

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ABBEVILLE COUNTY
COURT OF GENERAL SESSIONS

SC Court of Appeals

Donald B. Hocker, Circuit Court Judge

Appellate Case No.: 2019-001902

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

v.

Kenneth Earle McGill.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO FIND THE INDICTMENT DUPLICITOUS AND/OR FAILING TO GIVE A SPECIAL VERDICT FORM?
2. DID THE TRIAL COURT ERR IN FAILING TO GIVE A JURY INSTRUCTION ON ENTRAPMENT?
3. DID THE TRIAL COURT ERR IN FAILING TO GRANT A CONTINUANCE TO ALLOW THE DEFENSE TO DO A COMPLETE REVIEW OF STEWART FERGUSON'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. McGill was tried before the Honorable Donald B. Hocker and a jury on November 4-6, 2019. 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 and served his Notice of Appeal on November 8, 2019.

STATEMENT OF FACTS

On August 21, 2018, Agent Sorrow of the Abbeville County Probation and Parole Office did a home visit on Angelina Williams (Williams) who resided at 260 Suttles Landing, Iva, South Carolina, which is located in Abbeville County. (R. pp. 261-262). Williams was on probation for a April 3, 2018 conviction for distribution of methamphetamine and had a pending arrest warrant from July of 2018 for trafficking in methamphetamine, 2nd offense, 28 grams or more, but less than 100 grams. (R. pp. 89-90, 93, R. pp. 109-110, R. pp. 294 and 298-299, R. p. 330, R. pp. 352-353). There were also complaints of Williams selling methamphetamine from her home. (R. pp. 261-262). Williams minor child lived with her at 260 Suttles Landing. (R. p. 90, R. pp. 108-109).

A team of Abbeville County Sheriff's Office narcotic investigators, Joshua Monts (Monts), Lieutenant Jeffrey Hines (Hines), Captain, then Lieutenant, Matthew Graham (Graham), along with Investigator Balchin of the Abbeville City Police Department set up at a nearby church and waited for Agent Sorrow to make contact with Williams and notify the team to come to Williams' home without a warrant. (R. pp. 90-91, R. pp. 352-353, R. pp. 416-417, R. p. 425). Williams directed Graham to methamphetamine she had in her bathroom, which amounted to 28 grams hidden in a unsecured Betty Boop bag. (R. pp. 297-301, R. p. 425, R. p. 99). (R. pp. 574-579). Williams was charged that day with another trafficking in methamphetamine, 2nd offense, 28 grams or more, but less than 100 grams. (R. p. 428). However, she was not arrested that day and was allowed to turn herself in a month later and the Department of Social Services was never called. (R. pp. 111-112, R. pp. 301-302, R. pp. 353-355, R. pp. 428-430). Hines testified that Williams was very cooperative from the very beginning. That she was in good standing with probation and also had her child that was going to be home to deal with. So knowing that she was cooperative and in good standing on

probation and knowing she wasn't a flight risk, we allowed her to turn herself in at a later date. (R. p. 263).

Abbeville County then set up a buy/bust operation to be run out of Williams home. (R. pp. 263-265). A buy/bust operation is where you make a phone call and set up the operation in a controlled place. If it's not controlled it could be dangerous for law enforcement, the person making the call and the suspect. It needs to be as safe as possible and the informant gets burned. (R. p. 264). Williams' home was used because of it being confined. Law enforcement had already searched it, they knew where everything was and knew there was no weapons inside. (R. p. 264). (R. pp. 565-574).

Williams made a call to Stewart Ferguson (Ferguson), her drug dealer and he arrived with approximately eight (8) ounces of methamphetamine. (R. pp. 97-98, R. pp. 331-334, R. p. 366, R. p. 418). Ferguson was arrested on the charge of trafficking in methamphetamine, 200 grams or more, but less than 400 grams. (R. pp. 145-146, R. p. 168, R. pp. 192-194). The buy/bust operation continued and after Ferguson thought about it he called McGill. (R. pp. 147-148, R. pp. 336-337, R. pp. 418-419). Williams did not know McGill at all and he had never been to her house. (R. p. 107). Abbeville County Sheriff's Office had never heard of McGill and did not know who he was until August 21, 2018. (R. pp. 305-306, R. pp. 360-361, R. p. 374, R. pp. 430-431). The two calls were recorded by Abbeville County and all aspects of the buy/bust operation were controlled by Abbeville County narcotics investigators. (R. pp. 356-357, R. pp. 363-364, R. p. 426, R. p. 106). The area of operations was Williams' home. (R. p. 303, R. p. 356, R. p. 426). Abbeville County Sheriff's Office controlled Williams' home that day. (R. p. 304, R. p. 356, R. p. 426). The phone calls to Ferguson and McGill were recorded by and monitored by the Sheriff's Office. (R. pp. 304-305, R. pp. 357-

363, R. pp. 426-427). Ferguson told McGill to bring four (4) ounces to Williams' home. Ferguson had to give McGill directions because he had never been there before. (R. p. 314, R. pp. 361-363). McGill arrived at 260 Suttles Landing, Iva, South Carolina with 111.67 grams of methamphetamine and \$13,749.00 in cash in his truck. (R. p. 421, R. p. 401, R. p. 424). He was arrested and charged with trafficking in methamphetamine 100 grams or more, but less than 200 grams. McGill was given Miranda warnings and signed a consent to search his vehicle. (R. pp. 315-316, R. p. 420). Ultimately, McGill signed the money over to the Abbeville County Sheriff's Office as a form of cooperation and he was allowed to keep his truck. (R. p. 316).

While the Abbeville County Sheriff's Office narcotic investigators were issued cell phones with the capability to record audio and video, there was no audio or video recorded except the two phone calls. (R. pp. 308-309, R. pp. 427-428). The entire buy/bust operation lasted from about 3 pm until 8 pm at evening. (R. pp. 314-315, R. pp. 117-118). Subsequent to Ferguson's arrest, he was interviewed and Anderson County Sheriff's Department was notified. (R. p. 320, R. pp. 433-434). Anderson County responded to Abbeville and interviewed Ferguson and got a search warrant for his home at 225 Kitty Corner Circle. (R. p. 321, R. p. 146). Hines, Graham, and Monts accompanied Anderson County on their search of Ferguson's home. (R. p. 321, R. pp. 364-365). At Ferguson's home, law enforcement recovered 18 grams of methamphetamine, 15 firearms and \$5700.00 in cash. (R. pp. 321-325, R. pp. 364-365, R. pp. 375-377, R. pp. 186-188). Ferguson's brother did move and try to hide the methamphetamine and three (3) of the firearms at Ferguson's home were stolen. (R. pp. 434-435, R. pp. 188-190, R. p. 194, R. pp. 236-237). Ferguson was not arrested by Anderson County. (R. p. 189). Ferguson's phone was confiscated and the DEA performed a phone dump on the device. (R. p. 366, 368, R. pp. 436-437). McGill, who is 67 years old, did not have his cell phone

seized by Abbeville County, nor did they contact Anderson County to attempt to get a search warrant for McGill's home. (R. pp. 438-439).

Jarvis Reader (Reader) testified that he is an investigator with the Abbeville County Sheriff's Office assigned to the United States Drug Enforcement Agency (DEA), as a contract employee. (R. pp. 461-462). Reader retrieved Ferguson's phone from evidence in Abbeville and transported it to his office in Greenville and performed a phone dump on it. (R. p. 462). Ferguson assisted the DEA in giving up his phone and information about his drug dealing. (R. pp. 463-464). The DEA wanted to confirm Ferguson's contacts in South Carolina and the State of Georgia. (R. p. 466). The DEA analyst performed a phone dump and retrieved conversations, text messages, images, and videos of methamphetamine and porn. (R. p. 467). There were 26,188 images of family members, methamphetamine and porn. (R. p. 467). Reader did not look at all the photographs and did not look at all the text messages. (R. p. 469). The information about the phone dump was disclosed a couple of weeks before the trial of this case and the State got the information on disk but could not open it due to Government fire walls. (R. p. 468). The State proffered Stewart Ferguson regarding the phone and the Defense's request for continuance to have a meaningful review of that phone. (R. pp. 38-53, R. pp. 54-67). The Trial Court denied the request for a continuance. (R. pp. 65-67).

Williams testified that the Abbeville County narcotic investigators asked her if there was anything that she could give them and she called Stewart Ferguson. (R. p. 91). Williams had close to an ounce of methamphetamine and drug paraphernalia in her home. (R. p. 92). The morning of trial in this case, Williams pled guilty to two counts of trafficking in methamphetamine, 1st offense, 10 grams or more, but less than 28 grams, which carries three to ten years, which was a reduction of her original charges and in exchange for her cooperation. (R. pp. 94-96, R. pp. 120-121). Williams

testified that it was true that she would do anything to stay with her son. (R. p. 122).

Ferguson, on the morning of trial in this case, pled guilty to one count of trafficking in methamphetamine, 1st offense, 10 grams or more, but less than 28 grams, which carries three to ten years, which was a substantial reduction of his original charge and in exchange for his cooperation. (R. p. 128, R. p. 170, R. pp. 192-194). Ferguson testified he was in the National Guard and went to Afghanistan. (R. pp. 129-131). He started using methamphetamine in 2013. (R. p. 132). Ferguson testified that he started selling methamphetamine in May of 2018, when Brian McClure, the guy Ferguson was driving to Atlanta, Georgia to pick up six (6) to ten (10) pounds of methamphetamine a week, went to prison in July of 2018. (R. pp. 133-135). Ferguson would then go by himself to Atlanta weekly to pick up six (6) pounds of methamphetamine at different spots. (R. pp. 135-136). He then testified that McGill would get four pounds and he would get one pound. Then he said two pounds. (R. pp. 136-137). He testified he was getting methamphetamine from McGill's home when Williams called him wanting four ounces. (R. pp. 139-140). Ferguson brought eight ounces to Williams home, a little over 220 grams of methamphetamine, and he was charged with a crime that carried a mandatory twenty-five (25) year sentence. (R. p. 141, R. pp. 145-146). Ferguson testified to text messages between he and McGill over the Defense's objection because it was on the phone that the Defense sought a meaningful review. (R. pp. 151-156). (R. pp. 580-587). He testified to using methamphetamine while he was in the National Guard. (R. p. 172). He used methamphetamine while in a lower-end management job at Walgreens in 2013. (R. p. 174). He used methamphetamine while working for BMW. (R. p. 175). At the time of trial, Ferguson was still using methamphetamine. He never quit. (R. p. 179, R. pp. 218-220).

Ferguson was aware when he was driving Brian McClure to Atlanta that McClure had a

pending trafficking charge. (R. p. 180). He testified that they were getting methamphetamine from Mexicans every week. (R. pp. 180-181). McGill never went to Atlanta. (R. p. 181, R. p. 239). When McClure went to prison in July 2018, Ferguson communicated with someone in jail in Georgia and the Mexicans to get his methamphetamine. (R. pp. 181-182). Ferguson only knew the guy in jail by the name "Head" and didn't know what jail he was in. (R. p. 183). Head would tell Ferguson where to go and what time he needed to be there. (R. p. 183). Ferguson did not know the people he was meeting to pick up the methamphetamine. (R. p. 184). Ferguson was splitting his weekly profit with Head, not McGill. (R. pp. 184-185). He would give Head's profit to Head's sister, Melissa. (R. p. 185). Ferguson had a lot of text messages in his phone of his customers, including Williams, a female by the name of Vedera, Wolf Man, Wendy, Hillbilly, Josh, and Austin. (R. pp. 185-186, R. pp. 221-225). Ferguson testified McGill never went with him when he was providing methamphetamine to his customers. (R. p. 199). Because his customers were Brian McClure's people. (R. p. 199). Ferguson was also selling methamphetamine out of his seventy-two (72) year old mother's home at 225 Kitty Corner Circle in Anderson County. (R. pp. 186-187). He also gets marijuana for people. (R. pp. 190-191). He cooperated with the DEA about his Georgia connections and attempted to set up Angela Skelton in a federal drug conspiracy case. (R. pp. 211-215). None of which involved McGill.

Ferguson was in the custody of law enforcement the entire time he was in Williams's home and McGill never would have gone to Williams' home if Ferguson didn't call him. (R. p. 204, R. p. 209). Law enforcement asked Ferguson if he knew someone he could call to help himself. (R. p. 205). They wanted him to set someone up. (R. p. 205). Law enforcement set up the phone recording. (R. pp. 205-206). Law enforcement asked Ferguson to tell McGill to bring four ounces of

methamphetamine, over 100 grams. (R. pp. 206-207). Ferguson never would have called McGill but he was caught and law enforcement set up the buy that brought McGill to Abbeville County. (R. pp. 209-210, R. pp. 216-217).

Ferguson testified that he was going to try and help himself as best he could. (R. p. 194, R. pp. 239-240). He was trying to get out of a twenty-five (25) year mandatory sentence. (R. p. 216). His sentencing was deferred until January 2020 and he was free to continue to use methamphetamine if he chose too. (R. p. 225). After he walked through Williams door with the most methamphetamine of all. (R. p. 226).

ARGUMENTS

I. THE TRIAL COURT ERRED IN FAILING TO FIND THE INDICTMENT DUPLICITOUS AND/OR FAILING TO GIVE A SPECIAL VERDICT FORM.

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).

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).

McGill 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). McGill made this challenge on September 12, 2019, and before the jury was sworn on November 4, 2019. (R. pp. 33-34). McGill again made this challenge at the conclusion on the State's case on November 6, 2019. (R. pp. 475-485, R. pp. 490-499, R. p. 552).

In support of his challenge, McGill 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 McGill's appeal, is the Fourth Circuit Court of Appeals analysis 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 alternativethereby 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. McGill’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. The Trial Court erred in failing to quash the Indictment.

Further, McGill was prejudiced by proceeding to trial on a duplicitous Indictment. McGill 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). McGill requested a special verdict form. (R. pp. 482-483). The Trial Court presented to the jury a general verdict form, either guilty or not guilty. (R. pp. 550-551). (R. p. 592).

Our State Supreme 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 McGill 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 McGill 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) This Court should reverse.

II. THE TRIAL COURT ERRED IN FAILING TO GIVE A JURY INSTRUCTION ON ENTRAPMENT.

STANDARD OF REVIEW

Because the question of entrapment is generally one for the jury, an appellate court reviews the trial court's decision not to give an entrapment instruction de novo. *United States v. Singh*, 54 F.3d 1182, 1189 (4th Cir.1995) (“The district court's decision not to give an entrapment instruction is a question of law which we review de novo.”). *State v. Brown*, 362 S.C. 258, 264, 607 S.E.2d 93, 96 (Ct. App. 2004).

McGill requested the Trial Court charge the jury on entrapment and presented the following proposed jury instruction:

JURY CHARGE #1

ENTRAPMENT

The defendant in this case has pled to the defense of entrapment.

Entrapment is defined as the conception and planning of an offense by an officer or other person working with law enforcement agents under some sort of arrangement and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. Entrapment occurs where one is instigated, induced or lured by law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement for the purpose of prosecution into the commission of a crime which he had otherwise no intention of committing.

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.

The entrapment defense consists of two elements:

- (1) government inducement of the crime; and
- (2) lack of predisposition on the part of the defendant to engage in the criminal conduct.

Predisposition, the principal element in the defense of entrapment, focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime. The defense of entrapment is not available to a defendant with a predisposition, independent of government inducement and influence, to commit the crime with which the defendant is presently charged.

The defense of entrapment has as its basis the fact that the law does not tolerate any person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose the original intent to commit a crime, thus, entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement. Where a crime is person so entrapped, as his acts do not constitute a crime.

If the intent to commit the crime did not originate with the defendant and he was not carrying out his criminal purpose, but the crime was suggested by law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement acting with the purpose of entrapping and cause the arrest of the defendant, then the defendant is not criminally liable for the acts so committed. However, the fact that a government official merely affords opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials, that is, when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Where the doing of a particular act is a crime regardless of the consent of anyone, if the criminal intent originates in the mind of the defendant and the criminal offense is completed, the fact that an opportunity is furnished or that the defendant is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefore constitutes no defense. The purpose of the law enforcement officer is not to solicit the commission of the offense, but to ascertain if the defendant is engaged in an unlawful business. It is no defense that law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement, a law enforcement, acting as a decoy, furnished and opportunity for the commission of the offense to be committed, the theory being that the offender acts of his own volition and is simple caught in his own devices.

In considering the defense of entrapment, you must ascertain whether the acts charged as constituting the offense were the result of the intent of law enforcement, a law enforcement entity or a person acting at the request or behest of law enforcement to place the defendant in a position where he might be charged with the offense and the defendant had no previous intention of committing such offense, in which event, the defendant may not be convicted. If you find the defendant was acting in pursuance of his own intent when he committed the act and law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement was merely affording him the opportunity of doing so, in that event, the defense of entrapment would not relieve the defendant from criminal responsibility.

The defense of entrapment is an affirmative defense. This means the defendant must prove by the preponderance of the evidence that he was entrapped by actions of law enforcement, a law enforcement entity, or a person acting at the request or behest of law enforcement. The defendant has the burden of showing that he was induced, tricked or incited to commit a crime, which he would not otherwise have committed. (R. pp. 588-591).

“The affirmative defense of entrapment is available where there is the ‘conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer.’ ” *State v. Johnson*, 295 S.C. 215, 216, 367 S.E.2d 700, 701 (1988) (quoting *State v. Jacobs*, 238 S.C. 234, 244, 119 S.E.2d 735, 740 (1961)). “It is a well settled principle of law that the defense of entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence.” *Johnson*, 295 S.C. at 217, 367 S.E.2d at 701. Thus, the entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. *Matthews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). The United States Supreme Court explained the rationale underlying the defense of entrapment as follows:

When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the

government is estopped by sound public policy from prosecution therefor. *Sorrells v. United States*, 287 U.S. 435, 445, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

See State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

This incident began on August 21, 2018 when Agent Sorrow of the Abbeville County Probation and Parole Office did a home visit on Williams who resided at 260 Suttles Landing, Iva, South Carolina in Abbeville County. (R. pp. 261-262). Williams was on probation for a April 3, 2018 conviction for distribution of methamphetamine and had a pending arrest warrant from July of 2018 for trafficking in methamphetamine, 2nd offense, 28 grams or more, but less than 100 grams. (R. pp. 89-90, 93, R. pp. 109-110, R. pp. 294 and 298-299, R. p. 330, R. pp. 352-353). There were also complaints of Williams selling methamphetamine from her home. (R. pp. 261-262).

A team of Abbeville County Sheriff's Office narcotic investigators, Monts, Hines, and Graham, along with Investigator Balchin of the Abbeville City Police Department set up at a nearby church and waited for Agent Sorrow to make contact with Williams and notify the team to come to Williams' home without a warrant. (R. pp. 90-91, R. pp. 352-353, R. pp. 416-417, R. p. 425). From there a buy/bust operation was set up by Abbeville County Sheriff's Office and ran out of Williams home. (R. pp. 263-265). Her home was used because of it being confined. Law enforcement had already searched it, they knew where everything was and knew there was no weapons inside. (R. p. 264). Abbeville County Sheriff's Office controlled Williams' home that day. (R. p. 304, R. p. 356, R. p. 426). Williams called Ferguson and Ferguson called McGill. The phone calls to Ferguson and McGill were recorded by and monitored by the Sheriff's Office. (R. pp. 304-305, R. pp. 357-363, R. pp. 426-427). Law enforcement asked Ferguson to tell McGill to bring four ounces of methamphetamine, over 100 grams. (R. pp. 206-207). Ferguson had to give

McGill directions because he had never been there before. (R. p. 314, R. pp. 361-363). Ferguson was in the custody of law enforcement the entire time he was in Williams's home and McGill never would have gone to Williams' home if Ferguson didn't call him. (R. p. 204, R. p. 209). Law enforcement asked Ferguson if he knew someone he could call to help himself. (R. p. 205). They wanted him to set someone up. (R. p. 205). Ferguson never would have called McGill but he was caught and law enforcement set up the buy that brought McGill to Abbeville County. (R. pp. 209-210, R. pp. 216-217):

There was certainly evidence of government inducement on the part of the Abbeville County Sheriff's Office. "[T]he defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *United States v. Sligh*, 142 F.3d 761, 762 (4th Cir.1998) (citations omitted). "A defendant is not entitled to an entrapment instruction unless he can meet this initial burden of producing some evidence of government inducement." *Id.* at 762-63. *State v. Brown*, 362 S.C. 258, 263, 607 S.E.2d 93, 95 (Ct. App. 2004).

Williams did not know McGill at all and he had never been to her house. (R. p. 107). Abbeville County Sheriff's Office had never heard of McGill and did not know who he was until August 21, 2018. (R. pp. 305-306, R. pp. 360-361, R. p. 374, R. pp. 430-431). The only evidence that McGill may have had a predisposition was through Stewart Ferguson, who was trying to get out of a twenty-five (25) year mandatory sentence. (R. p. 216). Ferguson had the biggest motive to be dishonest in the courtroom, and if the jury believed him fine, but that should have been the jury's province. ("The issue of whether or not the defense of entrapment has been established is

ordinarily a question of fact for a jury unless there is undisputed evidence and only one reasonable conclusion can be reached.”) *State v. Brown*, 362 S.C. 258, 265, 607 S.E.2d 93, 96 (Ct. App. 2004).

Here, Ferguson was doing everything he could to get out of a mandatory twenty-five (25) year sentence. He was the one who started selling methamphetamine in May of 2018, when Brian McClure, the guy Ferguson was driving to Atlanta, Georgia to pick up six (6) to ten (10) pounds of methamphetamine a week, went to prison in July of 2018. (R. pp. 133-135). Ferguson would then go by himself to Atlanta weekly to pick up six (6) pounds of methamphetamine at different spots. (R. pp. 135-136). McGill never went to Atlanta. (R. p. 181, R. p. 239). When McClure went to prison in July 2018, Ferguson communicated with someone in jail in Georgia and the Mexicans to get his methamphetamine. (R. pp. 181-182). Ferguson only knew the guy in jail by the name “Head” and didn’t know what jail he was in. (R. p. 183). Head would tell Ferguson where to go and what time he needed to be there. (R. p. 183). Ferguson did not know the people he was meeting to pick up the methamphetamine. (R. p. 184). Ferguson was splitting his weekly profit with Head, not McGill. (R. pp. 184-185). He would give Head’s profit to Head’s sister, Melissa. (R. p. 185).

Ferguson had a lot of text messages in his phone of his customers, including Williams, a female by the name of Vedera, Wolf Man, Wendy, Hillbilly, Josh, and Austin. (R. pp. 185-186, R. pp. 221-225). Ferguson testified McGill never went with him when he was providing methamphetamine to his customers. (R. p. 199). Because his customers were Brian McClure’s people. (R. p. 199). He was also selling methamphetamine out of his seventy-two (72) year old mother’s home at 225 Kitty Corner Circle in Anderson County. (R. pp. 186-187). He got

marijuana for people. (R. pp. 190-191). Ferguson cooperated with the DEA about his Georgia connections and attempted to set up Angela Skelton in a federal drug conspiracy case. (R. pp. 211-215). None of which involved McGill.

Subsequent to Ferguson's arrest, he was interviewed and Anderson County Sheriff's Department was notified. (R. p. 320, R. pp. 433-434). Anderson County responded to Abbeville and interviewed Ferguson and got a search warrant for his home at 225 Kitty Corner Circle. (R. p. 321, R. p. 146). Hines, Graham, and Monts accompanied Anderson County on their search of Ferguson's home. (R. p. 321, R. pp. 364-365). At Ferguson's home, law enforcement recovered 18 grams of methamphetamine, 15 firearms and \$5700.00 in cash. (R. pp. 321-325, R. pp. 364-365, R. pp. 375-377, R. pp. 186-188). Ferguson's brother did move and try to hide the methamphetamine and three (3) of the firearms at Ferguson's home were stolen, (R. pp. 434-435, R. pp. 188-190, R. p. 194, R. pp. 236-237). Ferguson was not arrested by Anderson County. (R. p. 189). His phone was confiscated and the DEA performed a phone dump on the device. (R. p. 366, 368, R. pp. 436-437).

McGill, who is 67 years old, did not have his cell phone seized by Abbeville County, nor did they contact Anderson County to attempt to get a search warrant for McGill's home in Anderson. (R. pp. 438-439). There was sufficient evidence to entitle McGill to the requested charge of entrapment. Because entrapment was McGill's only defense before the jury, he was prejudiced. The Trial Court committed error in refusing the requested charge and McGill's conviction should be reversed and/or a new trial be granted.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT A CONTINUANCE TO ALLOW THE DEFENSE TO DO A COMPLETE REVIEW OF STEWART FERGUSON'S PHONE.

STANDARD OF REVIEW

A trial judge's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997). Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth. *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957). *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002).

Subsequent to Ferguson's arrest his phone was confiscated and the DEA performed a phone dump on the device. (R. p. 366, 368, R. pp. 436-437). The information about the phone dump was disclosed a couple of weeks before the trial of this case and the State got the information on disk but could not open it due to Government fire walls. (R. p. 468). The State proffered Ferguson regarding the phone and the McGill's request for continuance to have a meaningful review of that phone. (R. pp. 38-53, R. pp. 54-67).

The State argued that the contents of the phone dump were not relevant and that McGill was on a fishing expedition, however the State never looked at the information from the phone dump. (R. pp. 61-62). Ferguson limited his trafficking of methamphetamine from April of 2018 and testified that he would go to Atlanta and get six (6) pounds of methamphetamine and four (4) pounds would go to McGill. (R. pp. 41-53).

Jarvis Reader testified that he is an investigator with the Abbeville County Sheriff's Office assigned to the United States Drug Enforcement Agency (DEA), as a contract employee. (R. pp. 461-462). Reader retrieved Ferguson's phone from evidence in Abbeville and transported it to his office in Greenville and performed a phone dump on it. (R. p. 462). Ferguson assisted the DEA in giving up his phone and information about his drug dealing. (R. pp. 463-464). The DEA

wanted to confirm Ferguson's contacts in South Carolina and the State of Georgia. (R. p. 466). The DEA analyst performed a phone dump and retrieved conversations, text messages, images, and videos of methamphetamine and porn. (R. p. 467). There were 26,188 images of family members, methamphetamine and porn. (R. p. 467). Reader did not look at all the photographs and did not look at all the text messages. (R. p. 469).

The Trial Court denied McGill's request for a continuance finding there was no need to add to Ferguson being a big-time drug dealer going to Atlanta by looking at text messages to show whether or not he was dealing drugs prior to April. The Trial Court further found that it had to be careful not to allow complete fishing expeditions and this borders on that. (R. pp. 65-67). This was error.

Rule 5, SCRCrimP, governs the disclosure of evidence in criminal cases. Applicable in this case are those provisions of Rule 5 which require the disclosure of certain documents, tangible objects, and reports of examinations and tests, that are within the possession, custody or control of the prosecution, and which are material to the preparation of the defendant's defense or are intended for use by the prosecution as evidence in its case-in-chief. Rules 5(a)(1)(C) & (a)(1)(D), SCRCrimP. *State v. Salisbury*, 330 S.C. 250, 265, 498 S.E.2d 655, 663 (Ct. App. 1998), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). The State used text messages from Ferguson's phone against McGill in its case-in-chief. (R. pp. 151-156). Most egregious is the State's position that the information on the phone dump was not relevant, when they didn't even look at it. The defense determines whether the information is relevant or not and it was error for the Trial Court to deny McGill's request for continuance to have a meaningful review of that phone. If a party fails to comply with the rule, the court "may order such party to permit the

discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.” Rule 5(d)(2), SCRCrimP; *see State v. Trotter*, 322 S.C. 537, 542, 473 S.E.2d 452, 455 (1996).

Ferguson limited his trafficking of methamphetamine from April of 2018 and his testimony put McGill in the drug trade, the only witness of the State to do so. Ferguson was doing everything he could to get out of a mandatory twenty-five (25) year sentence. (R. p. 216). The DEA analyst performed a phone dump and retrieved conversations, text messages, images, and videos of methamphetamine and porn. (R. p. 467). There were 26,188 images of family members, methamphetamine and porn. (R. p. 467). This information was in the possession and control of the prosecution and was material to the preparation of McGill's defense. Particularly, as to the cross-examination of Ferguson and his credibility and bias in front of the jury.

The Confrontation Clause provides “in all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994) (*citing State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)). A defendant demonstrates a Confrontation Clause violation when he is prohibited from “engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias ... from which jurors ... could draw inferences relating to the reliability of the witness.” *State v. Stokes*, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439 (2009) (*citing Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (alteration in original). *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012).

“Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” Rule 608(c), SCRE (emphasis added). “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.” *State v. Pipkin*, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App.2004) (quoting *U.S. v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984)). Rule 608(c), SCRE, “preserves South Carolina precedent holding that generally, ‘anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.’ ” *State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting *State v. Brewington*, 267 S.C. 97, 226 S.E.2d 249 (1976)). *State v. McEachern*, 399 S.C. 125, 140–41, 731 S.E.2d 604, 611–12 (Ct. App. 2012).

The failure of the Trial Court to grant McGill’s request for a continuance to have a meaningful review of Ferguson’s phone unfairly prejudiced McGill and the error was not harmless.

CONCLUSION

For the reasons stated, this Court should reverse the conviction of Kenneth Earle McGill or reverse his convictions and remand the case for a new trial.

Respectfully submitted,

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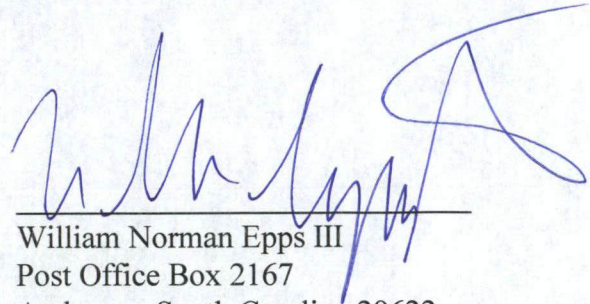
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief is in compliance with Rule 211(b) SCACR.



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