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## STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly denied Appellant's request to charge the jury it must give greater care to the examination of a co-defendant's testimony. The charge is not required in this state and invades the province of the jury.

## STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

## ARGUMENT

**I. The trial court correctly denied Appellant's request to charge the jury it must give greater care to the examination of a co-defendant's testimony. The charge is not required in this state and invades the province of the jury.**

Appellant contends the trial court erred in failing to give a jury instruction requiring the jury to weigh the testimony of his co-defendant with "greater care than the testimony of an ordinary witness." The requested charge is not appropriate and the trial judge more than adequately charged the jury on their responsibility in determining the credibility of a witness and the weight to assign a witness's testimony. Finally, the charge as proposed would invade the province of the jury and be an impermissible charge on the facts.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 479, 697 S.E.2d at 583

A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when

the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted).

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

Appellant specifically requested either of two charges which required the jury to weigh one witness's testimony with greater care than another. Specifically, the two requested charges were:

> Request to Charge 1
>
> The testimony of a witness who provides evidence against the Defendant for personal advantage or for the hope of lenient treatment from the prosecution must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness's testimony has been affected by interest or by prejudice against the Defendant.
>
> Request to Charge 2
>
> The testimony of a co-conspirator who provides evidence against a defendant for personal advantage must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the testimony by such a co-conspirator has been affected by interest, or by prejudice against defendant.

(Defendant's Request to Charge, Court's Exhibit 2; R. 325-327).

The denial of similar requests to charge has been upheld by the South Carolina Supreme Court. In State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972), the State relied largely on the uncorroborated testimony of a coconspirator. The trial court was asked "to instruct the jury that, in determining the credibility of the testimony of the witnesses, 'they have the right if not the duty to take into consideration any bias or prejudice or hope of reward that a witness might have.'" Id. at 542, 186 S.E.2d at 717. The trial court denied the request and instead charged the jury "that it was their duty to pass upon the credibility of the testimony of the witnesses and that they could reject any part of the testimony if they found good reason for so doing." Id. The Supreme Court held: "The instructions clearly left to the jury the determination of the credibility of the testimony of the witnesses and the record shows no prejudice from the failure to give the requested instruction." Id.

In State v. Bamberg, 270 S.C. 77, 240 S.E.2d 639 (1977), the Supreme Court again considered a "special instruction" related to the consideration of a witness's bias or prejudice. Id. at 82, 240 S.E.2d at 641. In Bamberg, the trial judge refused to instruct the jury to take into consideration the interest or bias of the witness in determining his credibility. The Supreme Court found the charge given which indicated the jury was the judge of the witnesses' credibility and could believe one witness over many and only portions of a witness's testimony was sufficient. The Court found no prejudice resulting from the failure to give the charge regarding bias and interest of the witness. Id.

Finally, and most directly on point to the instruction requested by Appellant, is the case of State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976). In Collins, the appellant asserted the trial judge erred in "refusing to charge that the testimony of a

codefendant should be carefully scrutinized and that the jury may consider whether the witness is fearful of retribution or has any hope of leniency from the prosecution." Id. at 573, 225 S.E.2d at 193. The South Carolina Supreme Court found "the trial judge's overall instruction that it was the jury's duty to pass upon the credibility of the testimony of witnesses, and that they could reject any part of the testimony if they found reason for doing so, was adequate." Id. (citing State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972)). Most significant, is the Court's final holding: "Any further instruction on this point might have invaded the province of the jury to draw inferences from the evidence." Id.

The charge in the current case was unnecessary in light of the extensive charge given by the trial court regarding the jury's role in determining the credibility of witnesses and what the jury may consider in making its decision. Prior to trial even beginning, the trial court specifically instructed the jury on their role in determining whether to believe any witness. The court stated:

> In determining what the true facts are, you must decide whether or not the testimony of a witness or witnesses is believable. It will be my responsibility to rule as a matter of law as to whether certain testimony is admissible at all or not, but once it is admitted, whether or not you believe it, is solely a matter for you to determine in your fact finding province.
>
> In deciding whether to believe a witness, you have the right to consider the interests of any witness, the bias of any witness, the prejudice of any witness, the opportunity for the witness to have seen the things and matters about which the witness may testify and the way the witness acts on the witness stand, something we commonly to refer to in the law as demeanor. You have the right to consider anything that is in the record that will help you evaluate the testimony of the witnesses. That means that it is your duty, Ladies and Gentlemen, to pay close attention to the

witnesses, to observe them, to listen to them and to pay close attention to the attorneys and the Court.

(T.43; R.13) (Emphasis Added).

The trial court's jury charge stated: "In every case tried in this court before a jury, the jury becomes the sole and exclusive judges of the facts. You, the jury, are the judges of the facts in this case." (T.347; R. 280). The trial court then continued a very extensive and comprehensive instruction regarding witness testimony:

> As jurors then, it is your duty to determine the effect, the value, the weight and the truth of the evidence presented during the trial. Necessarily, you must assess the credibility of witnesses who have testified. Credibility is simply a legalistic term meaning believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine that evidence that convinces you of its truth. Some of the things you may consider as you decide whether or not to believe a witness' testimony about a particular matter include: What was the manner and appearance of the witness who testified, was he or she straightforward or hesitant in answering. Was the testimony of the witness consistent or inconsistent. How did the witness come to know the facts that he or she testified to or what was his or her ability to know these facts. Is there some reason a witness would want to give testimony which would help or hurt one side or the other. In other words, was the witness biased or prejudiced and was the testimony of the witness strengthened or weakened by other testimony or evidence.
>
> In addition, in determining the question of the credibility or believability of witnesses who has testified, you may believe one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. If you have a good and sound reason, you may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider, as I've explained whether any witness has exhibited to you any interest, any bias, any prejudice or other motive in this case. You may consider the demeanor of a witness, that is the manner and appearance of the witness from the witness stand. You can

> believe as much or as little of each witness' testimony as you think appropriate. Throughout this process, Ladies and Gentlemen, you have but one objective, to seek the truth regardless of its source.
>
> I instruct you that a person who has a past criminal record is competent to testify during a trial. A past record does not affect the ability of that witness to testify. The past record may only be considered by you, if at all, in determining the witness' believability or credibility. Remember, Ladies and Gentlemen, you are the sole judges of the facts in this case and of the believability of any and all of the witnesses.

(T.348-350; R. 281-283)(emphasis added).

The trial court provided the jury with a more than adequate explanation of its role and the consideration it had to make regarding witness credibility and believability. The court even explained on multiple occasions the jury could consider the interest, bias, or prejudice of the witness and whether the witness would have a reason to give testimony to help or hurt one side or the other. The main aspects of Appellant's request to charge, that the jury could consider a witness's bias or reason for testifying was completely covered by the trial court's instruction. As the South Carolina Supreme Court found in Steadman, Collins, and Bamberg, the charge given in this case was more than adequate, and absolutely no prejudice can be shown by the trial court's decision to deny the specific request by Appellant.

Further, the request to charge proposed by Appellant is an impermissible charge on the facts which would invade the province of the jury. In addition, it is not totally based on the facts of this case as testified to by Appellant's co-defendant. The South Carolina Constitution provides: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21.

In State v. Cheeks, Op. No. 27211 (S.C.Sup.Ct. filed January 16, 2013)(Shearouse Adv.Sh. No. 3 at 29), the South Carolina Supreme Court recently concluded a jury instruction which included the language "strong evidence"[1] was an impermissible comment on the weight of the evidence by the court. Id. at 33. Similarly, the Supreme Court cautioned the requested charge in Collins would "invade the province of the jury to draw inferences from the evidence." Collins, 266 S.C. at 573, 225 S.E.2d at 193.

The charge requested invades the province of the jury. It comments solely on the testimony of one witness, sets that testimony apart from all other witness testimony, and establishes the existence of "personal advantage" as a basis for the testimony of Appellant's co-defendant when the jury would be free to find no such basis at all.

Additionally, in the instant case, the facts of this case do not provide support for the jury charges requested by Appellant. The co-defendant testified he had no deal from the Solicitor's Office. He testified he hoped for leniency, but that he made no deal in exchange for his testimony. (T.229; 243-244; 258; 274; R. 167; 181-182; 196; 212). It is, therefore, for the jury to determine whether Appellant's co-defendant was testifying to create a "personal advantage" and not for the judge to instruct. As a result, the trial court properly denied the requested jury charge because it is an impermissible charge on the facts of the case by the trial court.

Accordingly, as in Collins, the trial court's jury instruction more than adequately covered any issues raised by Appellant's requests to charge and no prejudice can be demonstrated in the failure of the trial court to give the requested charges. Further, the charges clearly invade the province of the jury and eliminate its ability to make

[1] The specific instruction given stated: "Because actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element." Cheeks at 33.

determinations from its own view of the evidence. As in Cheeks, this jury charge should not be permitted as a comment on the weight of the evidence and the facts of the case.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 22, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2011-205206

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The State, Respondent,

vs.

Travis Jones, Appellant.

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## CERTIFICATE OF COUNSEL

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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STATE OF SOUTH CAROLINA

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Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
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The State, Respondent,

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**PROOF OF SERVICE**

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I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 22nd day of April, 2013.

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