STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Honorable Donald Hocker, Circuit Judge

Appellate Case № 2016-002524

The State of South Carolina, ... Respondent,

vs.

Terrance Edward Stewart, ... Appellant.

INITIAL BRIEF OF APPELLANT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

ATTORNEY FOR APPELLANT

Statement of Issues on Appeal

Question I: Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the affidavit for the search warrant was not sufficient and the issuing magistrate had no recall of any of the oral information supplied to her to allegedly supplement the affidavit?

Question II: Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the magistrate failed to comply with S. C. Code § 17-13-141as to the the records required by the statute to be kept and as a result, Mr. Stewart was prejudiced?

Question III: Did the trial court err in failing to charge the lesser included of offense of possession of heroin with intent to distribute when S. C. Code § 44-53-370 by statute makes possession with intent to distribute a lesser included offense?

Question IV: Did the trial court err in failing to dismiss the charges on the basis the prosecution is prohibited by S. C. Code §44-53-410 which provides a prosecution in State Court is barred if the same act is tried in Federal Court resulting in either a conviction or acquittal when Judge Herlong in federal district court found that Mr. Stewart had committed this same crime when he sentenced Mr. Stewart and enhanced his federal sentence?

Question V: Did the trial court err in charging the jury "The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" when such a charge lessens the burden of proof on the State and is an improper charge on the facts in violation of Article V, §21 of the Constitution of the State of South Carolina?

Question VI: Did the trial court err in instructing the jury "Constructive possession means that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found" when such a charge eliminates any men rea of possession of the drugs when found on the property of the Defendant?

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Procedural History

The Laurens County Grand Jury indicted Terrance Stewart on June 19, 2015 on the charges of distribution of heroin, trafficking heroin, and possession with intent to distribute oxycodone. On March 28, 2016, Mr. Stewart filed a pre-trial motion to dismiss the case on double jeopardy grounds based on S. C. Code 44-53-410 . The denial of this motion resulted in an interlocutory appeal to the South Carolina Court of Appeals. This appeal was dismissed on September 9, 2016.

The case was tried before the Honorable Frank R. Addy, Jr. and a jury on December 13-14, 2016. Mr. Stewart was convicted of distribution of heroin, trafficking heroin and possession of oxycodone. He was sentenced to 25 years for trafficking heroin, ten years for distribution of heroin, and five years for possession of oxycodone. All the sentences are to be served concurrently.

Mr. Stewart filed his Notice of Appeal on December 20, 2016.

Factual History

On June 19, 2015, the Laurens County Grand Jury indicted Terrance Stewart for trafficking in heroin, one count of distribution of heron and one count of possession oxycodone with intent to distribute for an incident that occurred on January 22, 2015. On March 25, 2015, Matt Veal, the chief investigating officer in the Laurens County charges testified in United States District Court at the federal sentencing hearing of Terrance Edward Stewart. Rec. on App. at (Federal Hearing)

At this hearing Mr. Matt Veal, the lead investigator, testified as to the facts and circumstances that led to the charges being placed against Mr. Stewart. The Honorable Henry M. Herlong, Jr., after hearing the testimony, ruled that he believed Officer Veal and ruled that Mr. Stewart committed the drug charges in Laurens County. Rec. on App. at (Hearing dated March 25, 2015 at 59, ll 10-13; at 66, ll 16-25 to 67, ll 1-15.) As a result of the finding that Mr. Stewart had committed the exact same acts for which he was indicted in this case, Judge Herlong departed from the recommended sentence. He did an upward departure and sentenced Mr. Stewart to 145 months in prison

Prior to the trial in this case Mr. Stewart filed a Motion to Dismiss the indictment based upon the fact that as the federal judge had found Mr. Stewart guilty of the exact same crime for which he was being prosecuted in the General Session Court for Laurens County, then the prosecution was barred under S. C. Code § 44-53-410. Mr. Stewart file a Notice of Appeal. This Court subsequently dismissed the case ruling that a plea of double jeopardy is not immediately appealable.

A pre-trial hearing was held on the issue of the validity of the search warrant. This

hearing was held before the Honorable Donald Hocker on July 27-28, 2015. At that hearing, both sides agreed, and the judge so found, that the affidavit in the search warrant was deficient. Rec. on App. at (July 28, 2015 hearing at 103, ll 3-6.). As a result the judge took testimony from the officers involved. The issuing magistrate testified, but she has no recall as to what was told to her by the officers. Rec. on App. at (Hearing July 28, 2015, at 80, ll 15-18; 85, ll 12-25. Judge Hocker accepted the testimony of the officer who obtained the warrant and found that probable cause had been established Rec. on App. at __(Order of Judge Hocker). At the trial of the case, the search warrant issue was renewed by trial counsel. Judge Addy, the trial judge, reviewed the transcript of the suppression hearing and sustained the ruling of Judge Hocker. Rec. on App. at 6, l 17 to 9, l 6; 101, ll 5-10; 105, l 20 to 106, l 2; 165, ll 19-23;

The trial of this case then commenced on December 13, 2016. The State presented the testimony of investigating officers and an undercover informant as to the basic facts of the case. The drugs were found in a home that Mr. Stewart shared with his girl friend, who was the mother of his children. Rec. on App. at 127, ll 17-21. The undercover informant testified that he purchased five small bags of heroin. A subsequent search of the residence found the basis for the trafficking in heroin charge and the possessing with intent to distribute oxycodone.

The jury convicted Mr. Stewart of trafficking heroin, distribution of heroin, and possession of oxycodone. He was sentenced to 25 years for trafficking in heroin, ten years for distribution of heroin, and five years for possession of oxycodone. All sentences were to run concurrently

Argument

Question I

Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the affidavit for the search warrant was not sufficient and the issuing magistrate had no recall of any of the oral information supplied to her allegedly to supplement the affidavit?

At the hearing to suppress the evidence seized from the residence of Terrance Stewart, the State conceded, and the trial judge found, the affidavit was not sufficient. Rec. on App. at 44, l 16-25. The State sought to justify the search based an oral statement made by Steven Sweat. He testified that he gave the oral statement under oath before the issuing magistrate. This State has long recognized that a written affidavit may be supplemented by an oral statement given under oath. "A search warrant affidavit which itself is insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony." *State v. McKnight*, 472, 291 S.C. 110, 113, 352 S.E.2d 471 (1987). No case, however, has addressed the issue of whether the affidavit may be supplemented when the issuing magistrate has no recall as to the information, if any, provided to her. As the probable cause determination is to be made by the magistrate, logic would dictate that what the magistrate heard controls and not what the officer thought the magistrate heard. This issue was brought to the attention of Judge Donald Hocker who heard the motion to suppress. Rec. .on App. at 102, ll 12-20. At the hearing counsel argued "And if she's saying she doesn't know, doesn't recall, has no records to establish it, I would, again contend that how then can a reviewing court find that she independently and - - served a - - neutral and

detached issued a proper search warrant . . . ." Rec. on App. at 102, ll 15-19.

In this case, no recording or contemporaneous notes were taken of the oral information. Rec. on App. at 34, l 24 to 35, l 10. While he had his case file with him, he does not recall if Judge Tucker asked for the file. He knew he did not leave a copy with her. Rec. on App. at42, l 11 to 43, l 12. He testified Judge Tucker asked him questions but he does not recall the questions and therefore could not have remembered his answers nor how they impacted a determination of probable cause. Rec. on App. at 53, 12-16. Magistrate Tucker testified she had no recall of who sought the search warrant nor what she was told orally. Rec. on App. at 80, ll 15-18.

The courts have long held that a search warrant can only be a issued by a neutral and detached magistrate and the magistrate makes an independent determination of probable cause. As the United States Supreme Court has said:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.
> *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)

When the issuing magistrate does not recall the supplemental testimony, then there is simply no basis by which a court could conclude that the magistrate made an independent determination that probable cause existed. While the officer may have thought he had probable cause, that is not the criteria. The probable cause determination, must be made by the neutral and detached magistrate. Here, the only evidence as to what the magistrate was

told comes from one "engaged in the often competitive enterprise of ferreting out crime" - the investigating officer.

The South Carolina Supreme Court has held "In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention." *State v. Gore,* 408 S.C. 237, 247, 758 S.E.2d 717, 722 (2015). Further the Court said "The *magistrate should determine probable cause* based on all of the information available to the magistrate at the time the warrant was issued." *State v. Gentile*, 373 S.C. 506, 646 S.E.2d 171, 174 (2008)(emphasis added). In the present case, the record does not establish what the magistrate considered in making the probable cause determination. The State has not established that the magistrate heard what was said or if what was said at the hearing was said at the time the warrant was issued. Even the officer testified that the magistrate asked questions but he does not remember what the questions were or what his answers were. The record here simply does not establish what the magistrate understood what the facts were that established probable cause. This case should be reversed with instructions to suppress the evidence seized from the residence.

Question II

Did the lower courts err in failing to suppress the items seized from the residence of Terrance Stewart when the magistrate failed to comply with S. C. Code § 17-13-141 when the magistrate failed to comply with the records required by the statute and as a result, Mr. Stewart was prejudiced?

In *State v. Wise*, 252 S.E.2d 294, 272 S.C. 384 (1979) the South Carolina Supreme Court held that a violation of S. C. Code § 17-13-141 is not a ground for the suppression of

the evidence unless a defendant can establish prejudice. *See also, State v. Sheldon*, 344 S.C. 340, 343 543 S.E.2d 585, 586 (Ct. App. 2001)("In the context of the application of the exclusionary rule, our supreme court held the exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures.")

Terrance Stewart can establish prejudice in this case. The code section required the magistrate to keep records of the search warrant she issues. No records were kept. Rec. on App. at 83, ll 2-6. One of the records required to be kept is "(4) Reason for issuing warrant." This was not done in this case. Had such a record been kept, Mr. Stewart would have known what the officer told the magistrate. He would have known what the magistrate thought she heard. There would have been a written record as to what was said. The failure to keep such a record prejudiced Mr. Stewart in the attempt to establish the warrant was not issued based on probable cause.

Question III

Did the trial court err in failing to charge the lesser included offense of possession of heroin with intent to distribute when S. C. Code § 44-53-370 by statute makes possession with intent to distribute a lesser included offense?

At the trial below, Terrance Stewart requested that the trial court charge the jury that they may convict him of possession of heroin with intent to distribute as a lesser included of trafficking heroin. Rec. on App. at 183, l 13 to 200, l 14. The trial judge at first, upon reading the statute agreed to give the charge. Rec. on App. at 197, ll 5-16. He subsequently

changed his mind and advised the assistant solicitor that he was giving defense counsel "a fairly strong appellate issue if the Court were to decline to give him [defense counsel] what he wants." Rec. on App. at 199, ll 16-18. Notwithstanding this warning, the assistant solicitor persisted and the trial court declined to charge possession with intent to distribute. Rec. on App. at 200, ll 3-10.

The failure to charge possession with intent to distribute heroin was error. S. C. Code § 44-53-370 provides "The offense of possession with intent to distribute described in Section 44-53-370(a) is a lesser included offense to the offenses of trafficking based upon possession described in this subsection." This phrase is not ambiguous. The legislature could not have been clearer. Unless this Court is to re-write the statute, the lower court erred.

The section in question does not say "if the weight of the drug is in dispute" possession with intent is a lesser included. There are no exceptions. Nor does it not apply to heroin. It applies to all the trafficking offenses. The provision uses the phrase "offenses of trafficking" which is plural and thus intended to apply to all.

In somewhat similar fashion, the legislature has made simple assault and battery a lesser included offense of attempted murder, regardless of the facts proven at trial. S. C. Code § 16-3-600 E (3) ("Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, as defined in subsection (D)(1), assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29." Thus regardless of the facts established, the legislature has determined that simple assault and battery is a lesser included of attempted murder. The same principles

apply in this case. The trial court erred in failing to charge a lesser included of possession with intent to distribute. This case should be reversed.

Question IV

Did the trial court err in failing to dismiss the charges on the basis the prosecution is prohibited by S. C. Code §44-53-410 which provides a prosecution in state court is barred if the same act is tried in federal court resulting in either a conviction or acquittal when Judge Herlong in federal district court found that Mr. Stewart had committed this same crime when he sentenced Mr. Stewart and enhanced his federal sentence ?

Under South Carolina Code § 44-53-410 a prosecution in State Court is barred if the same act is tried in Federal Court resulting in either a conviction or acquittal.[1] In this case there is no dispute that the exact same act upon which the trafficking heroin and the sale of heroin are the same acts tried in federal court when the sentence of Terrance Edward Stewart was doubled because of these acts. The transcript of the sentencing hearing shows that prior to the federal judge enhancing his sentence because of these acts, Mr. Stewart was looking at 72 months in prison. At the federal hearing Mr. Veal testified as to the facts and circumstances that led to the charges being placed against Mr. Stewart. The Honorable Henry M. Herlong, Jr. after hearing the testimony, ruled that he believed Officer Matt Veal,

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" If a violation of this article is a violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State." S.C. Code Ann. §44-53-410

the head investigator, and found that Mr. Stewart had in fact committed the drug charges in Laurens County. Rec. on App. at Hearing dated March 25, 2015 at 59, ll 10-13; at 66, ll 16-25 to 67, ll 1-15. As a result of the finding that Mr. Stewart had committed the exact same acts for which he was indicted in this case, Judge Herlong departed from the recommended sentence. He did an upward departure and sentenced Mr. Stewart to 145 month in prison.

As the federal sentencing hearing involved the same charges involved in this prosecution, the only question before the court is whether the findings by federal district court judge Herlong is a conviction within the meaning of the state. The statute does not contain a definition of the word "conviction." This Court, therefore, must give the word the meaning that has generally been given by the courts. In South Carolina our Supreme Court has said "Conviction in its legal sense, is the determination of guilt in a criminal prosecution." *South Carolina State Bd. of Dental Examiners v. Breeland*, 208 S.C. 469, 478, 38 S.E.2d 644, 649 (1946). *See also* Black's Law Dictionary, Fourth Edition, (1951) "In a general sense, the result of a criminal trial which ends in a judgment or sentence that the prisoner is guilty as charged." In interpreting a statute, this Court must be guided by the words of our Supreme Court. "When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

In the present case there has been an adjudication of guilt by Judge Henry Herlong in a criminal proceeding in which witnesses for the government gave sworn testimony. Matt Veal testified as to the charges against Mr. Stewart pending in Laurens County. Rec. on App. at 52. Judge Herlong made a factual finding that Mr. Stewart did in fact commit the

exact same crimes the state tried him on. Rec. on App. at 59, ll 10-13. He used that finding to impose a sentence upon Mr. Stewart by doubling the punishment he otherwise would have received. Record on App. at 67, ll 16-20.

The United States Supreme Court in *United States v. Dixon,* 509 U. S. 688 (1993) recognized that the double jeopardy provision applies not just to a criminal trial as such, but a criminal contempt proceeding. The obvious intent of the statute was to prevent a defendant from being punished or tried twice for a drug crime that can be tried in both state and federal courts. This is exactly what has happened here. Mr. Stewart was found guilty of the same charges in federal court. The statute on its face prevents a second prosecution after a conviction. The legislature could have specifically defined the word conviction and limited its meaning and application. The legislature did not. This court, therefore, must give the word the meaning as has traditionally been used in our state and that includes any finding of guilt in a criminal proceeding, which is what happened in this case.

The federal government was well aware of the statute. As the Fourth Circuit noted in 1984, "The government admits that Count Four was dismissed so that pending state charges on the same crime would not be precluded. Code of Laws of South Carolina § 44–53–410 bars state prosecution for the same offense once jeopardy has attached in the federal action." *United States v. Manbeck*, 744 F.2d 360, 371 (4th Cir. 1984). The federal government was not required to use the present charges to enhance the punishment of Mr. Stewart. They elected to use it and are now preluded the prosecution of the charges in State court.

As Mr. Stewart has in fact been found guilty of the same act in a criminal proceeding

in federal court, the State is now precluded from further prosecuting Mr. Stewart. The plain meaning of S. C. Code § 44-53-410 prevents this prosecution. This case should be reversed and remanded with directions to dismiss this case with prejudice.

Question V

Did the trial court err in charging the jury "The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control" when such a charge lessens the burden of proof on the State and is an improper charge on the facts in violation of Article V, §21 of the Constitution of the State of South Carolina?

Over the objection of Terrance Stewart, 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 237, ll 7-10. 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 judge is certainly permissible. To give the state the edge by telling the jury they may make such an inference, and thus encouraging them to do so, is not permissible. As the South Carolina Supreme Court has said "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484, (2013)

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 they believed the case were close simply because that is what they were instructed to do. 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 that 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 it's 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).

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).

No doubt eliminating a charge that the jury may infer knowledge, dominion and control of the drugs from control of the premises 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.
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> *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 Premises Under the Control of Terrance Stewart 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 judge 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 in control of the premises - 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 in a

purse in the house. Could the trial judge have charged that the jury may infer that drugs found in the purse are in the possession of the owner of the purse? That charge would actually make more factual sense than saying a person in control of the premises knows what is in the house. 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 weigh or consideration

In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)[2] 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

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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.

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 the premises, 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 VI

Did the trial court err in instructing the jury "Constrictive possession mean that the Defendant had dominion and control over either the drugs itself or the property upon which the drugs were found" when such a charge eliminates any men rea of possession of the drugs when found on the property of the Defendant?

Somewhat related to the argument discussed above is the question of whether it is proper to charge a jury that constructive possession of drugs means exercising dominion and control over the property where the drugs are found. Such a charge eliminated the requirement of knowledge that the drugs are on the premises. The charge in essence tells the jury, if a defendant has dominion and control over the property, he possesses the drugs. No real foundation in South Carolina law can be found for the charge. When a judge also charges the jury that mere presence is not sufficient to convict, then confusion arises. As this Court has said "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385

S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

Research of this specific charge show little support among our sister states. *See, People v. Fetter*, 607 N.Y.S.2d 381, 382, 201 A.D.2d 500, 500 (N.Y.A.D. 2 Dept.,1994)("In order for a defendant to be found to 'possess' the property, it is sufficient to show constructive possession, which means that the defendant exercised some 'dominion and control' over the goods or the premises where the goods were found."); *State v. Amezola*, 49 Wash.App. 78, 86, 741 P.2d 1024, 1029, (Wash.App.,1987) (" Actual possession means that the goods are in the personal custody of the person charged with possession, while constructive possession is established when the person charged with possession has dominion and control over either the drug, . . . or the premises.")(internal citations omitted); *but see, State v. Callahan,* 77 Wash.2d 27, 29,459 P.2d 400, 401–02 (1969)("Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.")

Most states do not include control over the premises in their definition of constructive possession. They refer, properly, to the ability to control the actual property itself and not the premises upon which the property at issue is found. *State v. Durgan*, 467 A.2d 165, 167 (Me.,1983)("Constructive possession means that although one does not have the actual physical custody of the goods, he has dominion, authority or control over them."); *State v. Whittaker*, 326 N.J.Super. 252, 262, 741 A.2d 114, 120, (N.J.Super.A.D. 1999)("Constructive possession means possession in which the person does not physically

have the property, but though not physically on one's person, he is aware of the presence of the property and is able to exercise intentional control or dominion over it."); *U.S. v. Caldwell*, 423 F.3d 754, 758 (7th Cir. 2005)("Constructive possession exists when a person knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly, or through others.")

As no firm foundation exists in South Carolina for such a charge, this Court should correct the error. As the charge virtually eliminates any mens rea concerning a drug charge, it should be found to be a violation of the due process clause of the 14th Amendment to the Constitution of the United States of America and Article I, § 3 of the Constitution of the State of South Carolina. This is especially true when the charge is given in conjunction with the inference charge referred to in Argument V. This Court should reverse this case and remand for a new trial.

Conclusion

For the reasons stated in Questions I, II, III, V, and VI, this Court should reverse the conviction for Terrance Stewart and remand the matter to the lower court for a new trial. As it Question IV, this Court should reverse the conviction of Terrance Stewart and remand the matter to the lower court to dismiss the case with prejudice.

June 16, 2017

C. Rauch Wise
305 Main St.
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S.C. Bar № 06188

Attorney for
Terrance Edward Stewart

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 19 2017
SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Honorable Donald Hocker, Circuit Judge

Appellate Case № 2016-002524

The State of South Carolina, ... Respondent,

vs.

Terrance Edward Stewart, ... Appellant.

AFFIDAVIT OF SERVICE

Personally appeared before me, Sandy Traynham, who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on June 16, 2017, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Initial Brief of the Appellant to John Benjamin Aplin, SC Attorney General's Office, PO Box 11549, Columbia, SC 29211, and Christopher Dale Scott, Assistant Solicitor Eighth Judicial Circuit. PO Box 516, Greenwood, SC 29648

Nichelle Collins

Sworn to and Subscribed
before me this 16th, day
of June, 2017

Nichelle D Collins
Notary Public for South Carolina
My Commission Expires: 12/13/2026

LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646
email rauchwise@gmail.com

C. Rauch Wise

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

June 16, 2017

Jenny Abbot Kitchings
SC Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: The State vs. Terrance Edward Stewart

Dear Ms. Kitchings:

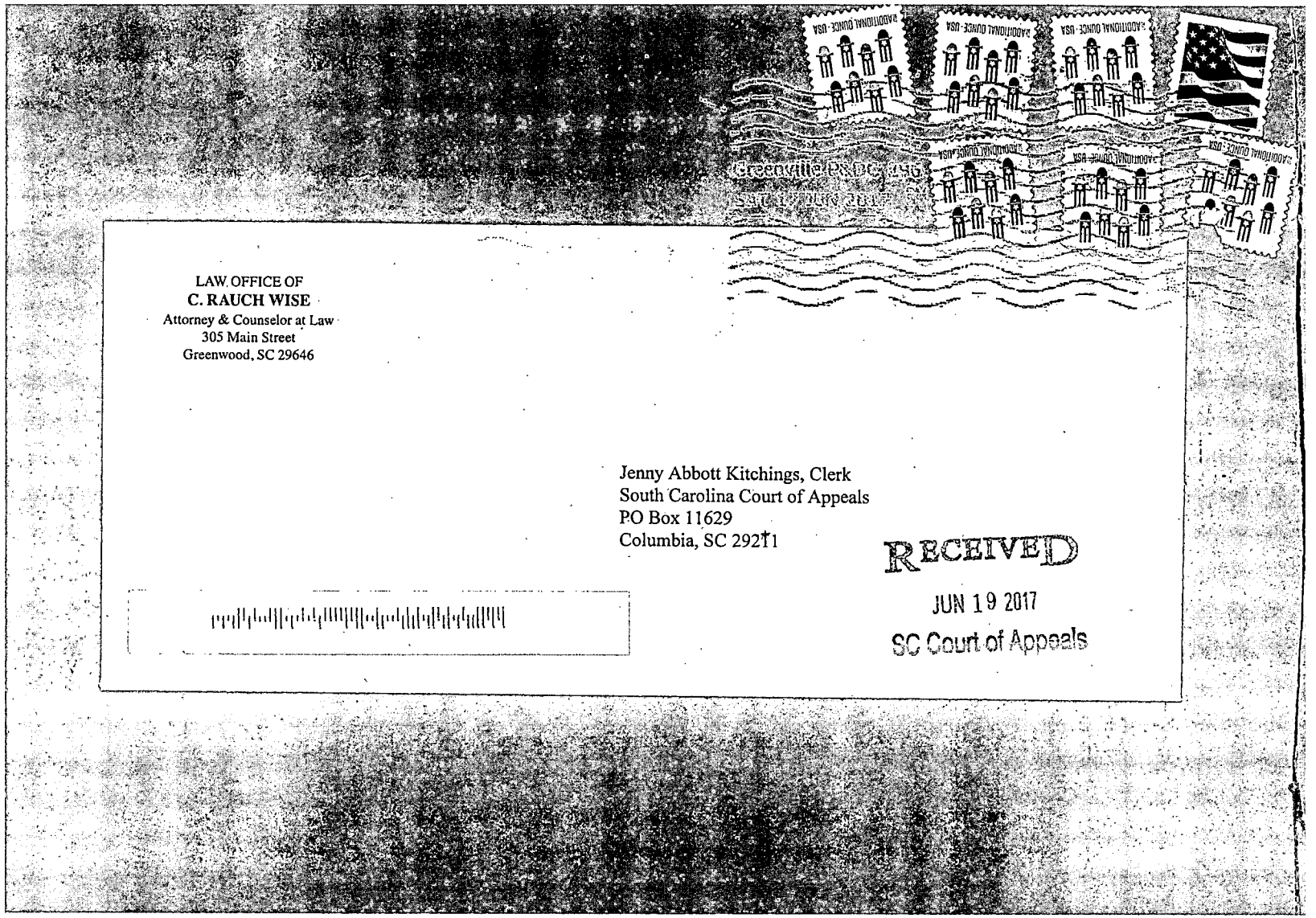
Enclosed herewith is the original Initial Brief of Appellant as well as the Affidavit of Service.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/mqc
cc: Benjamin Aplin
Christopher Scott



LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646

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

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