THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions

The Honorable Donald Hocker, Circuit Court Judge
Appellate Case No.2015-002206

The State of South Carolina, ... Respondent,

vs

Timothy Artez Pulley, ... Appellant.

INITIAL BRIEF OF APPELLANT

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Statement of the Case

Procedural History

Timothy Pulley was arrested on June 23, 2013 and charged with trafficking crack cocaine. He was indicted by the Laurens County Grand Jury on the charge. He was initially tried before the Honorable Donald B. Hocker and a jury on July 29, 2015. This trial resulted in a mistrial due to the jury being unable to reach a verdict.

He was tried a second time in a trial before the Honorable Donald B. Hocker and a jury beginning on October 6, 2016. He was sentenced to 25 years in prison and ordered to pay a fine of $50,000.

Mr. Pulley filed his Notice of Intent to Appeal on October __, 2015.

Factual History

The police department for the City of Laurens pulled the automobile Mr. Pulley was driving in the early morning house of June 23, 2013. He was initially arrested for driving under suspension and resisting arrest. Rec. on App. at ____. The automobile he was driving was searched by the officers and the found crack cocaine in a yellow plastic bag on the back seat floorboard behind the driver's seat. The crack cocaine weighed 16.5 grams. Rec. on App. at 196, ll 7-9.

In addition, a small amount of marijuana was found on the person of Mr. Pulley. Whether the marijuana was found before or after the search of the automobile is a matter of dispute. The trial judge found that the marijuana was found before the search of the automobile. Rec. on App. at 54, ll 2-6.

The suppression hearing held at the first trial was incorporated into the second

trial as Judge Hocker had presided at both trials. Rec. on App. at 18, l 19 to 19, l 15.

Argument

Question I

Did the trial court err in charging the jury that they may infer Timothy Pulley had dominion and control of the drugs found on the back floorboard of the automobile he was driving when the automobile was the property of his girlfriend and he was driving with her permission?

Over the objection of Timothy Pulley, the trial judge instructed the jury that "The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." Rec. on App. at 277, l 23 to 278, l 1. Such a charge is factually not correct and is not supported in the law of our state. In addition, the charge is a violation of Article V, § 21 of the Constitution of the State of South Carolina.

Such an Inference Charge is not Supported by the Prior Decisions in South Carolina

The historical basis for so instructing a jury is simply not supported by a logical reading of the prior cases in South Carolina. The basis for such a charge is generally attributed to *State v. Adams,* 291 S.C. 132, 352 S.E.2d 483 (1987). In *Adams* the Supreme 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 the 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. The 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. The Court in *Hudson* made no reference to a jury charge. For the jury to reach such a conclusion on their own without an instruction from the 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, Mr. Pulley was merely the driver of an automobile owned by his girlfriend. To tell a jury they may infer knowledge and possession from the fact that Mr. Pulley was the driver of an automobile owned by a third party is a misleading charge on the facts. What this charge tells the jury is that in a close case, they may use the fact that the defendant was driving an automobile owned by a third party as evidence of his knowledge and possession of the drugs and therefore his guilt. Few people who drive automobiles owned by a third party know of the contents of those automobiles.

In *Leary v. United States*, 385 U.S. 6 (1969) the United States Supreme Court addressed the question of whether congress could constitutionally pass a statute that established a presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana. In rejecting such a presumption the Court held "Such information is 'not within specialized judicial competence or completely common place.'" *Id.* at 38. Likewise, under the facts of this case, it is not commonplace to infer knowledge and possession from the fact that a person was driving an automobile they did not own. As there is no basis in fact to support such an inference,

the charge also violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

To what use did the jury use the inference? While this question obviously cannot be answered with certainty, the Court can only assume the jury followed the judge's instructions. That being true, the reasonable assumption is that the jury used the inference if the case were close simply because that is what they were instructed to do. The State in its closing argument certainly encouraged the jury to use the inference the judge would charge to the jury. Rec. on App. at 253, ll 19-21. The jury would be less likely to use the inference if the evidence against a defendant is very strong. When the jury decides that in a close case, they will use the inference to persuade them the case has been proven beyond a reasonable doubt, then the burden of proof required of the State has been lessened. This would violate the principles established in *In Re Winship*, 397U.S. 358 (1970). When the only means the State has to win a case is to tell the jury they may infer guilt from the proof of certain facts, the State has not proven its case beyond a reasonable doubt. Arguably when two equally plausible conclusions can be drawn from the same set of facts, the government has not met its burden of eliminating other reasonable hypothesis and therefore has not met its burden of proof.

In discussing the use of presumptions and inferences, the United States Supreme Court has said "But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." *Tot v. United States*, 319 U.S. 463,

468 (1943). Common knowledge and experience would require one to conclude that few if any are fully aware of the contents of an automobile they may borrow from a friend or even rent. This is even more so when the item in controversy is concealed in a bag on the back floorboard of an automobile. If the legislature may not create such a rule, then neither may the courts.

The Supreme Court of Washington has also discussed the question of permissive inference in the context of an inference of intent to steal from breaking into a residence. The Court said "Because it was not the sole and sufficient proof of intent in these consolidated cases, the inference is constitutional if intent to commit a crime more likely than not flows from unlawful entry." *State v. Brunson*, 128 Wash.2d 98, 112, 905 P.2d 346, 353 (1995). Here the only proof of any intent to posses the drugs is the fact that the drugs were found in the automobile being driven by Mr. Pulley. And again certainly knowledge of the contents of a borrowed automobile is not a fact that more likely than not flows from such possession.

Under facts similar to this case, some states even hold that the facts would not even be sufficient to take the case to the jury. In *Woolridge v. Texas*, 514 S.W.2d 257 (Ct. Crim. App. 1974) the Texas court reversed the conviction of the defendant when the testimony established that he was not the owner of the automobile, he had been driving it for less than five hours, and the marijuana was not readily visible. In the *Woolridge* case, as in this one, the girlfriend who owned the automobile testified she did not put the marijuana in the automobile. In reversing the case the Court said "In this case, the record does not contain evidence linking the appellant to the marijuana found in the car he had

borrowed. The marijuana was not discovered in plain view." *Id.* at 259. In this case no evidence links Mr. Pulley with the drugs and the drugs were not discovered in plain view. If the evidence is not sufficient to convict in Texas, there is certainly no basis to conclude that the jury should be told to infer Mr. Pulley had knowledge of the drugs and the intent to exercise dominion and control over the drugs simply because they were in the automobile he was driving and did not own.

In *LaVerne v. State*, 559 S.W.2d 282 (Mo. App. S.D. 1990) the defendant owned the automobile in question. Drugs were found in a box in the trunk of the automobile. There was also testimony that other people had also driven the automobile in the past. At the time of the search, the defendant had been released from an overnight stay at the local jail. The Missouri Court of Appeals reversed the conviction holding the facts were not sufficient to sustain the conviction. The Court said "The only evidence that implicates the defendant was the fact of defendant's ownership of the vehicle. Missouri does not recognize the presumption that the owner is charged with knowledge of everything found in his or her vehicle." *Id.* at 285. In Missouri even ownership does not give rise to any presumption or inference that the defendant has knowledge, dominion and control over the drugs found.

The Mississippi Supreme Court, and several others, have said "When the State's case is based entirely upon circumstantial evidence the State is required to prove the defendant guilty not only beyond a reasonable doubt but to the exclusion of every reasonable hypothesis consistent with innocence." *Cotton v. State*, 144 So.3d 137, 140 (Miss.2014). This obligation cannot be met by telling a jury they may infer one version

of the facts over another. *See, also, Owen v. State,* 432 So.2d 579, 581 (Fla.App. 2 Dist.,1983) ("It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must also eliminate all reasonable hypotheses of innocence."); *People v. Wolter*, 396 N.E.2d 1102, 1106, 33 Ill.Dec. 378, 382, 78 Ill.App.3d 32, 38 (Ill.App. 1 Dist., 1979) ("The undoubted rule in such case is that, before a conviction can properly be had upon purely circumstantial evidence, the guilt of the accused must be so thoroughly established as to exclude every reasonable hypothesis of his innocence."); *Davis v. State*, 90 So.2d 629, 632 (Fla. 1956) (" Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence."); *Clemmer v. Commonwealth*, 208 Va. 661, 666, 159 S.E.2d 664, 667(1968) ("The Commonwealth's evidence must exclude every reasonable hypothesis of innocence."). South Carolina does not apply such a high standard of review on appeal. *State v. Larmand*, 415 S.C. 23, 780 S.2d 892 (2015). This does not mean that this Court should approve a charge to the jury that instructs them to give preference to the State's theory of the case.

No doubt eliminating a charge that the jury may infer knowledge, dominion and control of the drugs from control of the automobile where the drugs are found will result in some guilty individuals not being convicted. But it will also assure that some innocent defendants will not be convicted. As was said by the Pennsylvania Supreme Court:

> It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would

> also make it easier to convict the innocent. If such a trade-off is acceptable, why not suspend the hearsay rule entirely when the Commonwealth introduces evidence in a criminal case? More defendants, guilty and innocent alike, would undoubtedly be convicted. The same result would obtain if we allowed the Commonwealth to introduce coerced confessions.
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> However, such a trade-off is not acceptable. It is a fundamental precept of law in Pennsylvania that one charged with crime, be it murder, child abuse, or keeping a public nuisance, comes to trial clothed in the presumption of innocence. If we bear this in mind, we will be less tempted to distort the law of evidence in favor of the Commonwealth in order to increase the conviction rate. The Commonwealth should be bound by the same rules of evidence, including the hearsay rule, as other litigants. *Commonwealth v. Bujanowski,* 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992).

Charging the Jury They may Infer Knowledge, Dominion and Control of Drugs Found in the Automobile Under the Control of Timothy Pulley is a Charge on the Facts in Violation of Article V, § 21 of the Constitution of the State of South Carolina.

Article V, § 21 of the Constitution of the State of South Carolina provides "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision simply means that judges may not tell a jury to place emphasis on one fact over another. To do so is to instruct the jury as to the importance of certain facts to the exclusion of others. " In interpreting this provision our Supreme Court has held that a trial court may not charge a jury that they can infer acceptance by the railroad of a package left on their loading dock for a period of time. As the Court said:

> The circuit judge laid down in the charge of the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact 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.

Yarborough v. Southern Ry., 78 S.C. 103, ___, 58 S.E. 936, 937 (1907). The Court held that charging such an inference is a comment upon the facts in violation of the State constitution.

In *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907) the South Carolina Supreme Court held that instructing a jury they may infer negligence from particular facts was a comment on the facts in violation of our State constitution. The Court said:

> What inferences may be drawn from the circumstances appearing on the trial, from the direct evidence, from the manner of the witnesses, the introduction of evidence, or the failure to introduce it-all are for the jury. 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.

In this case the trial judge singled out a particular fact - who was driving the automobile - and instructed the jury they may infer he was the possessor of the drugs. Such a charge is a charge on the facts in violation of our constitution. The charge takes one particular fact, and heightens it above all the others. What if the drugs were found under the floor mat on the passenger side where a passenger was sitting. Could the trial judge have charged that the jury may infer that drugs found under the floor mat are in the possession of the person sitting on that side of the automobile? That charge would actually make more factual sense than saying a person driving an automobile knows what is in the automobile. This is especially true when the person is not the owner of the automobile. No trial court would ever charge that a jury can infer the defendant did not

possess the drugs because he was not the owner of the house or automobile. Why is the State the only party to achieve such an inference charge?

In *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (1992) the defendant requested that a charge to the jury simply stating that the absence of motive "is to be duly considered by you in weighing the question of guilt regarding him." *Id.* at 240, 414 S.E.2d at 183. The Court held that such a charge was improper as it was a charge on the facts in violation of the state constitution. As the Supreme Court held "Thus, the trial judge was requested, in effect, to charge that particular evidence (*i.e.* evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is clearly a charge on the fact that the jury was to determine." *Id.* at 241, 414 S.E.2d at 184. Any inference charge is legally no different. A judge in essence would tell the jury that particular evidence is entitled to receive special weight or consideration

In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)[1] the defendant had requested a simple charge that the testimony of a co-defendant was to be "received by the jury with caution and should be scrutinized by the jury with great caution." *Id.* at ___, 23 S.E.2d at 249. In holding the trial court did not commit error, the South Carolina Supreme Court said "A judge cannot express in his charge, or intimate any opinion as to the *weight or sufficiency* of testimony of accomplice without violating the prohibition of the Constitution as to charging upon the facts." *Id.* (emphasis added). When a judge instructs a jury that they may infer guilt from the fact that the defendant is in control of

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

the automobile, that judge is both expressing and intimating an opinion as to the weight and sufficiency of the evidence. He is making a comment on the facts and telling a jury what they may do with those particular facts. Such a statement violates the constitution in that it is a comment on a particular fact of the case. The comment as to an inference tells the jury to place special emphasis on one fact above all others.

Question II

Did the trial court er in failing to charge the jury that the state must prove a complete chain of custody before they can convict Timothy Pulley?

During the trial an issue as to whether the state had prove a proper chain of custody arose. As the items seized from the car Mr. Pulley was driven were seen on the hood of another officers car when Officer Roger Craven drove off, a question arose as to how Mr. Craven then obtained the drugs to drop them off in the drop box at the Laurens City police department. To attempt to overcome this deficiency, the State then recalled officer David Brewer, who, contrary to his testimony the previous day, stated that he delivered the items seized to Officer Craven. Officer Craven never testified he received the items seized from Officer Brewer. Compare, Rec. on App. at 126, l 5 to 128, l 9 to 198, l 19 to 201, l 21. In his testimony Officer Craven implied that he took the items seized from the scene. Rec. on App. at 106, ll 8-22. He never testified as to receiving the seized items from Officer Brewer at an unknown time and place.

Based on this contradictory testimony and ambiguity as to who obtained the seized items and when they received them, defense counsel requested a charge to the jury that simply instructed the jury that if the State has failed to prove a chain of custody as to

the seized items, they are to find the defendant not guilty. The South Carolina Supreme Court has said "The evidence that a saliva sample was placed in the kit simply contradicts the State's evidence negating tampering, thereby creating a factual issue. In sum, we find the evidence of a discrepancy in the contents of the kit does not render the blood sample inadmissible but goes only to its weight as credible evidence." *State v. Carter,* 344 S.C. 419, 425, 544 S.E.2d 835, 837-38 (2001). In *Carter* the Court held any question as to the adequacy of the chain of custody goes to its weight. Unless a jury is properly instructed as to how to consider any question as to the adequacy of the chain of custody, saying the issues goes to its weight is meaningless. A jury is not to intuitively know that evidence admitted by the trial judge can be rejected by them based upon the flaws in the chain of custody.

Other states have recognized that a jury charge as to the obligation of the state to prove a chain of custody is proper. In approving the charge given to the jury, the Georgia Court of Appeals in *Coleman v. State,* 327 Ga. App. 409, 731 S.E.2d 94 (2012) held the charge adequately explained to the jury their obligation as to determining the chain of custody. The charge said:

> [W]ith respect to drug evidence, the State is required to establish a chain of custody, that is, *the State is required to establish reasonable assurance* that the drugs tendered into evidence at trial are the same drugs alleged to have been sold by the defendant. However, the State is not required to foreclose every possibility of tampering and is not required to have every person involved in the chain of custody testify. Any evidence, should you find there to be evidence, or speculation as to the substitution or tampering of the drugs goes to the weight you, the jury, give to the evidence

admitted. *Id.* at 410, 731 S.E.2d at 95 (emphasis in original)

While Mr. Pullery does not advocate this particular charge, the case does recognize that when the issue of chain of custody arises, the jury should be properly instructed as to what their duty is concerning the evidence.

Research has shown that there is dearth of cases involving a request for jury charge on the chain of custody issue. This does not mean such a charge should not be given. When our courts have consistently stated some question on the chain of custody go to weight and not admissibility, without a proper instruction, a jury will not know how to weigh the evidence involved nor what factors to consider in determining if the evidence should be considered. One reason for a lack fo cases may be simply because in most cases the chain of custody is adequate and in those cases where it is an issue, defense counsel did not request such a charge. In South Carolina, no case has ever held that the refusal to give a charge is proper.

Question III

Did the trial court err in failing to suppress the items seized from the automobile driven by Timothy Pulley when the State failed to prove a proper chain of custody of the items seized?

The courts of our state have recognized "that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). The Court further held "Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." *Id.*

Furthermore, when a witness does not testify, business records may be used to complete the chain of custody. *State v. Williams*, 297 S.C. 290, 376 S.E.2d 773 (1989). In the present case, the State attempted to establish the chain with contradictory and confusing evidence. As such, the chain is not properly established.

When Officer Roger Craven testified, he stated that he took the drugs from the scene and placed them in the depository for the Laurens City police department. He stated:

> Q. (By Ms. Boykin): What did you do with the drugs after you found them?
> A. (By Mr. Craven) They were placed in evidence inside the Laurens police department.
> Rec. on App. at 106, ll 8-11.

In fact this was not true. The video tape from the patrol car of Officer Brewer shows the drugs on the hood of officer Brewer's car after Mr. Craven left to take Mr. Pulley to be tested on the datamaster. State's Exhibit 1. Mr. Brewer initially testified he did not take item seized from the scene. He stated:

> Q. (By Mr. Wise) Mr. Brewer, did you take the drugs from the scene?
> A. (By Mr. Brewer) No, sir.
> Q. Who did?
> A. Normally, like I said, I can't - - the officer in which made the charges took possession of the drugs.
> Q. So what you're saying is Officer Craven took possession of the drugs?
> A. That's correct.
> Q. And you never touched them again?
> A. Based on my recollection, I didn't take the drugs.
> Rec. on App. at 126, ll 5-17.

Mr. Brewer further acknowledged that he had looked at the video and the drugs

were still on the hood of his car when Mr. Craven left with Mr. Pulley. Rec. on App. at 126, l 21 to 127, l 23. He further again acknowledged that "I don't recollect as far as how the drugs got from there to the patrol office." Rec. on App. at 127, ll 15-16.

Later, defense counsel moved to suppress the items seized from evidence. Rec. on App. at 188, ll 6-21. The trial court denied the motion to suppress the evidence stating:

> The way I view this is even though Officer Brewer did not testify that he handed the bag to Craven at some point in time, the logical assumption is that he did. Officer Brewer is the last officer on the scene. I would be very surprised that Officer Brewer would have driven off from McDonald's with the bag of drugs on his hood. Presumably, he had to take possession of it and then turn it over to craven at some point in time that evening. So I'm going to find that there was a sufficient chain of custody.
> Rec. on App. at 193, ll 11-21.

Notwithstanding this ruling by the trial judge, the State then recalled Officer Brewer in an attempt to correct any chain of custody problems. Officer Brewer then testified, contrary to his previous testimony, that he turned the seized items over to Officer Craven prior to the end of the shift. Rec. on App. at 199, ll 11-14. No paper work was ever signed acknowledging this transfer. In addition, the State never recalled Officer Craven to testify that he received the seized items from Officer Brewer.

In addition the above uncertainty of who had possession of the seized drugs, Officer John Stankus testified he obtained the items from the locked drop box. Rec. on App. at 155, ll 6-7. He acknowledged, however that the chain of custody form he prepared stated he obtained the items personally from Officer Roger Craven. Rec. on App. at 155, l 4 to 156, l 4. According to his trial testimony, the form he signed some two

years previously was not correct.

Against this conflicting testimony, this Court must make the determination to whether the State has established a proper chain of custody. Had the evidence been placed in a proper tamper proof and sealed package at the scene, then the State could argue that glitches in the chain of custody would have had little consequence. But this did not happen.

Recognizing that the State need not call every single person who could have possibly touched the item, the South Carolina Supreme Court has said " Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be." *State v. Hatcher*, 392 S.C. 86, 95,708 S.E.2d 750, 755 (2011). Evidence as to how or even who obtained the item in this case is missing or inconsistent. As such, the chain has not been established. Which version of the event by Officer Brewer is the correct version? His testimony was that he had reviewed the video tape before he made each statement. His statement that he was mistaken in his first testimony because he reviewed the video tape after his testimony is not consistent. With the inconsistent testimony of Officer Brewer, the necessity of the testimony of Officer Craven to say how he came into possession of the seized items after he left them at the scene, become not only crucial, but necessary. As the chain of custody was not properly established, this Court should reverse the conviction of Timothy Pulley and remand the case to have the charges dismissed.

Question IV

Did the trial court err in failing to require the State to open fully on the law

and the facts of the case and replying only to new arguments of defense counsel when the defendant was deprived of a fair trial in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America by his counsel not being able to respond to the new arguments made by the State in its rebuttal closing argument?

In a fair trial, both parties should be given a fair opportunity to present their side and refute the argument of the other side. This worthy goal is recognized in virtually every state in the union in which the government is required to fully open on the law and the facts, including its theory as to how and why the defendant committed the crime. The defendant, then having fully heard the State's theory, is able to refute that theory and give its theory. The government in its final argument then refutes the theory the defendant proposed as to why the defendant is not guilty. Such a procedure is equally fair to both sides. As one court has said "The rule is rooted in the concepts of due process and fundamental fairness. Simply put, it is unfair and often highly prejudicial for plaintiff's or State's counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply." *Bailey v. State.*, 440 A.2d 997, 1002 (Del. 1982).

Defense counsel made a motion before closing arguments that the State be required to open fully on the law and facts. The understanding of defense counsel was the State was going to follow such a procedure. Unfortunately, this did not occur in this case. The opening argument in "full" by the Solicitor consisted of only 12 pages. Rec. on App. at 761-772. Of those 12 pages, only three page were used to discuss the facts. Rec. On App. 769- 772. His "rebuttal" to the argument of the defense consisted of 34

pages, almost three times longer than his opening argument in "full" and ten times longer than his discussion of the facts in his opening argument at closing. Rec. on App. at 802-835.

In South Carolina no Rule of Criminal Procedure addresses the question of the order of argument to the jury.[2] The practice of the State opening only on the law and then closing fully on the facts after the defendant has given the closing argument is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the State to open fully on the law and the facts. In *State v. Atterberry,* 129 S.C. 464, 124 S.C. 648 (1924), the Supreme Court held that the failure to require the State to open fully on the law and facts was reversible error. At that time Circuit Court Rule 59 provided, "The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party."[3] In reversing the conviction of the defendant the Court said, "The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant's attorneys were required to make their arguments. This was

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The South Carolina Supreme Court recently held a public hearing on Rule 21 which would require by a court rule that which the defendant contends is required by the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America. This proposed amendment was rejected by the legislature.

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Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. Rule 1 of the South Carolina Rules of Civil Procedure today does limit their application to civil cases.

refused. This was error." *Atterberry*, 129 S.C. at ___, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said "It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case." *Id.* at ___, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again, the defense counsel requested that the State be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry,* Rule 59 of the Circuit Court Rules had been changed to Rule 58 and the rule then read, "The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party." The Court in *Lee* concluded that "It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening argument to the jury on issues of fact." [4] *Lee,* at 318, 178 S.E.2d at 656. Thus began the more recent, but incorrect, practice of requiring the State to open only on the law and not the facts.

Today Rule 43(j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes, "The party having

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[4] Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter." With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff's lawyers "sandbagging" and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continues in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

The practice of "sandbagging" in a closing argument was a basis for reversal of a criminal conviction in *Bailey.* The Court said "Application of these authorities to the facts at hand compels us to reverse and remand the case for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy." *Id.* In South Carolina "sandbagging" by a prosecutor is not only approved but is actually legalized.

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. *See, e.g.* Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see, Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008). The treatise writers also support the requirement that the State open fully on the law and evidence. *See*, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D *Trial* § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted "The statute provides that in accord with the common law, the prosecuting attorney shall open the

closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal." *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE- FINAL ARGUMENTS*, 957 So.2d at 1166.[5] In commenting on the proposed amendment to Federal Rule 29.1 of the Federal Rules of Criminal Procedure, the committee said it "believes that, as the Advisory Committee Note has stated, fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply." H.R. REP. 94-247, 17, 1975 U.S.C.C.A.N. 674, 689

South Carolina should break with a practice that has no support in logic or the law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally "sandbag" its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing. The inherent logic of this position has been acknowledged by this Court concerning reply briefs and oral argument. "An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989). The reason of this rule in the appellate court is a party should have a fair chance to respond to matters raised by counsel in their briefs. The rule should also be applied to arguments before a jury.

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The Florida Supreme Court also noted that forty-seven states follow the common law.

In this case, defense counsel did not have the opportunity to respond to the final argument of the State when they argued that the State was not obligated to test for DNA or fingerprints because:

> You heard testimony from law enforcement. Mr. Pulley was the only person in that vehicle. It was clear to them whose drugs those were, There was no reason to test those when it was clearly this man's dope.
> Rec. on App. at 257, l 22 to 258, l 1.

Defense counsel could have responded that the belief of law enforcement were not facts the jury could or should consider in their deliberations. The State had to prove Mr. Pulley possessed those items regardless of any belief by law enforcement.

She further argued that there is no "mysterious" person and no one would leave $1,600 worth of "merchandise" in their automobile. Rec. on App. at 258, ll 11-20. In reply defense counsel could have pointed out to the testimony of Lakendra Anderson that the automobile had been in the shop for many weeks. In addition she noticed that the employees seemed to change rather regularly. Rec. on App. at 181, ll 4-23. During that period of time the State could not say that some employee of the body shop did not test drive the automobile and accidently leave the items in the back floorboard of the automobile.

The State further argued that Mr. Pulley was failing to stop because he was trying to hide the items that were found in the automobile he was driving. Rec. on App. at 257, ll 8-12. Defense counsel in reply could have pointed out that the drugs were not hidden, and if in fact Mr. Pulley knew the drugs were present they would have been hidden. At trial defense counsel for Mr. Pulley pointed out to the Court the matters that could have

been argued had the state been required to open fully on the law and the facts. Rec. on App. at 260, l 2 to 262, l 10.

Whether a timely response to the arguments of the State would have changed the outcome of the trial is not know. What is known is not requiring the State to open fully on the law and the facts deprived defense counsel a fair opportunity to respond to the best argument of the State. The State had the opportunity to respond to the best argument of defense counsel. Such a procedure is inherently unfair. When the procedure is unfair, the trial is unfair. The conviction of Timothy Pulley should be reversed.

Question IV

Did the trial court err in failing to suppress the items seized from the automobile Timothy Pulley was driving when the officers for the City of Laurens failed to follow the written policy for inventory searches?

When a law enforcement agency has a valid policy for conducting an inventory search and the search is conducted in accordance with that policy, the search and any evidence found will generally be held admissible. *South Dakota v. Opperman,* 428 U.S. 364 (1976). In justifying an inventory search the United States Supreme Court held there are three basic reasons for conducting such a search. the protection of the owner's property while it remains in police custody, the protection the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger . . . ." *Id* at 369 (citations omitted). The inventory policy of the Laurens Police Department fail to achieve these purposes and the policies they have were not followed in this case. The failure to follow the policy and the failure of the policy to protect the intetes of the department from a false claim therefore violate the Fourth Amendment to

the Consitution of the United States of American and Article I, § 3 of the Constitutino of the State of South Carolina.

The Pennsylvania Supreme Court has said coning an inventory search "The purpose of an inventory search is not to uncover criminal evidence, but to safeguard items taken into police custody in order to benefit both the police and the defendant." *Commonwealth v. Lagenella,* 623 Pa. 434, 447, 83 A.3d 94, 102 (2013). The Pennsylvania court held the search was improper simply because the vehicle was immobilized and was not required to be towed. For reasons to be discussed, the same facts were applicable here.

For an inventory search to be valid, the State is required to established that the vehicle needs to be towed or moved, that the decision to towed or move the vehicle is based upon a standard policy and that the inventory of the vehicle was conducted in accordance with an established policy. In this case, the State failed in all three areas. *Fair v. State*, 627 N.E.2d 427 (Ind. 1993).

Officer Roger Craven established that the basis for the search was an inventory search. He testified "We were gonna do an inventoy search of the vehicle. We were – he was under arrest. We were gonna go ahead and tow the vehicle so we could get an inventory at that time." Rec. on App. at 16, l 25 to 17, l 2. He further testified on cross examination:

> Q. (By Mr. Wise) You're the one that conducted the actual search of this vehicle?
> A. (By Mr. Craven) Inventory. Myself and Officer - -
> Rec. on App. at 27, ll 5-7 (July 2015 motion hearing)

In the present case, the State failed to establish that a need to tow the automobile Mr. Pulley was driving. The automobile was on private property. It did not pose any danger to the community. Rec. on App. at 33, l 13 to 34, l 2. Officer Roger Craven contended the policy permitted him to tow a vehicle if it is seen on a public highway and subsequently is stopped in a private driveway. 34, l 21 to 35, l 22. The towing policy for the City of Laurens does not have provisions directing the arresting officer as to how to handle an automobile on private property.

First the record below further establishes that no policy of the City of Laurens Police department would in fact prevent a false claim against the police department due to the policy not having a requirement that a defendant acknowledge that the inventory from the vehicle is correct. Rec. on App. at (Vehicle Inventory, Seizure and Towing policy). Officer Craven admitted that the policy does not prevent a false claim. Rec. on App. at 37, ll 2-23 (July 2015 motion hearing).

In addition, the officer did not follow the procedure established by his department. One of the requirements for a valid inventory search is have the tow truck operator sign the inventory before he leaves with automobile. The purpose of this requirement is to protect the officer and the towing company. By signing the form the tow truck operator acknowledges that what is on the inventory is in fact the only items in the truck. He is protected from a false claim. But this was not done. Officer Craven acknowledges he failed to comply with this portion of the policy. Rec. on App. at 31, ll 4-9.

The inventory form was not completed at the scene. Rec. on App. at 27, l 18 to

28, l 23.)July 2015 Motion hearing). The policy provides "Officer are to comply with 731.3.1 and to ensure that Tow operator, taking custody of any vehicle for tow purposes, sign the *Motor Vehicle Tow and Inventory Report* to acknowledge receipt of the impounded vehicle, its contents and condition." Rec. on App. at ___ (Vehicle Inventory) The tow truck operator could not have signed the form at the time he towed the automobile because the form did not exist at that time.

In *Fair*, the court noted that the items seized should be suppressed because "The search was conducted not at the impoundment lot but at the scene of the crime. The inventory was conducted by an officer responsible for criminal investigations and not the custody of impounded property. There is no evidence that formal inventory sheets were completed." *Id.*at 437 (internal citation omitted). While in this case a form was completed, it was not completed in a timely manner so that the tow truck operator could sign it. It was only marginally better than no form at all.

As Officer Craven failed to justify the impounding of the automobile driven by Mr. Pulley and he failed to comply with the policies of his department, the items seized should have been suppressed. In addition, the policies themselves are not adequate to protect the City of Laurens Police Department from false claims and therefore are unconstitutional.

Question V

Did the trial Court err in finding that the items seized from the automobile Timothy Pulley was driving were seized as a search incident to arrest for the marijuana charge?

In searching the automobile of a defendant who has been detained by law

enforcement, the United States Supreme Court has held "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Arizona v. Gant*, 556 U.S. 332, 351 (2009). In this case, there was no probable cause to believe any drugs were in the automobile driven by Mr. Pulley.

In addition, one of the basis used by the trial court to justify the search was that the officer found the marijuana before they searched and found other items in the automobile Mr. Pulley was driving. This finding is contrary to the facts of this case. At one point Officer Roger Craven, in an attempt to justify the finding that the marijuana was found first, testified he placed the marijuana back into the pocket of Mr. Pulley after he found it during the struggle. He testified:

> A. (By Mr. Craven) If I had to recall, if memory serves me right, I do believe that it was probably left still in his pocket during the struggle.
> Q. (By Mr. Wise) Excuse me?
> A. It was placed back in his pocket during the struggle if my memory calls.
> Q. Placed back in his pocket?
> A. Yes
> Q. After y'all found it, you put it back in Mr. Pulley's pocket?
> A. Yes, sir. Because of the struggle it I remember correctly.
> Q. Okay. Then it was found later by someone else? A. I don't know. I couldn't tell you.
> Rec. on App. at 37, ll 1-15.

No documents were ever introduced to show who found the marijuana and who

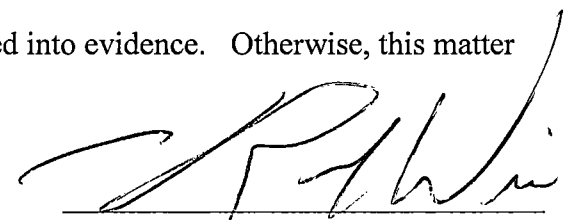
turned in the marijuana. The video recording of the incident shows that marijuana was not discussed by any officer until after the car was searched and Mr. Pulley was being placed in the patrol car. While credibility is an issue to be determined by the trial judge, this testimony stretches credibility to the breaking point. No office would ever place illegal drugs back into the pocket of the person they were arresting. This would even be more true if the person being arrested.

As the search of the automobile cannot be justified as a search incident to arrest, the trial court erred in not suppressing the evidence and dismissing the case. *See State v. Patton,* 167 Wash.2d 379, 219 P.3d 651 (2009); *State v. Eckel*, 185 N.J. 523, 888 A.2d 1266 (2006). In *State v. Brown*, 270, 401 S.C. 82, 96, 736 S.E.2d 263 (2012) the Court said "In conclusion, we hold the Court of Appeals properly applied Gant and found the warrantless police search conducted incident to Brown's arrest for an open container violation was illegal." The case involved a search of the automobile after the defendant was arrested for open container. The court affirmed the conviction only because at the time of the search the law would permit the search as the case was made before the United State Supreme Court decided *Gantt*. This case arose after *Gantt* and therefore the evidence should have been suppressed.

CONCLUSION

For the foregoing reasons, the conviction of Timothy Pulley shold be reversed and the case remanded with instructions to dismiss the case in the event this Court should find the items seized should ont have been introduced into evidence. Otherwise, this matter should be reversed for a new trial.

November 29, 2016



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November 29, 2016

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State vs. Timothy Artez Pulley (2015-002206)

Dear Ms. Kitchings:

Enclosed herewith is the original Initial Brief of Appellant concerning the above referenced matter, together with the original Affidavit of Service and Designation of Matter.

With kindest regards, I am

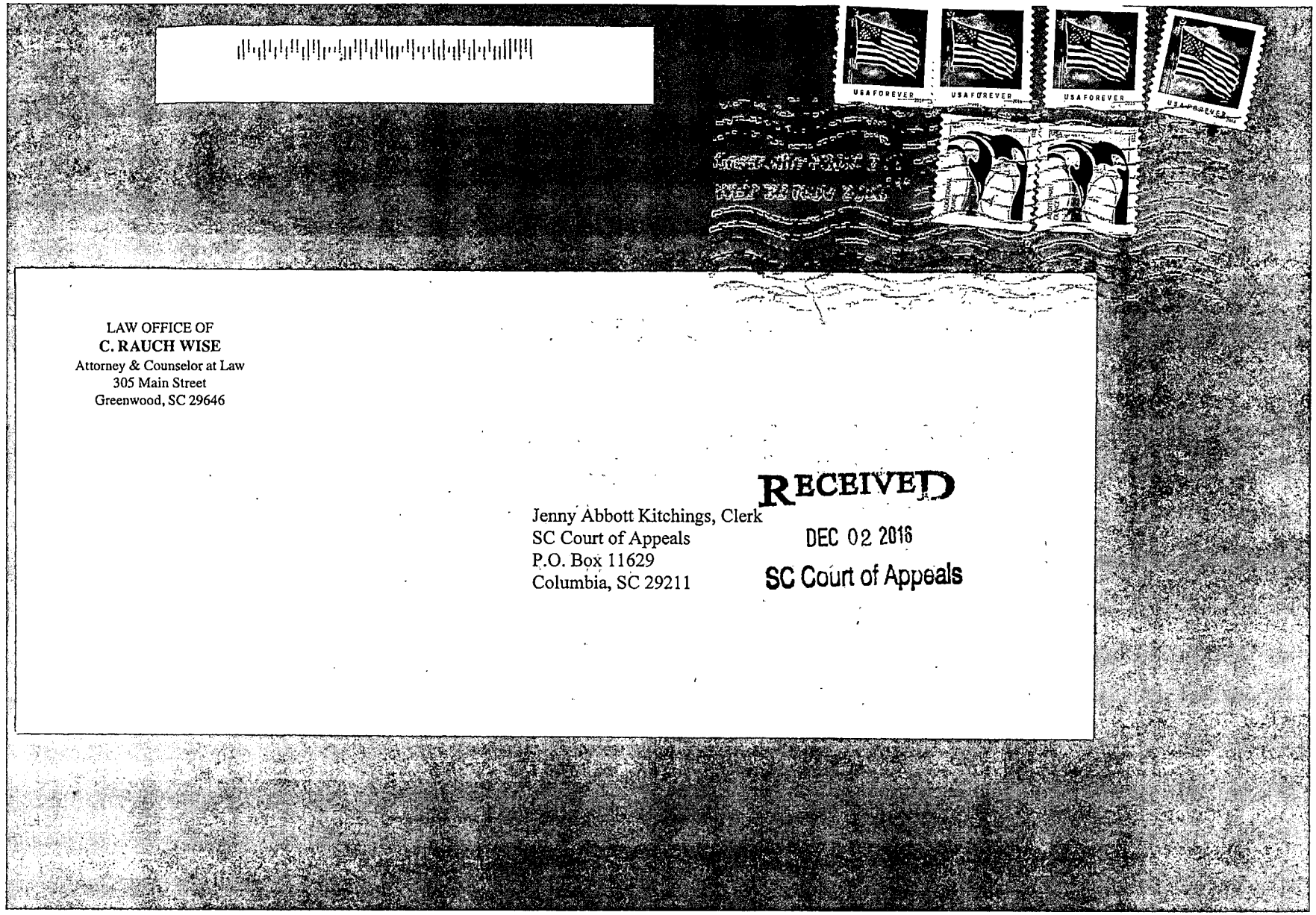
Very truly yours,

C Rauch Wise

C. Rauch Wise

CRW/mjh
cc: John Benjamin Aplin

P.S. Affidavit of mailing will be sent on Wednesday



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