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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
COURT OF GENERAL SESSIONS

Donald B. Hocker, Circuit Court Judge

Appellate Case No.: 2019-001902

The State of South Carolina.....Respondent,

v.

Kenneth Earle McGill.....Appellant.

APPELLANT'S PETITION FOR REHEARING

William Norman Epps III, # 73158
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Anderson, South Carolina 29622-2167
(864) 224-2111
ATTORNEY FOR APPELLANT

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MEMORANDUM IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

COMES NOW Kenneth Earle McGill, Appellant in the above-entitled action, who respectfully shows this Honorable Court the following:

ARGUMENT

I. Appellant is entitled to a rehearing as this Honorable Court overlooks the uncertainty created by the trial court's refusal to allow the use of a special verdict form to remedy the negative impact to Appellant's rights given the language of the operative indictment, and the arguments made by Respondent during its closing.

In United States v. Furlow, 928 F.3d 311 (4th Cir. 2019), the Fourth Circuit Court of Appeals recognized that "South Carolina courts treat the alternatives specified in section 44-53-375(B) as separate offenses with different elements," thus concluding the statute was divisible. Id. at 320; *see, e.g.*, State v. Brown, 319 S.C. 400, 406, 461 S.E.2d 828, 831 (Ct. App. 1995) (noting distribution of crack cocaine and possession of crack cocaine with intent to distribute are separate statutory crimes); State v. Gill, 355 S.C. 234, 239-241, 584 S.E.2d 432, 434-35 (Ct. App. 2003) (discussing the elements of distribution of crack cocaine); Carter v. State, 329 S.C. 355, 361, 495 S.E.2d 773, 776 (1998) (treating manufacturing as a separate offense under the statute); Harden v. State, 360 S.C. 405, 410, 602 S.E.2d 48, 50 (2004) (noting "[c]onspiracy is a separate offense").

In terms of the sufficiency of an indictment, our Supreme Court determined the test was whether

> (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer . . . and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

State v. Samuels, 403 S.C. 551, 555, 743 S.E.2d 773, 776 (2013) (quoting State v. Gentry, 363 S.C. 93, 102-02, 610 S.E.2d 494, 500 (2005)). Yet in Samuels, the Court clarified the Gentry

decision "did not consider duplicitous indictments which allege two distinct and separate offenses in the same count." 403 S.C. at 555, 743 S.E.2d at 776. The Court explicitly recognized "[d]uplicitous indictments 'implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy in a subsequent prosecution.'" Id. at 556, 743 S.E.2d at 776 (quoting United States v. Murray, 618 F.2d 892, 896 (2d Cir. 1980)).

Here, given the language of the operative indictment against Appellant, (*see* R. p. 4), each risk to Appellant's rights as identified by the Court in Samuels, except for that pertaining to sentencing, exists regardless of whether the instant indictment is duplicitous in the exact manner as the indictment in Samuels. *Cf.* 403 S.C. 555, 743 S.E.2d 775-776 (noting it was alleged in a single count the defendant "assaulted 'Patricia Speaks and/or Carla Daniels.'"). In terms of Appellant's rights to notice of the charge against him, Appellant was mandated by the language of the indictment to be prepared to defend against a variety of claims with no bearing on the instant matter, including that Appellant knowingly sold, manufactured, delivered, purchased, or brought into this State 100 grams or more of methamphetamine. (*See* id.) This is a massive burden to impose on the defense if the State had no good faith basis to believe each act as indicted took place. *Cf.* Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 (requiring "the offense" to be "stated with sufficient certainty and particularity").

As to Appellant's rights to a unanimous verdict, during closing Respondent argued: "A person who knowingly sells, manufactures, delivers, purchases, or brings into this state. Did he do this? Did he sell? Absolutely." (R. p. 504, lines 20-22) Yet no evidence was presented Appellant sold any quantity of methamphetamine. Instead, if Respondent's law enforcement witnesses are to be believed, Appellant merely walked into a room with a bag which contained

methamphetamine. (*See, e.g.,* R. p. 275, lines 1-3; p. 277, lines 7-8) Further, as to the "bringing into the state" portion of the indictment's language, it was Mr. Ferguson who testified he himself brought methamphetamine into the State to the tune of "over 108 pounds," not Appellant. (*See* R. p. 180, line 25 – p. 181, line 14; *see also* R. p. 236, lines 1-4)

Respondent argued at closing: "Did he manufacture? He did. You heard testimony about washing the meth, and those were in the text messages that Mr. Ferguson read." (R. p. 504, lines 23-25) Yet there was absolutely no testimony from any witness that "washing the meth" equated to manufacturing methamphetamine. Respondent further contended: "Did he provide financial assistance? Absolutely. He showed up with almost $14,000." (R. p. 505, lines 4-6) Yet if Respondent's primary witness is to be believed, the "typical" amount of money required for going "down to Atlanta" was "around about $16,000." (R. p. 151, lines 16-21) It seems odd that Mr. Ferguson's suppliers in Atlanta would suddenly discount their product by a little more than $2000.

As to duplicitous indictments, South Carolina recognizes "the risk that a jury divided on the two separate offenses in one count could nevertheless convict through a general verdict on the one count." Samuels, 403 S.C. at 556, 743 S.E.2d at 776; *see also* United States v. Sturdivant, 244 F.3d 71, 75 (2d Cir. 2001) (noting the "risk that the jurors may not have been unanimous"). In short, in light of the evidence presented and closing argument made by Respondent, the only way to truly know the act or acts for which Appellant was found guilty by the jury was through the use of the special verdict form urged by Appellant at trial. (*See* R. p. 483, lines 3-5) Thus, regardless of whether the instant indictment was duplicitous in the exact same manner as the indictment in Samuels, in light of the same risks to Appellant's rights presented by the language of the indictment, the trial court's failure to require the use of such a

form was error, and this Honorable Court should grant a rehearing in this matter for that reason. *See* Samuels, 403 S.C. at 557, 743 S.E.2d at 777 ("Despite the indictment's duplicity, we find no prejudice to Samuels due to the actions of the circuit court. A duplicitous indictment's potential prejudice can be cured through jury instructions and the use of a special verdict.").

II. Appellant is entitled to a rehearing as this Honorable Court misapprehended, to Appellant's detriment, the extent to which Appellant sought to impeach the credibility of Respondent's pivotal witness through the use of that witness's cell phone data.

By its Opinion, this Honorable Court determined: "The trial court did not abuse its discretion in refusing to grant [Appellant] a continuance to review the contents of a potential witness's phone because he had the opportunity to review the phone data during the trial and he was able to impeach the witness—his stated purpose for reviewing the data—by other means." State v. McGill, Op. No. 2023-UP-109, at *2-3 (S.C. Ct. App. Mar. 22, 2023). Respectfully, this Honorable Court cannot determine whether Appellant's impeachment of the witness "by other means" was as effective as it would have been had the continuance been granted, given the multiple avenues potentially available to Appellant following an in-depth review of the "phone dump" which was obtained by Respondent.[1] (*See* R. p. 466, line 24 – R. p., line 8)

As recognized by the U.S. Supreme Court, cell phones "are in fact minicomputers that also have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." Riley v. California, 573 U.S. 373, 393 (2014). Not only can data on a cell phone "reveal where a person has been," the "sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions. . .

[1] Appellant recognizes this phone was collected by the Abbeville County Sheriff's Office at the time of Ferguson's arrest, (R. p. 45, lines 5-9), and later transferred to an agent for the Drug Enforcement Agency, (R. p. 436, line 16 – p. 438, line 4), which had the "phone dump" performed. (R. p. 467, lines 1-8)

." Id. at 396 & 394. Notably, [e]ven the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, thousand-entry phone book, and so on." Id. at 394.

In State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002), following a deadlock and mistrial, the defendant moved prior to the second trial for a continuance in order to obtain the transcript of the first trial so he would be in a better position to impeach the witnesses who previously testified. Id. at 21, 561 S.E.2d at 604. One in particular testified during the second trial she was not neighbors with the victim, but at the first trial two weeks beforehand she testified she still lived across from the victim. Id. at 22, 561 S.E.2d at 604. Our Supreme Court reasoned: "Although the fact that [the witness] no longer lived at the . . . address is not in any way relevant to [the defendant's] guilt, the fact that she lied about her address at the first trial is relevant to her overall credibility." Id. It went on to determine: "On the present record, we simply cannot escape the conclusion that the verdict hinged upon [the witness's] credibility, and that [the defendant] was hindered in his ability to impeach her." Id. at 23, 561 S.E.2d at 605. It thus reversed this Honorable Court's decision and remanded for a new trial. Id. at 24, 561 S.E.2d at 606.

In State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989), the defendant in a case involving felony driving under the influence sought to obtain test results from blood, skin, and hair samples obtained from the vehicle which he was purportedly driving. Id. at 461-62, 385 S.E.2d at 833-34. The defendant sought these to help establish the female with him at the time of the collision was actually driving, even though immediately after the collision witnesses placed the defendant on the driver's side of the vehicle and the other occupant on the passenger side. Id. at 461, 385 S.E.2d at 833. In response to several inquiries concerning the samples,

counsel for the defense was informed by the Solicitor's Office "the samples were lost or misplaced." Id. at 462, 385 S.E.2d at 834. Yet the samples were ultimately brought to the trial by SLED, and ten minutes before trial was to begin defense counsel was advised of their availability. Id.

Though no tests had been conducted on the samples at the time, defense counsel nonetheless moved for a continuance so that independent testing could be had, or at least the results of a SLED analysis could be obtained prior to litigating the matter. Id. The trial judge barred the State from using the samples, but refused to grant the continuance.[2] Id. Our Supreme Court held "the trial court erred in failing to consider the potential exculpatory value of the samples," thus reversing and remanding the case. Id. at 463-64, 385 S.E.2d at 834-35. It explained "*the eve of trial production of these samples warranted the granting of a continuance so that the defendant could adequately ascertain the samples' full evidentiary value.*" Id. at 463, 385 S.E.2d at 834 (emphasis added).

Here, Respondent's primary witness, Mr. Ferguson, testified that he used methamphetamine from July 2013 forward, but did not begin selling it until the end of May, 2018, approximately three months before his arrest. (R. p. 133, lines 2-18; *see also* R. p. 233, lines 6-13) He conceded on the day of trial that he still used methamphetamine "every now and then," despite awaiting a sentencing hearing on January, 9, 2019, two months into the future from when he was testifying. (R. p. 50, line 25 – p. 51, line 1; R. p. 225, line 19 – p. 226, line 2) Ferguson claimed that from April, 2018, forward, he drove another individual, one Brian McClure, to Atlanta once a week to pick up between six and ten pounds of methamphetamine, and that when McClure went to prison in July he started making solo trips to pick up six pounds

[2] No explanation is provided within the decision of how the State would have used blood, skin, and hair samples that were not tested to determine to whom they belonged.

per week. (R. p. 134, line 19 – p. 136, line 5) Ferguson placed his first solo trip to Atlanta on the weekend of July 14, 2019. (R. p. 136, lines 10-13) He testified he only made around five solo trips before getting arrested in the operation which led to Appellant's indictment. (R. p. 138, lines 8-14) Ferguson later agreed he in fact took over McClure's drug trafficking organization at the time McClure went to prison in July, 2018. (R. p. 191, line 25 – R. p. 192, line 3)

The cell phone at issue contained 26,188 pictures. (R. p. 467, lines 20-22) Yet Ferguson claimed he only had the phone "[m]aybe a few days" before he was arrested and it was seized by the Abbeville County Sheriff's Office. (R. p. 158, lines 2-15; R. p. 211, lines 19-23; R. p. 45, lines 5-9) He asserted he had broken his other phone, and conceded it was what he had used to "communicate with the Mexican in Atlanta and Head in jail . . . and coordinating with individuals to pick up the 6 to 10 pounds of methamphetamine in Atlanta." (R. p. 196, lines 18-23) Ferguson testified he had transferred all his contacts from his Google account to the new phone, (R. p. 197, lines 13-18), and attempted to explain the stunning number of pictures on the phone he had for "only a few days" as being attributable to some form of syncing with his Google account. (*Cf.* R. p. 213, lines 2-11) While he claimed not to know exactly what was on the phone since he had not seen it in a year, (R. p. 212, line 24 – p. 213, line 3), Ferguson testified "there's a lot of text messages in my phone." (R. p. 185, lines 15-16) On the surface, this contradicts the physical exam of the phone which showed text messages going back only "three or four days" from when it was seized. (*See* R. p. 58, lines 10-12) Notably, during cross-examination Ferguson admitted to using coded language in his text communications. (R. p. 191, lines 3-8) More importantly, when asked to identify specific numbers which appeared in various text messages, he claimed not to know to whom those numbers belonged. (R. p. 220, line 21 – p. 221, line 4; R. p. 224, lines 21-23)

Ferguson admitted that with the 220 grams he was arrested with, he had the most drugs of anybody at the house that day. (R. p. 192, lines 17-22) In fact, two of the deputies present during the operation each identified Ferguson as the "weight man" that day. (*See* R. p. 366, lines 8-18; p. 436, lines 8-15) Ferguson conceded that with his testimony against Appellant he was avoiding a mandatory minimum sentence of 25 years in prison due to the amount of methamphetamine he brought over. (R. p. 193, line 2 – p. 194, line 4) When asked if he would say or do anything to help himself, Ferguson stated he would "try to help myself as best I can." (R. p. 194, lines 5-7; *see also* R. p. 239, line 22 – p. 240, line 2) Given that no search warrant was ever executed at Appellant's home, nor his cell phone seized and subjected to a phone dump, (*see* R. p. 438, lines 9-20), the only evidence that Appellant was a major drug dealer who received four pounds of methamphetamine per week from Ferguson came from Ferguson's assertions that is what took place. (*Cf.* R. p. 134, line 14 – p. 137, line 20)

Ferguson testified that when his Anderson County home was searched by law enforcement, 18 grams of methamphetamine was located along with fifteen firearms and $5700 in cash. (R. p. 187, lines 16-25) Yet he was not charged as a result. (R. p. 188, lines 2-4; *see also* p. 189, lines 14-18)) Ferguson explained that before his home was searched his brother threw out the methamphetamine that was hidden there, but acknowledged his brother was not charged for doing so. (R. p. 188, lines 7-22) He claimed that while they were not friends at the time he attempted to dispose of evidence, his brother later became friends with an Anderson County solicitor. (R. p. 188, line 23 – p. 189, line 13)

Of the fifteen firearms seized from his home, Ferguson explained that three were stolen, but claimed Brian McClure, the individual with whom Ferguson transported drugs from Atlanta that was sent to prison in July, 2018, left those three guns at his home. (R. p. 194, lines 19-21)

He acknowledged he was not arrested for having possession of stolen firearms in his home, (R. p. 194, lines 22-24), and claimed to have no idea why he was never charged. (R. p. 196, lines 11-13; *see also* R. p. 228, lines 7-11)

"'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'" Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 689-90 (1986) (additional internal citation omitted)). Two of the primary purposes of the Confrontation Clause are to force the witness to submit to cross-examination, and to allow "'the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.'" State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (quoting California v. Green, 399 U.S. 149, 158 (1970)).

Respondent argued Appellant

> claimed that the purpose of the requested continuance was to find evidence that Ferguson had dealt drugs for a longer period than he had testified. Appellant also sought information with which he could illustrate Ferguson received a reduction of his own charge and potential sentence as a result of his apparent cooperation with the State.

(Resp.'s Br. at 25) But in reality Appellant's counsel specifically argued to the trial court a detailed examination of the information contained on Ferguson's cell phone was necessary "because it affects his - - it goes to his bias, his credibility, and his reliability in front of this jury," noting the text messages observed from the exam on the day of trial only went back "three or four days." (R. p. 59, lines 15-17; R. p. 58, lines 10-12)

Appellant could not view the information previously due to firewalls blocking the information on the disk containing the phone dump. (R. p. 468, lines 18-21; R. p. 470, lines 13-

16) While Respondent accurately contended defense counsel "spent about two hours [the day before trial] going through" the phone, and "had an opportunity to look at" the readily visible "messages and whatnot," (R. p. 155, lines 1-7), Respondent's assertion does not reflect a complete opportunity by Appellant's counsel to look for coded messages, (*see* R. p. 191, lines 3-8), especially those transmitted in picture form, or to determine whether texts which were previously erased were recoverable and readable, or to examine in detail the photographs on the phone, all in an effort to gather information which could be used to show Ferguson was a demonstrable liar. *See* Riley, 573 U.S. at 394 ("The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions. . . ."); Stokes, 381 S.C. at 401, 673 S.E.2d at 439 (noting the significance of a witness being subject to cross-examination and his demeanor being an aid to the assessment of his credibility).

Instead, similar to the situation involving the defendant in Tanner, on the eve of trial Appellant's counsel "got to look at text messages, but, obviously, [he] couldn't look at the whole phone." (R. p. 153, lines 13-17) Thus, there was only a very limited opportunity to determine what information was contained in the cell phone which might form a basis to impeach Ferguson's credibility, and discredit the story of how Ferguson came to get Appellant to respond to a simple telephone call to drive to a home in another county Appellant had never been to before for the sole purpose of bringing Ferguson four grams of methamphetamine. *But see* Holmes, 547 U.S. at 324 (noting "'the Constitution guarantees criminal defendants "a *meaningful* opportunity to present a *complete* defense."'") (emphases added).

Thus, while Ferguson testified as to how he transported pounds of methamphetamine from Atlanta and would give four of these to Appellant, (*see* R. p. 136, lines 14-17), Ferguson also testified the stolen guns in his home conveniently belonged to an individual already sitting

in prison. (R. p. 194, lines 19-21) He claimed to be a user of methamphetamine since 2013, but only became a drug dealer months before being arrested for drug dealing. (R. p. 133, lines 2-18; *see also* R. p. 233, lines 6-13) Ferguson asserted he had no idea why he was not charged with the drugs and stolen guns at his home in Anderson County, (R. p. 196, lines 11-13; *see also* R. p. 228, lines 7-11), despite noting his brother had become friends with an Anderson County solicitor. (R. p. 188, line 23 – p. 189, line 13) He admitted he would try to do everything to "help himself out" in terms of the mandatory minimum 25 years charge he was facing. (R. p. 194, lines 5-7; *see also* R. p. 239, line 22 – p. 240, line 2) And most strikingly, Ferguson's testimony that he had the phone only "a few days" does not square with the reality there was 26,188 pictures on that same phone. (Compare R. p. 158, lines 2-15; R. p. 211, lines 19-23; R. p. 45, lines 5-9 *with* R. p. 467, lines 20-22) It therefore makes abundant sense to believe that an in-depth examination of the phone could have revealed important information bearing on Ferguson's credibility as a witness. *Cf.* McMillian, 349 S.C. at 21, 561 S.E.2d at 604 (noting "the fact that [the witness] lied about her address at the first trial is relevant to her overall credibility.").

Respondent has pointed to caselaw, (*see* Resp.'s Br. at 24-25), which recites the denial of the continuance must be upheld because "there is no showing that any other evidence on behalf of [Appellant] could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial." State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002); *see also* State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996) ("Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted …, the denial of a motion for continuance is not an abuse of discretion."); State v. Squires, 248

S.C. 239, 244, 149 S.E.2d 601, 603 (1966) (similar). Yet Respondent's position is, to be kind, disingenuous, given that Appellant has neither the non-functioning disk containing the Ferguson phone dump, nor the phone itself. It is thus wholly impossible for Appellant to obtain the evidence to meet the McKennedy standard. *Cf.* 348 S.C. at 280, 559 S.E.2d at 855.

Here, this Honorable Court "simply cannot escape the conclusion that the verdict hinged upon [Ferguson's] credibility, and that [Appellant] was hindered in his ability to impeach [Ferguson]." McMillian, 349 S.C. at 23, 561 S.E.2d at 605. As in Tanner, "the eve of trial production of [the phone] warranted the granting of a continuance so that [Appellant] could adequately ascertain the . . . full evidentiary value" of the information it contained. 299 S.C. at 463, 385 S.E.2d at 834. Because Appellant was not allowed a meaningful opportunity to conduct a detailed examination of Ferguson's phone in order to determine Ferguson's overall credibility, and information from said phone was used in the State's case in chief, (*see* R. p. 159, line 2 – p. 165, line 6), Appellant should be granted a rehearing in this matter. Holmes, 547 U.S. at 324 (noting "'the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'").

(Conclusion and signature page follows.)

CONCLUSION

FOR THE REASONS SET forth herein, Appellant prays this Honorable Court to GRANT the instant Petition for Rehearing.

Respectfully submitted,

EPPS & EPPS, LLC

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This 4th day of April, 2023.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant's Petition for Rehearing is in compliance with Rules 221(a) and 240(c), SCACR.

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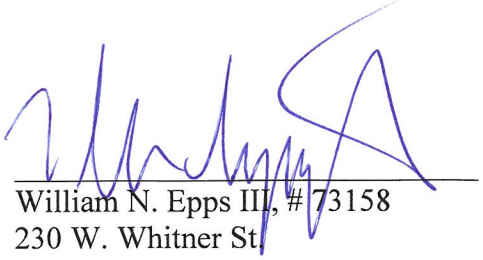
APPELLANT'S CERTIFICATE OF SERVICE

I, counsel for Appellant, do hereby certify that pursuant to Rule 240(c)(1), Respondent was served with Appellant's Petition for Rehearing on April 4, 2023, by delivering to Mr. William M. Blitch, Jr., Esquire, Post Office Box 11549, Columbia, SC 29211, a copy thereof by U.S. mail, described in R. 262(c).



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