THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2014-001407
Lower Court Case No. 2009-CP-32-012229

Christopher W. Ashe, ... Petitioner

vs.

State of South Carolina ..... Respondent.

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Rules of Appellate Procedure, Christopher W. Ashe, the Petitioner above named, hereby requests that this Court rehear the dismissal of his Post Conviction Relief Petition appeal based upon the following:

1. Christopher W. Ashe has raised a substantial and unsettled question as to whether a judge may in a criminal case charge a jury that they may infer possession of drugs from having dominion and control over the property where the drugs are found. This Court has held on several occasions that telling a jury they may infer a fact from the proof of other facts is a

charge on the facts in violation of our state constitution. Presently such a provision is found in Article V, § 21 of the Constitution of the State of South Carolina.

In *Yarborough v. Southern Ry*, 78 S.C. 103, 58 S.E. 936 (1907) the South Carolina Supreme Court discussed the issue of the trial judge giving a charge to a jury which permits them to infer a certain fact. The Court held "The circuit judge laid down in the charge the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the facts that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts." *Id.* at ___, 58 S.E. at 937. The principle in that case were re-affirmed in *Finch v. Atlanta & Air Line Ry.*, 87 S.C. 190, 69 S.E. 208 (1910). In *Finch* this Court said "The Constitution does not allow the presiding judge to state the evidence, much less does it allow him to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then they may infer that the defendant was negligent." *Id.* At ___, 69 S.E. at 209.

Unless the prohibition against commenting on the facts is to have one meaning in a civil trial and another in a criminal trial this Court should grant the Petition for Writ of Certiorari of the Petitioner and clarify the law in this area. This issue will come before this Court in other cases. On the website for the Supreme Court of the State of South Carolina the recommended jury charges in criminal cases contain no less than three occasions that the suggested charge uses an inference in a manner that violates the two civil cases cites above. http://www.judicial.state.sc.us/juryCharges/GS%20InstructionsJune2013.pdf at 137,

142, and 147 (visited April 13, 2015).

In the suggested jury charges reference is made to *State v. Adams,* 291 S.C. 132, 352 S.E.2d 483 (1987) for the proposition that a trial judge may charge the jury they may infer possession if the property is under the dominion and control of the defendant. In *Adams* this Court said "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." *Id.* at 135, 352 S.E.2d at 486. In support of this statement this Court cited *State v. Hudson,* 277 S.C. 200, 284 S.E.2d 773 (1981). But *Hudson* does not support such a charge. All *Hudson* holds is that if a defendant is exercising dominion and control over the premises then the case should be submitted to the jury. This Court said "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 which may be sufficient to carry the case to the jury." *Id.* at 203, 284 S.E.2d at 775. This Court in *Hudson* made no reference to a jury charge. In addition, for a judge to tell the jury they may infer what the *Hudson* court said they may infer on their own, is a charge on the facts in violation of our constitution. The charge places emphasis on one particular fact to the exclusion of other facts. For the jury to reach such a conclusion on their own without an instruction from judge is certainly permissible. To give the state the edge by telling, and thus encouraging, the jury they may make such an inference, is not permissible.

In addition in *Adams* and *Hudson* the drugs were found on the property either owned or the residence of the defendant. In the present case, the Petitioner was merely on the premises as a guest of a third party. To tell a jury they may infer knowledge and possession from the fact that the Petitioner was there upon another's property is not only a charge on the facts but

a misleading charge on the facts.

2. The error state above was compounded when trial counsel failed to object to a statement by Officer Thomas Hamilton that the Petitioner being near the drugs was sufficient to establish dominion and control over the drugs. With an un-objected to leading question, the prosecuting attorney asked the following:

> Q. The only thing I'd like to ask you, if somebody was standing at this window, would they have dominion and control over the meth lab as well as the drugs that were found in the duffel bag?
> A. Yes, sir. They were in close proximity to that window sir.
> App. at 300, ll 3-8.

This is the precise question the jury was to answer. This Court has held in *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) that an officer is not permitted to testify as to the ultimate issue to be decided by the jury. But that is what was done in this case. When that statement is couple with the charge by the trial judge as to an inference, the conviction of the Petitioner was assured.

3. The Petitioner was sentenced to 25 years in prison based upon the weight of the pseudoephedrine including the inactive ingredients placed into the drug by the manufacturer. With the number of manufacturing methamphetamine cases being made in our state, the question of whether the weight of the pseudoephedrine should include the inert ingredients placed into it by the manufacturer will continue to be presented to the courts. The question needs to be answered by this Court.

Pseudoephedrine is not a controlled substance. The substance is not defined as a controlled substance under S. C. Code § 44-53-110. Under S.C. Code § 44-53-370 only a controlled substance is to be weighed with whatever inert ingredients are mixed with the

controlled substance. The testimony at the post conviction relief hearing establishes that the Petitioner was given a 25 year sentence based upon the total weight including the inert ingredients. App. at 571, ll 12-7. This was contrary to the plain meaning of the statute. As this issue, and the resulting error, is subject is being repeated in the courts of our state, this Court should grant this petition for rehearing and clarify this issue by holding that the weight of pseudoephedrine is the amount of the pure substance and is not to include the inert ingredients.

For the foregoing reasons the Petitioner requests that this Court rehear this matter and address issues the substantial issues that are of importance not only to the Petitioner but to the criminal justice system in our state. Without a definitive ruling on on these issues, this Court will only be postponing the inevitable.

April 14, 2015

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AFFIDAVIT

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on April 14, 2015, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing in the above case addressed to J. Walt Whitmire, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

Sandy Traynham

SWORN to and Subscribed
before me this 14 day
of April, 2015.

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

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April 14, 2015

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: State vs. Christopher Ashe

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Petition for Rehearing together with the original Affidavit of Service regarding the above matter.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc J. Walt Whitmire