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THE STATE OF SOUTH CAROLINA

FEB 18 2015

In the Supreme Court

**S.C. SUPREME COURT**

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Honorable Alexander S. Macaulay, PCR Judge

Honorable R. Ferrell Cothran, Trial Judge

Case No. 2014-001407

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

vs.

The State ..... Respondent.

REPLY TO RETURN TO PETITION  
FOR WRIT OF CERTIORARI

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## Argument

### Question I

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

When an officer is permitted without objection to testify that the defendant, not a third party, has dominion and control over a methamphetamine lab, such a decision simply cannot be a strategy decision as to third party guilt. Trial counsel testified he did not see anything wrong with the question.<sup>1</sup> He testified on direct that such a statement actually helped him. His comment was “That actually kind of helps me if it’s not my client standing there. That means it’s the other guy.” Rec. on App. at 49, l 25 to 50, ll 1-2. But the testimony was not that some other guy was up there. Jimmy Gleaton testified he saw somebody and that person came down and talked to them. Rec. On App. at 59, ll 23-25 to 60, ll 1-2; 62, ll 3-24. Chris Bailey testified that he also saw the petitioner at the upstairs window. Rec. on App. at 107, ll 8-14. Mr. Hamilton never saw anyone at the second story window. He would have been in no position to give testimony as to how close anyone was to the methamphetamine lab on the second floor.

While Officer Hamilton had been qualified as an expert in methamphetamine labs, he was not an expert in whether one has dominion and control over a methamphetamine lab. No person could be qualified as an expert in that area. The Respondent has put forth no conceivable

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<sup>1</sup> Arguably the question is leading, but that was not raised as a basis for granting post conviction relief.

trial strategy to permit an officer who was not present when Mr. Ashe was allegedly seen to testify that Mr. Ashe would have had dominion and control over the methamphetamine lab. Nor has the Respondent given any explanation as to how such “testimony benefitted the defense’s presentation of its case.” Br. of Resp. at 6.

When an officer is permitted to in essence tell the jury that Mr. Ashe is guilty, Mr. Ashe has been prejudiced by such testimony. In *State v. Farr-Lenzini*, 93 Wask. App. 453, 970 P.2d 313 (1999) the Court of Appeals for the State of Washington found that the defendant was prejudiced when the officer who was pursuing the defendant was permitted to testify “It exhibited to me that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop.” *Id.* at 458, 970 P.2d at 317. The same principle applies in this case. The officer should not have been permitted to express the opinion that Mr. Ashe had dominion and control over the methamphetamine lab.

As noted in the opening brief, simply because a person may be qualified as an expert, they are not allowed to testify to their opinion if it is beyond their expertise. Here Officer Hamilton may have been an expert on the operation of a methamphetamine lab, but he was hardly an expert on when one has dominion and control over a methamphetamine lab. *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001)(“An officer’s improper opinion which goes to the heart of the case is not harmless.”)

## Question II

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

In stating that Mr. Ashe should not prevail on this issue the State argues “It is not ineffective to fail to request an instruction contrary to the law.” Br. of Resp. at 7. But the state fails to recognize that Mr. Ashe’s argument is not that his trial counsel failed to request a certain charge. The error was not objecting to an improper charge that was given. In its brief the State has failed to cite a single case that says the charge given in this case was proper. Nor has the state shown that the charge was proper at the time and deemed to be ineffective later.

The State has ignored the argument of Mr. Ashe that the charge to the jury was in fact a charge on the facts in violation Article V, § 21 of the Constitution of the State of South Carolina. The State has not explained how this case is not controlled by the law established in *Yarborough v. Southern Ry*, 78 S.C. 103, 58 S.E. 936 (1907). That case establishes the principle that when a trial court charges an inference, such a charge is a charge on the facts in violation of our state constitution. As trial counsel in this case failed to object to an incorrect statement of the law, the Post Conviction Relief judge erred in holding trial counsel was not ineffective. At the time of the trial below, this had been the law in South Carolina for ninety-nine years.

### **Question III**

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

The admitted trial strategy of trial counsel was third party guilt. App. at 53, ll 16-18. The only other person who could have been guilty was Brian Jenkins. The failure of trial counsel to look into the criminal history of the person whose guilt the strategy was to implicate, is simply ineffective assistance of counsel. When trial counsel stated that his plan was to show that the

officers did an inadequate investigation, such a plan is benefitted by a check of the background of Brian Jenkins to point out the officers did not even check out Mr. Jenkins background.

The Post Conviction Relief judge found that trial counsel was aware of the background of Mr. Jenkins. App. at 669. The Post Conviction Relief judge, however, ignored the facts that trial counsel could have obtained concerning Mr. Jenkins had counsel conducted a simple background check. The Post Conviction Relief judge did not discuss the criminal background of Mr. Jenkins that trial counsel could have brought out. The State in its brief has not stated what the plan of trial counsel was to justify ignoring the criminal history of Mr. Jenkins. To argue that trial counsel made a strategic decision implies that one knows what the strategy was. Under no strategy could failure to obtain the background of Mr. Jenkins be justified. The finding by the Post Conviction Relief judge on this issue was without evidence to support it.

#### **Question IV**

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

If the legislature is creative enough to name different elements in two crimes arising out of the same facts, can the legislature circumvent the double jeopardy protections given to people under both the state and federal constitutions? If the answer is yes, then the double jeopardy clause provides no real protection for citizens. For example, would an acquittal on a charge of homicide by child abuse permit a subsequent conviction for murder because each contain different elements? Would an acquittal of homicide by child abuse permit a conviction for unlawful conduct toward a

child arising out of the same conduct? If the double jeopardy provisions of the state and federal constitutions are to afford any meaningful protections, the answer has to be no.

The State in its brief seems to take the exact opposite position. Apparently the State believes as long as a “fact” is called an “element” the legislature can willfully violate double jeopardy. The fact of this case is the same pseudoephedrine that was used to convict Mr. Ashe of manufacturing methamphetamine is the same pseudoephedrine that was used to convict him of possessing over 200 grams of pseudoephedrine. That cannot be denied. The state contends that simply because one charge contained an allegation of possessing over 200 grams of pseudoephedrine, then double jeopardy is not violated.

The State has misinterpreted *Rutledge v. United States*, 517 U.S. 292 (1995). The charge of manufacturing methamphetamine under the facts of this case required the state to prove the possession of pseudoephedrine. The amount of pseudoephedrine the state proved in the manufacturing crime was greater than 200 grams. The State then elected to use the same 200 grams of pseudoephedrine to prove the crime of possessing more than 200 grams. The same fact was used to prove both crimes. This is exactly what *Blockburger v. United States*, 284 U.S. 299 (1932) prohibits. The possession of pseudoephedrine was required in both cases. Simply because the amount may have been greater than 200 grams should be of no importance. Under the State’s theory double jeopardy would apply if the amount of pseudoephedrine had been smaller. The protections afforded by double jeopardy should not be so illusory.

#### **Question V**

**Did the Post Conviction Relief Judge err in holding trial counsel was not ineffective for his failure to object to the amount of pseudoephedrine as including the**

**substances with which it was mixed and not the pure amount of pseudoephedrine?**

The State has failed to recognize that what Mr. Ashe is urging on this issue is a simple question of statutory interpretation. The question is not has any agency ever tested pseudoephedrine for its purity. The question is does the statute require the state to prove the amount of pure pseudoephedrine?

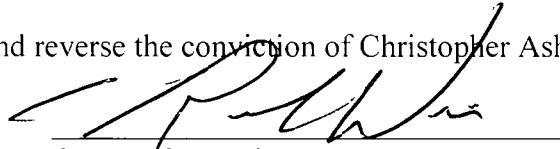
South Carolina Code § 44-53-370 provides “The weight of any controlled substance in this subsection includes the substance in pure form or any compound or mixture of the substance.” Without that provision, the weights of the drugs listed in the statute would be the pure substance. This provision permits the prosecution based upon the weight of the illegal substance including the “cut.” This provision is limited to “controlled substances” as defined by the code. As noted in the opening brief, pseudoephedrine is not a controlled substance. The State apparently does not argue that it is. As pseudoephedrine is not a controlled substance, the section cited above which permits the inclusion of “any compound or mixture of the substance” does not apply. Thus, only the pure amount of pseudoephedrine is to be weighed.

The fact that SLED does not perform quantitative analysis of substances that it tests does not change the meaning of the statute. The State contends that the analysis by Mr. Ashe is “novel” or seeking “to change the law as it stands in South Carolina.” Br. of Resp. at 14. Neither is correct. Mr. Ashe is simply asking the lower court to interpret the statute as written and to give to the wording of the statute its plain meaning. As trial counsel failed to object to the weight of the pseudoephedrine as including substances other than pure pseudoephedrine, counsel was ineffective and the Post Conviction Relief judge erred in failing to so hold.

**CONCLUSION**

For the forgoing reasons and the reasons set forth in the opening brief, this Court should grant the Petition for Writ of Certiorari and reverse the conviction of Christopher Ashe.

February 17<sup>th</sup>, 2015



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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on February 12, 2015, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Reply to Return to Petition for Writ of Certiorari in the above case addressed to J. Walt Whitmire, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

*Sandy Trayhnam*

before me this 12 day

of February, 2015.

*Mary Jane Harter* (L.S.)  
Notary Public for South Carolina

My Commission expires: 11/30/15

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February 12, 2015

Daniel Shearouse, Clerk  
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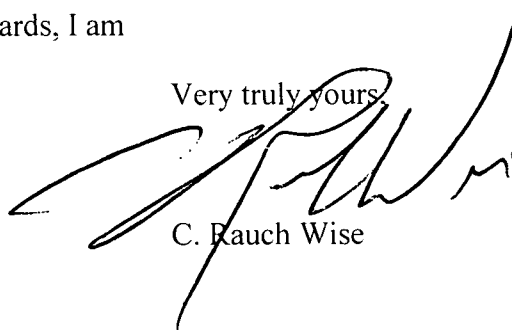
Re: Christopher W. Ashe vs. The State

Dear Mr. Shearouse:

Enclosed herewith is the original and six copies of the Reply to Return to Petition for Writ of Certiorari concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', written over the typed name below.

C. Rauch Wise

CRW/mjh  
cc: J. Walt Whitmire

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