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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PETITION FOR A WRIT OF CERTIORARI

William N. Epps, III. (SC Bar #73158)
EPPS & EPPS, LLC
Post Office Box 2167
Anderson, South Carolina 29622
(864)224-2111
(864)224-3536 (Fax)
ATTORNEYS FOR THE PETITIONER

Other Counsel of Record:

William M. Blitch, Jr.
Sr. Asst. Deputy Attorney General
PO Box 11549
Columbia, SC 29211

David M. Stumbo
Solicitor, Greenwood County
600 Monument Street, Suite 203
PO Box 516
Greenwood, SC 29649

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 24, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the trail court did not abuse its discretion in refusing to quash the indictment as duplicitous and failing to give a special verdict form?

2. Did the Court of Appeals err in finding that the trail court did not abuse its discretion in refusing to grant a continuance to allow the Petitioner to conduct a complete review the contents of a State witness's phone?

STATEMENT OF THE CASE

Kenneth Earle McGill (McGill) was arrested on August 21, 2018 and charged with trafficking in methamphetamine 100 grams or more, but less than 200 grams. The Abbeville County Grand Jury indicted McGill for trafficking in methamphetamine 100 grams or more, but less than 200 grams on December 3, 2018. (R. pp. 1-2). The Abbeville County Grand Jury indicted McGill again for trafficking in methamphetamine on September 6, 2019. (R. pp. 3-4). McGill moved to quash the Indictment on September 12, 2019, which was denied by Order filed September 19, 2019. (R. pp. 5-6). McGill was tried before the Honorable Donald B. Hocker and a jury on November 4-6, 2019. (R. pp. 21-564). He was convicted of trafficking in methamphetamine 100 grams or more, but less than 200 grams. On November 6, 2019, McGill was sentenced to twenty-five (25) years imprisonment.

McGill filed his appeal to the Court of Appeals. The Court of Appeals affirmed via an Unpublished Opinion filed March 22, 2023. State v. Kenneth Earle McGill, Op. No. 2023-UP-109 (S.C. Ct. App. filed March 22, 2023). The Petition for Rehearing was denied May 24, 2023. The Court of Appeals affirmed via an Unpublished Opinion withdrawn, substituted and refiled May 24, 2023. State v. Kenneth Earle McGill, Op. No. 2023-UP-109 (S.C. Ct. App. filed March 22, 2023, withdrawn, substituted and refiled May 24, 2023). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Pulley, 423 S.C. 371, 376-77, 815 S.E.2d 461, 464 (2018) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. However, "[q]uestions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below." State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

1. **Did the Court of Appeals err in finding that the trail court did not abuse its discretion in refusing to quash the indictment as duplicitous and failing to give a special verdict form?**

The Abbeville County Grand Jury indicted McGill for trafficking in methamphetamine 100 grams or more, but less than 200 grams on December 3, 2018. (R. pp. 1-2). The Abbeville County Grand Jury indicted McGill again for trafficking in methamphetamine on September 6, 2019. (R. pp. 3-4). Both indictments read as follows:

> The Defendant, Kenneth Earl McGill, did on or about August 21, 2018, in Abbeville County, South Carolina, knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of one hundred (100) grams or more of methamphetamine as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of 44-53-375(C), Code of Laws of South Carolina (1976, as amended).

The State proceeded under Indictment No.: 2019-GS-01-0549. McGill moved to quash the Indictment on September 12, 2019 on the grounds that the Indictment was duplicitous, which was denied by the Trial Court. (R. pp. 7-20). (R. pp. 5-6). This was error.

The Trial Court's Order as it related to the indictment held in part:

> The Defense moved to quash the indictment or in the alternative for a continuance as the indictment is duplicitous in that it contains more than one offense. The Indictment for the most part repeats the Trafficking statute which does state varied ways to accomplish the offense of Trafficking. The Defense relies on a federal Fourth Circuit Appeals case, United States vs. Furlow, in support of its position. The Court believes that this Furlow case does not benefit the Defendant in that it only deals with federal sentencing and classification and would not provide grounds to quash the indictment. The Court's position is that the Indictment is proper and said Motion is denied. (R. p. 6).

Petitioner challenges the Indictment as duplicitous, meaning it alleged "two distinct and separate offenses in the same count. ... present[ing] 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." State v. Samuels, 403 S.C. 551, 555–56, 743 S.E.2d 773, 776 (2013) (internal citations omitted).

In support of his challenge, Petitioner cites to United States v. Furlow, 928 F.3d 311, 313 (4th Cir. 2019), cert. granted, judgment vacated on other grounds, No. 19-7007, 2020 WL 2814768 (U.S. June 1, 2020). The Furlow Court dealt with the following:

> Defendant Bryshun Genard Furlow pleaded guilty in the District of South Carolina to a single count of possession with intent to distribute cocaine and methamphetamine, and also to possession of a firearm and ammunition as a convicted felon. After ruling that Furlow is an "armed career criminal" pursuant to the Armed Career Criminal Act (the "ACCA") and a "career offender" under the Sentencing Guidelines, the district court sentenced him to 180 months in prison. On appeal, Furlow maintains that he does not have the requisite number of predicate convictions for those sentencing enhancements. More specifically, he contends that the court erred in ruling that his prior felony convictions for distribution of crack cocaine in South Carolina and first-degree arson in Georgia are proper predicates under the ACCA and the Guidelines career offender provision. As explained below, we reject those contentions and affirm. Id., 928 F.3d 311, 313 (4th Cir. 2019), cert. granted, judgment vacated other grounds, No. 19-7007, 2020 WL 2814768 (U.S. June 1, 2020).

Relevant to Petitioner's appeal, is the Fourth Circuit Court of Appeals analyzation and finding that S.C. Code Ann. § 44-53-375(B) is divisible, - or in other words, when the statute "list[s] elements in the alternative .....thereby defin[ing] multiple crimes". Furlow, 928 F.3d at 316. Section 44-53-375(C) is very similar to Section 44-53-375(B) which states:

> (B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony. S.C. Code Ann. § 44-53-375.

Analyzing the facts of the Furlow case, the Fourth Circuit Court of Appeals stated:

> Generally, we use the categorical approach when assessing whether a state crime constitutes a "serious drug offense" under the ACCA or a "controlled substance offense" under the Guidelines. See United States v. Dozier, 848 F.3d 180, 183 (4th Cir. 2017) (Guidelines); United States v. Williams, 326 F.3d 535, 538 (4th Cir. 2003) (ACCA). In making a categorical approach analysis, we are obliged to "focus on the elements, rather than the facts, of the prior offense." See United States v. Shell, 789 F.3d 335, 338 (4th Cir. 2015) (alteration and internal quotation marks omitted). Under that approach, we address only whether "the elements of the prior offense ... correspond in substance to the elements of the ... offense" defined by the ACCA or the Guidelines. See Dozier, 848 F.3d at 183 (alterations and internal quotation marks omitted).
>
> As related above, a modification to the categorical approach is appropriate when a state statute is divisible (i.e., specifies elements in the alternative, thereby defining multiple offenses), and at least one of the crimes defined therein has elements that match the elements of an offense specified in the ACCA or the Guidelines, but another of those crimes does not. See Mathis v. United States, —— U.S. ——, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). To determine divisibility, it is important to understand the distinction between the elements of an offense and the means of committing an offense. *See id.* at 2256. The "elements" of an offense "are the constituent parts of a crime's legal definition — the things the prosecution must prove to sustain a conviction." Id. at 2248 (internal quotation marks omitted). As the Supreme Court has emphasized, "[a]t a trial, [elements] are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, [elements] are what the defendant necessarily admits when he pleads guilty." Id. (citations omitted). By contrast, "means" are the "various factual ways of committing" an element of an offense. Id. at 2249. The modified

categorical approach has no role to play when a state statute specifies alternative means of commission, but it may apply when a state statute lists elements in the alternative. Id. at 2256. Furlow, 928 F.3d at 318.

In determining that S.C. Code Ann. § 44-53-375(B) was divisible the Fourth Circuit Court of Appeals stated:

> Because section 44-53-375(B) of the South Carolina Code prohibits the mere "purchase[ ]" of methamphetamine or crack cocaine, we agree with Furlow that the statute is not a categorical match with the federal definitions of "serious drug offense" and "controlled substance offense." See 18 U.S.C. § 924(e)(2)(A)(ii) (defining "serious drug offense"); USSG § 4B1.2(b) (defining "controlled substance offense"). We must therefore assess and decide whether the statute is divisible, and thus amenable to the modified categorical approach. In so doing, we look to sources like the statutory text and South Carolina court decisions interpreting it. See Mathis, 136 S. Ct. at 2257.
>
> Starting with section 44-53-375(B)'s text, nothing therein clearly suggests that the various specified actions are means rather than elements. As the Supreme Court explained in Mathis, the language of a state statute itself might answer the divisibility inquiry by "identify[ing] which things must be charged (and so are elements) and which need not be (and so are means)," or by specifying a list of "illustrative examples." See 136 S. Ct. at 2256 (internal quotation marks omitted). Because section 44-53-375(B)'s text does not have those indicators, we are entitled to turn to the relevant state court decisions to discern whether those courts treat the listed alternatives as elements or means. See id.
>
> Our review of South Carolina precedents leads us to conclude that the state courts have treated the alternatives specified in section 44-53-375(B) as distinct offenses with different elements. By way of example, in State v. Brown, the Court of Appeals of South Carolina explained that two of the actions specified in section 44-53-375(B) — that is, distribution of crack cocaine and possession of crack cocaine with intent to distribute — are separate "statutory crimes." *See* 319 S.C. 400, 461 S.E.2d 828, 831 (S.C. Ct. App. 1995); *see also* State v. Gill, 355 S.C. 234, 584 S.E.2d 432, 434 (S.C. Ct. App. 2003) (identifying "the elements of distribution of crack cocaine"); State v. Watts, 321 S.C. 158, 467 S.E.2d 272, 277 (S.C. Ct. App. 1996) (same). In the same vein, the state courts have treated manufacturing as a separate offense. *See* Carter v. State, 329 S.C. 355, 495 S.E.2d 773, 776-77 (1998); *cf.* State v. Austin, 276 S.C. 441, 279 S.E.2d 374, 375 (1981) (treating "manufacture" of marijuana as separate offense under nearly identical statute). And those courts also treat conspiracy under section 44-53-375(B) as a distinct offense. *See* State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918, 919, 922

(1997) (describing indictment and conviction for crime of "conspiracy to distribute crack cocaine"); *cf.* Harden v. State, 360 S.C. 405, 602 S.E.2d 48, 50 (2004) (explaining that "[c]onspiracy is a separate offense from the substantive offense, which is the object of the conspiracy" in the context of section 44-53-375). Because the South Carolina courts treat the alternatives specified in section 44-53-375(B) as separate offenses with different elements, we are satisfied that the statute is divisible.

Our divisibility ruling garners support from persuasive authority. For example, in an unpublished opinion in United States v. Marshall, we ruled divisible an almost identical South Carolina drug statute, section 44-53-370(a)(1) of the South Carolina Code. See 747 F. App'x 139, 150 (4th Cir. 2018).10 For our purposes, the sole distinction between section 44-53-370(a)(1) and section 44-53-375(B) is that the former applies to all controlled substances and controlled substance analogues, while the latter concerns specifically methamphetamine and crack cocaine.

In the Marshall decision, Judge Keenan emphasized that the South Carolina courts treat the alternatives specified in section 44-53-370(a)(1) as distinct crimes. *See id.* In particular, Marshall observed that the "[c]ourts in South Carolina treat the purchase of a controlled substance as a distinct crime from possession with intent to distribute." *Id.* (citing State v. Watson, No. 2013-UP-312, 2013 WL 8538756, at *2 (S.C. Ct. App. July 3, 2013)). The Marshall decision further explained that South Carolina prosecutors "charge one of the listed statutory alternatives [specified in section 44-53-370(a)(1)] in state court indictments" and that "South Carolina juries typically are instructed to find one of the alternative elements listed in the statute beyond a reasonable doubt." *Id.* Additionally, Marshall observed that the Fifth Circuit had held that section 44-53-370(a) of the South Carolina Code is divisible. *Id.* (discussing United States v. Rodriguez-Negrete, 772 F.3d 221, 226-27 (5th Cir. 2014)). The Marshall panel thus concluded that section 44-53-370(a)(1) is divisible. *Id.* And Marshall's thorough analysis of section 44-53-370(a)(1) reinforces our decision that section 44-53-375(B) is divisible. *See* Collins v. Pond Creek Mining Co., 468 F.3d 213, 219 (4th Cir. 2006) (explaining that our unpublished decisions are "entitled ... to the weight they generate by the persuasiveness of their reasoning" (internal quotation marks omitted)). United States v. Furlow, 928 F.3d 311, 319–20 (4th Cir. 2019), cert. granted, judgment vacated on other grounds, No. 19-7007, 2020 WL 2814768 (U.S. June 1, 2020).

In footnote 15 of Furlow, Fourth Circuit Court of Appeals stated, "Furlow also argues that our recognition that section 44-53-375(B) is divisible renders duplicitous countless state

court drug offense indictments. *See* United States v. Burns, 990 F.2d 1426, 1438 (4th Cir. 1993) (explaining that an indictment is duplicitous when it "join[s] in a single count ... two or more distinct and separate offenses" (internal quotation marks omitted)). Even if correct, Furlow identifies a potential issue best raised with — and resolved by — state prosecutors and the South Carolina courts. Furlow, 928 F.3d at 322.

The same analysis would and does render Section 44-53-375(C) divisible. Petitioner's Indictment is duplicitous in that it "join[s] in a single count ... two or more distinct and separate offenses" Id. To sell methamphetamine is a crime, to manufacture methamphetamine is a crime, to deliver methamphetamine is a crime, to purchase methamphetamine is a crime, to bring methamphetamine into this State is a crime, to provide financial assistance or otherwise aid, abet, attempt or conspire to sell methamphetamine are crimes, to do so as to manufacturing methamphetamine are crimes, to do so as to delivering methamphetamine are crimes, to do so as to purchasing methamphetamine are crimes, to do so as to bringing into this State methamphetamine are crimes, knowingly having actual or constructive possession of methamphetamine is a crime and knowingly attempting to become in actual or constructive possession of methamphetamine is a crime. These are distinct offenses with different elements, not alternative "means" of various factual ways of committing an element of the offense.

Further, Petitioner was prejudiced by proceeding to trial on a duplicitous indictment. He was charged with trafficking in methamphetamine 100 grams or more, but less than 200 grams for bringing a quantity of methamphetamine and money to Angelina Williams' home at 260 Suttles Landing, Iva, South Carolina, which is located in Abbeville County. This happened as a result of a buy/bust operation being conducted by Abbeville County Sheriff's Office narcotic

investigators out of Williams' home. Williams did not know McGill and neither did the Abbeville County Sheriff's Office. McGill lived in Anderson County and never would have come into Abbeville County but for Stewart Ferguson calling him as part of the buy/bust operation. Any other conduct that Ferguson may have testified to as to McGill did not occur in Abbeville County or on August 21, 2018.

However, the trial court read to the jury pool verbatim the indictment at the beginning of trial, "The Defendant, Kenneth Earl McGill, did on or about August 21, 2018, in Abbeville County, South Carolina, knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of one hundred (100) grams or more of methamphetamine as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of 44-53-375(C), Code of Laws of South Carolina". (R. p. 26).

The trial court charged the jury, "the State must prove beyond a reasonable doubt that the Defendant knowingly sold, manufactured, delivered, purchased, brought into the State, provided financial assistance or otherwise aided, abetted, attempted, or conspired to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of methamphetamine. The State must also prove beyond a reasonable doubt that the amount of methamphetamine was 100 grams or–100 grams or more but less than 200 grams. (R. pp. 549-550). A copy of the jury charge went to the jury. (R. p. 550).

The trial court did discuss prior to charging the jury, "Let me throw this out, and I'm not suggesting that I'm changing my previous ruling as to the defense motion, but let's assume for the sake of argument that there is a problem with the indictment. If the jury gets a – is requested by way of a special verdict to designate which act in the trafficking statute they unanimously believe that Mr. McGill committed, would that cure — assuming that there is a problem, would that not, cure them to say, okay, we find this act or acts he committed under the – under the trafficking statute? I'm just throwing it out just for discussion purposes. I'm not saying that I necessarily would – would do that". (R. pp. 480-481). Petitioner requested a special verdict form. (R. pp. 482-483). The trial tourt presented to the jury a general verdict form, either guilty or not guilty. (R. pp. 550-551). (R. p. 592).

This Court in State v. Samuels, 403 S.C. 551, 557, 743 S.E.2d 773, 777 (2013) held, "A duplicitous indictment's potential prejudice can be cured through jury instructions and the use of a special verdict. See Robinson, 627 F.3d at 958 ("It is black letter law that duplicitous indictments can be cured through appropriate jury instructions."); Mauskar, 557 F.3d at 226–27 (finding the defendant was not prejudiced due to the trial court's clear instructions that in order to return a guilty verdict, the jury had to unanimously agree he committed one of the offenses in a duplicitous indictment). The trial court did not cure the duplicitous indictment through jury instructions and the use of a special verdict form and as a result Petitioner suffered prejudice.

The State compounded the problem during closing arguments by placing Section 44-53-375(C) on the monitor before the jury and recited the entirety of Section 44-53-375(C). (R. pp. 502-504). The State then argued each individual offense set forth in (C), as to McGill, did he sell? Absolutely. (R. p. 504). There was no evidence that McGill sold methamphetamine in

Abbeville County on August 21, 2018. The State argued did he manufacture? He did. (R. p. 502). There is absolutely no evidence that McGill manufactured methamphetamine. Did he deliver? Absolutely. (R. p. 505). Did he provide financial assistance? Absolutely. (R. p. 505). Any alleged financial assistance, that Ferguson may have testified to, was not in Abbeville County on August 21, 2018. Did he otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase methamphetamine? Absolutely. (R. p. 505). He was helping Mr. Ferguson out, aiding, abetting, attempting. Yes, Yes, Yes. (R. p. 505). There was no evidence of manufacturing, and absent McGill bringing methamphetamine and money to Angelina Williams' home at 260 Suttles Landing in Abbeville County on August 21, 2018, there is no evidence he did any other crime listed in Section 44-53-375(C) on that date in Abbeville County.

Because a general verdict form was sent to the jury, there is no doubt or no way to say otherwise that the jury did not convict Petitioner on a crime for which there was no evidence or did not happen on August 21, 2018 in Abbeville County. "Duplicitous 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." United States v. Murray, 618 F.2d 892, 896 (2d Cir.1980). For example, such indictments present 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. United States v. Robinson, 627 F.3d 941, 957 (4th Cir.2010); see also United States v. Sturdivant, 244 F.3d 71, 75 (2d Cir.2001) (discussing the "risk that the jurors may not have been unanimous as to any one of the crimes charged"). State v. Samuels, 403 S.C. 551, 556, 743 S.E.2d 773, 776 (2013).

The trial court erred in failing to quash the indictment and the Court of Appeals erred in

finding the indictment was not duplicitous because it related only to one crime which constituted a continuous course of conduct. The Court of Appeals finding that Petitioner's actions constituted a continuous course of conduct was never argued or raised to the trial court, nor were there any findings by the trial court in this respect. Second, because the argument was not raised, Petitioner certainly could not be heard on it or respond to it at the trial court. Third, it is incorrect.

Petitioner's indictment only put him on notice for his actions on August 21, 2018, in Abbeville County, South Carolina. (R. pp. 1-4). Further, the trial court found in its Order related to the indictment in that ...The Indictment for the most part repeats the Trafficking statute which does state varied ways to accomplish the offense of Trafficking...(R. p. 6).

The Fourth Circuit Court of Appeals rejected this argument in United States v. Furlow, 928 F.3d 311, 313 (4th Cir. 2019), cert. granted, judgment vacated on other grounds, No. 19-7007, 2020 WL 2814768 (U.S. June 1, 2020), so holding in part....

> Finally, Furlow argues that "[i]ndictments in South Carolina drug cases indicate that [section] 44-53-375 and similar South Carolina drug statutes are not divisible." See Br. of Appellant 14. According to Furlow, state court indictments charging a violation of section 44-53-375(B) or other drug statutes consistently list all of the statutory alternatives, which demonstrates that the alternatives are means and not elements. See United States v. Jones, 914 F.3d 893, 901 n.8 (4th Cir. 2019) (explaining that "when a charging document reiterates all the terms of the state law, that is an indication that each alternative is only a possible means of commission" (alterations and internal quotation marks omitted)). Although Furlow identifies several state court indictments that list many of the alternatives specified in various South Carolina drug statutes, other state court indictments charging violations of those statutes are more specific. See, e.g., Gill, 584 S.E.2d at 434; Carter, 495 S.E.2d at 776-77.14 We are unpersuaded that the sloppy drafting of indictments on some occasions overrides the state courts' clear indications that the alternatives specified in section 44-53-375(B) are distinct offenses. See Mathis, 136 S. Ct. at 2257 (explaining that sentencing court can take "peek" at record documents, such as indictment, when "state law fails to provide clear answers" on divisibility). Furlow, 928 F.3d at 321–22.

Petitioner contends that it was error for the Court of Appeals to affirm and find that the trail court did not abuse its discretion in refusing to quash the indictment as duplicitous and failing to give a special verdict form.

2. **Did the Court of Appeals err in finding that the trail court did not abuse its discretion in refusing to grant a continuance to allow the Petitioner to conduct a complete review the contents of a State witness's phone?**

By its Opinion, the Court of Appeals 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, the Court of Appeals erred in that it cannot determine whether Petitioner'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 Petitioner 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

[1] Petitioner 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)

reconstructed through a thousand photographs labeled with dates, locations, and descriptions. . . ." 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. This 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. This Court thus reversed the Court of Appeal'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. This 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. This Court 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

[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.

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 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 Petitioner'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 Petitioner
>
> 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 Petitioner'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).

Petitioner 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 Petitioner'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 Petitioner to respond to a simple telephone call to drive to a home in another county Petitioner 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 Petitioner, (*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 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 Petitioner has neither the non-functioning disk containing the Ferguson phone dump, nor the phone itself. It is thus wholly impossible for Petitioner to obtain the evidence to meet the McKennedy standard. *Cf.* 348 S.C. at 280, 559 S.E.2d at 855.

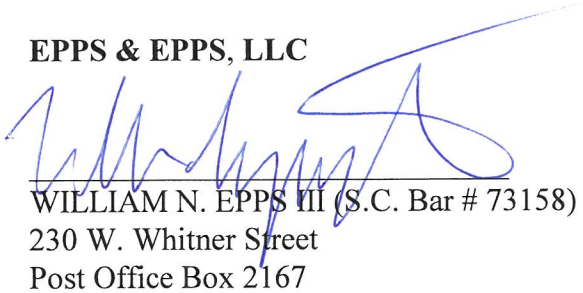
Here, the Court of Appeals "simply cannot escape the conclusion that the verdict hinged upon [Ferguson's] credibility, and that [Petitioner] was hindered in his ability to impeach [Ferguson]." McMillian, 349 S.C. at 23, 561 S.E.2d at 605. As in Tanner, "the eve of trial production of [the phone] warranted the granting of a continuance so that [Petitioner] could adequately ascertain the . . . full evidentiary value" of the information it contained. 299 S.C. at 463, 385 S.E.2d at 834. Because Petitioner 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), Petitioner's motion for a continuance should have been granted . Holmes, 547 U.S. at 324 (noting "'the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'").

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully Submitted,

EPPS & EPPS, LLC



WILLIAM N. EPPS III (S.C. Bar # 73158)
230 W. Whitner Street
Post Office Box 2167
Anderson, SC 29622-2167
Telephone: (864) 224-2111
ATTORNEYS FOR PETITIONER

June 22, 2023