe challenges neither his arrest nor the issuance and execution of the search warrant for the structure. The State would further note that Ashe rightfully conceded at trial that he had no standing to challenge the search of the structure. (R. 17).

not affecting the result. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984); see State v. Bernotas, 277 S.C. 106, 283 S.E.2d 580 (1981)[for an error in the erroneous admission of unlawfully seized evidence to require reversal, the appellant must be sufficiently prejudiced]; see also State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003)[admission of improper evidence is harmless where the evidence is merely cumulative to other evidence]; State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992)[erroneous admission of evidence may constitute harmless error if the evidence did not affect the result of the trial], *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Darby, 297 S.C. 459, 377 S.E.2d 340 (1989)[without ruling on the validity of an inventory search of a car, the appellate court held any error was harmless beyond a reasonable doubt in view of the overwhelming evidence of the defendant's guilt]; accord State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003).

Independent of the items seized from Ashe's truck, a review of the record demonstrates that Ashe's guilt was conclusively proven by competent evidence such that no other rational conclusion could be reached. Ashe was observed upstairs in the methamphetamine lab when the officers arrived. The officers seized items used to manufacture methamphetamine, including Pseudoephedrine, a substance produced by crushing a decongestant similar to the type found in Ashe's truck. After greeting the officers at the door, Ashe fled when they tried to detain him. After Ashe was apprehended, he told them that he was the only person in the structure. Most important, on appeal Ashe does not challenge the sufficiency of the evidence to convict him of unlawful possession of

Pseudoephedrine and manufacturing methamphetamine.⁹ Given the substantial and overwhelming evidence of Ashe's guilt of the offenses charged, the introduction of the decongestant and the set of scales seized from his truck was merely cumulative to the other evidence already seized inside the structure. The admission of the challenged evidence, therefore, is not a ground for reversal. Baccus, 625 S.E.2d at 224.

⁹Ashe only argues on appeal that there was insufficient evidence to convict him of possession of crank. However, as discussed in Argument II, infra, the evidence at trial was more than sufficient to demonstrate constructive possession of the methamphetamine seized on the second floor of the structure.

II.

The trial judge properly denied Ashe's motion for a directed verdict for the offense of possession of crack. (Issuc 2).

Ashe argues the trial judge erred in denying his motion for a directed verdict for the offense of possession of crack,¹⁰ because the evidence indicated he was merely present in a structure owned by another individual and there was no evidence he knew about the presence of the methamphetamine in the duffle bag.

When ruling on a motion for a directed verdict, the trial judge is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). However, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). In State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996), the Supreme Court reiterated the standard a trial judge

¹⁰On appeal, Ashe does not challenge the sufficiency of the evidence to convict him of unlawful possession of Pseudoephedrine and manufacturing methamphetamine.

should utilize to measure circumstantial evidence in light of a defendant's motion for a directed verdict:

[A]lthough [the trial judge] should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.

Id., 470 S.E.2d at 853 [quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955)].

The Indictment charged that Ashe "knowingly and intentionally possess[ed]" crank in violation of S.C. Code Ann. §44-53-375(A) (2002). Conviction of possession requires proof of possession, either actual or constructive, coupled with knowledge of its presence. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). "Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. Ballenger, 470 S.E.2d at 854. "To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control. . . ." Ballenger, 470 S.E.2d at 854; Hudson, 284 S.E.2d at 774-75. Such possession can be established by circumstantial or direct evidence, or a combination of the two. State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976).

"Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 284 S.E.2d at 775; State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637, 639 (Ct. App.1999). "[C]onstructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found." Ballenger, 470 S.E.2d at 854 [citing State v. Ellis,

263 S.C. 12, 207 S.E.2d 408 (1974)]. Possession requires more than mere presence. The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it. Ellis, 207 S.E.2d at 413 [citing State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973)]; Muhammed, 524 S.E.2d at 639.

Actual knowledge of the presence of contraband is strong evidence of intent to control its disposition or use. State v. Kimbrell, 294 S.C. 51, 363 S.E.2d 630, 631 (1987); see also State v. Brown, 319 S.C. 400, 461 S.E.2d 828, 830 (Ct. App. 1995)[finding the brother's presence in his sibling's vehicle at the time of the sale indicated actual knowledge of the presence of crack sufficient to support a reasonable inference that the brothers were working together to sell the drug; court stated such knowledge is "strong evidence" of an intent to control disposition of the drug]. In drug cases, it is recognized that the element of knowledge is seldom susceptible of direct proof, so it may be proven by circumstantial evidence. See State v. Attardo, 263 S.C. 546, 211 S.E.2d 868, 869 (1975)[holding that in prosecution for knowing or intentional possession of controlled substances, knowledge can be proven by evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substance]. Knowledge is generally a question for the jury. Id.

Viewing all the evidence in the light most favorable to the State, the record sufficiently demonstrates Ashe knew about the methamphetamine and exercised dominion and control over it. Ashe was in a methamphetamine lab on the second floor of the structure when the officers arrived. Ashe's guilt of manufacturing methamphetamine and his

possession of the Pseudoephedrine used in the manufacturing process is undisputed.¹¹ Clearly, the evidence supported the inference that Ashe had dominion and control and knowledge of the methamphetamine found in the same duffel bag as the bag of Pseudoephedrine which he possessed. The issue of his possession of the methamphetamine was, therefore, a matter properly left to the jury. Muhammed, 524 S.E.2d at 639-41 [finding trial judge's denial of a motion for a directed verdict was proper where the record reflected sufficient evidence to establish the defendant exercised dominion and control over the cocaine].

Further, Ashe fled into the woods when the officers sought to detain him. Evidence of his flight constituted proof of guilty knowledge and intent regarding the methamphetamine found inside the structure. State v. Ezell, 321 S.C. 421, 468 S.E.2d 679, 680 (Ct. App. 1996); see also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606, 612 (1999)[stating that evidence of flight has been held to constitute evidence of guilty knowledge and intent]; State v. Grant, 275 S.C. 404, 272 S.E.2d 169, 171 (1980)[“[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent”]; Ballenger, 470 S.E.2d at 854 [noting that flight is “at least some evidence” of defendant's guilt]; State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, 587 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)[finding evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension]; State v. Freely, 105 S.C. 243, 89 S.E. 643, 645 (1916)[declaring the flight of one charged with a crime has

¹¹See footnote 8, *supra*. The State further notes that cold medicine used in the manufacture of methamphetamine and a set of scales were found in Ashe's truck.

always been held to be some evidence tending to prove guilt]; State v. Williams, 350 S.C. 172, 564 S.E.2d 688, 691 (Ct. App. 2002)[noting that flight, when unexplained, is admissible as indicating consciousness of guilt].

Similarly, whether Ashe might not have been the only person with access to the structure or whether another person was present when the police arrived is irrelevant,¹² because possession of the methamphetamine could be shared. State v. Lewis, 277 S.C. 234, 285 S.E.2d 354 (1981); State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981); Muhammed, 524 S.E.2d at 639. This Court may not weigh the evidence and must determine only whether sufficient evidence existed as to Ashe's guilt.

The above facts, when viewed in the light most favorable to the State, were sufficient to create a jury question as to whether Ashe exercised dominion and control over the methamphetamine amounting to constructive possession. Ashe's arguments to the contrary merely go to the weight of the evidence against him rather than its sufficiency to submit the charge to the jury. Accordingly, the trial judge properly denied Ashe's motion for a directed verdict. See State v. Bailey, 276 S.C. 32, 274 S.E.2d 913, 915 (1981)[“unless there is a failure of competent evidence tending to prove the indictment, the issue of possession is a jury matter”].

¹²As previously noted, the property was owned by Jenkins, who the police knew was involved in the manufacture of methamphetamine. Gleaton admitted that his police report stated there “appeared to be a second subject,” but he explained this was only because they heard the noise inside the structure when Ashe ran away. (R. 65-66, 69). He said the protective sweep showed only Ashe was in the structure. (R. 48-50, 72-73). In fact, Ashe told the police that he was alone in the structure. (R. 69-70). Gleaton and Bailey positively identified Ashe as the person they saw on the second floor of the structure and then flee into the woods. (R. 63-65, 72, 74-75, 92-93, 95-97).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court should be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

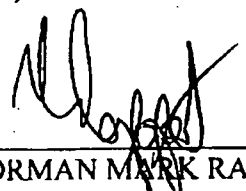
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY:


NORMAN MARK RAPOPORT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 18, 2007

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
R. Ferrell Cothran, Circuit Court Judge

THE STATE,

Respondent,

vs.

CHRISTOPHER W. ASHE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

HENRY DARGAN McMASTER
Attorney General

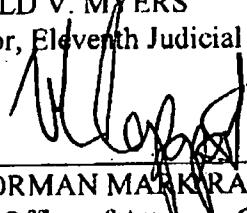
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

By:


NORMAN MARK RAPOPORT
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 18, 2007

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
R. Ferrell Cothran, Circuit Court Judge

THE STATE,

Respondent,

vs.

CHRISTOPHER W. ASHE,

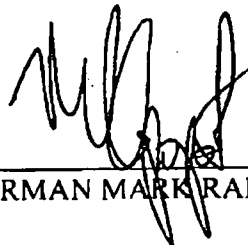
Appellant.

PROOF OF SERVICE

I certify that I have served the within Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert T. Williams, Sr., Williams, Hendrix, Steigner & Brink, P.A., P.O. Box 849, Lexington, SC 29071.

I further certify that all parties required by Rule to be served have been served.

This 18th day of June, 2007.



NORMAN MARK RAPOPORT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

Christopher W. Ashe, Appellant.

Appeal From Lexington County
Ralph F. Cothran, Circuit Court Judge

Memorandum Opinion No. 2008-MO-015
Heard February 20, 2008 – Filed March 24, 2008

AFFIRMED

Robert T. Williams, Sr., of Williams, Hendrix,
Steigner & Brink, of Lexington, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W.
Elliott, Senior Assistant Attorney General Norman
Mark Rapoport, and Assistant Attorney General
Michelle J. Parsons, all of Columbia, and Solicitor
Donald V. Myers, of Lexington, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002) (no suppression where physical evidence would inevitably have been discovered); State v. Bultron, 318 S.C. 325, 457 S.E.2d 616 (Ct. App. 1995)(no error in denial of directed verdict motion) *distinguished on other grounds* Anderson v. State, 338 S.C. 629, 527 S.E.2d 398 (Ct. App. 2000).

AFFIRMED.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

AWL ORIGINAL AL

FORM 5
FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

2009 MAR 23 P 1:48

IN THE COURT OF COMMON PLEAS

Christopher W. Ashe, SCDC No. 318402
Full name and prison number (if any) of Applicant

BETH A. GARRIGG
CLERK OF COURT
LEXINGTON SC

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

2009CP3201229

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence General Session Court, Lexington, SC
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 06-GS-32-2155
Possession of pseudoephedrine in excess of 200 grams
 - (b) 06-GS-32-2157
Manufacturing methamphetamine
 - (c) 06-GS-32-2156

Revised 3/2003

Possession of crank

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 25, 2006, 25 years
 - (b) October 25, 2006, 15 years
 - (c) October 25, 2006, three years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. South Carolina Supreme Court
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Judgment Affirmed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. March 24, 2008
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. 2008-MO-015
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel in the trial and preparation of the case

(b) After discovered evidence that tended to prove the innocence of the applicant.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Counsel was ineffective in that he failed to make a proper objection to an opinion statement made by Thomas Hamilton as to the guilt of the applicant (page 300). Counsel was ineffective because he did not make an objection to the jury charge that the applicant's "knowledge and possession may be inferred when a substance is found on the property under the defendant's control." (page 427). In addition there was no factual basis under the facts of the case for this charge. This charge is not a proper statement of the law and is a charge on the facts in violation of Article V, sec. 17 of the Constitution of the State of South Carolina. Counsel was ineffective because he failed to object to the admission of evidence seized in violation of South Carolina Code Sec. 17-13-140. Counsel was ineffective in that he failed to properly investigate the background and arrest record of Brian Jenkins so that he could have impeached the testimony of Jimmy Gleaton and Chris Stout. Counsel was ineffective in that he failed to investigate the testimony of the former girl friend of Brian Jenkins who would have confirmed the testimony of the applicant about moving a tanning bed. Counsel was ineffective in failing to object to the multiple charges against the applicant as being a violation of the prohibition of the double jeopardy provisions of Article I, Sec. 12 of the Constitution of the State of South Carolina and the Fifth Amendment to the Constitution of the United States of America. Counsel was ineffective in failing to object to the jury finding that the applicant possessed more than 200 grams of pseudoephedrine when the weight included substances other than pseudoephedrine and S.C. Code Sec. 44-54-375 requires that the drug weight be of the pure substance and in addition as pseudoephedrine is not a controlled substance, no cutting agents should be included in the weight determined by the jury.

(b) Applicant is informed and believes that favorable testimony is now available

Revised 3/2003

from Brian Jenkins' his former girlfriend who would confirm the testimony of the applicant.

- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
 - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
 - (d) the date of each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. N/A
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. N/A
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Trial counsel failed to object to several of the issues at trial and ineffective assistance of counsel cannot be raised on direct appeal unless such appear directly in the record.
 - (b) Additional testimony was not discovered until after the trial
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Robert T. Williams, Sr., P. O. Box 849, Lexington, SC 29071
- ii. C. Rauch Wise, 305 Main Street, Greenwood, SC 29646
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Arraignment, trial, sentencing and appeal
- ii. Preparation of the Post Conviction Relief Application
- iii. _____
19. State clearly the relief you seek in filing this application:
- A new trial in this matter
20. Are you now under sentence from any other court that you have not challenged?
- No

STATE OF SOUTH CAROLINA

VERIFICATION

County of Richland

I, Christopher W. Ashe, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Christopher W. Ashe

SWORN to and subscribed before me this 17th
day of MARCH, 2009.

[Signature] (L.S.)
Notary Public

My Commission Expires: 10/26/2009

RETH A 241106
CLEK 051107
MAR 23 2009

2009 MAR 23 1:48

FILED

2009CP3201229

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
	)	2009-CP-32-1229
	)	
Christopher W. Ashe, #318402,	)	
Applicant,	)	
	)	
v.	)	RETURN AND REQUEST FOR
	)	APPOINTMENT OF COUNSEL
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed March 23, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the July 2006 term of the Lexington County Grand Jury for Unlawful Possession of Pseudo-ephedrine—200 g or more, but less than 400 g (2006-GS-32-2155), Possession of Crank (2006-GS-32-2156), and Manufacturing Methamphetamine (2006-GS-32-2157). He was represented by Robert T. Williams, Esquire. On October 25, 2006, the Applicant underwent trial and was found guilty as charged. He was sentenced by the Honorable R. Farrell Cothran, Jr., to confinement for a period of twenty-five (25) years for the unlawful possession of pseudo-ephedrine, and concurrent terms of three (3) years for the possession of crank and fifteen (15) years for manufacturing methamphetamine. A timely appeal was filed on the Applicant's behalf, and an

appeal was perfected. The South Carolina Supreme Court subsequently affirmed the Applicant's conviction in a Memorandum Opinion filed March 24, 2008 (No. 2008-MO-015).

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend and/or supplement this Return upon receipt with any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in the trial and preparation of the case:
 - a. "Counsel was ineffective in that he failed to make a proper objection to an opinion statement made by Thomas Hamilton as to the guilt of the Applicant."
 - b. "Counsel was ineffective because he did not make an objection to the jury charge that the Applicant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control."
 - c. "Counsel was ineffective because he failed to object to the admission of evidence seized in violation of South Carolina Code."
 - d. "Counsel was ineffective in that he failed to properly investigate the testimony of the former girl friend of Brian Jenkins who would have confirmed the testimony of the Applicant about moving a tanning bed."
 - e. "Counsel was ineffective in failing to object to the multiple charges against the Applicant as being a violation of the prohibition of double jeopardy."
 - f. "Counsel was ineffective in failing to object to the jury finding that the Applicant possessed more than 200 grams of pseudo-ephedrine when the weight included substances other than pseudo-

ephedrine and the statute requires that the drug weight be of the pure substance and in addition as pseudo-ephedrine is not a controlled substance, no cutting agents should be included in the weight determined by the jury.”

2. After discovered evidence that tended to prove the innocence of the Applicant:
 - a. Applicant is informed and believes that favorable testimony is now available from Brian Jenkins’ his former girlfriend who would confirm the testimony of the Applicant.”

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland.

Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

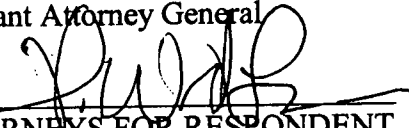
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

December 16, 2009.

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) COURT OF GENERAL SESSIONS

Christopher Ashe,)
PLAINTIFF,) PCR HEARING
-VS-) 2009-CP-32-1229
State of South Carolina,)
DEFENDANT.)

BEFORE THE HONORABLE ALEXANDER S. MACAULAY, JUDGE

MAY 20, 2010

LEXINGTON, SOUTH CAROLINA

A P P E A R A N C E S:

Rauch Wise, Esq.
For the Applicant

A. West Lee, Esq.
For the State

REMA K. GANTT THOMAS
CIRCUIT COURT REPORTER

I N D E X

	PAGE NO.
Exhibit List	4
Opening Remarks.	5
Testimony of witnesses	
Emily Homer	
Direct	9
Cross.	13
Redirect	14
Recross.	15
David MacDougall	
Direct	17
Cross.	21
Christopher W. Ashe	
Direct	22
Cross.	37
Redirect	39
Recross.	40
Robert Theodore Williams, Sr.	
Direct	41
Cross.	52
Redirect	69
Recross.	74

Closing Remarks.	75
Court Reporter's Certification	98

E X H I B I T S**PAGE NO.**

Applicant's Exhibit Number One, Incident Report and Indictment	20
Applicant's Exhibit Number Two, Indictment	20
State's Exhibit Number One, Fax.	44

1 THE COURT: All right, you may call your
2 next case.

3 MR. LEE: Thank you, Your Honor. This is
4 Christopher Ashe versus the State of South Carolina,
5 2009-CP-32-1229. It comes to the Court by way of
6 application for post-conviction relief filed March
7 23, 2009.

8 The applicant was indicted at the July
9 2006 term of the Lexington County Grand Jury for
10 unlawful possession of pseudoephedrine, 200 grams or
11 more but less than 400 grams, possession of crank,
12 and manufacturing methamphetamine.

13 He was represented by Mr. Theo Williams,
14 and on October 25, 2006, the applicant underwent
15 trial and found guilty as charged. He was sentenced
16 to confinement for 25 years for the unlawful
17 possession of pseudoephedrine and concurrent terms
18 of three years for the possession of crank and 15
19 years for manufacturing methamphetamine.

20 Timely appeal was filed on the applicant's
21 behalf, and the appeal was perfected. The South
22 Carolina Court of Appeals subsequently affirmed the
23 applicant's conviction in a memorandum opinion filed
24 March 24, 2008.

25 In his current application, the applicant

1 makes several allegations of ineffective assistance
2 of counsel. And at this time, I will now turn it
3 over to the applicant's attorney, Mr. Rauch Wise, to
4 expand upon those claims. Thank you, Your Honor.

5 MR. WISE: Judge, we've made several
6 allegations of ineffective assistance of counsel.
7 I'll give you some background because I want to call
8 a witness a little out of order. The first issue
9 I'd like to make sure we talk on is the issue of
10 whether or not the pseudoephedrine -- the weight of
11 pseudoephedrine -- includes what it was cut with or
12 just the pure pseudoephedrine.

13 It's our position that under the code
14 section involved with this case that pseudoephedrine
15 is not a controlled substance, and we have to do an
16 analysis of the actual weight of the
17 pseudoephedrine.

18 THE COURT: Well, let me ask you. First
19 of all, I need to know your grounds for that. The
20 application as I understand it is for ineffective
21 assistance of counsel.

22 MR. WISE: That's correct.

23 THE COURT: Failure to --

24 MR. WISE: Failure to object to the
25 pseudoephedrine issues.

1 THE COURT: All right.

2 MR. WISE: Failure to object to a comment
3 by one of the witnesses for the State that basically
4 said -- in our opinion at least from the question
5 and answer, said the client was guilty; failure to
6 object to a charge to the jury that used that the
7 knowledge and possession may be inferred where a
8 substance is found on property under the defendant's
9 control and no factual basis for that; failure to
10 object to the double jeopardy argument in that the
11 pseudoephedrine was also an allegation that
12 possession of the pseudoephedrine was part of the
13 manufacturing meth, the results of convicted of.

14 And I believe that covers all of the
15 issues that we had discussed. There was a technical
16 question, also. The indictment alleges
17 pseudoephedrine is a controlled substance, which
18 also is not correct, which ties in with our
19 pseudoephedrine argument.

20 THE COURT: All right, Mr. Wise, as I
21 understand, the basis for your ineffective
22 assistance of counsel is failure to object to
23 pseudoephedrine being a controlled substance that is
24 subject to a prosecution; failure to object to the
25 statement -- was the statement made by him?

1 MR. WISE: The statement was made by a
2 witness, and I can't remember his name right now.

3 THE COURT: Well, that's all right. A
4 written statement?

5 MR. WISE: Right.

6 THE COURT: And failure to object to the
7 charge of possession and control of the --

8 MR. WISE: The charge to the jury, that's
9 correct.

10 THE COURT: And a double jeopardy?

11 MR. WISE: Double jeopardy in that --

12 THE COURT: Due process.

13 MR. WISE: -- that manufacturing
14 methamphetamine included the possession of
15 pseudoephedrine, so the separate charge of
16 possession of pseudoephedrine would be double
17 jeopardy. And the other one I forgot to mention was
18 failure to properly investigate the background of
19 Brian Jenkins so that he could impeach some of the
20 testimony of the officers in the case.

21 THE COURT: Is Mr. Jenkins an officer?

22 MR. WISE: No, sir. Mr. Jenkins is an
23 individual that during the course of the trial, his
24 name came up, and there were some questions asked
25 about him. We feel that if a proper investigation

1 had been done into the background of Mr. Jenkins,
2 there would have been some pretty powerful testimony
3 for the jury to hear.

4 THE COURT: Very well.

5 Anything from the State before we proceed?

6 MR. LEE: Nothing from the State, Your
7 Honor.

8 THE COURT: All right, Mr. Wise, you can
9 call your first witness.

10 MR. WISE: Thank you. I'd call Emily
11 Homer.

12 (The witness was sworn.)

13 CLERK OF COURT: Have a seat and state
14 your name for the record.

15 MS. EMILY: Emily Homer -- H-O-M-E-R.

16 EMILY HOMER, having first been duly sworn,
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. WISE:

20 Q And where are you employed?

21 A Lexington County Sheriff's Department.

22 Q And how long have you been employed with
23 them?

24 A About five years.

25 Q All right. I believe you testified in

1 this case back in 2006?

2 A Yes, I did.

3 Q You testified in the case. I'm sure you
4 probably don't remember what year it was exactly.

5 A Yes, it's been a while.

6 Q Okay. But you did testify in the case
7 regarding Christopher Ashe?

8 A Uh-huh.

9 Q And you did an analysis of the
10 pseudoephedrine?

11 A Yes.

12 Q All right. You testified at trial and
13 your report shows a total of about 290 grams of the
14 substance contained pseudoephedrine?

15 A Yes, sir, but there's two different
16 evidences --

17 Q Two different, is that correct?

18 A -- added together.

19 Q Did you do a quantitative analysis of the
20 substance that you tested?

21 A No, sir, I don't do any quantitative. I
22 do qualitative analysis.

23 Q All right. And what is a quantitative
24 analysis?

25 A A quantitative analysis will tell you the

1 mass percentages of the different substances in an
2 unknown amount.

3 Q Now, your report has "OTC" after that.
4 What does that mean?

5 A Over the counter.

6 Q All right. So what did you find -- why
7 did you put down "over the counter"?

8 A Why did I?

9 Q Yes.

10 A I normally -- I always write down on my
11 reports what controlled -- what schedule different
12 drugs are and what -- if it's prescription, I'll put
13 down "prescription"; if it's over the counter, I'll
14 put down "over the counter."

15 Q All right. And this was an over-the-
16 counter substance containing pseudoephedrine?

17 A Yes, sir.

18 Q Okay. And pseudoephedrine, as you
19 testified in the trial, is not a controlled
20 substance?

21 A It's a precursor.

22 Q It's a precursor that's regulated?

23 A Uh-huh.

24 Q All right. Were you able to do analysis
25 to tell the exact amount of pseudoephedrine that was

1 in the two bags that you analyzed?

2 A I do it -- the other stimulant
3 qualitative?

4 Q Yes.

5 A Okay. So I don't do quantitative. I do
6 qualitative.

7 Q Right.

8 A So doing it from the report out, you know,
9 percentages of it, I'd have to do quantitative, but
10 I don't do that for anything.

11 Q Okay. And in doing analysis in this case,
12 did you determine there were some other substances
13 in that stuff that you analyzed?

14 A Of what specifically are you asking?

15 Q In the two results you did and the two
16 bags that you analyzed, did you ever make a
17 determination that there were other substances put
18 in there by the manufacturer or put in there by
19 whoever?

20 A I don't know if there's, you know --

21 Q Or is my question a poor question?

22 A Well, for those two substances, all I
23 really identified is the pseudoephedrine.

24 Q All right. You didn't identify anything
25 that was specific to--

1 A I didn't try to identify anything else.

2 Q Okay. And you are not able to determine
3 from your analysis the amount of pure
4 pseudoephedrine that was contained in those two
5 bags?

6 A That would require quantitative.

7 Q That would require quantitative analysis?

8 A Correct.

9 Q All right, thank you.

10 THE COURT: Cross-examine?

11 MR. WEST: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. LEE:

14 Q Ms. Homer, you stated that you don't do
15 quantitative analysis. Does anyone in the state of
16 South Carolina do quantitative analysis?

17 A No, sir, not to my knowledge. And we're
18 actually certified by SLED to not do. We don't do
19 quantitative analysis. My certification from SLED
20 does not include it. No one is certified by SLED to
21 do quantitative analysis.

22 Q You stated that pseudoephedrine is a
23 precursor.

24 A Correct.

25 Q Can you explain what that means?

1 A A precursor is that it is the necessary
2 ingredient to make a controlled substance. You
3 can't make methamphetamine without having some form
4 of Sudafed.

5 Q And when you received the substance that
6 you tested, what form was it in? Was it in a liquid
7 form, was it powder, etc.?

8 A The items that I received were a powder
9 substance.

10 Q Do you have much experience with coming
11 across pseudoephedrine where it's in a powder form
12 for legal reasons?

13 A No, sir.

14 MR. LEE: Beg the Court's indulgence one
15 second, Your Honor. No further questions for this
16 witness.

17 MR. WISE: Just a couple, briefly.

18 REDIRECT EXAMINATION

19 BY MR. WISE:

20 Q Is pseudoephedrine sold over the counter?

21 A Yes, sir, you don't have to have -- I
22 mean, it's controlled sort of. It's not an actual
23 controlled substance.

24 Q Regulated?

25 A But it is regulated, right.

1 Q Is it sold over the counter?

2 A Yes.

3 Q And it comes commonly in what cold
4 tablets?

5 A I'm not a pharmacist.

6 Q Okay.

7 A I'm sure that the names of different cold
8 tablets change all the time. But, you know, one
9 common is Sudafed that's sold.

10 Q Sold over the counter?

11 A Yes.

12 Q Okay, thank you.

13 A But when it's sold over the counter, you
14 can only really buy enough for a person to use.

15 Q Right. You have to sign for it and
16 everything, too?

17 A Right, uh-huh.

18 Q Okay.

19 THE COURT: Anything else?

20 RECROSS EXAMINATION

21 BY MR. LEE:

22 Q You say that pseudoephedrine was sold over
23 the counter as a part of Sudafed, correct?

24 A That's one thing, off the top of my head.
25 I mean, I'm not a chemist, and I actually don't buy

1 it.

2 Q But it is regulated. You can only
3 purchase a certain amount of it before it becomes
4 illegal, correct?

5 A Right, yes.

6 Q Okay. And are there other things sold
7 over the counter that are used as drugs?

8 A You mean other --

9 Q Are there other substances that you can
10 buy legally that you can ultimately use as an
11 intoxicant?

12 A There's other forms of -- there's a
13 different way to make meth. It's called a PTP
14 method.

15 Q Okay.

16 A I believe that's it, yes.

17 Q That's okay. Maybe I misworded the
18 question, but that's all right. No further
19 questions.

20 A Not that I know off the top of my head.
21 I'm sure there are, but I don't know a lot of other
22 drugs.

23 MR. WISE: I have no further questions.

24 THE COURT: All right.

25 MR. WISE: I'd like to excuse the witness,

1 if we may.

2 THE COURT: Any objections?

3 MR. LEE: No, Your Honor.

4 THE COURT: All right, you may be excused.

5 Thank you very much, ma'am.

6 MR. WISE: I call David MacDougall.

7 (The witness was sworn.)

8 CLERK OF COURT: Have a seat and state
9 your name for the record.

10 MR. MACDOUGALL: My name is David
11 MacDougall, spelled M-a-c-D-o-u-g-a-l-l.

12 DAVID MACDOUGALL, having first been duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WISE:

16 Q Where are you employed, Mr. MacDougall?

17 A I'm a licensed registered private
18 investigator in South Carolina and have been since
19 1979.

20 Q All right. And did I contact you, I
21 believe last year, concerning this matter?

22 A You did, in 2009.

23 Q All right. Did I request you to do
24 anything concerning Brian Shealy?

25 A You did.

1 Q Excuse me, Brian Jenkins, Brian Shealy
2 Jenkins.

3 A I think that may be one of his aliases.
4 Brian Shealy Jenkins, that's correct.

5 Q Right, all right. And what did you obtain
6 from him on him concerning any background
7 information or prior arrests?

8 A Well, you had provided me with a SLED
9 history on Mr. Jenkins, which was readily accessible
10 to anybody on the Internet with a \$25 fee. And
11 based on that, I went to Lexington County and
12 actually again via Internet -- I believe they call
13 it index search, which indicated at that time Mr.
14 Jenkins had arrests in Lexington County General
15 Sessions offenses that went back to 1994 all the way
16 through 2007, which I learned was when he went to
17 the Department of Corrections.

18 Q All right. And did you learn anything
19 about any arrests of Mr. Jenkins in 2005?

20 A That was one incident you had particularly
21 asked me about. And I obtained through the Freedom
22 of Information Act via Lexington County Sheriff's
23 Department an arrest warrant -- I'm sorry,
24 correction. It was an incident report relating to
25 the arrest of Mr. Jenkins on or about May 25, 2005..

1 Q All right. And that charge was for what?

2 A Well, the incident report is listed as
3 drugs/narcotics violation, and I'm not certain at
4 this point exactly what he eventually was charged
5 with. It related to the incident report related to
6 a traffic stop. Strong odor of starter fluid led to
7 a search, and they discovered methamphetamine
8 related materials and marijuana in the vehicle.

9 Q Did you obtain a copy of an indictment for
10 manufacturing methamphetamine?

11 A If I did, I would have sent that to you.

12 Q All right.

13 A One of the things I did get was a --

14 Q Hold on.

15 A I did, that's correct.

16 Q Is that it?

17 A Indictment for Brian Jenkins, that's
18 correct.

19 Q All right. And did the date of the
20 allegations in the indictment relate to the incident
21 report that you just discussed?

22 A That's correct, relating to on or about
23 May 25, 2005.

24 Q All right.

25 MR. WISE: I'd like to introduce this

1 incident report and indictment as a defense exhibit.

2 THE COURT: Do you want them as separate
3 exhibits?

4 MR. WISE: I was going to put them
5 together. It would just be easier.

6 THE COURT: Any objection?

7 MR. LEE: No objection.

8 THE COURT: All right, let's go off the
9 record while the Court Reporter marks the exhibit.
10 That will be Applicant's Exhibit Number One?

11 COURT REPORTER: You said it was a defense
12 exhibit?

13 MR. WISE: Yes.

14 COURT REPORTER: Defense exhibit?

15 MR. WISE: Applicant's exhibit would be
16 more accurate.

17 (Applicant's Exhibit Number One, Incident
18 Report and Indictment, were entered in evidence.)

19 THE COURT: All right, you may proceed.

20 Q And did you also find a prior marijuana
21 charge against Mr. Jenkins?

22 A I did. There was a --

23 Q The one from '97 is the one I'm really
24 talking about, where he entered a guilty plea. Let
25 me hand you this to see if that refreshes your

1 memory.

2 A Yes, possession with intent to distribute
3 marijuana, first offense, right.

4 Q All right.

5 MR. WISE: I'd like to introduce this as
6 Applicant's Two.

7 MR. LEE: No objection.

8 (Applicant's Exhibit Number Two,
9 Indictment, was entered in evidence.)

10 THE COURT: All right, you may proceed.

11 Q Did you also find any charges that were
12 subsequently dismissed against Mr. Jenkins?

13 A I did. There were charges that were
14 dismissed in Lexington County, either nol prossed.
15 I think several were nol prossed. I believe there
16 may have even been a not guilty if tried but not
17 guilty on one charge.

18 Q How long did it take you to find Mr.
19 Jenkins' records and obtain them?

20 A Well, all in all, from beginning to end,
21 including -- to find the records?

22 Q Right.

23 A Three and a half hours.

24 Q Okay, thank you. Answer any questions
25 that the State may have.

1 CROSS-EXAMINATION

2 BY MR. LEE:

3 Q I just have a couple of questions, Mr.
4 MacDougall -- actually, just one. Mr. Jenkins'
5 involvement, even assuming that he was involved in
6 the particular crime that we're talking about today,
7 that wouldn't necessarily disprove Mr. Ashe's
8 involvement, correct?

9 A Not completely, no.

10 Q No further questions, thank you.

11 MR. WISE: I'd like to excuse this witness
12 if the State has no objection.

13 MR. LEE: No objection.

14 THE COURT: All right, without objection.
15 Thank you very much, sir.

16 MR. WISE: I call Christopher Ashe.

17 (The witness was sworn.)

18 CLERK OF COURT: Have a seat and state
19 your name for the record.

20 MR. WISE: Your Honor, I would like to ask
21 if it would be possible to remove at least one
22 handcuff so he can look through this as I ask him
23 questions.

24 THE COURT: All right, if you could, free
25 one hand.

1 MR. WISE: His father is here. If he gets
2 unruly, he'll take care of him, too.

3 CHRISTOPHER W. ASHE, having first been
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 Q Give us your full name.

7 A Christopher W. Ashe -- A-S-H-E.

8 Q All right. And how old are you?

9 A Thirty-five.

10 Q All right. How far did you go in school?

11 A Graduated.

12 Q All right. And before you got arrested on
13 these charges, what were you doing? Where were you
14 living, and what were you doing?

15 A I was living in Pelion, and I was framing
16 houses for myself. I had my own business.

17 Q Excuse me?

18 A I was framing houses for myself. I had my
19 own business when I got locked up. I was living in
20 Pelion.

21 Q All right. Did anybody work for you?

22 A I had a bunch of people that worked for
23 me.

24 Q How many?

25 A At that time, I think it was about a

1 dozen.

2 Q All right. And how long have you been
3 doing that?

4 A My whole life.

5 Q All right. Are you married?

6 A Yes, sir.

7 Q Have you got any children?

8 A Three.

9 Q All right. Is your wife here in the
10 courtroom?

11 A Yes, sir.

12 Q All right. Two of your children?

13 A All three of them.

14 Q All three of them, okay. You were
15 arrested on this charge I believe in December of
16 2005?

17 A Yes, sir.

18 Q All right. Tell us, if you would, after
19 you were arrested who you hired as a lawyer and when
20 he was hired, approximately.

21 A I hired Theo Williams, and I believe it
22 was my first day -- I met him my first day of roll
23 call, I believe is when I met him.

24 Q All right.

25 A And it was a little bit after that before

1 I hired him.

2 Q And how did you come to meet him?

3 A Just his name.

4 Q Okay. Did you see him there in court on
5 roll call day?

6 A Yes, sir.

7 Q All right. When did you -- and you think
8 that was about when?

9 A That was in March of '06, I believe is
10 when I had roll call.

11 Q What did they initially charge you with?

12 A Manufacture of meth and possession with
13 intent to distribute meth.

14 Q Okay. Those are the only two charges?

15 A The only two charges I had at that time.

16 Q All right. Approximately when did you
17 first talk to Mr. Williams?

18 A It was -- well, I talked to him that day
19 when the Solicitor showed me who he was at roll
20 call, and then it was a few weeks after that, I
21 believe.

22 Q All right. And did you meet with him?

23 A Well, I went and met with him for a few
24 minutes, and then I think I went and paid him a
25 retainer.

1 Q All right. Did you discuss the case with
2 him?

3 A Not at that time, I don't believe I did.

4 Q All right. Did you do it later?

5 A For a few minutes one day.

6 Q What did you basically discuss with him
7 when you talked with him?

8 A Just how everything went down that day and
9 how we was at the house, and I was outside, and
10 Brian was inside. And he run, and I run, too.

11 Q And did you give him the names of people
12 who were -- did you give him the name of Brian
13 Jenkins?

14 A Yes, sir.

15 Q All right. Did you tell him what you were
16 doing there that day?

17 A Yes, sir.

18 Q And did that include -- did you give him -
19 - what were y'all doing there that day?

20 A I was helping him move back into his
21 house.

22 Q Okay. And that was where this allegedly
23 occurred?

24 A Yes, sir.

25 Q All right. When you got to trial -- let

1 me back up. How much did you talk to him after you
2 talked to him for the couple of times earlier in
3 March and April?

4 A Only during roll call times.

5 Q Only during roll call?

6 A Only during roll call.

7 Q And when were you notified of the trial of
8 this case?

9 A One day during work, when I was working
10 one day.

11 Q Okay.

12 A I can't remember the exact date.

13 Q Excuse me?

14 A I can't remember the exact date.

15 Q Okay. It was tried in I believe October
16 of 2006?

17 A Okay.

18 Q So you were at work?

19 A In October, no. I was locked up in the
20 county then.

21 Q All right, okay. How did that come about?
22 Let's go through that. I forgot about that. When
23 was that?

24 A I got locked up during -- I got locked in
25 the county on a bench warrant.

1 Q All right. And how did that bench warrant
2 come about?

3 A Leaving court one day.

4 Q Excuse me?

5 A Leaving court.

6 Q Leaving court, all right. Prior to the
7 trial of this case, how much did you talk with Mr.
8 Williams, let's say in October?

9 A He come and visited me one time I think in
10 the county for a few minutes.

11 Q All right. When you got to trial, what
12 did you learn different about your case?

13 A I learned that I had a new charge.

14 Q And what was that charge?

15 A Possession of pseudoephedrine.

16 Q Had you ever heard of that before?

17 A No, sir. I was indicted that same day.

18 Q Excuse me?

19 A I was indicted the day of the trial with
20 the charge.

21 Q And is that what we call -- do you know
22 that to be a direct indictment?

23 A My lawyer said it was an indictment.

24 Q That's what he told you it was, okay. Did
25 you know anything about what that charge carried or

1 anything?

2 A No, sir.

3 Q And the first you heard of that was the
4 day of trial?

5 A The day of trial.

6 Q Okay. If you would -- and this trial
7 lasted about how long?

8 A Three days -- two and a half days, I
9 think.

10 Q All right. And you entered a not guilty
11 plea obviously?

12 A Yes, sir.

13 Q And had you always told Mr. Williams you
14 were going to enter a not guilty plea?

15 A Yes, sir.

16 Q All right. If you would, did some things
17 occur at trial that you thought were improper?

18 A Yes, sir.

19 Q All right. Turn first back to page 300 of
20 the transcript in front of you, when Thomas Hamilton
21 was testifying. When you get to it, let me know.

22 A All right.

23 Q You got it?

24 A Yes, sir.

25 Q All right. If you look there at I believe

1 line three, was there a question-and-answer session
2 -- what was the question that was asked at line
3 three?

4 A The question is, "The only thing I'd like
5 to ask you if somebody was standing at that window,
6 would they have dominion and control over a meth lab
7 as well as the drugs that were found."

8 Q The answer?

9 A The answer was, "Yes, sir. They were
10 within close proximity to the window."

11 Q All right. Was any objection raised to
12 that?

13 A No, sir.

14 Q Do you think an objection should have been
15 raised?

16 A Yes, sir.

17 Q And why is that?

18 A It infers guilt.

19 Q Excuse me?

20 A It tells the jury that I'm guilty.

21 Q All right. Look back also on page 234,
22 again the testimony of Thomas Hamilton, also.

23 A All right.

24 Q And look at lines 16 through 20.

25 A Okay.

1 Q What does that -- could you read that
2 question and answer?

3 A It says, "Going back to State's One, if
4 somebody were up there, were they in close dominion
5 and control or proximity?" And the answer is, "Yes,
6 sir, they could readily observe from standing
7 there."

8 Q Do you think that question should have
9 been objected to?

10 A Yes, sir.

11 Q And why is that?

12 A It infers guilt.

13 Q All right. Now, going back, also look at
14 page 427 of that transcript you have in front of
15 you, as far as the judge charge is concerned.

16 A All right.

17 Q I believe it's highlighted there in yellow
18 toward the bottom.

19 A Line 15?

20 Q I believe that's it.

21 THE COURT: What's the page number?

22 MR. ASHE: Four twenty-seven.

23 MR. WISE: Four twenty-seven.

24 Q What did the judge charge the jury?

25 A Actual knowledge of the presence of the

1 crank or pseudoephedrine or both is evidence of a
2 defendant's intent to control its disposition or
3 use. The defendant's knowledge and possession may
4 be inferred when the substance is found on property
5 under the defendant's control.

6 Q Was an objection raised to that?

7 A No, sir.

8 Q Do you think an objection should have been
9 raised?

10 A I think so, sir, yes, sir.

11 Q All right. How does that charge by the
12 judge go back to what the officers just said?

13 A It's telling the jury that I'm guilty --

14 Q Okay.

15 A -- before they even have a chance.

16 Q All right. Brian Jenkins -- who is Brian
17 Jenkins?

18 A Who is he?

19 Q Yes.

20 A A long time ago, he used to be a friend of
21 mine.

22 Q All right. And you've known him about how
23 long?

24 A I would have say from 10 to 15 years.

25 Q All right. Did you tell Mr. Williams

1 about Brian Jenkins before the trial started?

2 A Yes, sir.

3 Q All right. Did Mr. Williams cross-examine
4 the officers about Brian Jenkins and his reputation
5 about narcotics?

6 A Yes, sir.

7 Q I believe if you look on page 134 at lines
8 22 through 25, there were some questions about Mr.
9 Jenkins' association with narcotics?

10 A Yes, sir.

11 Q All right. And if you also look on page
12 134, lines one through 10, there are questions about
13 Brian Jenkins' involvement with narcotics continues?

14 A Yes, sir.

15 Q All right. And looking on 135, lines 19
16 through 21, is that some questions also about Brian
17 Jenkins?

18 A Yes, sir.

19 Q All right. Was it ever mentioned at the
20 time in any of that cross-examination that Mr.
21 Jenkins had a current charge against him for
22 manufacturing methamphetamine?

23 A I don't think so, sir.

24 Q All right. Was it ever mentioned that he
25 had previously been arrested for possession with

1 intent to distribute marijuana?

2 A No, sir.

3 Q All right. Do you think that information,
4 if the jury had heard that, would have been helpful
5 in your case?

6 A I think it would been a lot helpful in my
7 case.

8 Q And why is that?

9 A Because it all happened at his house.
10 Everything that went down happened at his house.

11 Q All right. Who owned that property?

12 A Brian Jenkins.

13 Q All right. Now, you were convicted of
14 possession with intent to distribute -- you were
15 convicted of manufacturing methamphetamine, is that
16 correct?

17 A Yes, sir.

18 Q How did the pseudoephedrine that you were
19 also convicted of play a part or be involved in your
20 conviction for manufacturing methamphetamine?

21 A How did it play a part in it?

22 Q Right.

23 A Well, it was found in his house.

24 Q Uh-huh.

25 A Everything was found in his house.

1 Q Right. Was that part of the evidence that
2 was introduced to prove that you manufactured meth?

3 A Yes, sir.

4 Q All right. And yet you also have a
5 separate indictment for that, too?

6 A Yes, sir.

7 Q All right. Were you familiar at all with
8 the double jeopardy provision of the United States
9 Constitution before this case?

10 A I heard about it.

11 Q Okay. Now, after you became incarcerated,
12 did you start doing some reading about the
13 pseudoephedrine?

14 A Yes, sir.

15 Q And what did you discover?

16 A Well, I discovered that it had to be in a
17 pure form of pseudoephedrine. The law states 200
18 grams, less than 400 grams of pseudoephedrine.

19 Q Right.

20 A In this case, it was crushed.

21 Q Right.

22 A It has to be in pure form.

23 Q You saw the bags that were introduced into
24 evidence at trial?

25 A Yes, sir.

1 Q Describe them for the Court.

2 A A Zip-loc bag, I believe, containing a
3 powdered substance.

4 Q All right. Did it have any flakes in it?

5 A It was just a powder.

6 Q Okay. Now, under the code section
7 involved here, did the judge charge the jury
8 concerning the controlled substance being what it's
9 mixed with?

10 A No, sir, I don't believe so.

11 Q I think if you look on page -- I don't
12 have the charge in front of me, but I've got it
13 marked. Let me borrow the transcript a second.
14 It's the last part. Look at 428, the last line.

15 A Okay.

16 Q What did the judge charge the jury?

17 A It says, "The weight of a controlled
18 substance referred to in this article is the weight
19 of a substance in pure form or any other compound
20 mixture thereof that deals with the weight of a
21 controlled substance under the law of South
22 Carolina."

23 Q All right. Now, you were indicted for
24 possession of pseudoephedrine, and in the indictment
25 it's listed as a controlled substance?

1 A Yes, sir.

2 Q And what did you subsequently learn?

3 A It's not a controlled substance.

4 Q Actually, there was testimony at trial
5 about that, wasn't it?

6 A Yes, sir.

7 Q That's what Ms. Homer testified to?

8 A Yes, sir.

9 Q All right. Do you think the judge should
10 have charged the jury that the pseudoephedrine
11 includes whatever it's mixed with?

12 A Included, yes, sir.

13 Q You think she should have charged them it
14 included what it's mixed with, or should the judge
15 have charged the jury about the pure form of
16 pseudoephedrine?

17 A Should have charged them about the pure
18 form of pseudoephedrine.

19 Q All right. And do you have any way of
20 knowing the amount of pure pseudoephedrine in that
21 substance that was introduced?

22 A No, sir. I've come to learn since then
23 that there was so much in each box.

24 Q Uh-huh. But you don't know what kind
25 these were?

1 A No, sir.

2 Q Okay. If an objection had been made to
3 the testimony of Mr. Hamilton and if an objection
4 had been made to the charge of the jury, do you
5 think it would have impacted the jury's decision in
6 this case?

7 A Yes, sir.

8 Q And you're asking the Court to grant you a
9 new trial on the failure to object to those things
10 and failure to raise the issue about the
11 pseudoephedrine?

12 A Yes, sir.

13 Q And also because you can't be convicted of
14 both manufacturing meth which includes the
15 pseudoephedrine and the pseudoephedrine?

16 A Yes, sir.

17 Q Okay, thank you. Answer any questions the
18 State may have.

19 CROSS-EXAMINATION

20 BY MR. LEE:

21 Q Sir, I just have a few questions. You
22 were originally offered a plea in this case,
23 correct?

24 A I was offered a plea.

25 Q And you were actually -- you elected not

1 to take that plea, correct?

2 A I was told by my lawyer not to take a
3 plea.

4 Q And then after not taking the plea, when
5 your case was called for trial, didn't you in fact
6 run? Is that why you were in lockup?

7 A Yes, sir.

8 Q Okay. And then you stated that on the day
9 that the police showed up at Mr. Jenkins' property,
10 he ran and you also ran, correct?

11 A Yes, sir, I did run.

12 Q And then with regard to the
13 pseudoephedrine charge that came up after your other
14 two charges, that actually -- that charge, you
15 became aware of that in July of '06, correct?

16 A No, the indictment was filled out for
17 July. We become aware of it the day of trial.

18 Q So you're alleging that your attorney
19 didn't inform you before July?

20 A He didn't know himself until they came and
21 gave him the indictment right of front of me at
22 trial.

23 Q Now, you stated that the pseudoephedrine
24 in this case was a powder, correct?

25 A Yes, sir.

1 Q How did you know that?

2 A It was in a bag at trial.

3 MR. LEE: I have no further questions for
4 this witness at this time, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. WISE:

7 Q Just one question. When the police came
8 up to the scene, what was the first thing you did?

9 A I approached them.

10 Q And what did they do? What did they ask
11 you?

12 A They asked me -- I told them that Brian
13 was upstairs in the house, for one thing, because
14 they asked me where Brian was.

15 Q Uh-huh.

16 A And I said he was upstairs in the house.

17 Q All right. And did you give them
18 anything?

19 A I gave them my license.

20 Q Your driver's license?

21 A Yes, sir.

22 Q All right. What did they tell you then?

23 A They told me I was being -- if I ain't
24 mistaken, I was being arrested. And I don't know --
25 it's a term, and I don't know exactly how they said

1 it.

2 Q Investigative purpose?

3 A Investigative purpose.

4 Q All right. When did you run?

5 A When they tried to arrest me.

6 Q Okay, thank you.

7 THE COURT: Any further questions?

8 RECROSS EXAMINATION

9 BY MR. LEE:

10 Q I have just one question. If you were
11 innocent of the charge as you claim, why did you
12 run?

13 A I run because I had -- and I stated during
14 trial that I had drugs on me. I had marijuana on
15 me. I had a prior marijuana possession, too.

16 MR. LEE: No further questions.

17 MR. WISE: You can come down. I need the
18 transcript.

19 That's the case for the applicant, Your
20 Honor.

21 THE COURT: All right, anything from the
22 State?

23 MR. LEE: Yes, Your Honor. The State
24 would call Theo Williams to the stand, please.

25 (The witness was sworn.)

1 CLERK OF COURT: Have a seat and state
2 your name for the record, please.

3 MR. WILLIAMS: I'm Robert Theodore
4 Williams, Sr.

5 ROBERT THEODORE WILLIAMS, SR., having
6 first been duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. LEE:

9 Q Mr. Williams, how long have you been
10 practicing law?

11 A This November I think will be 34 years.

12 Q And what extent of that practice has been
13 in the practice of criminal law?

14 A Now I do nothing but criminal law.

15 Q If I heard correctly, I believe you came
16 into representation of the applicant in this case
17 because you were retained, is that correct?

18 A Yes.

19 Q Okay. Now, after being retained, did you
20 have the occasion to meet with the applicant?

21 A Yes.

22 Q During that meeting, would you have done
23 things like go over the elements of the charges the
24 applicant was facing?

25 A Yes.

1 Q Would you have gotten his version of the
2 events?

3 A Yes.

4 Q And what was his version of the events?

5 A His version of the events was that he was
6 helping a friend by the name of Brian Jenkins move
7 into his residence because his wife had kicked him
8 out of his prior residence.

9 Q Okay. So he maintained that he was
10 innocent of the charges?

11 A He did.

12 Q So there was never any indication that
13 there might be a plea?

14 A No. No, we had pleas offered, but he said
15 he wasn't guilty of anything. So he wasn't going to
16 plead guilty.

17 Q So it was quite apparent to you that you
18 were proceeding to trial in this case?

19 A It was.

20 Q And when the case was called for trial the
21 first time -- actually, let me back up a little bit.
22 There was a third charge. Originally, he was just
23 charged with two things, correct?

24 A Yes.

25 Q And then there was a final charge of

1 pseudoephedrine in an amount greater than 200 grams,
2 correct?

3 A Yes.

4 Q When did you find out about that charge?

5 A I want to say it was July. I want to say
6 that the Solicitor got mad because we wouldn't agree
7 with his pleas. So he said, "Well, I'm going to
8 indict you for the pseudoephedrine."

9 Q In fact, it came after his analysis of the
10 substance in question, correct?

11 A It did, yes.

12 MR. WEST: May I approach the witness,
13 Your Honor?

14 THE COURT: Certainly.

15 Q Can you tell me what this document is?

16 A Well, it's a fax from Kent Collins on July
17 the 21st, and I scribbled some stuff on the bottom
18 of it. Oh, I scribbled stuff to my secretary to put
19 in a letter back to Kent in reference to the
20 indictment and in reference to the trial, I guess.
21 But if you want to introduce it, I can publish it.

22 Q Please.

23 A Essentially, Kent is saying "Per our last
24 conversation, your client turned down my offer. He
25 will be going on the trial list for July 31, 2006.

1 I'm attaching to this fax a copy of the drug
2 analysis. In light of the analysis, I plan on
3 straight indicting your client for possession of an
4 unlawful amount of pseudoephedrine under 34-53-375
5 E(1)(d). I'm attaching a copy of this new
6 indictment. In addition, I'm going to resubmit the
7 other pending indictments to the Grand Jury."

8 And then I scribbled a note on the bottom
9 of it, "Send letter that we request presence of any
10 and all witnesses in the chain of custody." So I
11 guess we were fighting back.

12 Q Okay. And, again, the date on that letter
13 was July 21, 2006?

14 A Yes. And there's some additional thing
15 that I wrote on the bottom, but I think it has to do
16 with letting Kent know of any possible conflicts in
17 terms of trial.

18 Q Okay.

19 MR. WEST: The State would move this into
20 evidence.

21 MR. WISE: No objection.

22 (State's Exhibit Number One, Fax, was
23 entered in evidence.)

24 Q After receiving that letter on July 23rd,
25 did you inform the applicant of this third charge?

1 A Yes, we talked about it.

2 Q Okay. Now, after finding out that --
3 after turning down the plea offer and finding out he
4 was coming up for trial, did the applicant
5 subsequently run.

6 A We actually were called to court one day,
7 and he was like on the trial list to be tried. And,
8 yes, he ran. The joint answer is yes, he ran.

9 Q Okay. Now thereafter, were you put back
10 on the trial docket?

11 A We were, after some period of time. I
12 think Kent wanted him to sit him in jail for a
13 little while to see if he could get him to plead to
14 something.

15 Q But that never came to fruition?

16 A No.

17 Q So it was apparent that you were
18 proceeding to trial. What was your trial strategy
19 in this case?

20 A The trial strategy was to indicate the
21 person who was waving at police officers was not my
22 client, because the key here is the person upstairs,
23 because that's where all the drugs were basically,
24 except for the drugs that were -- there was some
25 pseudoephedrine in his truck, talking about my

1 client's truck.

2 But all of the stuff was upstairs in this
3 rundown house. And we were trying to get, number
4 one, that the description of the guy upstairs was
5 not my client; and, number two, that when he was
6 finally caught, he didn't have any drugs on him when
7 he ran.

8 Q Although it was -- was it your client's
9 testimony today that he ran because he had --

10 A Well, he said -- yes, he had marijuana on
11 him, is what he said. But that's what I'm saying,
12 though. When he was actually found, when the cops
13 got him and they searched him, he had no drugs on
14 him. There was a plastic bag on him, if I remember
15 right, but it did not contain any drugs in the
16 plastic bag.

17 Q Okay. Now, you stated that your theory of
18 the case or your trial strategy here was, if I'm
19 hearing you correctly, to prove third-party guilt?

20 A That it was somebody else and not him.

21 Q In fact, didn't you, once you got to
22 trial, argue that this person, this someone else,
23 was Brian Jenkins?

24 A I did.

25 Q Did you cross-examine the State's

1 witnesses on Mr. Jenkins?

2 A I did. And they candidly owned up to the
3 fact that they were looking for Mr. Jenkins, but
4 they just hadn't been able to catch him or find him.

5 Q Okay. And did you ultimately argue this
6 concept of third-party guilt in your closing?

7 A Yes.

8 Q Okay.

9 Beg the Court's indulgence for one second.

10 The applicant alleged during his testimony
11 that prior to trial, you had only met with once.

12 How many times do you recall meeting with the
13 applicant?

14 A It was a lot more than once.

15 Q And did he ever -- he always maintained
16 his innocence?

17 A He did.

18 Q Did he ever suggest any other possible
19 defenses other than third-party guilt, or is that
20 the one you went with?

21 A Well, his only defenses really that he did
22 have was to say that he was moving the mattress into
23 the house, that he was helping his friend move in
24 there, and he didn't know what the other guy had
25 upstairs.

1 That was his defense. As a matter of
2 fact, when I argued to the jury and stuff, I think I
3 argued that there was no ether smell about him. I
4 mean, I did everything I could to indicate that he
5 wasn't upstairs.

6 Q Now, the applicant also made an allegation
7 regarding the testimony of I believe his name was
8 Thomas Hamilton --

9 A Yes.

10 Q -- on pages 234 and 300 of the record. He
11 was testifying to dominion and control, I believe,
12 correct?

13 A I had no objection with that question.
14 It's not a question I like for him to ask. But I
15 think the point was a factual issue, and it's a
16 location of a person, whether or not there was a
17 person standing there and if he would have been
18 close to where the drugs were found. To this day, I
19 don't see anything wrong with that question. I
20 don't like it, but I think you can ask that
21 question.

22 Q But your retort in terms of your strategy
23 to that question was that was not your client
24 standing there?

25 A That's right. That actually kind of helps

1 me if it's not my client standing there. That means
2 it's the other guy.

3 Q Now, let's talk about the jury charge for
4 one moment. There was an allegation that -- again,
5 the jury charge regarding dominion and control.
6 What came right before that in the jury charge?

7 A Mere presence at the scene of a crime is
8 not evidence, the mere presence charge which always
9 comes on any kind of drug charge where the drugs are
10 found around somebody. It means you're not guilty
11 just because you happen to be where the drugs are.

12 Q Which would have coincided with your idea
13 that he was just moving Mr. Jenkins into the
14 residence?

15 A Correct.

16 Q So the concept of mere presence was put to
17 the jury for them to consider?

18 A It was. It's the sentence right before
19 what was read.

20 Q Okay. And, again, you brought up the fact
21 that it was Mr. Jenkins that owned the property in
22 your case?

23 A I did.

24 Q Okay. There was a statement that you
25 didn't bring up Mr. Jenkins' prior I guess

1 conviction or whatever in this case. Do you recall
2 doing that or not doing it?

3 A I probably did. One of the things I
4 harped on, though, throughout the whole transcript
5 when they're talking about where they searched and
6 stuff like that, they pick this picture of this
7 rundown house with this brand-new truck there,
8 trying to find out why this brand-new truck was at
9 this rundown house. Well, there was a trailer which
10 was right next to this rundown house.

11 And I crossed the officers and argued that
12 "You didn't check to see if there was electricity
13 there, you didn't check to see if somebody was
14 living there," to indicate further evidence that it
15 wasn't my client there, that it was somebody else
16 who was living in the trailer who would have been
17 responsible.

18 Q Now, the applicant's attorney made an
19 argument regarding the quantitative analysis of the
20 powdered substance which was discovered to have
21 pseudoephedrine in it?

22 A Right.

23 Q Did you make a similar argument at trial?

24 A I did.

25 Q In fact, didn't you make the argument that

1 the only thing proven was the existence of
2 pseudoephedrine, not how much it was?

3 A Yes.

4 Q The applicant also alleged that you should
5 have made an objection to the conviction of the
6 possession of pseudoephedrine and the manufacturing
7 of methamphetamine as being a violation of the
8 double jeopardy clause. Can you explain to this
9 Court why you didn't do that?

10 A I don't think it is double jeopardy. And
11 the reason for that is that you can actually make or
12 manufacture the drug without having 200 grams of
13 pseudoephedrine, meaning you could have a legal
14 amount of pseudoephedrine and make the drug.

15 Q A small amount?

16 A A small amount.

17 Q So what you're saying, if I'm hearing you
18 correctly, is that there are distinct elements --

19 A There are.

20 Q -- of both charges?

21 Beg the Court's indulgence for one moment,
22 Your Honor.

23 There was an allegation that you failed to
24 object to pseudoephedrine being termed a controlled
25 substance in this case. It's not in fact a

1 controlled substance, but it is a precursor to a
2 controlled substance, correct?

3 A Yes.

4 Q And is it not also illegal by statute to
5 have more than 200 grams of pseudoephedrine --

6 A It is.

7 Q -- be it controlled or not?

8 A Yes. So I guess it is controlled to a
9 certain extent.

10 Q It's regulated?

11 A It's regulated.

12 Q Now, again, just to clarify, there was a
13 plea offer on the table before this all went to
14 trial?

15 A Yes.

16 Q And you had a trial strategy to prove that
17 third-party guilt?

18 A Yes.

19 Q Ultimately, that was not successful?

20 A True.

21 Q Let me ask this one final question, two
22 final questions. Does -- even if Mr. Jenkins was
23 involved, does his involvement negate Mr. Ashe's
24 involvement?

25 A No.

1 Q Okay. So the existence of a positive
2 doesn't necessarily prove a negative in this case?

3 A No. On most meth cases that are found,
4 there's normally more than one person making the
5 meth.

6 Q Do you feel you provided effective
7 assistance of counsel in this case?

8 A Yes.

9 MR. LEE: No further questions for this
10 witness at this time, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. WISE:

13 Q Where in the transcript did you make an
14 objection about the purity of the pseudoephedrine?

15 A When the chemist was giving her testimony
16 and I was crossing the chemist, and I talked about
17 what amount of pseudoephedrine did she actually
18 test. And I think it ended up to be like one one-
19 hundredth of a gram, is what she tested.

20 Q Do you know where that is in the
21 transcript?

22 A Well, if you pull up Ms. Homer's cross-
23 examination by me. I'll look if you want me to.

24 Q Have you got the transcript?

25 A Well, I've got a record from the appeal.

1 Q Yes, hers is in there.

2 A Can you tell me what page it starts on,
3 because I'm not sure I know which page.

4 Q One ninety-four is where the cross starts.

5 A One ninety-four?

6 Q One ninety-four.

7 A Okay, if you get over to page 198 and 199

8 --

9 Q Okay.

10 A -- this is talking about -- there was
11 something about one one-hundredth, if I remember
12 right.

13 Q I believe what you're referring to is on
14 page 192 during direct examination, dealing with the
15 amount of methamphetamine that was found. Is that
16 where you thinking about, 192?

17 A No, I believe it was something else in
18 here. Oh, here it is, on recross.

19 Q All right. What page are you on there?

20 A Page 203 and 202.

21 Q Okay.

22 A Where I was asking her, "The Solicitor
23 asked you about 21B when you said the metamphetamine
24 was." "Yes, sir." "How much is five one-hundredths
25 of a gram." And then Mary Moses objects saying it's

1 outside her qualifications. And I make the comment,
2 "Well, I certainly hope not." And the judge allows
3 her to go into it. "How much is five one-hundredths
4 of a gram?" "Well, how much do you mean?"

5 Q What lines are you on?

6 A 202 and going up to 203.

7 Q Okay, I've got you.

8 A It goes on about "How big is it?" And
9 then we actually go into the question about, "Okay,
10 can you help" -- this is at line 11. "Okay, can you
11 help the jury and me out with how big it's going to
12 look, because all that white stuff is not
13 methamphetamine, is it in 21B?" "Right." "That's
14 not all methamphetamine, is it?" "Some of it is.
15 Five one-hundredths of a gram should be, right?"
16 "Well, there's" -- and then we keep going.

17 Q But that would deal with the
18 methamphetamine, not the pseudoephedrine?

19 A Yes.

20 Q Okay. Did you ever argue to the jury that
21 the State did not know the weight of the pure amount
22 of pseudoephedrine in those bags?

23 A No.

24 Q Do you agree with the premise that what is
25 illegal is possession of pure pseudoephedrine and

1 not what it's cut with?

2 A I don't know the answer to that question.

3 Q All right. I'm going to hand you a copy
4 of South Carolina Code 44-53-292 --

5 A All right.

6 Q -- which defines controlled substance.

7 A All right.

8 Q A controlled substance includes whatever
9 it's cut with under the definition charged to the
10 jury by the Court in this case, correct?

11 A Well, what you just handed me says that
12 this is the weight of a controlled substance. It
13 says, "Notwithstanding any other provision in this
14 article, the weight of any controlled substance
15 referred to in this article is the weight of the
16 substance in pure form or any compound or mixture
17 thereof."

18 So I guess if your premise is right, Mr.
19 Wise, that would mean that any time there was
20 methamphetamine cases that no one could ever be
21 convicted of -- I mean pseudoephedrine cases -- no
22 one could ever be convicted of it, because they
23 don't test the pure substance.

24 Q Isn't that a problem of proof, not a
25 problem of the law?

1 A I don't know.

2 Q Isn't that a problem with the government's
3 proof, not a problem with the law?

4 A It might be a problem for both, because
5 there's no one in South Carolina, as I understand
6 it, who can quantitatively test it.

7 Q Did you bring that issue up to the jury?

8 A No, I didn't.

9 Q To the Court?

10 A No, I don't think I did. It's whatever I
11 argued, because I can't remember.

12 Q You'll agree that pseudoephedrine is not a
13 controlled substance?

14 A It's a regulated substance.

15 Q Correct. But it's not a controlled
16 substance under any of the schedules under the drug
17 code?

18 A It's not listed under a schedule, correct.

19 Q All right. Now, what research did you do
20 on the background of Brian Jenkins prior to the
21 trial?

22 A Well, I knew what my client had told me,
23 and that is that he was a friend, and that he had
24 known him for a long time, and that -- I have heard
25 his name around in various other drug areas.

1 Q Now, look at the transcript on page 135 on
2 the top portion.

3 A Which page number?

4 Q Cross-examination of Chris Stout, 134,
5 135 --

6 A Okay.

7 Q -- if you look in the upper right-hand
8 corner. The bottom page is 117.

9 A Okay.

10 Q All right. You were cross-examining
11 Officer Chris Stout there on page 135?

12 A Right.

13 Q And you were asking about his involvement
14 in the arrest of Brian Jenkins?

15 A Yes.

16 Q All right. I'll hand you Defendant's
17 Exhibit One and ask you to look at that. That's an
18 indictment for manufacturing methamphetamine?

19 A Yes.

20 Q And it's an indictment against Brian
21 Jenkins for manufacturing methamphetamine?

22 A It is.

23 Q And it's an indictment for Brian Jenkins
24 for manufacturing methamphetamine in I believe April
25 of 2005?

1 A No.

2 Q May?

3 A I believe it's May 25th.

4 Q May 25, 2005, all right. And it was
5 before this trial?

6 A It was.

7 Q All right. And can you review the
8 incident report there?

9 A Yes.

10 Q Do they make reference to the fact that he
11 was found sleeping in his car?

12 A It does say that.

13 Q And basically they found a drug lab in his
14 car?

15 A It does.

16 Q All right. Would that information have
17 been helpful when you were cross-examining Chris
18 Stout concerning Brian Jenkins' prior involvement in
19 manufacturing methamphetamine?

20 A It's an additional thing which could have
21 been used.

22 Q Would it have been helpful?

23 A Well, I guess.

24 Q All right. And in fact, it also points
25 out it's a second offense for him, too?

1 A That doesn't necessarily mean it's a
2 second methamphetamine charge.

3 Q I understand that. We'll get to that in a
4 second.

5 A He had a simple possession of marijuana.

6 Q He had a prior possession with intent to
7 distribute marijuana?

8 A Yes, which would not be a second meth
9 offense.

10 Q Correct. But both of those would have
11 been helpful in pointing out to the jury that this
12 is an individual who was known to be involved in
13 manufacturing drugs and distributing drugs?

14 A Yes.

15 Q Okay.

16 A It would have been better, though, if it
17 had somebody other than Brian Jenkins, actually.

18 Q Christopher Ashe told you that his defense
19 was "I didn't manufacture those drugs. Brian
20 Jenkins did"?

21 A He said he was helping his best friend
22 come over and move furniture. If he said that Brian
23 Jenkins was manufacturing it, that would indicate
24 that he knew what was going on.

25 Q Right.

1 A He couldn't say that.

2 Q Well, he told you that he didn't
3 manufacture it, and Brian Jenkins was there,
4 correct?

5 A He said he didn't manufacture it. He was
6 moving Brian Jenkins back over there.

7 Q He told you that he didn't manufacture it,
8 and Brian Jenkins was there?

9 A Yes.

10 Q And Brian Jenkins owned the property?

11 A He did.

12 Q And therefore the only person left that
13 would have been logically manufacturing would have
14 been Brian Jenkins?

15 A Or would have been involved in it.

16 Q Correct. Brian Jenkins?

17 A Could possibly have been involved in it.

18 Q And you did not check the background of
19 Brian Jenkins even on the SLED website for general
20 charges that were pending against him or what he's
21 been convicted of?

22 A No, but I crossed the officers about it.

23 Q Correct. And they did not testify that he
24 had been charged with manufacturing methamphetamine
25 back in May of 2005, shortly before this incident?

1 A They did -- a good little bit.

2 Q Now --

3 A That charge was not proessed, too.

4 Q The question on page 300 of the
5 transcript, in the upper right-hand corner 300 --

6 A All right.

7 Q -- where the question was, "If someone was
8 standing at this window, would that have dominion or
9 control over the meth lab as well as the drugs that
10 were found in a duffel bag?" You don't think that
11 calls for an opinion from Officer Thomas Hamilton?

12 A No, I think it's showing a location where
13 the person was, and that is close to the drugs.

14 Q So you don't think that calls for an
15 opinion of Thomas Hamilton as to the effect of
16 someone standing next to drugs?

17 A No. I think it is a comment on the
18 location of the person in regards to where the meth
19 lab was.

20 Q And then 427, the charge to the jury,
21 that's not in yours?

22 A I know what's in it.

23 Q Okay. Do you know of any law that allows
24 a judge to make that charge?

25 A I don't know of any law that does not

1 allow him to make that charge. I think it's a
2 comment on dominion and control. I think it's the
3 difference between actual possession and
4 constructive possession. And I think the judge was
5 demonstrating the difference between the two.

6 Q Do you know of any case law that supports
7 that conclusion?

8 A I don't know of any case law that says he
9 can't charge it.

10 Q Who has the burden of establishing the
11 law, the government or the defendant?

12 A I think the judge gets the law.

13 Q I understand. But who has the burden of
14 coming -- so you don't know of any basis for
15 charging that, law that supports that one way or the
16 other?

17 A I think it was a comment on -- I don't
18 know I could say it any other way. I think it was a
19 comment -- it was the judge's way of instructing
20 constructive possession.

21 Q Do you consider that at all a comment on
22 the facts of the case --

23 A No.

24 Q -- and how the jury is to interpret
25 certain facts?

1 A No, because he charged mere presence. I
2 mean, why wouldn't that be a comment on the facts.

3 Q Aren't they somewhat contradictory?

4 A Sure.

5 Q All right. So on one hand, you tell the
6 jury mere presence is not enough to convict. On the
7 other hand, you tell the jury you can infer he's
8 guilty if he's present?

9 A It's a question that they could concern
10 themselves with. But I don't think the judge is
11 directing the jury to a particular outcome.

12 Q Have you read a case that cited since this
13 case was handled of State versus Belcher?

14 A No.

15 Q Dealing with inference of a firearm --
16 inference of malice in use of a firearm?

17 A I think I might be familiar with that
18 case. Yes, I've read it, but I don't remember
19 everything in it.

20 Q The Court said the inference is not a
21 proper inference.

22 A In regards to the firearm?

23 Q Right.

24 A It might be true in regards to a firearm.

25 Q All right. But it wouldn't be true in

1 regards to this particular inference?

2 A No, I don't think so.

3 Q Did you check to determine whether or not
4 the electricity was on in the trailer?

5 A No.

6 Q Did you think about checking the
7 electricity to see if it was on in the trailer --

8 A No.

9 Q -- and whose name it was in?

10 A No, because my client had told me that he
11 was living there. I didn't want to know the answer
12 that it was not on.

13 Q What if the answer was it was on?

14 A That would surprise me.

15 Q But you didn't check one way or the other?

16 A No.

17 Q Okay. Now, the allegation against him for
18 manufacturing --

19 A May I ask you why it would surprise me?

20 Q I assume -- did you ever go --

21 THE COURT: Let's do this. You can
22 explain your answer.

23 A I got the impression from my client that
24 he was there periodically, but that wasn't really
25 the only place he was staying. And more than

1 likely, the lights would not have been turned on
2 that day.

3 Q Did you ever interview Brian Jenkins'
4 girlfriend?

5 A No, didn't know who she was, didn't know
6 her name.

7 Q Okay. The charge against Mr. Ashe was
8 possession of pseudoephedrine and manufacturing
9 methamphetamine, correct?

10 A Yes.

11 Q And then the State introduced as part of
12 its case for manufacturing amphetamine the fact that
13 there was a large quantity of substance containing
14 pseudoephedrine present?

15 A I don't know if that introduction had to
16 do with that charge or the charge of possession in
17 excess of 200 grams of pseudoephedrine.

18 Q Did you ever request a charge for the
19 judge to tell the jury that they're not to consider
20 the pseudoephedrine as a basis for convicting him of
21 manufacturing methamphetamine?

22 A Well, I don't think that would have been a
23 proper charge, because if there is pseudoephedrine
24 found, that's one of the items that is used to make
25 methamphetamine.

1 Q So the pseudoephedrine would have been
2 probative of the manufacturing of methamphetamine?

3 A It might -- yes, it would have been
4 probative of both charges.

5 Q And you think that if the jury had
6 acquitted Christopher Ashe of manufacturing
7 methamphetamine, the State would have had a right to
8 come back and charge him with possession of the
9 pseudoephedrine that was found and introduced in the
10 manufacturing charge?

11 A Say that one more time.

12 Q If the State had tried Christopher Ashe by
13 himself on one charge of manufacturing
14 methamphetamine and in the course of that trial had
15 introduced the pseudoephedrine found there at the
16 scene to prove manufacturing, and if the jury had
17 acquitted him of those charges, do you think the
18 State would have come back and charged him
19 individually with just possession of
20 pseudoephedrine?

21 A If there are different elements involved,
22 yes. And I think that's the argument, is that there
23 are different elements.

24 Q Well, are they different elements or
25 different facts?

1 A Yes.

2 Q Well, I mean, my question is, does double
3 jeopardy depend upon different elements or different
4 facts?

5 A Different elements.

6 Q Have you read Blattberger?

7 A Yes.

8 Q Carefully?

9 A I mean, as carefully as I could at the
10 time when I was reading it.

11 Q All right. Do you realize Blattberger
12 says different facts?

13 A Okay. Wouldn't it be different facts if
14 you had different elements?

15 Q Blattberger says different facts.

16 A Okay.

17 Q All right. If the State is required to
18 prove different facts to convict him of the
19 pseudoephedrine, would they be allowed, in your
20 opinion, to go forward with a charge of
21 pseudoephedrine after he had been acquitted for
22 manufacturing?

23 A Well, obviously, this is a theoretical
24 exercise --

25 Q Right.

1 A -- which only the judge would know the
2 answer to it.

3 Q Well, sometimes lawyers have to urge a
4 judge along.

5 A I thought that he could have gone to trial
6 on both charges.

7 Q And that's why you didn't make an
8 objection on double jeopardy?

9 A Well --

10 Q You didn't perceive it as a double
11 jeopardy violation that they were going to use the
12 pseudoephedrine to prove the manufacturing?

13 A I think he could have been convicted of
14 both charges.

15 Q And did you write Mr. Ashe and tell him
16 about the new indictment that came down at the end
17 of July?

18 A I told him personally.

19 Q You told him in person?

20 A Uh-huh -- on the phone and in person, I
21 think.

22 Q Okay. And --

23 A Matter of fact, the gentleman that just
24 walked in the courtroom I think told him about it
25 also, who is my associate.

1 Q And that new charge came about after
2 Christopher Ashe said, "I want a jury trial"?

3 A It did.

4 Q Okay, thank you.

5 THE COURT: Re-exam?

6 MR. LEE: Thank you, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. LEE:

9 Q I've got a bunch of notes. All right, I'm
10 going to ask you a couple of questions that are
11 going to be repetitive, so I apologize for that.
12 But, again, you did try to argue third-party guilt
13 and that Mr. Jenkins was the one basically
14 manufacturing meth?

15 A Yes.

16 Q Okay. And even if Mr. Jenkins had been
17 involved and was the one manufacturing meth, that
18 doesn't necessarily prove that Mr. Ashe --

19 MR. WISE: Your Honor, he's leading the
20 witness a little bit.

21 MR. LEE: Okay, I'll rephrase that.

22 THE COURT: Restate your question.

23 Q If it was proven that Mr. Jenkins was
24 making the meth, would that necessarily disprove
25 that Mr. Ashe was involved?

1 A No.

2 Q Okay. Has any affidavit from this Mr.
3 Jenkins been submitted today stating that he was the
4 one manufacturing the meth and that Mr. Ashe was not
5 involved?

6 A No.

7 Q Was Mr. Jenkins here today to testify to
8 this?

9 A No.

10 Q Is there anything on the record other than
11 Mr. Ashe's testimony that he was not involved?

12 A No.

13 Q Okay. Now, also, did the police testify
14 that Mr. Jenkins was a person of interest?

15 A Yes.

16 Q Okay. Was that charge -- the prior
17 methamphetamine charge that Mr. Wise just brought to
18 your attention, did that result in a conviction?

19 A No, it was nol prossed. It was nol
20 prossed by the Solicitor.

21 Q Now, do judges differentiate between
22 direct possession and constructive possession in
23 their charges to juries?

24 A They explain the two different
25 possessions.

1 Q Okay.

2 A You're talking about actual versus
3 constructive?

4 Q Yes. I apologize, I misstated it. Now,
5 in explaining constructive possession, is it common
6 for judges to use terms like "dominion" and
7 "control"?

8 A Yes.

9 Q Now, is it your recollection that the
10 judge gave a mere presence instruction as well as a
11 constructive possession?

12 A I know he did.

13 Q Okay. And you agree that those are
14 conflicting ideas?

15 A Yes.

16 Q Okay. When giving juries choices such as
17 between guilty and not guilty, do judges frequently
18 give conflicting choice to juries?

19 A Well, he's supposed to be unbiased and
20 give instructions that would satisfy both the State
21 and the defendant.

22 Q So your testimony is that's the very
23 nature of jury charges?

24 A Very nature of jury charges.

25 Q Okay. Now, would you agree that

1 pseudoephedrine is not a controlled substance per
2 se?

3 A Yes.

4 Q Would you agree that it's a regulated
5 substance?

6 A Yes.

7 Q Is there in fact anything that goes into
8 methamphetamine that is a controlled substance?

9 A No.

10 Q But methamphetamine itself is illegal,
11 correct?

12 A Yes.

13 Q So in your understanding, is it Mr. Wise's
14 position that there could be no charges or no
15 convictions ever brought in this case until the
16 actual meth was made?

17 A I think that's his position.

18 Q Okay. Does that seem like a very good
19 public policy position to you?

20 MR. WISE: Again, I would object to
21 whether it's good public policy or bad public
22 policy. It's the law.

23 THE COURT: I'm not sure that it is within
24 the purview of this witness as to whether it's good
25 public policy. He might have a position on it, but

1 I'm not sure.

2 MR. WILLIAMS: I haven't been qualified.

3 THE COURT: There we go.

4 Q Okay. Was a search for Brian Jenkins
5 done?

6 A The police officers testified that there
7 was a search that was done for Brian Jenkins or
8 whoever the person was, but they said that they
9 couldn't find anybody else.

10 Q Now, let's go back to the double jeopardy
11 issue for a second. Do you agree that you have to
12 have pseudoephedrine to make methamphetamine?

13 A As far as I understand, you do.

14 Q Do you agree that possession of that
15 pseudoephedrine alone does not meth make?

16 A True.

17 Q So would you agree that there are steps
18 that have to be taken other than that possession to
19 create the methamphetamine?

20 A Yes.

21 Q Now, would you agree that you don't
22 necessarily have to have 200 grams of
23 pseudoephedrine to make methamphetamine?

24 A Without being qualified as a chemist, I
25 would think that you wouldn't have to.

1 Q So going to the realm of hypotheticals
2 again, would you agree that it is a fact to be
3 proven that a person possesses in excess of 200
4 grams?

5 A Yes.

6 Q Would you agree that it is a fact to be
7 proven that a person undertook steps to create
8 methamphetamine?

9 A Yes.

10 Q So in this case, would you agree that
11 different elements are essentially the equivalent of
12 different facts?

13 MR. WISE: I would object to that, and I
14 don't think it's a correct statement of the law.

15 THE COURT: That's all right. Overruled.

16 MR. LEE: No further questions for this
17 witness, Your Honor.

18 THE COURT: It was a hypothetical.

19 MR. WISE: That's true.

20 RE CROSS EXAMINATION

21 BY MR. WISE:

22 Q Just one. A regulated substance, when you
23 test an improper amount of regulated substance, can
24 you show me in the code anywhere where that includes
25 whatever it's mixed with?

1 A No.

2 Q Thank you, nothing further.

3 THE COURT: Anything further?

4 MR. WISE: If Your Honor will allow me to
5 ask.

6 THE COURT: Certainly.

7 Q Does anyone in this state do quantitative
8 analysis?

9 A No.

10 MR. WISE: No further questions. I have
11 nothing further.

12 THE COURT: All right, you may step down.

13 MR. WILLIAMS: Thank you, Your Honor.

14 THE COURT: You may call your next
15 witness.

16 MR. LEE: No further witnesses from the
17 State, Your Honor.

18 THE COURT: Any reply?

19 MR. WISE: No reply. I would, Your Honor,
20 like to hand up to the Court a copy of the relevant
21 code sections involved here. It talks about the
22 weight of a controlled substance, and it's a
23 pseudoephedrine statute, also. They clearly, in my
24 opinion, show that the State has got to prove the
25 amount of a pure substance.

1 THE COURT: Well, I thought that
2 pseudoephedrine is not a controlled substance.

3 MR. WISE: It's not a controlled
4 substance, that's correct.

5 THE COURT: Then they wouldn't have to
6 prove --

7 MR. WISE: The State has to prove the
8 weight of the pseudoephedrine, not the controlled
9 substance. They can get by with the controlled
10 substance but not pseudoephedrine. That code
11 section, 392, allows the State to use a mixture of
12 the substance to get the total weight in a
13 controlled substance case.

14 THE COURT: But this is not --

15 MR. WISE: This is not a controlled
16 substance. So by elimination, however you want to
17 call it, then with pseudoephedrine you're dealing
18 with actual amount of pseudoephedrine.

19 THE COURT: Again, I'm not quite sure if I
20 understand. Pseudoephedrine is not a controlled
21 substance.

22 MR. WISE: That's correct.

23 THE COURT: And at best, and I think the
24 witness said, it is a regulated substance.

25 MR. WISE: Correct.

1 THE COURT: But she also said it's a
2 precursor.

3 MR. WISE: Correct. But that doesn't make
4 it a controlled substance, never has.

5 THE COURT: Well, then, where does the
6 weight come in as far as --

7 MR. WISE: The weight comes in under the
8 code section where you make it illegal to possess
9 pseudoephedrine. They basically say you have to
10 possess more than like 12 grams of pseudoephedrine
11 before it's an illegal substance.

12 And it does not refer in the code section
13 to the weight of pseudoephedrine including what it's
14 cut with. Pseudoephedrine, if you knew what pills
15 these were, you may be able to make a rough
16 calculation as to the amount of pure pseudoephedrine
17 in them.

18 THE COURT: But the pure weight deals with
19 a controlled substance.

20 MR. WISE: Correct -- no, no, no. The
21 mixed weight deals with a controlled substance.
22 It's illegal to possess cocaine.

23 THE COURT: Well, I'm reading 392 -- 44-
24 53-392. The weight of any controlled substance
25 referred to in this article is the weight of that

1 substance in pure form.

2 MR. WISE: Or -- it goes on and says "or."

3 THE COURT: But pseudoephedrine is not a
4 compound of methamphetamine.

5 MR. WISE: It's not a controlled
6 substance.

7 THE COURT: Excuse me, yes.

8 MR. WISE: It's not a controlled
9 substance. So what you're talking with
10 pseudoephedrine here --

11 THE COURT: Methamphetamine is a compound
12 of things, pseudoephedrine --

13 MR. WISE: No, no.

14 THE COURT: Then why do they use it?

15 MR. WISE: Because when you cook it, it
16 changes chemical composition. You don't mix it
17 with --

18 THE COURT: Well, there again, that just
19 means it's not a controlled substance.

20 MR. WISE: Right, it's not a controlled
21 substance. We've heard that.

22 THE COURT: All right. So that's in
23 essence a separate offense.

24 MR. WISE: Well, you're talking about on
25 double jeopardy?

1 THE COURT: I don't know. I'm just
2 looking at the language of Section 44-53-392 applies
3 only to controlled substances and any compound or
4 mixture.

5 MR. WISE: Correct.

6 THE COURT: And you've just told me that
7 by reason of the cooking process that the
8 pseudoephedrine is no longer --

9 MR. WISE: Pseudoephedrine is a separate
10 offense. There's no question about that.

11 THE COURT: Well, again, Mr. Wise, I'm
12 just trying to understand these statutes.

13 MR. WISE: Since pseudoephedrine is not a
14 controlled substance, you have to go with the actual
15 amount of the pseudoephedrine that you're
16 possessing, not what it's cut with.

17 THE COURT: Well, that's a little bit
18 different, I'm afraid, because it looks like the
19 only time you control with the weight of a
20 controlled substance is in the purity of it, is when
21 it is a "controlled substance."

22 MR. WISE: It's really not --

23 THE COURT: Well, it's called *exclusus*
24 *alterius*.

25 MR. WISE: Correct.

1 THE COURT: They limit it to controlled
2 substances. They didn't say regulated substances.
3 They didn't say --

4 MR. WISE: I understand.

5 THE COURT: All right.

6 MR. WISE: But what under 392 the code
7 says is that -- in other words, it's illegal to
8 possess cocaine, period, all right. But in
9 determining what is cocaine under the code, the
10 legislature has enacted a law that says it includes
11 what it's cut with.

12 We don't have a law over pseudoephedrine
13 that says it includes what it's cut with. So you
14 have to be talking about the pure amount of
15 pseudoephedrine under the same theory that would
16 exclude others.

17 THE COURT: How does pseudoephedrine come
18 under a controlled substance?

19 MR. WISE: It doesn't.

20 THE COURT: Then why is it weighed? It
21 doesn't have anything to do with it. It's the
22 purity of it.

23 MR. WISE: Well, the purity of it, this
24 legislature has prohibited you from possessing
25 pseudoephedrine more than -- I think it's 12 grams

1 is the minimum amount you can possess, all right.
2 In fact, literally under that, if you include
3 whatever it's cut with -- and manufacturers put
4 other stuff with it because it's anywhere from 100
5 milligrams, 120, or 240 milligrams per tablet,
6 depending on what strength you get. So what the
7 legislature has said pseudoephedrine -- it's illegal
8 to possess pseudoephedrine, so it's not illegal to
9 possess --

10 THE COURT: Excuse me. That's a separate
11 statute. It's not --

12 MR. WISE: That is a separate statement.
13 There's no legal basis to conclude that the
14 pseudoephedrine includes whatever the manufacturer
15 puts in it in addition to pseudoephedrine. There's
16 no law in this state that says that's included in
17 the weight, none.

18 There is a law in this state that says if
19 the substance is a controlled substance, then you
20 include whatever it's cut with. But there's no law
21 in this state that says when someone is charged with
22 pseudoephedrine, you include whatever the
23 manufacturer has put in there with it as other
24 ingredients -- you know, time-release substances and
25 all that.

1 That's what the position is. The only way
2 you can include what something is cut with is if
3 it's a controlled substance. Therefore, if it's not
4 a controlled substance, you don't include what it's
5 cut with, what the manufacturer puts in there.

6 And the amount you're talking about then
7 is the amount of pure pseudoephedrine, which no one
8 knows, on the possession of pseudoephedrine charge.
9 Does that explain it better?

10 THE COURT: Not at this point. I still
11 don't understand. It says that it's limited to
12 controlled substances.

13 MR. WISE: Right.

14 THE COURT: And we agree that
15 pseudoephedrine is not a controlled substance.

16 MR. WISE: So therefore --

17 THE COURT: But it is a precursor of a
18 controlled substance.

19 MR. WISE: Correct. But you don't go with
20 what it's cut with unless it's a controlled
21 substance. That's what 392 says. Otherwise, you've
22 got to deal with how much pseudoephedrine did he
23 actually have in his possession, and no knows
24 because we don't have the quantitative analysis.

25 Now, that's a problem the state has with

1 their case, but it's not something that can't ever
2 be obtained, because obviously you can do a
3 quantitative analysis if you've got the right
4 equipment. And with pseudoephedrine, you're going
5 to have to do it.

6 THE COURT: But wouldn't qualitative
7 analysis actually just go to the purity?

8 MR. WISE: No, qualitative -- that's her
9 testimony. Qualitative does not go to the purity.
10 Qualitative just goes to show it is a substance
11 present in that powder. And the answer was yes, it
12 is.

13 Just like when you test cocaine, you get a
14 bag of what purports to be cocaine. You do analysis
15 and say it's cocaine in there. Yes, it is. Under
16 392, once you find cocaine is in there, you weigh
17 the whole thing, because that's what 392 says.

18 But pseudoephedrine, since you have no
19 statute that says you include what it's mixed with,
20 you have to go just to the amount of pure
21 pseudoephedrine.

22 THE COURT: All right, anything else?

23 MR. WISE: All you're dealing with there
24 is the testimony in the transcript that shows to
25 just crush Sudafed pills. So the testimony at trial

1 was pretty clear that what they saw was crushed bags
2 of Sudafed with little flecks of red in it, where
3 somebody just got the pills and crushed them up.

4 And the pills don't contain pure
5 pseudoephedrine. They contain a lot of other
6 ingredients that the manufacturers put in there for
7 different purposes.

8 And therefore we've got to be dealing with
9 the amount of pure pseudoephedrine. Otherwise, you
10 can have somebody arrested for pseudoephedrine for
11 just a few boxes of Sudafed.

12 THE COURT: I think it's limited to
13 weight.

14 MR. WISE: It's twelve grams.

15 THE COURT: Grams are quantity, not
16 quality.

17 MR. WISE: Correct. Well, actually, grams
18 can be quantity or quality if it's pure.

19 THE COURT: Again, I'm still trying to
20 find out. It doesn't say 12 grams of pure
21 pseudoephedrine.

22 MR. WISE: It says 12 grams of
23 pseudoephedrine, all right. Pseudoephedrine is not
24 a controlled -- you know, let me put it this way.
25 Let's take 392.

1 If they did not have in Section 392 a
2 provision that says "or what it's mixed with" and it
3 just said eliminate 392, then every drug case would
4 require that you actually know the amount of cocaine
5 in the substance before you can be convicted of a
6 weight amount of cocaine.

7 So it's 392 that gives the right of the
8 State to prosecute somebody for possessing cocaine
9 that's cut with something else.

10 THE COURT: Well, how about the definition
11 of controlled substances, which actually say
12 precursor?

13 MR. WISE: It doesn't really say
14 precursor. It says controlled substance or
15 precursor. Precursors are not controlled
16 substances, no question about that.

17 THE COURT: What definition are you
18 looking at?

19 MR. WISE: Well, just from my reading of
20 them in the past.

21 THE COURT: Well, I'm actually looking at
22 Section 44-53-110.

23 MR. WISE: All right.

24 THE COURT: Definitions.

25 MR. WISE: All right, I don't have that in

1 front of me.

2 THE COURT: Well, it's not long.

3 MR. WISE: Okay.

4 THE COURT: "Controlled substance" means a
5 drug, substance, or immediate precursor in Schedules
6 I through V.

7 MR. WISE: Well, the testimony was that
8 pseudoephedrine is not a controlled substance.

9 THE COURT: The testimony is that it's a
10 precursor.

11 MR. WISE: Well, yes, but she also said it
12 wasn't a controlled substance. I'd have to look
13 into that.

14 THE COURT: That was my whole problem.

15 MR. WISE: Yes.

16 THE COURT: Anything else? In other
17 words, you have posed some very good questions which
18 I think I'm going to have to apply some more
19 thorough development than I can do at this point.

20 MR. WISE: I don't know if you want hear
21 any summary or other argument.

22 THE COURT: Please, yes.

23 MR. WISE: Okay.

24 THE COURT: I want to hear anything. But
25 I am going to ask for some briefing --

1 MR. WISE: Okay.

2 THE COURT: -- if not more than a proposed
3 order.

4 MR. WISE: I would point out on the other
5 one, the testimony by the officer who clearly I
6 think is an opinion testimony, an opinion basically
7 that says that whoever standing there is guilty,
8 that is not a factual allegation. An opinion
9 testimony like that is certainly not permissible.

10 I can tell the Court because I researched
11 it over the weekend there is no case in this state
12 that allows a jury charge that says you can infer
13 from dominion and control. There are some cases
14 that say you can infer from ownership of the
15 residence, which I don't think is really
16 questionable anyway.

17 There is one case that says that the jury
18 could have inferred dominion and control from a
19 person's presence there, dominion and control over
20 the drugs.

21 THE COURT: Well, isn't that what a jury
22 charge is for, is to instruct them as to what they
23 can do?

24 MR. WISE: It is to instruct them what
25 they can do. But you're not to tell them factually

1 what inference to draw from certain facts when
2 there's no such statutory basis for it. That's what
3 ultimately the holding of State versus Belcher was.

4 If you look at the fact that what a
5 reviewing Court does when it says under the facts of
6 this case, the jury could consider or could infer
7 that the person possessed the drugs, had dominion
8 and control, that's different from telling a jury
9 they may infer.

10 I think it's proper for a reviewing Court
11 to look back at it from hindsight and say the jury
12 came to the right decision because this is a proper
13 inference. But to tell the jury up front what you
14 can infer from certain facts, I think is a charge on
15 the facts in violation of the state constitution,
16 and it's got some serious problems with it. So
17 there is no authority that allows a judge,
18 particularly for someone who doesn't own the
19 premises and has never been shown to be a tenant on
20 the premises, never been shown to live on the
21 premises, to then tell one that dominion and control
22 is sufficient, is an inference of conviction. I
23 don't think it's there. I think also on the double
24 jeopardy argument, clearly, you know, the State used
25 the pseudoephedrine to convict him for

1 manufacturing. The State used the pseudoephedrine
2 to convict him of possession of pseudoephedrine.
3 And I think that's clearly double jeopardy. If the
4 Court reads Blattberger carefully --

5 THE COURT: Well, isn't it manufacturing
6 of methamphetamine?

7 MR. WISE: Correct.

8 THE COURT: Once pseudoephedrine goes into
9 methamphetamine, it loses its --

10 MR. WISE: Correct.

11 THE COURT: So if you arrest a fellow
12 going to the still a hundred pound sack of sugar and
13 you charge him with having illegal liquor making
14 materials, and then you arrest his cousin leaving
15 the still with a couple of jugs of liquor, there's
16 no question that the one who's going in has got
17 something that is going to be useful for improper
18 purpose. And then you've got something coming out
19 that is contraband.

20 MR. WISE: Right. Well, the point is
21 this. What he was actually -- from my memory --

22 THE COURT: I can only speak from not my
23 experience in making liquor.

24 MR. WISE: But the point of this is that
25 actually if my memory of the transcript is correct,

1 they really found no product as such. They found
2 the apparatus to manufacture methamphetamine and in
3 the process of doing it. So it's not like they
4 found methamphetamine they charged him with
5 possession of.

6 But when you charge him with manufacturing
7 methamphetamine, obviously the process of
8 manufacturing methamphetamine would include the use
9 and possession of all the ingredients to make it
10 with. And one of the ingredients you make it with
11 is pseudoephedrine. So to help prove manufacturing,
12 they would prove the possession of these
13 pseudoephedrine substances in order to get the
14 charge of manufacturing.

15 So I think quite clearly, as I asked Mr.
16 Williams on cross, if Mr. Ashe had been charged with
17 manufacturing meth and then acquitted, they couldn't
18 have come back two days later and used the same
19 pseudoephedrine that they used to try to convict him
20 of manufacturing to prove him of possession with,
21 because it would violate the double jeopardy quite
22 clearly.

23 So I think in view of that that it clearly
24 would be a double jeopardy violation to be convicted
25 of both. But I will be happy to submit whatever

1 else the Court wants.

2 THE COURT: Well, I think that you have
3 gotten really the two things that the Court is
4 particularly concerned with, and that is the
5 qualitative analysis necessary to establish what
6 would be a violation of the statute. And, of
7 course, the statute that I'm talking about is the
8 one that he was indicted under, Section 44-53-375
9 E(1)(d), I think.

10 MR. WISE: Correct.

11 THE COURT: And then, of course, the other
12 statutes that have been provided. Now, I don't
13 expect a lengthy treatise on the subject.

14 MR. WISE: Right.

15 THE COURT: What I'm looking for is any
16 authority or anything that would be help to the
17 Court in interpreting those standard statutes.

18 MR. WISE: I will just advise you a little
19 bit about my schedule for the next two weeks or so.
20 I've got four briefs due between now and the eighth
21 of June.

22 THE COURT: No problem. I'll give you
23 plenty of time.

24 MR. WISE: Okay.

25 THE COURT: But then also the due process.

1 Brian Jenkins didn't testify?

2 MR. WISE: No, sir, Brian Jenkins did not
3 testify one way or the other.

4 THE COURT: And they never found him?

5 MR. WISE: They found him.

6 THE COURT: They didn't find in connection
7 with this particular event?

8 MR. WISE: No, sir. No, sir, they found
9 him later, and he went to jail on a CDV I think or
10 something.

11 THE COURT: All right.

12 MR. WISE: He was never charged with this
13 event either, by the way.

14 THE COURT: All right, anything, Mr. Lee,
15 that you want to say?

16 MR. LEE: The State would request the
17 opportunity to brief our position on the issue, as
18 well.

19 THE COURT: Okay. Not only do I like to
20 look at exhibits, but also I like to have both sides
21 of discussion. These are important cases, and we're
22 in an area that apparently is evolving.

23 MR. WISE: I have not had an opportunity
24 to put a proper show. I have not checked other
25 states for what they do with pseudoephedrine and so

1 forth, but there may be some answers out there.

2 THE COURT: Anything will be of help. I
3 notice the current statute is a 2005 act. We're
4 approaching the summer months. Inasmuch as you are
5 the moving party, Mr. Wise, is 60 days enough?

6 MR. WISE: Sixty is more than enough.
7 That's fine, Your Honor.

8 THE COURT: And anything in the 60 days
9 would be fine.

10 MR. WISE: Okay.

11 THE COURT: And then I'll give 30 days to
12 the State to respond.

13 MR. WISE: It will probably be toward the
14 end of June.

15 THE COURT: That's about 60 days.

16 MR. WISE: Thank you.

17 THE COURT: We're at the end of May now.
18 And if there's any reply, 60, 30, 10.

19 MR. WISE: Okay, all right.

20 THE COURT: As I say, I don't need a whole
21 lot. I'm better at reading what other people say
22 than just trying to think for myself. It's not
23 going to be a full brief or anything like that.

24 And then, of course, what I'll do if I
25 don't do my own order, I will ask one of you to

1 prepare a final order. All right, anything else?

2 MR. LEE: If I could put our position
3 briefly on the record.

4 THE COURT: Please.

5 MR. LEE: And I'm perfectly happy to put
6 it in a brief.

7 THE COURT: No, no, go, that's fine. I
8 want to hear from you really. In fact, lawyers, as
9 we all know, if I don't hear it here, maybe it's not
10 actually raised. Go ahead.

11 MR. LEE: Well, the State submits that Mr.
12 Wise has posited a novel theory certainly in that
13 he's seemingly attempting to use common law to
14 rewrite the statute. But the State would posit that
15 counsel cannot be found ineffective for the failure
16 to argue new theories.

17 Their job is to provide effective
18 assistance in the law to the extent that the law
19 allows. If you were to hold counsel ineffective
20 every time they didn't argue something that had
21 never been argued before, you could pretty much
22 grant PCR any day of the week.

23 Basically -- and I know we're not supposed
24 to go into public policy here, but the reason that
25 pseudoephedrine in a high quantity was made illegal

1 was for public policy reasons in that if that policy
2 was there, it's a very obvious precursor to
3 methamphetamine.

4 It was designed to be preventative in
5 that, you know, there are dangers not only to the
6 drug itself but also to the manufacturing of the
7 drug. You know, there are frequently deaths because
8 of meth labs blowing up, etc. So that's why they
9 started monitoring pseudoephedrine, etc.

10 But it seems like the applicant's position
11 in this case would be that unless quantitative
12 analysis is done -- and I would point out that
13 nowhere in South Carolina does quantitative
14 analysis, so failure to have that quantitative
15 analysis done.

16 And also, there hasn't even been any
17 evidence presented that other states do it. But
18 failure to have that quantitative analysis done
19 can't be a reason to find someone ineffective
20 because no one in South Carolina does it.

21 But at any rate, it seems like it's the
22 applicant's position that you can't prosecute until
23 the meth is actually made. If that's the case, it
24 would rewrite the statute as written, but it would
25 also lead to more dangers, meth being available,

1 more death. I just don't think that's a good
2 precedent to set.

3 Speaking to this case specifically with
4 regard to the officer's testimony, he was questioned
5 about dominion and control. He was questioned about
6 whether or not being -- and if I'm picturing this
7 right -- in that window, in the upstairs window -- I
8 guess the testimony is reflected that someone was
9 waving -- being in that upstairs window in that same
10 room where the drugs were made.

11 He was asked if being close by could
12 possibly insinuate dominion and control over that
13 area, and he said yes, it could at that time.
14 That's not telling someone that they have to infer
15 guilt. That's saying that it could be construed
16 that way, which is also what the judge, if you look
17 again to the -- there's been much ado made over the
18 jury charge, page 427.

19 The judge goes into, again, the actual
20 knowledge and dominion and control, etc. But what
21 the judge says is, "The defendant's knowledge and
22 possession may be inferred when a substance is found
23 on the property under defendant's control."

24 Again, that's not telling the jury what to
25 find. It's saying that you can find that. It's not

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON MAY 20, 2010, IN LEXINGTON, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT CHAPIN, SOUTH CAROLINA, THIS THE SEVENTH DAY OF SEPTEMBER, 2012.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

State of South Carolina
Office of the Solicitor
Eleventh Judicial Circuit

COUNTIES
EDGEFIELD / LEXINGTON
McCORMICK / SALUDA
FAXES: (803) 785-8431 or (803) 785-8255



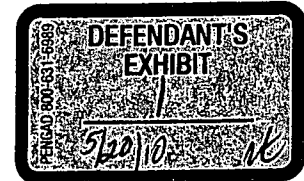
LEXINGTON COUNTY JUDICIAL CENTER
205 E. MAIN ST. • THIRD FLOOR
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352

DONALD V. MYERS

Solicitor

July 21, 2006

Sent Via Fax 359-4543



To: Theo
From: Kent

Re: Chris Ashe

Dear Theo:

Per our last conversation, you client turned down my offer. He will be going on the trial list for July 31, 2006. I am attaching to this fax a copy of the drug analysis. In light of the analysis, I plan on straight indicting your client for possession of an unlawful amount of pseudoephedrine under 44-53-375(E)(1)(d). I am attaching a copy of this new indictment. In addition, I am going to resubmit the other pending indictments to the Grand Jury.

*Send letter that
we request presence
of my and all U. men
in the case of custody.*

*Also let Chris know
about me
as confidant.*

J

DOCKET NO. 2007GS-32-515
The State of South Carolina
County of Lexington

COURT OF GENERAL SESSIONS

January TERM 2007

THE STATE
vs.
Brian Shealy Jenkins

CDR# 0113

Indictment for
Manufacturing Methamphetamine
2nd offense

\$44-53-375(B)(2)

DONALD V. MYERS, SOLICITOR

WITNESSES

LCSD - NET

HAMILTON

A-2005-32-01959

12/21/2006 1:42 PM

ARREST WARRANT NUMBER

STRAIGHT INDICTMENT

ACTION OF GRAND JURY
TRUE BILL

Foreman

Foreperson of Grand Jury

Date: 2-5-07

VERDICT

Foreperson of Petit Jury

Date:

NOLLE PROSSED: P.O.C.
DATE: 2/27/07
SOLICITORS OFFICE



STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

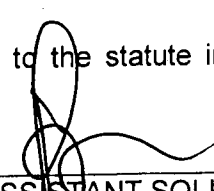
INDICTMENT FOR
Manufacturing Methamphetamine
2nd offense

§44-53-375(B)(2)

At a Court of General Sessions, convened on January, 2007, the Grand Jurors of Lexington County present upon their oath:

That Brian Shealy Jenkins did in Lexington County on or about May 25, 2005, knowingly and intentionally, willfully and unlawfully cultivate, manufacture or otherwise, aid, abet, attempt, or conspire to manufacture, cultivate, or bring into this State, a quantity of Crank, a controlled substance under provisions of § 44-53-110, et. Seq. Code of Laws of South Carolina 1976, as amended, in violation of § 44-53-375(B)(2), Code of Laws of South Carolina, 1976, as amended. Such being the second offense.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

UNAPPROVED REPORT

292

AGENCY I.D.
SCO 320000LEXINGTON COUNTY SHERIFF'S DEPARTMENT
INCIDENT REPORT

CASE NUMBER

05041582

NCIC

INQ

ENTD.

INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	USPS	TYPE VICTIM
1. DRUG/NARCOTIC VIOLATIONS		☒ YES ☐ NO	☐ YES ☐ NO	Highway/Road/Alley	☐ Business	☒ Individual
2.		☐ YES ☐ NO	☐ YES ☐ NO		☐ Financial Inst.	☐ Government
3.		☐ YES ☐ NO	☐ YES ☐ NO		☐ Other	☐ Unknown
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)				ZIP CODE	WEAPON TYPE	
1231 Boiling Springs Road Lexington SC				29073		
INCIDENT DATE	24 HR CLOCK	TO	DATE	24 HR CLOCK	DISPATCH DATE/TIME 24 HR CLOCK	LOCATION NO.
5/25/05	0831		5/25/05	0903	5/25/05 0756 0831	South
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RACE	SEX	AGE
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.
VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RACE	SEX	AGE
Lexington County -						
HEIGHT		WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.	
0		0				
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.
521 Gibson Road		Lexington		SC	29073	
VISIBLE INJURY (VICT. 1)		☐ YES ☒ NO		EXPLAIN		
VICTIM (NO. 1) USING ALCOHOL		☐ YES ☐ NO ☒ UNK		COMPLAINANT OF ANY NON-VISIBLE INJURIES ☐ YES ☒ NO		
TWO-MAN VEH		ONE-MAN VEH		DETECTIVE/SP. ASST		
☐		☐		☐		
SUSPECT		NAME (LAST, FIRST, MIDDLE)		RACE	SEX	AGE
☒		Jenkins - Brian		W	M	30
RUNAWAY		FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.		ETH	DATE OF BIRTH	HEIGHT
☐				N	12/31/74	603
WARRANT		ADDRESS		CITY	STATE	ZIP CODE
☐		1208 Daralynn Drive		Lexington	SC	29073
ARREST		SUBJECT (NO. 1) USING ALCOHOL		ARRESTED NEAR OFFENSE SCENE		DATE / TIME OF OFFENSE
☒		☐ YES ☐ NO ☒ UNK		☐ YES ☒ NO		05/25/05 0903
JAIL		DRUGS		TOTAL # ARRESTED		
☐		☐ YES ☐ NO ☒ UNK		1		
VICTIM BILL OF RIGHTS (COPY PROVIDED) ☐ YES ☒ NO BOND HEARING (DATE / TIME)						
VICTIM WISHES TO BE NOTIFIED OF FUTURE LEGAL PROCEEDINGS? ☐ YES ☒ NO						
R/O responded to a suspicious vehicle on Boiling Springs Road which was dispatched out to R/O. The vehicle was dispatched out as a black truck on Boiling Spring Road near Bethany Church Road. R/O arrived and located the vehicle at 1/L just before Bethany Church Road. The subject was passed out in the vehicle and it took the R/O to yell at the subject and shake the vehicle to wake him up. When R/O approached the vehicle there was a strong odor of starting fluid coming from the bed of the truck. R/O retrieved all the subjects information and asked him what was wrong. Subject stated he was tired because he had been up all night fighting with his girlfriend.						
VICTIM SIGNATURE						
JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY						
TYPE (GROUP)						
Amphetamine Marijuana						
STOLEN						
DAMAGED						
BURNED						
RECOVERED						
SPENT						
0						
FORGED						
UNKNOWN						
NONE						
SUBJECT IDENTIFIED						
☒ YES ☐ NO						
SUBJECT LOCATED						
☒ YES ☐ NO						
ACTIVE						
☐ ADM CLOSED						
ARRESTED UNDER 18						
☐ UNFOUNDED						
ARRESTED 18 AND OVER						
☐ EX-CLEAR UNDER 18						
EX-CLEAR 18 AND OVER						
☐						
REASON FOR EXCEPTIONAL CLEARANCE 1: ☐ OFFENDER DEATH 2: ☐ NO PROSECUTION 3: ☐ EXTRADITION DENIED 4: ☐ VICTIM DECLINES COOPERATION 5: ☐ JUVENILE - NO CUSTODY						
REPORTING OFFICER(S)						
Shirer - L						
DATE						
5/25/05						
UNIT NUMBER						
557						
APPROVING OFFICER						
FOLLOW-UP INVESTIGATION						
☐ YES ☒ NO						
DATE						
05-25-05						
INITIALS						
1361						

UNAPPROVED REPORT

AGENCY I.D.
SCO320000LEXINGTON COUNTY SHERIFF'S OFFICE
INVESTIGATIVE REPORT

CASE NUMBER

05041582

203

☒ ORIGINAL
REPORT☐ SUPPLEMENTAL
REPORT☐ ADDITIONAL
VICTIMS☐ ADDITIONAL
STOLEN PROPERTY☐ STATUS
CHANGE☐ ADDITIONAL
OFFENDERS☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 2 of 2 PAGES.

ORIGINAL COMPLAINANT ☐ OR VICTIM ☐

NAME:

DATE OF BIRTH:

STREET ADDRESS:

RACE:

SEX:

CITY - STATE - ZIP:

AGE:

INCIDENT TYPE:

ORIGINAL SUSPECT:

NAME:

DATE OF BIRTH:

STREET ADDRESS:

RACE:

SEX:

CITY - STATE - ZIP:

AGE:

RECOVERED PROPERTY DOLLAR AMOUNT: \$ _____

CANCEL NCIC ENTRY: YES ☐ NO ☐

Subject stated he left Pelion and was going home to his address. The subject was out the way going to his address. There was alot of containers in the back of the truck along with the smell which is associated with manufacturing Meth. R/O explained this to the subject and he had no explanation for the smell. Deputy Fields was present at this time and R/O recieved permission to search from the subject. Deputies located a quantity of Meth and Marijuana in the front seat of the truck. The Meth was in a pill bottle and the Marijuana was in a baggie. There was also a scale located with the narcotics in the vehicle. Ther was a quantity of lithium batterys and pills used in the manufacture of Meth located in the cab of the truck. A 12 gauge shotgun was located behind the seat of the truck. Detective Hamilton responded to the scen and took possession of all items and narcotics associated with the charges of this incident. Detective hamilton will attach a supplemnet for the case on all items siezed and obtain warrants on the subject. The vehicle was towed by rotation. The subject was arrested, handcuffed, searched, double locked, and transported to lock up. The subjects charges are Trafficking Meth, Possession of a firearm during the commission of a Violent Crime, and simple possession of marijuana.

SUBJECT IDENTIFIED		SUBJECT LOCATED		☒ ACTIVE ☐ UNFOUNDED ☐ CLOSED ☐ REPORT		☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER		☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER			
YES ☒	NO ☐	YES ☒	NO ☐								
REASON FOR EXCEPTIONAL CLEARANCE:		1. ☐ OFFENDER DEATH		2. ☐ NO PROSECUTION		3. ☐ VICTIM WITNESS DECLINES COOPERATION		4. ☐ EXTRADITION DENIED		5. ☐ JUVENILE / NO ARREST	
REPORTING OFFICER	DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER					
Shirer - L	5/25/05	557	[Signature]		05-25-05	552					
REPORTING OFFICER	DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER					

COUNTY OF LEXINGTON

MARCH

, 19 97

Term

STATE

PROBATION ORDER

-VS-

Brian Shealy Jenkins

No. 97

- GS - 32

835

Defendant

OFFENSE PWID Marijuana 1st

The sentence of the court is that the defendant, Brian Shealy Jenkins, shall be in the custody of the South Carolina Department of Corrections for a term of 5 years. ~~XXXXXX~~ Upon the service of ~~XXXXXX~~ however, the balance of this sentence is hereby suspended and the defendant is hereby ordered to be placed on probation for a period of 2 years under the supervision of the South Carolina Department of Probation, Parole, and Pardon Services. During this period of probation, the Defendant shall be subject to the laws of South Carolina and the rules and orders of the Department and its agents. This suspended sentence may be revoked or modified at any time after the date of this order. The conditions of supervision are set forth below.

IT IS FURTHER ORDERED: that the Sheriff or other law enforcement officers who have the custody of the defendant is hereby ordered to deliver said defendant to the Probation Office of this county, or if the defendant is under bond, then such bond shall remain in full force until the defendant reports to the Probation Office. The conditions of probation begin (today/after service of the required portion of the suspended sentence). It is further ordered that the Clerk of Court file this order in his office and that he forthwith forward a certified copy to the County Office of the Department.

This 4th day of March, 19 97

Thomas H. Ryan

Presiding Judge

Lexington, S.C.

11th

Judicial Circuit

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any special conditions it deems proper; or it may extend your period of probation not to exceed five (5) years.

You shall be subject to arrest, upon order of the Court, or upon a warrant issued by the Probation Agent. At any time within the period of your probation, the Court may, upon proof of a violation resentence you and impose any sentence it might have imposed in the first instance.

This is to certify that I have read or have had read to me this Order of Probation and the Conditions set out herein. I agree to comply with these conditions during the period of my probation. I have received a copy of this court order.

Witnessed by:

Signed:

Probationer

Signed this 4th day of March, 19 97

Lexington

, S.C.

CONDITIONS ORDERED BY THE COURT:

Waive Costs and Assessments. (NOTE: Some costs cannot be waived.)

☒ Complete 50 (hours) Public Service Employment.

Intensive Supervision for an indeterminate period not to exceed 6 months, as determined by the Department.

Home Detention for an indeterminate period not to exceed 6 months, as determined by the Department.

Electronically Monitored Home Detention for an indeterminate period not to exceed 90 days, as determined by the Department.

☒ Participate and successfully complete an evaluation/referral for alcohol/drug abuse as determined by the Department.

Fine/Costs and Assessments payable as directed by the Court.

\$ _____ restitution payable to the Clerk of Court as directed by the Department or its agents.

Restitution Center.

Community Control Center.

Case to end upon Certification by the Clerk of Court that all monies have been paid (Sec. 24-21-550).

☒ Other: Vacate Bench Warrant. Random drug testing. Remain employed.

1 STATE OF SOUTH CAROLINA)
1 COUNTY OF LEXINGTON)

PW/D Marijuana 2nd
IN THE COURT OF GENERAL SESSIONS

IND# 97-GS-32-835

ARRAIGNMENT

A.W.# E614835

THE DEFENDANT

Brian Shealy Jenkins

IS PUT TO THE

BAR AND ARRAIGNED, AND UPON HIS/HER ARRAIGNMENT PLEADS GUILTY ~~AS CHARGED~~

ATTEST:

PW/D Marijuana 1st

Thomas H. Comerford
THOMAS H. COMERFORD, CLERK OF COURT
LEXINGTON COUNTY

Brian Jenkins

DEFENDANT

DATE SIGNED 3-3-97

... SENTENCE ...

THE DEFENDANT Brian Shealy Jenkins IS COMMITTED TO
THE STATE DEPT. OF CORRECTIONS/COUNTY FOR A TERM OF 5(Five) ~~MONTHS~~/YEARS
AND/OR TO PAY A FINE OF \$ _____; PROVIDED UPON THE SERVICE OF _____
MONTHS/YEARS AND/OR PAYMENT OF \$ _____ PLUS PAY/WAIVE COST AND
ASSESSMENTS AS APPLICABLE*, THE BALANCE IS SUSPENDED WITH PROBATION FOR
2 (Two) ~~MONTHS~~/YEARS.

RESTITUTION

FOR PHYSICAL INJURY \$ _____

YES / NO

PROPERTY DAMAGE \$ _____

TO BE PAID _____

VACATE BENCH WARRANT

TO THE CLERK OF COURT FOR _____ **

OTHER CONDITIONS random drug testing; counseling as rec.
Complete 50 hours of P.S.E. - remain employed

DATE 3/4/97

Thomas H. Comerford
PRESIDING JUDGE

*COST AND ASSESSMENTS

NON-WAIVABLE \$ _____

NOT WAIVED \$ _____

TOTAL \$ 0

Thomas H. Comerford
THOMAS H. COMERFORD, CLERK OF COURT
LEXINGTON COUNTY

**PAY TO VICTIM'S COMPENSATION FUND IF SUBROGATED.

all by a DATE 3-4-97

WHITE (CLERK OF COURT) YELLOW (JAIL) PINK (PROBATION) GOLD (DEFENDANT)

ARREST WARRANT
172 E-614835
6022 E614835
STATE OF SOUTH CAROLINA
County/ ☒ Municipality of
CITY OF WEST COLUMBIA

THE STATE
against

BRIAN SHEALY JENKINS
Address: 1204 DARALYNN DRIVE
LEXINGTON, S. C. 29072
Phone: M Race: W Height: 603 Weight: 195
DL State: SC DL #: 4190319
DOB: 12/31/74 Agency ORI #: SC0320500
Prosecuting Agency: WCPD
Prosecuting Officer: SANDERS, JACK DONALD
Offense: POSS MARIJUANA 2ND
Code/Ordinance Sec. Offense Code: 187

This warrant is CERTIFIED FOR SERVICE in the
County/ ☐ Municipality of
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge
Date: (L.S.)

RETURN
A copy of this arrest warrant was delivered to
defendant Brian Shealy Jenkins
on 5/30/96

Signature of Constable/Law Enforcement Officer
Sandra Dauling

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA
County/ ☒ Municipality of
CITY OF WEST COLUMBIA
Personally appeared before me the affiant J. D. SANDERS
being duly sworn deposes and says that defendant BRIAN SHEALY JENKINS
did within this county and state on 05/30/96 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of CITY OF WEST COLUMBIA)
in the following particulars:

DESCRIPTION OF OFFENSE:
POSSESSION OF MARIJUANA 2ND OFFENSE
I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
IN THAT ON OR ABOUT MAY 30, 1996 WHILE IN 1000 BLOCK OF SUNSET
BLVD IN THE CITY OF WEST COLUMBIA, COUNTY AND STATE AFORESAID,
ONE BRIAN SHEALY JENKINS WAS FOUND TO HAVE IN HIS POSSESSION
A QUANTITY OF MARIJUANA. PRIOR OFFENSE OCCURED ON 05-25-92; ALL
OF WHICH CONSTITUTES THE CRIME OF POSSESSION OF MARIJUANA 2ND
OFFENSE AND IS IN VIOLATION OF THE SOUTH CAROLINA CODE OF LAWS
OF 1976, AS AMENDED. THE FOREGOING IS BASED ON AN INVESTIGATION
BY THE WEST COLUMBIA POLICE DEPARTMENT.

Sworn to and subscribed before me on 05/30/96
Signature of Affiant
Affiant's Address 1053 CENTER STREET
WEST COLUMBIA, SC 29169
Signature of Issuing Judge (L.S.)
Affiant's Telephone 794-0721

STATE OF SOUTH CAROLINA
County/ ☒ Municipality of
CITY OF WEST COLUMBIA
ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on 05/30/96 defendant BRIAN SHEALY JENKINS
did violate the criminal laws of the State of South Carolina (or ordinance of
County/ ☒ Municipality of CITY OF WEST COLUMBIA) as set forth below:

DESCRIPTION OF OFFENSE:
POSSESSION OF MARIJUANA 2ND OFFENSE
Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution, or as soon thereafter as is practicable.

Judge's Address 1053 CENTER STREET
WEST COLUMBIA SC 29169
Judge's Telephone 794-0721
Signature of Issuing Judge (L.S.)
Judge Code: Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Christopher W. Ashe,
S.C.D.C. No. 318402,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Case No. 2009-CP-32-1229

ORDER OF DISMISSAL

BETH A. CARPIS
CLERK OF COURT
LEXINGTON, SC

2014 JUN 17 A 11:36

FILED

This matter comes before the Court pursuant to an application for post conviction relief (PCR) filed March 23, 2009. Respondent made its Return on December 16, 2009. An evidentiary hearing into the matter was convened on May 20, 2010 at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by C. Rauch Wise, Esquire. The Respondent was represented by A. West Lee, Esquire, of the South Carolina Attorney General's Office. Applicant, trial counsel, and Emily Homer testified at the hearing.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the July 2006 term of the Lexington County Grand Jury for Unlawful Possession of Pseudoephedrine—200 g or more, but less than 400 g (2006-GS-32-2155), Possession of Crank (2006-GS-32-2156), and Manufacturing Methamphetamine (2006-GS-32-2157). He was represented by Robert T. Williams, Esquire. On October 25, 2006, the Applicant underwent trial and was

1.616



found guilty as charged. He was sentenced by the Honorable R. Farrell Cothran, Jr., to confinement for a period of twenty-five (25) years for the unlawful possession of pseudoephedrine, and concurrent terms of three (3) years for the possession of crank and fifteen (15) years for manufacturing methamphetamine. A timely appeal was filed on the Applicant's behalf, and an appeal was perfected. The South Carolina Supreme Court subsequently affirmed the Applicant's conviction in a Memorandum Opinion filed March 24, 2008 (No. 2008-MO-015).

At the PCR hearing, Applicant moved forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. failure to investigate the prior record and background of Brian Jenkins.
 - b. failure to make a double jeopardy objection to the charges of possession of pseudoephedrine and manufacturing methamphetamine.
 - c. failure to object to testimony of Officer Thomas Hamilton's improper opinion testimony.
 - d. failure to object to the method employed in determining the weight of the pseudoephedrine.
 - e. failure to object to the jury charge that knowledge and possession may be inferred when a substance is found on the property under the defendant's control.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

2 of 10
S.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel, exhibits, and briefs submitted. Pursuant to S.C. Code Ann. §17-27-80

3 • 610
O

(2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

I.

A.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to investigate the background and arrest record of Brian Jenkins for impeachment purposes. This Court finds trial counsel's testimony regarding the allegation credible. Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986);

At the PCR hearing, trial counsel testified he investigated the matter and was aware of Jenkins' arrest record. Trial counsel, through his reasonable investigation, learned Jenkins' owned the property in question and had previous dealings with law enforcement concerning methamphetamine. 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. (Trial Tr. 70-3). This Court finds trial counsel's strategy on the matter reasonable and effective. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) ("Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance."). Therefore, this allegation is denied and dismissed.

B.

This Court finds Applicant failed to prove trial counsel was ineffective for failing to make a double jeopardy objection to the charges of possession of pseudoephedrine and manufacturing methamphetamine. Trial counsel testified he did not find the objection had merit. This Court agrees

4.610
Or.

with trial counsel. "Where an 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." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180 (1932). South Carolina Code §44-53-375(E)(1)(d) states in relevant parts that it is unlawful to possess any product that contains one of a variety of substances or their combinations in excess of twelve grams. A conviction requires proof that a defendant was essentially operating a meth lab. Pseudoephedrine is one of numerous ingredients that the final methamphetamine substance is derived from. A conviction for manufacturing does not necessitate proof of a particular amount of pseudoephedrine. While a conviction for possession of pseudoephedrine in this instance necessitates proof a defendant possessed at least two-hundred grams of pseudoephedrine.

Furthermore, this claim lacks merit due to the posture of this case. Applicant failed to enunciate case law directly on point or applicable that would have substantiated a double jeopardy claim at trial. This Court finds 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 on such an argument at trial. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). Therefore, this allegation is denied and dismissed.

C.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to object to testimony of Officer Thomas Hamilton's improper opinion testimony. An "opinion may be offered on ultimate issue only where witness is otherwise qualified." State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001). Hamilton was properly qualified as an expert in the

5 10
0

detection of meth, production of meth, dismantling of meth labs, and in handling hazardous by-products of meth labs. (Trial Tr. 210). Hamilton testified he had eight years of experience investigating narcotics crime (Trial Tr. 207). Furthermore, Hamilton testified to investigating over a hundred meth labs in his career. Hamilton also testified he received extensive local and federal training in the clandestine production of drugs. (Trial 208). Hamilton obtained a specialized certification from the DEA in clandestine labs. Trial counsel effectively challenged the scope of Hamilton's expert qualification. The trial judge agreed and did not qualify Hamilton as an expert on the effects of hazardous chemicals on the body. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (holding "[t]he admission of expert testimony is within the discretion of the trial court."). This Court finds there was no showing trial counsel was deficient for not objecting to sound testimony. See Gooding v. St. Francis Hosp., 326 S.C. 248, 253, 487 S.E.2d 596, 598 (Ct. App. 1995) ("Qualification depends on the particular witness' reference to the subject."). Therefore, this allegation is denied and dismissed.

D.

This Court finds Applicant has failed to meet his burden to prove counsel was ineffective for failing to object to the method employed in determining the weight of the pseudoephedrine. This Court finds trial counsel and Emily Homer's testimony on the issue credible. "An attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). At the PCR, Emily Homer of the Lexington County Sheriff's Dept. testified she performed a qualitative analysis of the drugs in this case and determined the mass percentages of the difference substances in unknown amounts. Homer testified the drugs she examined were in powder form. Homer did not conduct a quantitative analysis

6 610
O

to determine the amount of pure pseudoephedrine contained in the drugs. Homer testified that to her knowledge, no one in this jurisdiction is certified by SLED to conduct a quantitative analysis. Trial counsel additionally testified that to his knowledge, law enforcement did not test for amount of the pure substance. Trial counsel further stated that if Applicant's premise held true, no one in South Carolina could ever be convicted of pseudoephedrine based on weight. This Court finds Applicant's legal claim novel and unpersuasive in this Court's deficiency analysis.

Furthermore, the record shows trial counsel thoroughly competent on how he approached the issue at trial. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence). Trial counsel vigorously cross-examined Homer at trial. Trial counsel attached the chain of custody, the presumptive analysis, the confirmatory analysis, and the GCMS (gas chromatograph mass spectrometer) utilized in substance identification. At trial, trial counsel argued the State's proof of guilt only consisted of evidence showing the presence and not amount of pseudoephedrine. Therefore, because case law firmly dictates trial counsel is under no duty to be clairvoyant to unascertainable legal theories not established by precedent, this Court denies and dismisses this allegation.

E.

This Court finds Applicant failed to prove trial counsel was ineffective for not objecting to the jury charge that knowledge and possession may be inferred when a substance is found on the property under the defendant's control. (Trial Tr. 427, lines 5-25). This Court finds the charge was proper. "If a charge is substantially correct and covers the law there is no need for reversal." Lowry

7-6-16


v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State predicate facts, thereby relieving the State's burden of proof on an element of the offense. Id. This Court finds the instruction regarding inference was permissive. 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. Furthermore, this Court finds the jury was properly instructed on mere presence. Therefore, this allegation is denied and dismissed.

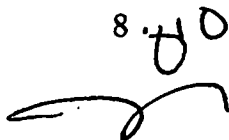
Thus, Applicant failed to meet his burden of proof trial counsel was ineffective under the first prong of the Strickland test – counsel failed to render reasonably effective assistance under prevailing professional norms.

II.

This Court finds Applicant also failed the second prong of Strickland – that he was prejudiced by trial performance. The record exhibits convincing evidence of Applicant's guilt. At trial, the State presented testimony regarding the discovery of materials used in the manufacture of methamphetamine found at the scene of the offense. (Trial Tr. p.86-9). Furthermore, Applicant's vehicle was parked at the scene of the offense. (Trial Tr. p.62; p.123). Additionally, Applicant fled from the scene. (Trial Tr. p.69).

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or

8. 10


implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

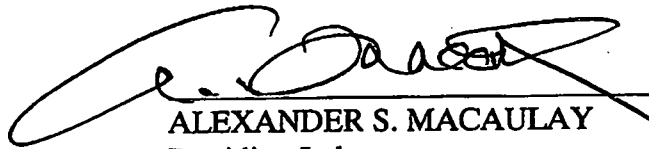
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 2nd day of June, 2014.

9.4.10

ALEXANDER S. MACAULAY
Presiding Judge
Eleventh Judicial Circuit

Walhalla, South Carolina



FILED

2014 JUN 17 A 11:36

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

ALAN WILSON
ATTORNEY GENERAL

June 16, 2014

The Honorable Beth Carrigg
Lexington County Clerk of Court
305 E. Main St, Suite 146
Lexington, SC 29072

Re: Christopher W. Ashe v. State of South Carolina
2009-CP-32-1229

Dear Mrs. Carrigg:

Enclosed please find the original **Order of Dismissal** signed by Judge Alexander Macaulay, for filing in your office. Please serve on all parties and return a clocked copy to our office.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosure

cc: C. Rauch Wise

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS**
Christopher W Ashe

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3201229**

State South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

6/23/2014

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on 6/17/2014, and a copy mailed first class or placed in the appropriate attorney's box on 6/23/2014, to attorneys of record or to parties (when appearing pro se) as follows:

C. Rauch Wise
Attorney at Law
305 Main St.
Greenwood, SC 29646

ATTORNEY(S) FOR THE PLAINTIFF(S)

Walt Whitmire
Assistant Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-32-1229

Christopher W. Ashe, ... Appellant,

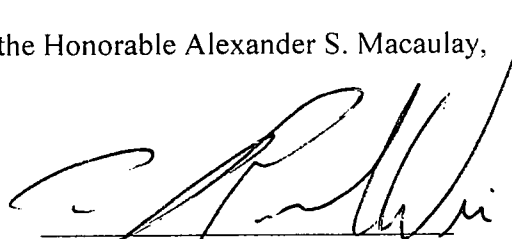
vs.

The State Respondent.

NOTICE OF APPEAL

Christopher W. Ashe, appeals the order of the Honorable Alexander S. Macaulay,
dated June 2, 2014, and filed on June 17, 2014.

June 26th, 2014



C. Rauch Wise
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellant

Other Counsel of Record:
J. Walt Whitmire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970