STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Case No. 2015-CP-46-2859

Kenneth D. Morris, #334303 ..... Respondent,

v.

State of South Carolina, ... Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable J. Mark Hayes's order granting post-conviction relief filed June 21, 2017. The State's subsequent motion to reconsider was denied by written order filed on November 3, 2017, and received by the State on November 6, 2017. Copies of both orders are attached hereto.

November 15, 2017

Respectfully submitted,

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PROOF OF SERVICE

I, Justin J. Hunter, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Clarence Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served this 15th day of November, 2017

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)

Kenneth D. Morris,
Inmate No. 334303

Applicant,

-vs-

State of South Carolina.

ORDER

2015-CP-46-2859

This is a Post-Conviction Relief Application. Applicant, Kenneth D. Morris, is serving a 30 year sentence at the South Carolina Department of Correction. Morris went to trial charged with the offenses of trafficking in ecstasy and possession with intent to distribute marijuana. A jury convicted Morris of the trafficking charge but did not convict him of the possession with intent to distribute charge. They found him guilty of the lesser included offense of possession of marijuana.

Morris raises five issues in his Post-Conviction Relief Application. After conducting an evidentiary hearing, reviewing the trial transcript, two appellate decisions involving the trial and the briefs from both sides, this court's decision is to grant the application. Each issue raised by Morris will be discussed separately, but either separately or cumulatively they afford a basis for granting the application.

FACTS

As previously stated, Morris went to trial charged with trafficking in ecstasy and possession with the intent to distribute marijuana. Both substances were located by law enforcement after a

traffic stop in the trunk of the car not owned by Morris. The car was rented by Morris' co-defendant Brandon Nichols. At the time of the traffic stop for following too closely, however, the car was being driven by Morris. Morris and Nichols both consented to a search of their persons. However it was Nichols, again the renter of the car, who would not consent to a search of his automobile. Twice the K-9 dog failed to alert to the existence of contraband in the car. After not locating contraband in the passenger compartment, law enforcement searched the trunk where the ecstasy was located hidden in a wrapped bag. Subsequently the marijuana was located hidden under the spare tire in the tire well. No finger prints were found by the police on the bags containing the drugs.

At the trial of case and in the appeal of case to the Court of Appeals and Supreme Court, the constitutional validity of the search was a significant issue. The South Carolina Supreme Court in affirming the conviction and search noted that the presence of "Phillies Blunt" cigars. *See, State v. Morris*, 411 S.C. 571, 576, 769 S.E.2d 854, 857 (2015) n. 1 and 2. The Supreme Court and the Court of Appeals used this finding in sustaining probable cause for the search.

The testimony at the trial consistently referred to the interior of the automobile as containing "Phillies Blunts" or "blunts." Tr. at 131, 117 to 133, 123; 177, 113 to 179, 123. The brief of Morris on appeal also constantly referred to the cigar in the automobile as being a "blunt" or "Phillies Blunt." In both written opinions by the appellate courts, the courts made special mention of the "Phillies Blunt."

Prior to Morris's trial, Nichols pled guilty to possession of ecstasy and a marijuana charge. He received a two year probationary sentence in exchange for testifying "truthfully". Nichols testified both he and Morris bough the ecstasy. But he testified the marijuana was solely Morris',

he stated he pled to the marijuana charge because he knew the marijuana was in the car he had rented. The attorney for Morris attempted to impeach Nichols by referring to an affidavit Nichols had signed. In the affidavit Nichols stated "I was not aware that Mr. Morris had purchased marijuana and did not see him place any quantity in the vehicle." He also stated, "Mr. Morris was not aware of the purchase of the ecstasy and had no knowledge of it." While the substance of the affidavit was read into the record, the affidavit itself was never introduced into evidence. The jury, during deliberations, asked about a copy of the affidavit. The affidavit was not provided to the jury because trial counsel had not introduced the affidavit during the course of the trial. Tr. at 329, ll 5-6. Further, trial counsel did not cross examine the co-defendant as to the sentence he was facing before he agreed to testify for the state.

In the charge to the jury, the trial court instructed the jury "A defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." Tr. at 317, ll 8-10. No objection was made to this charge. Moreover, the trial counsel further did not request that possession with intent to distribute be charged as a lesser included offense of trafficking.

The jury returned a verdict of trafficking in Ecstasy and the lesser included offense of possession of marijuana. He was sentence to a term of imprisonment of 30 years.

ISSUES ON POST-CONVICTION RELIEF

I. *Trial counsel was ineffective in failing to effectively cross examine the co-defendant*

In *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) our Supreme Court ruled that a defense attorney may cross-examine and impeach the credibility of a testifying co-defendant as to the possible sentence the testifying co-defendant is facing. The Court said:

> The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.
> *Id.* at 333, 563 S.E.2d at 318.

The *Mizzell* case was decided over seven years before the trial of this case. In this case the co-defendant had reached a plea bargain for probation which was considerably less than the mandatory minimum sentence of three years, if it were his first offense. The fact that the plea was negotiated prior to trial does not impact on the prejudice in the failure to cross-examine Brandon Nichols on the sentence he was facing before he agreed to the plea deal.

This South Carolina Supreme Court has held that the failure to impeach a witness in a criminal sexual conduct case is a ground for granting a post-conviction relief petition. *Pauling v. State,* 331 S.C. 606, 503 S.E.2d 468 (1998). In this case, the jury was concerned about the testimony of the co-defendant as they asked for a copy of the statement he gave exonerating Morris. The failure to inform the jury that Nichols avoided at least three years in prison would have had an impact on the jury in judging the credibility of Nichols.[1] Had the jury known the co-defendant was avoiding a mandatory sentence of at least three years, they well could have rejected his credibility. Trial counsel was ineffective in failing to cross-examine Nichols as to his punishment. This failure was prejudicial to Morris.

II. *Trial counsel was ineffective in failing to request a charge of the lesser included offense of possession of Ecstasy with intent to distribute.*

By statute, possession with intent to distribute is a lesser included of the offense of

[1] The jury could have also reasonably assumed that Morris would receive a somewhat similar sentence to Nichols as Nichols testimony was they were both equally in on the drug deal.

trafficking Ecstasy. *See*, S.C. Code § 44-53-370(b). The legislature has made this determination and as such, a lesser included charge would be required if the trial counsel had requested it. Co-counsel for Morris testified at the post-conviction relief hearing. Morris' trial counsel has since been disbarred and could not be located. Co-counsel testified he was not aware of the provision in the code by which possession with intent is a lesser included of trafficking. In this case, the jury gave Morris the benefit of the doubt and convicted him of possession of marijuana rather than possession with intent to distribute. The fact that the jury found him guilty of the lesser included offense of possession of marijuana also reflects that the jury understood the significance of credibility or lack thereof of the co-defendant. By not requesting a lesser included offense charge, the jury was denied the option of convicting Morris of the lesser included offense of possession of ecstasy. Therefore, the prejudice is clear. Nothing in this record suggests that the jury would not have also given Morris the benefit of the doubt and convicted him of the lesser included. At the very least, the jury should have been given that option. The failure to request the lesser included offense was ineffective assistance of counsel.[2] The failure to give such a charge was prejudicial to Morris.

III. The trial counsel failed to introduce the sworn statement of Brandon Nichols and therefore was not able to request a jury instruction that the statement can be considered as substantive evidence.

Trial counsel cross-examined Brandon Nichols on the prior affidavit he had given the exonerated Kenneth Morris. He did not introduce the statement. Tr. at 200, l 19 to 206, l 10.

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[2] Possession of Ecstasy with intent to distribute third offense carries a minimum penalty of 10 years. S. C. Code § 44-53-370(b)(1).

As a result, the jury heard the impeaching information contained in the statement. Under the principles established in *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982) an inconsistent statement may be used as substantive evidence. The Court said "Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination." *Id.* at 581 300 S.E.2d at 69. The Court in *Copeland* further recognized that prior to the decision, a Court should instruct a jury that the inconsistent statement is admissible only for impeachment purposes. The reasoning from the decision is that now the trial judge should instruct the jury that the inconsistent statement may be considered as substantive evidence.

In this case, the trial counsel did not introduce the statement. Therefore, he was not entitled to a charge from the trial court that the statement could be considered as substantive evidence. As noted earlier, the jury had some concerns about the testimony of Nichols. They specifically requested a copy of the statement. The record in this case establishes that had the statement been introduced and the jury instructed that they could consider the statement as substantive evidence, the result in this case would have been different. Trial counsel was ineffective in failing to introduce this statement. The failure to introduce the statement was prejudicial to Morris.

IV. ***Trial counsel failed to object to the charge to the jury stating "A defendant's knowledge and possession may be inferred when a substance is found on property under the defendant's control." Tr. at 317, ll 8-10.***

A. ***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 in *Hudson* 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, 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, Morris was merely the driver of an automobile rented by the co-defendant. To tell a jury they may infer knowledge and possession from the fact that Morris was the driver of an automobile rented 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 content 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 of the contents of an automobile 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 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*, 397 U.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 fact, 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 in the trunk 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 a 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). And again certainly knowledge of the contents of an automobile rented by someone else is not a fact that more likely than not flows from such possession.

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 a preference to the State's theory of the case. Also, such a charge in essence tells the jury that they may infer that Brandon Nichols is telling the truth. If they can infer knowledge and possession of the drugs by the fact Morris was driving the automobile, they are in essence being told they can infer Nichols is being truthful.

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 defendant 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.
>
> 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).

B. *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 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 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 weigh or consideration

In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)[3] 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 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 State 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. The cases establishing this principle are over 100 years old. Trial counsel should have made an objection to the charge. His failure to do so rendered his representation of Morris ineffective. His failure to object was prejudicial to Morris.

V. *Trial counsel and appellate counsel were ineffective in failing to differentiate between a*

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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.

"Phillies Blunt" and a "Black and Mild" which failure lead to confusion as to the trial court and appellate courts on the issue of whether there was probable cause to search the automobile.

At the trial of the case, the investigating officer testified he observed he observed a "blunt" cigar. He testified "I saw a lot of hollowed out Blunt." Tr. at 16, l 5. He testified that the "blunt" cigar was an indication that one had been smoking marijuana in the automobile. Tr. at 16, ll 13-14.; Tr. at 131, l 4-25; Tr. At 133, ll 4-23. This testimony was also discussed on cross examination. Tr. at 33, l 14 to 34, l 13 (at pre-trial hearing); Tr. at 177, l 19 to 178, l 20. The trial judge referred to "blunts" in his ruling. Tr. at 62, ll 17-21. In the brief before the South Carolina Supreme Court appellate counsel used the word "blunt" or the phrase "hollowed out cigar" no less than six times. Br. of Petitioner at 7, 8, 10, 12, 15, and 18. The terms also appear throughout the Brief of Appellant before the South Carolina Court of Appeals.

In both appellate court opinions, the courts found probable cause to search the automobile based upon "Phillies Blunts" being found in the automobile. The Court of Appeals said "Officer Vinesett noticed hollowed "Phillies Blunts" in the center console and blunt tobacco in the center console and on the floorboard." *State v. Morris*, 395 S.C. 600, 604, 720 S.E.2d 468, 469 (Ct. App. 2011). A footnote in the case further said "Phillies Blunts" are a brand of inexpensive, American-made cigars. The tobacco inside a "Phillies Blunt" is often emptied in order to roll a marijuana cigar." *Id.* at 604, 720 S.E.2d at 469, n. 1. The South Carolina Supreme Court likewise noted "He [Officer L. T. Vinesett] stated he also observed several hollowed out "Phillies Blunt" cigars in the center console of the vehicle, and loose blunt tobacco scattered over the frontal interior of the vehicle." *State v. Morris*, 411 S.C. 571, 576, 769 S.E.2d 854, 857 (2015). In a footnote they also noted "Phillies Blunts" are an inexpensive brand of cigar. Vinesett testified that people

"hollow [the blunt] out and place the marijuana in there, so if you did see them riding down the road smoking anything, it would look like they were just smoking a [Phillies] blunt." *Id* at 77, 769 S.E.2d at 857, n. 1.

At the Post-Conviction Relief hearing counsel introduced a "Phillies Blunt" and a "Black and Mild." Morris testified the remnants found in the automobile were from a "Black and Mild" and not a "Phillies Blunt." The trial exhibits introduced at trial and viewed by the Court at the Post-Conviction Relief hearing show no "Phillies Blunt" or any "blunt" was found in the automobile. The difference between a "Phillies Blunt" and a "Black and Mild" is very clear. Besides the "Black and Mild" being considerably smaller, the "Black and Mild" has a tip which the "Phillies Blunt" does not. The two simply cannot be confused.

Had trial counsel pointed out to the trial judge that no "Phillies Blunt" was found in the automobile, instead of agreeing that "blunts" were found, the trial judge well could have found no probable cause. The impact of this error is even more compounded when the appellate decisions are reviewed. The Supreme Court, in a 3-2 decision, placed special emphasis on the presence of a "Phillies Blunt" to find probable cause to search the automobile. Both trial and appellate counsel erred in failing to point out that no "Phillies Blunt" was in the automobile being driven by Morris. This error was not minor nor inconsequential. From reading the record the decision by the trial court and the appellate courts was based upon "blunts" being found. This error was significant and easily could have been the difference between probable cause and no probable cause having been found. Trial counsel was ineffective in failing to make the distinction between a "Phillies Blunt" and a "Black and Mild." Appellate counsel was ineffective in continuing this error on appeal. Both errors were prejudicial to Morris.

VI. *Cumulative error*

The South Carolina Appellate courts have never squarely addresses the issue of cumulative error in the context of a Post-Conviction Relief Petition. But the court has discussed the concept of cumulative error. The South Carolina Supreme Court has said cumulative error "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor's improper argument and improperly excluded evidence warranted reversal).

In this case, the errors taken as a whole show that Morris was denied a fair trial. While this Court believes that any one error is sufficient to grant him relief, when taken together, Morris has established that if the cumulative errors not occurred, he would have had a different result in the trial. This Court grants the application for post-conviction relief and remands the case for a new trial.

CONCLUSION

Based upon the review of the transcript of record in this matter, the testimony of the witnesses at the Post-Conviction Relief hearing, and the relevant law, this Court concludes that trial and appellate counsel were ineffective and that Kenneth Morris is therefore entitle to a new trial.

June 16, 2017

J. Mark Hayes, II
Presiding Judge
16th Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4602859

Kenneth D Morris		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by: The Court		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/J. Mark Hayes, III	2132	6/16/2017
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **June 21, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **June 21, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Leah B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock Hill, SC 29730
Clarence Rauch Wise 305 Main St. Greenwood, SC 29646

Justin James Hunter PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

Kenneth D. M orris,

Inmate № 334303

Applicant,

-vs-

State of South Carolina.

Respondent.

Order on Motion to Reconsider

2015-CP-46-2859

This matter come before me upon the Motion of the State pursuant to Rule 59 to Reconsider the decision previously entered in this matter. Based upon the following reasons, the Court respectfully denies the Motion to Reconsider. In denying this Motion the Court is considers the standard by which a Post Conviction Relief is to be granted. As said by our South Carolina Supreme Court "In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Prejudice is proven by showing a reasonable probability that the outcome of the trial would have been different.

I. Trial Counsel was ineffective in failing to effectively cross examine the co-defendant.

State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) clearly and unequivocally holds that defense counsel may cross examine the co-defendant as to the possible punishment they are

facing. While the witness testified that he was receiving a probationary sentence, the jury never knew he was facing a mandatory minimum mandatory sentence. The jury easily could have assumed he was receiving no real benefit from his testimony as he was being given a record and probation. Had the witness been cross examined as to his minimum sentence, the defense would have an easy explanation as to why the co-defendant would have claimed the written affidavit was coerced The prejudice to Mr. Morris is further evident from the fact that the State made a specific motion to exclude from closing argument any reference to the mandatory minimum sentence. The reasonable probability that the result would have been different is clearly evident.

II. Trial Counsel was ineffective in failing to request a charge of the lesser included offense of possession of Ecstacy with intent to distribute.

The determination of this issue is strictly a case of statutory interpretation. The State's reliance in its Motion upon *State v. Sellers,* 362 S.C. 182, 607 S.E.2d (2005) is misplaced. The provision of the code relevant to this case was added in 2000 under Act 355. *Sellers* was tried before 2000. The Supreme Court noted "This Court affirmed his convictions and sentences on direct appeal. *State v. Sellers*, Op. No. 99-MO-79 (S.C. Sup. Ct. filed November 15, 1999)." *Id.* at 187, 607 S.E.2d at 84. As the *Sellers* case was tried before the statute was amended to add the provision about possession with intent being a lesser included of trafficking, it has no application to this case.

As the lesser included should have been charged under the statute, as noted in the order, the prejudice is obvious. The jury reduced the charge on possession with intent to distribute marijuana to possession. The jury likely would have reduced the Ecstasy charge. Nothing in this record suggests anything but that there is a reasonable probability the jury would have

convicted Mr. Morris of the lesser included offense.

III. The trial Counsel failed to introduce the sworn statement of Brandon Nichols and therefore was not able to request a jury instruction that the statement can be considered as substantive evidence.

On this issue the State has contended that the statement would not have been admissible as Brandon Nichols admitted making the statement and therefore the state itself would not have been admissible under Rule 613(b) of the South Carolina Rules of Evidence. As our Court of Appeals has said concerning the admission of a prior inconsistent written statement, "When the issue is whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal." *State v. Carmack*, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010). In the present case, the admission was not unequivocal. The co-defendant stated he was coerced into making the statement. In recognition of this principle, the State at the trial below took the position that any reference to the statement would require that the Defendant introduce the statement. Tr. at 198, ll 5-9. As the State concluded its argument "I don't think it is fair for him to get the benefit of it without offering it into evidence." The statement, had the defense so sought, would have been admitted.

Mr. Morris was prejudiced in this case because while the jury could consider the statement, they were not told they could consider it as substantive evidence. The jury was concerned about the statement as they specifically asked to see the statement. The jury said "we would like to see Mr. Nichols [sic] statement that he signed at the notary." Tr. at 329, ll 5-6. Based upon these factors, there is a reasonable probability that the outcome of the trial would have been different if the statement had been introduced into evidence and the jury had seen and

examined the statement.

IV. Trial counsel failed to object to the charge to the jury stating "A defendant's knowledge and possession may be inferred when a substance is found on property under the defendant's control." Tr. at 317, ll 8-10.

In its Motion to Reconsider the State never attempted to distinguish *Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907) and *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907). These two cases hold that based upon a party proving one fact, the jury may not be told they may infer another fact. The Court held such a statement violates what is now Article V, § 21 of the Constitution of the State of South Carolina which prohibits a judge from commenting on the facts. The State has not argued that the Court's reliance upon those cases was misplaced. Instead, the State has argued that *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987) permits such a charge. *Adams* is distinguishable due to the fact that the case was not decided on state constitutional grounds. The issue of a charge on the facts was simply not addressed in the opinion and therefore is not precedent as to how our State Constitution should be interpreted. As the jury was improperly instructed concerning the inference that Mr. Morris' possession may be inferred simply because he was driving the rental car, there is a reasonable probability that the result may have been different had the jury been properly instructed.

V. Trial counsel and appellate counsel were ineffective in failing to differentiate between a "Phillies Blunt" and a "Black and Mild" which failure lead to confusion as to the trial and appellate courts on the issue of whether there was probable cause to search the automobile.

The State contends in its Motion to Reconsider "Nowhere did the trial court indicate that

it was denying the motion based on the fact that the objects found were "Philly Blunts" and not "Black and Milds." The term "Black and Milds was not brought up until the cross examination of the officer. Tr. at 48, l 16 to 49, l 9. In that cross examination, the arresting officer never indicated that the Black and Mild had been used to smoke marijuana. He never indicated a Black and Mild, based on his experience, had ever been used to smoke marijuana. He did testify that a blunt cigar is a brand. Tr. at 16, ll 15-16. This would indicate that the officer knew the difference between a Phillies Blunt and a Black and Mild. Based upon the exhibits introduced at trial a Black and Mild should not be confused with a Phillies Blunt. In ruling on this matter the trial judge never made even a slight reference to Black and Mild. He made three references to "blunts." Based upon the testimony at trial and the exhibits introduced at trial, there is a reasonable probability that had the proper information been presented to the trial court and appellate courts, the result would have been different.

VI. Cumulative Error

The Court, in its original order, acknowledged that cumulative error analysis had not been recognized in South Carolina, nor has it been prohibited. The Court believes that any one error would be sufficient to grant relief, two of the errors are so interlinked, that the error of any one issue, is enhanced when both are considered together. Issues I and III involved the credibility of Brandon Nichols. When both are considered together the prejudiced to the Applicant is enhanced. Also, considering all the errors together the trial as a whole had numerous errors that were prejudicial to the applicant. Based upon a reading of the record, the testimony at the Post Conviction Relief hearing and considering the errors collectively, there is a reasonable probability that had all the errors not occurred the result of the trial would have been different.

For the foregoing reasons, the Motion of the State to Reconsider this matter is hereby denied.

IT IS SO ORDERED

October 23, 2017

J. Mark Hayes, II
Presiding Judge
16th Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4602859

Kenneth D Morris		**Souh Carolina State Of**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION
ORDER ON MOTION TO RECONSIDER

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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S/ J MARK HAYES II	2132	11/3/2017
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

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Leah B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock Hill, SC 29730
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ATTORNEY(S) FOR THE PLAINTIFF(S)

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