ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 25 2020
S.C. SUPREME COURT

March 25, 2020

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Maunwell Ervin v. State of South Carolina
Case No. 2015-CP-24-01268

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

Sincerely,

Brianna L. Schill for BLS
Assistant Attorney General

cc: C. Rauch Wise, Esquire
South Carolina Department of Corrections
The Honorable Chastity Copeland, Clerk of Court, Greenwood County
The Honorable David M. Stumbo, Solicitor, 8th Judicial Circuit
The Honorable J. Mark Hayes, II, Presiding Judge
Victim Advocacy Division

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

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Case No. 2015-CP-24-01268

Maunwell Ervin, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable J. Mark Hayes, II's order granting post-conviction relief, filed September 13, 2018. The State filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which was denied in part by an Order dated February 14, 2020, and served upon the State on March 3, 2020. Copies of the orders on appeal are attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

BRIANNA L. SCHILL
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Columbia, SC 29211
(803) 734-3737

March 25, 2020

By: s/ Brianna L. Schill
Attorneys for the Petitioner

Other Counsel of Record
C. Rauch Wise, Esquire
Law Office of C. Rauch Wise
305 Main Street
Greenwood, SC 29646

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PROOF OF SERVICE

I, Kaitlyn Slice, certify that I have today served the within notice of appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

C. Rauch Wise
Law Office of C. Rauch Wise
305 Main Street
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served this 25th day of March, 2020.

KAITLYN S. SLICE
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Legal Assistant

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT O F COMMON PLEAS

Mauwell J. Ervin, Jr. № 3566337)
)
Applicant.) 2015-CP-24-01268
)
-vs-) Order
)
State of South Carolina)

This matter comes before me upon the application for Post-Conviction Relief filed by the applicant on November 30, 2015 as amended by filing on June 1, 2017. The allegations of ineffective assistance of counsel raises five issues:

1. Was trial counsel ineffective in failing to object to a jury charge that impermissibly told the jury they may infer knowledge and control over the drugs if the defendant had knowledge and control over the premises where the drugs were found?

2. Was trial counsel ineffective in failing to object to a jury charge that improperly defined constructive possession that effectively eliminate a mens rea as to the possession of the drugs?

3. Was trial counsel ineffective in failing to object on Double Jeopardy grounds to the consecutive sentence for possession with intent to distribute marijuana within proximity to a school that was consecutive to the charge of possession with intent to distribute marijuana?

4. Was trial counsel ineffective in failing to object to the opinion testimony of several law enforcement officers when none of them was ever qualified as an expert?

5. Was trial counsel ineffective in failing to object to the closing argument of the

prosecuting attorney when the argument expressed his personal opinion as to the credibility of the officers involved?

Mauwell J. Ervin was appointed counsel to represent him on several drug charges and one count of possession of a firearm while engaged in a drug trafficking offense. His first trial, held in January of 2013, resulted in a not guilty on the possession of a firearm while engaged in a drug trafficking offense and a hung jury on all other charges. He was subsequently tried in July of 2013. That trial resulted in a conviction of possession of marijuana with intent to distribute, possession of marijuana with intent to distribute within proximity to a school and possession of Benzylpiperazine. The jury again was unable to reach a verdict on the two drug trafficking charges.

The facts giving rise to these charges occurred on December 9, 2010 when Mr. Ervin was arrested as a result of a search of a house he was renting. During the search the police found sufficient drugs to charge him with possession of marijuana with intent to distribute, possession of marijuana with intent to distribute within proximity to a school, trafficking crack cocaine, trafficking crack cocaine within proximity to a school, possession of Benzylpiperazine, and possession of a firearm while engaged in a drug trafficking offense. Appointed counsel represented Mr. Ervin in both trials. She did not represent him on the appeal. There are no allegations of ineffective assistance of appellate counsel.

Was trial counsel ineffective in failing to object to a jury charge that impermissibly told the jury they may infer knowledge and control over the drugs if the defendant had knowledge and control over the premises where the drugs were found?

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* did not refer to a jury charge. For the jury to reach such a conclusion on their own without an instruction from judges is certainly permissible. To give the State the edge by telling, and thus encouraging, the jury that they may make such an inference, is not permissible. In this case, while Mr. Ervin leased the house, there was a dispute as to whether he lived there on a regular basis or if it were the primary residence of another individual. Tr. at 222, l 23 to 223, l 11

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, when drugs are found in a residence occupied by two or more people there is no reason to infer the drugs belong to one or the other. 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 the effect of the charge. 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. Moreover, the record in this case establishes it is in fact a close case. One jury was not able to reach a verdict on any of the drug charges. The second jury reached a verdict on the marijuana charges but was unable to reach a verdict on the crack cocaine charges. 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. This would violate the principles established in *In Re Winship*, 397 U.S. 358 (1970). 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 a house they share with another. 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 a house shared with 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 a court should approve a charge to the jury that instructs them to give a 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 when one is the leaseholder of the house where the drugs are found will result in some guilty individuals not being convicted. But it will also assure that some innocent individuals will not be convicted. The Pennsylvania Supreme Court has said:

> 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.
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> *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 Resident Rented by Mr. Ervin 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 rented the house - 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. 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 where the drugs are found. 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)[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

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

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 lease is in the defendant's name, 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. Her failure to do so rendered his representation of Mr. Ervin was ineffective. Her failure to object was prejudicial to Mr. Ervin.

Was trial counsel ineffective in failing to object to a jury charge which improperly defined constructive possession so as to eliminate a mens rea as to the possession of the drugs?

The indictment in this case charged Mr. Ervin did "willfully, unlawfully, and knowingly possess with intent to distribute, . . . Marijuana . . . .". The State alleged he committed a specific intent crime. The State did not allege he committed this crime recklessly or with willful blindness. The State is required to prove he specifically knew the marijuana was in the residence and that he intended to and did in fact possess the marijuana.

The charge to the jury in this case simply eliminated the mens rea the State was required to prove. The trial judge charged the jury "Constructive possession means the defendant had dominion and control, over either the crack cocaine and/or marijuana itself *or the property on*

which the drugs were found." Tr. at 285, ll 18-21. (Emphasis added). The State did not indict him for having control over the house. What this charge means is that the jury can convict Mr. Ervin based solely on his being the person that rented the house. The charge does not require that the jury find Mr. Ervin have actual knowledge of the presence of the drugs or any intent to possess the drugs. The mens rea is supposed to be knowledge that the drugs are on the property and one has the intent to possess them. It does not mean an intent to be in possession of the house where drugs are found. A charge that eliminates a required mens rea lessens the burden upon the state and is a violation of *In Re Winship*, 397U.S. 358 (1970). As one Court has said, "Although the legislature may punish an act without regard to any particular (specific) intent, the State must still prove general intent, that is, that the defendant intended to do the act prohibited." *State v. Oxx*, 417 So. 2d 287, 290 (Fla. Dist. Ct. App. 1982). The act prohibited was the possession of the drugs and not the house. Trial counsel should have object to this charge and the failure to do so prejudiced Mr. Ervin as it lessened the burden upon the State.

Was trial counsel ineffective in failing to object on Double Jeopardy grounds to the consecutive sentence for possession with intent to distribute marijuana within proximity to a school that was consecutive to the charge of possession with intent to distribute marijuana?

In addition to making the possession of marijuana with intent to distribute illegal, the legislature has enacted a crime for possession with intent to distribute within proximity to a school. It is defined as "(A) It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or

technical educational center; or a public or private college or university." This section found in S. C. Code § 44-53-445. While the legislature states it is a separate crime it does not call for consecutive punishment from the possession with intent to distribute.

To give consecutive sentences for such a violation violates the Double Jeopardy provision of the Fifth Amendment to the Constitution of the United States of America and Article I, § 12 of the Constitution of the State of South Carolina. In *Blockburger v. United States*, 284 U.S. 299 (1932) the Court held Double Jeopardy is not violated if each crime required the proof of a fact that the other one did not.[2] A simple explanation of the case is if one crime requires the proof of facts A and B and the other crime requires the proof of facts A and C, then there is no Double Jeopardy violation if a defendant is convicted of both crimes in one trial.[3] In this case there is no separate fact to be proven that is different in each case. To convict Mr. Ervin of the possession of marijuana with intent to distribute, the state must prove he possessed the marijuana and that he did so with the intent to distribute. Other words, they must prove facts A and B. To prove the proximity charge the state must prove Mr. Ervin possessed the marijuana, that he did so with the intent to distribute and he did so within one-half mile of a school. Other words, they must prove facts A, B, and C. Properly understood, the possession of marijuana with intent to distribute is a lesser included of the proximity charge. Thus, the state can no more convict a defendant of the two charges here than they could convict a defendant of both possession of

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[2] While courts commonly refer to *Blockburger* as a "same elements" test, this is not correct. The word "element" only appears one time in the case. The Court discussed the different facts that need to be proven.

[3] If the cases were to be tried separately and the first verdict was not guilty, there would be an issue preclusion issue under Double Jeopary as the defendant would have been acquitted of fact A which is common to both cases.

marijuana and possession with intent to distribute.

This case is controlled by *Brown v. Ohio*, 432 U.S. 161 (1977). In that case, the defendant entered a plea to joy riding under the applicable Ohio statute. The State subsequently convicted him of the theft of the same automobile. The Supreme Court held the joy-riding statue, while a separate crime, was a lesser included offense of the theft and that to permit prosecution for both was a violation of Double Jeopardy. The same principle was also established in *Rutledge v. United States,* 517 U.S. 517 (1996). In that case, the Supreme Court held a conviction for both conspiracy and a separate crime, continuing criminal enterprise, to violate Double Jeopardy based upon the fact that both crimes required the proof of a conspiracy. The conspiracy under the CCE statute would satisfy the conspiracy under the general conspiracy statute even though the reverse would not be true.

Trial counsel should have raised the Double Jeopardy argument before the trial judge. Such an argument is meritorious and the failure to raise it is ineffective assistance of counsel. Mr. Ervin was prejudiced as the trial judge ran the two charges consecutive. If the issue had been raised, the State would have been required to elect as to which charge they wished to proceed. Mr. Ervin would not have received a consecutive sentence.

Was trial counsel ineffective in failing to object to the opinion testimony of several law enforcement officers when none of them was ever qualified as an expert?

Generally, a witness may not give an opinion about the evidence. The one exception is the lay opinion rule that is not involved in this case. *See*, Rule 701, South Carolina Rules of Evidence. Under that rule, an opinion by a non-expert witness is very limited and is based on common sense. For example, when a non-expert witness testified a defendant is or is not

intoxicated, it is an opinion, but it is the type of opinion lay people make in their ordinary life. The same is true for statement such as "he was angry" or "he was upset." As stated by the rule, such observations do not require "special knowledge, skill, experience or training."

During the examination of the applicant's trial attorney, counsel for Mr. Ervin pointed out numerous examples of an opinion given by the officers. These examples consisted of three of the officers who testified and one SLED expert who testified to matters for which she was not qualified. These examples are found on the following transcript pages. 84, ll 15-23; 87, ll 19-24; 92, ll 14 to 93, l 1; 94, ll 7-25; 141, l 21 to 142, l 1; 171, ll 7-15; 218, l 25 to 219, l 5; and 245, ll 1-10. Except for the last page reference, the opinions all helped the state to build a case for possession of marihuana with intent to distribute. The last page referenced was asked on cross-examination. During that cross Mr. Ervin's trial counsel elicited the following exchange involving an opinion of Officer Courtney Smith:

> Q. Based on your training and experience and being at that location and hearing that, how did you take that?
> A. I took it as an admission of guilt that he was taking responsibility for the things that were found inside the home . . . .
> Tr. at 245, ll 1-10

Here trial counsel elicited an opinion from the officer that her client was guilty. Had she not asked for an improper opinion evidence this admission would not have been made. No valid trial strategy was given for asking this question. No valid reason was given for not objecting to the other opinion testimony. When this opinion is considered together with the opinions given by the other officers as to the intent with which they contend Mr. Ervin possessed the marijuana, prejudice is shown. Mr. Ervin is entitled to a new trial based upon the failure to object to improper opinion testimony.

Was trial counsel ineffective in failing to object to the closing argument of the prosecuting attorney when the argument expressed his personal opinion as to the credibility of the officers involved?

During the closing argument, the solicitor said to the jury "Are these guys perfect? Absolutely not. None of us are. But I'm proud to be their solicitor and the job that they're doing here and the job they did in this case. Tr. at 256, ll 16-19. In a closing argument, an attorney is not to express their personal belief in the credibility of the witnesses or the cause. By stating that he is proud of "the job they did in this case" the solicitor has expressed his personal belief in the investigation and integrity of the officers. This was improper. Rule 3.5 of Rule 407 concerning professional conduct states, in part, a lawyer shall not "assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness . . . ."

In *Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016) the South Carolina Supreme Court granted post-conviction relief because cause of improper argument of the prosecuting attorney who vouched for the credibility of the. In that case, he did not argue his personal belief but argued a witness had vouched for the credibility of another witness. The same principle should apply here. The solicitor in his closing argument did convey to the jury his belief in the integrity of the officer witnesses who testified in this case.

Trial counsel defended her position by saying she did not like to object to the closing argument of opposing counsel. This is generally true for virtually any attorney who tries cases on a regular basis. But there comes a time when such an objection is necessary to protect the integrity of the system. This was one.

Mr. Ervin is entitled to a new trial based upon the failure to object to improper opinion testimony. Because the solicitor personally vouched for the credibility of the officers, Mr. Ervin was prejudiced. Such a comment could have been the basis for the jury deciding to convict in this case. If they did, it was an improper basis.

THEREFORE, it is hereby Order, Adjudged and Decreed that Mauwell J. Ervin is entitled to a new trial in this matter.

IT IS SO ORDERED

August 27, 2018

J. Mark Hayes, II
Presiding Judge
8th Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT O F COMMON PLEAS
	)	
COUNTY OF GREENWOOD	)	
Mauwell J. Ervin, Jr. № 3566337	)	
	)	
Applicant.	)	2015-CP-24-01268
	)	
-vs-	)	Order
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The State of South Carolina filed a Rule 59 Motion requesting this Court to alter or amend the previous order issued in this matter. A hearing was held on October 1, 2019. The Court reviewed the motion filed by the State and listened to argument of both counsel. The Court declines to maned the previous order with one exception. As to Issue 3, discussed beginning on page 10 of the order, the Court amends the order to find that trial counsel was not ineffective in failing to raise the Double Jeopary issue.

The Court has again reviewed controlling South Carolina law and concluded that this Court is bound by the holding of the South Carolina Court of Appeals when the Court said, "We wish to emphasize that there is no prohibition against the contemporaneous prosecution by the State for both possession with intent to distribute and distribution of crack cocaine and the related school charges where, like this case, they arise out of the same conduct." *State v. Brown,* 319 S.C. 400, 408, 461 S.E.2d 828, 832 (Ct. App. 1995). *See, also Riley v. South Carolina*, 82 F. Supp. 2d 474 (D.S.C. 2000). The previous order in this matter is hereby modified to hold that trial counsel was not ineffective in failing to raise the Double Jeopary issue.

In all other respects, the previous Order has been carefully reviewed and the Court finds no error of law or facts that were overlooked in ruling on this matter.

Therefore it is hereby Ordered that the previous order is hereby modified to reflect that trial counsel was not ineffective in failing to rise the Double Jeopardy issue. All other findings in the Order are not modified or changed.

~~December ~~, 2019~~
February 14, 2020

J. Mark Hayes, II
Presiding Judge
8th Judicial Circuit