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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.....Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CETIORARI

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COMES NOW Kenneth Earle McGill, Petitioner in the above-entitled action, who, pursuant to Rule 242(g), respectfully show this Honorable Court the following:

ARGUMENT

I. The Court of Appeals erred by determining the trial court did not abuse its discretion in refusing to allow the use of a special verdict form to remedy the negative impact to Petitioner's rights given the language of the operative indictment and Respondent's closing argument.

The Court of Appeals determined "the indictment was not duplicitous because it related only to one crime which constituted a continuous course of conduct." State v. McGill, Op. No. 2023-UP-109, at *2 (S.C. Ct. App. Mar. 22, 2023). But the Fourth Circuit Court of Appeals has recognized that "South Carolina courts treat the alternatives specified in section 44-53-375(B) as separate offenses with different elements," thus concluding that statute was divisible. United States v. Furlow, 928 F.3d 311, 320 (4th Cir. 2019); *see, e.g.*, State v. Brown, 319 S.C. 400, 406, 461 S.E.2d 828, 831 (Ct. App. 1995) (noting distribution of crack cocaine and possession of crack cocaine with intent to distribute are separate statutory crimes); State v. Gill, 355 S.C. 234, 239-241, 584 S.E.2d 432, 434-35 (Ct. App. 2003) (discussing the elements of distribution of crack cocaine); Carter v. State, 329 S.C. 355, 361, 495 S.E.2d 773, 776 (1998) (treating manufacturing as a separate offense under the statute); Harden v. State, 360 S.C. 405, 410, 602 S.E.2d 48, 50 (2004) (noting "[c]onspiracy is a separate offense").

The statute under which Petitioner was indicted, section 44-53-375(C), contains similar terms as those embraced by section 44-53-375(B), the operative statute in Furlow. *See* 928 F.3d at 317. Moreover, variants of the terms "manufactures," "delivers," "purchases," "aids," "abets," "attempts," "or conspires to . . . manufacture," "deliver," and "purchase" appear in both sections 44-53-375(C) and 44-53-370(a), the latter of which generally criminalizes acts with respect to controlled substances. *See also* §§ 44-53-370(b) & -210(d)(2) (designating methamphetamine a

Schedule II controlled substance). It thus makes abundant sense, under the reasoning of the Fourth Circuit, to view section 44-53-375(C) as divisible in a manner similar to which that court viewed 44-53-375(B). (R. p. 482, lines 12-19) *See* Furlow, 928 F.3d at 319-20.

Moreover, Respondent urges that "Petitioner's charged crime constituted a continuous course of conduct which could not be separated into individual charges," (Ret. at 13), and the Court of Appeals apparently accepted this argument given its ruling concerning the indictment. *See* McGill, Op. No. 2023-UP-109, at *2. Petitioner is aware of an appellate court's ability to affirm a decision based on any ground appearing in the record. *See* S.C. APP. CT. R. 220(c). However, it is notable the "continuous course of conduct" argument was not presented to the trial court by Respondent, and is thus *not* in the record. (*See* R. p. 16, line 13 – p. 19, line; p. 479, line – p. 480, line 9; p. 480, line 20 – p. 482, line 9; p. 483, line 14 – p. 484, line 20; p. 491, line 18 – p. 494, line 5) In conformity with Rule 220(c), this Honorable Court has previously determined the "basis for [a] respondent's additional sustaining grounds must appear in the record on appeal," and explicitly stated the logical conclusion flowing therefrom, that an "appellate court may not rely on Rule 220(c) . . . when the reason does not appear in the record." I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000); *see also* In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2005) ("An issue may not be raised for the first time on appeal."). Accordingly, Petitioner respectfully submits the Court of Appeals erred in its "continuous course of conduct" determination. *See* Op. No. 2023-UP-109, at *2.

This Honorable Court has determined the test for the sufficiency of an indictment is whether

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

State v. Samuels, 403 S.C. 551, 555, 743 S.E.2d 773, 776 (2013) (quoting State v. Gentry, 363 S.C. 93, 102-02, 610 S.E.2d 494, 500 (2005) (emphasis added)). Yet in Samuels, this Honorable Court clarified the Gentry decision "did not consider duplicitous indictments which allege two distinct and separate offenses in the same count." 403 S.C. at 555, 743 S.E.2d at 776. It explicitly recognized "[d]uplicitous indictments 'implicate a defendant's rights to notice of the charge against him, to a unanimous verdict, to appropriate sentencing and to protection against double jeopardy in a subsequent prosecution.'" Id. at 556, 743 S.E.2d at 776 (quoting United States v. Murray, 618 F.2d 892, 896 (2d Cir. 1980)).

Here, given the language of the operative indictment against Petitioner, (*see* R. p. 4), each risk to Petitioner's rights as identified in Samuels, except for that pertaining to sentencing, exists regardless of whether the instant indictment is duplicitous in the exact manner as the indictment in Samuels. *Cf.* 403 S.C. at 555, 743 S.E.2d at 775-776 (noting it was alleged in a single count the defendant "assaulted 'Patricia Speaks and/or Carla Daniels.'"). Respondent makes no attempt to argue against this position. (*See* Ret. at 13-20) In terms of Petitioner's rights to notice of the charge against him, Petitioner was mandated by the language of the indictment to be prepared to defend against a variety of claims with no bearing on the instant matter, including that Petitioner knowingly sold, manufactured, delivered, purchased, or brought into this State 100 grams or more of methamphetamine. (*See* R. p. 4) This is a massive burden to impose on the defense if the State had no good faith basis to believe each act as indicted took place. *Cf.* Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 (requiring "the offense" to be "stated with sufficient certainty and particularity").

It was well within the Solicitor's power to indict Petitioner, using the operative statute, with language substantially as follows: "The Defendant, on or about August 21, 2018, in

Abbeville County, South Carolina, was knowingly in actual possession of one hundred grams or more of methamphetamine, in violation of 44-53-375(C), Code of Laws of South Carolina (1976, as amended)." Instead, a litany of surplus language was included, which Respondent argues was sufficient because the language of the indictment tracked the statute. (Ret. at 17) While Petitioner concedes Respondent accurately represented the law in this context, Petitioner notes an indictment phrased substantially in the language of the statute upon which it is based contains the caveat that it is only "ordinarily sufficient," which dictates there are circumstances where such phrasing is insufficient. *See* State v. Tabory, 262 S.C. 136, 140, 202 S.E.2d 852, 853 (1974); *see also* § 17-19-20 (requiring "*the crime*" be charged "substantially in the language of the . . . statute prohibiting the crime," as opposed to mandating every irrelevant term contained within a statute be included in an indictment) (emphasis added); Hamling v. United States, 418 U.S. 81, 117 (1974) (noting "it is generally sufficient that an indictment set forth *the offense* in the words of the statute itself") (emphasis added). Given the litany of terms recited within the indictment upon which there was no good faith basis on Respondent's part to believe would be demonstrated by the evidence, such an insufficiency exists in this case.[1] *Cf.* Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 (requiring "*the offense*" to be "stated with sufficient certainty and particularity") (emphasis added).

Beyond these factors is the Solicitor's argument at closing, which hit upon multiple elements within the operative statute upon which no evidence was presented, and which created a morass of confusion for the jury which could only be cured through the use of a special verdict form.[2] Despite Petitioner's right under Samuels to a unanimous verdict, during closing

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[1] Petitioner objected to the use of the entire language of section 44-53-375(C) being used to charge the jury for the same reason. (R. p. 491, lines 4-16)

Respondent argued: "A person who knowingly sells, manufactures, delivers, purchases, or brings into this state. Did he do this? Did he sell? Absolutely." (R. p. 504, lines 20-22) Yet no evidence was presented Petitioner sold any quantity of methamphetamine on or about August 21, 2018. (*See generally* R. pp. 37-475) Respondent further argued: "Did he manufacture? He did. You heard testimony about washing the meth, and those were in the text messages that Mr. Ferguson read." (R. p. 504, lines 23-25) Yet there was absolutely no testimony from any witness that "washing the meth" equated to manufacturing methamphetamine, and no additional testimony from which it might be inferred Petitioner manufactured anything. (*See generally* R. pp. 37-475) Respondent offers no explanation for why these arguments were made during closing. (*See* Ret. at 13-20)

South Carolina recognizes that with regard to duplicitous indictments there is a "risk that a jury divided on the two separate offenses in one count could nevertheless convict through a general verdict on the one count." Samuels, 403 S.C. at 556, 743 S.E.2d at 776; *see also* United States v. Sturdivant, 244 F.3d 71, 75 (2d Cir. 2001) (noting the "risk that the jurors may not have been unanimous"). Because of the language of the instant indictment, the evidence presented, and the closing argument made by Respondent, the only way to truly know the act or acts for which Petitioner was found guilty by the jury was through the use of the special verdict form urged by Petitioner at trial. (*See* R. p. 478, lines 10-18; p. 480, line 21 – p. 481, line 7; p. 483, lines 3-5) Accordingly, regardless of whether the instant indictment was duplicitous in the exact same manner as the indictment in Samuels, in light of the same risks to Petitioner's rights presented by the language of the indictment, especially in light of Respondent's closing

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[2] Respondent similarly argued to the trial judge: "And with all the different ways that [Petitioner] can be found guilty of trafficking, I think it's been laid out in testimony today that he pretty much hits on every one of these in this trafficking statute.") (R. p. 479, lines 17-21)

argument, the trial court's failure to require the use of a special verdict form was reversible error, and this Honorable Court should therefore grant the Petition. *Cf.* Samuels, 403 S.C. at 557, 743 S.E.2d at 777 ("Despite the indictment's duplicity, we find no prejudice to Samuels due to the actions of the circuit court. A duplicitous indictment's potential prejudice can be cured through jury instructions and the use of a special verdict.").

II. The Court of Appeals erred in determining the trial court did not abuse its discretion in refusing to grant a continuance because the appellate court's conclusion the witness was sufficiently impeached by other means is not inferable from the facts.

Petitioner learned of the phone dump performed by the DEA from reviewing chain of custody forms, and communicated with Respondent before trial in an effort to gain access to that material. (*See* R. p. 55, lines 55-17) Previous efforts to view the material were stymied for technological reasons. (*See* R. p. 56, line 18 – p. 57, line 4) Significantly, Respondent was not aware of the existence of the phone dump prior to being alerted by Petitioner, (R. p. 32, lines 14-25; R. p. 56, lines 8-9; p. 57, lines 11-13; p. 63, lines 10-12), and in fact later argued, despite not having seen the information, "[w]hatever's on that phone prior to August the 21st is not relevant to why we're actually here, because what we're here for is what happened on that particular day." (R. p. 61, lines 5-8; *see also* id. lines 15-18) Because Petitioner's previous attempt to view the phone data proved unsuccessful, arrangements were made for the DEA task force officer to bring the jump drive with the phone dump, and an effort was made to download the proper reader so the information could be viewed. (R. p. 62, line 22 – p. 63, line 5) This attempt was also unsuccessful, and the parties ultimately spent two hours reviewing the phone itself. (*See* R. p. 155, lines 2-5) From this review Respondent lifted a text conversation to introduce against Petitioner at trial. (Id., lines 7-9)

Petitioner sought a continuance based upon his desire to conduct a full review of the information on the phone, in an attempt to gauge the credibility of Respondent's primary witness, Mr. Ferguson. Counsel explained the Sixth Amendment's Confrontation Clause guarantees an "opportunity to cross examine a witness concerning bias. . . . [P]ursuant to the Confrontation Clause . . . I would ask for a continuance because I would like to review that information fully. The text messages on . . . his phone is limited in days." (R. p. 55, lines 18-21; line 23 – p. 56, line 56) Petitioner specifically contended to the trial court that "a full review of that phone is necessary, one, for the presentation of my defense of my client. A full review of that phone and materials on that phone are certainly . . . congruent with the [C]onfrontation [C]lause . . . to show *bias, reliability, and credibility* of Mr. Ferguson." (R. p. 57, lines 15-22) (emphasis added). Counsel argued: "[T]hose text messages I saw . . . I believe there are others. I believe there are more than that and there should be more than that - - only go back three or four days." (R. p. 58, lines 10-12) The following exchange then occurred between the trial court and counsel:

> [Q:] Where is it significant to show Mr. Ferguson being a drug dealer more than four or five months? He's a drug dealer. He does it four months or five months or he does it for a year. Where . . . is that important and how does that help your client . . . to try to show that he actually dealt in drugs more than the time he said? . . . [A:] "[W]ell, I think it's very important because it affects . . . *his bias, his credibility, and his reliability* in front of this jury.

(R. p. 59, lines 7-17) (emphasis added) Counsel explained: "I would like an opportunity in preparation of my defense for my client to be able to fully review - - have a meaningful review of that information." (R. p. 60, lines 21-24)

Respondent countered that "[a]nything that Mr. Ferguson has testified to, obviously he showed up with 220 grams of methamphetamine. . . . So there's plenty there for [defense counsel] to get into at this point." (R. p. 62, lines 12-18) But Petitioner accurately noted it was not "the State's call to make, *especially when they haven't even seen or looked at the evidence*. It

is the defense's call to make. . . . The appropriate question under the [C]onfrontation [C]lause analysis is whether there's been any interference with the defendant's opportunity for effective cross-examination at trial." (R. p. 63, lines 10-12; id. line 20 – p. 64, line 3) (emphasis added) This point flows directly from the case cited by counsel in his argument: "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. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (internal citation omitted) (emphasis added). Counsel noted at the same time, "Rule 608(c) 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 in considering and determin[ing] the credit to be accorded his testimony." (R. p. 64, lines 13-18) (emphasis added) More pointedly, counsel argued:

> Your Honor, I think it's even more important. He limited himself. He said, 'I didn't do it before April of 2018.' . . . [T]his is not a fishing expedition. I want to see. I think pursuant to Rule 5 . . . I've got an opportunity to review that information with my client. I think it's important. I think it's very important because . . . if he was in fact dealing prior to April 2018, and he just - - he lied on the stand. *That affects his credibility. That affects his bias. That affects his partiality.*

(R. p. 64, line 19 – p. 65, line 7) (emphasis added)

The trial judge commented he did not "see where you need to add to that by way of looking at . . . text messages to show whether or not he was dealing in drugs prior to [August]. You've got the fact that he's a drug dealer." (R. p. 66, lines 12-16) But, as made abundantly clear by Petitioner, Petitioner wanted an opportunity for a full review of the phone dump *to gauge whether Ferguson was a liar.* (R. p. 59, lines 16-17; p. 64, lines 13-18; p. 65, lines 6-7) Ferguson testified he only had the phone for "a few days," (R. p. 211, lines 19-23), yet it

contained 26,188 pictures. (R. p. 467, lines 20-22) He claimed "there's a lot of text messages in my phone," (R. p. 185, lines 15-16), but the physical exam only showed text messages going back "three or four days" from when it was seized. (*See* R. p. 58, lines 10-12) Ferguson admitted to using coded language in his text communications, (R. p. 191, lines 3-8), and 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 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, yet he was not charged as a result. (R. p. 187, lines 16-25; p. 188, lines 2-4) He acknowledged his brother was not charged for disposing of evidence, (R. p. 188, lines 7-22), and he himself was not charged with possession of three stolen firearms, (R. p. 194, lines 22-24), while also testifying his brother became friends with an Anderson County solicitor. (R. p. 188, line 23 – p. 189, line 13; *see also* p. 189, lines 14-18) Ultimately, the only evidence that Petitioner was a major drug dealer who received four pounds of methamphetamine per week came from Ferguson's assertions that is what took place. (*Cf.* R. p. 134, line 14 – p. 137, line 20) Thus, Ferguson's credibility was pivotal, and given the inconsistencies in his testimony, there are multiple reasons to doubt Ferguson's word, and to believe a full examination of the phone data would have led to information which cast doubt upon his testimony. *Cf.* State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (noting "the fact that [the witness] lied about her address at the first trial is relevant to her overall credibility."); Riley v. California, 573 U.S. 373, 393-94, 396 (2014) (noting modern cell phones "are in fact minicomputers that also have the capacity to be used as a telephone," that data can "reveal where a person has been," and the "sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates,

locations, and descriptions.").

The trial court ruled: "I have to be careful not to allow complete fishing . . . expeditions and this borders on that. . . . [L]astly, I don't know if I mentioned this or not, but we have to be careful too not allowing impeaching a witness on *collateral matters*. So with all that taken together, I'm going to deny your motion for a continuance." (R. p. 67, lines 7-11) (emphasis added) But "[b]ias, prejudice or any motive to misrepresent" are always relevant, and can in no way be considered a collateral matter. *See* S.C. R. Evid. 608(c); *see also* Gracely, 399 S.C. at 372, 731 S.E.2d at 885.

Respondent now claims Petitioner was provided "several hours" to review the phone, when in reality it was two. (*Compare* Ret. at 4 *with* R. p. 155, lines 2-5) Respondent argues the trial judge explained Petitioner "did not articulate any specific information which he believed to be on the phone which would" be helpful, (Ret. at 4), when in actuality it was asserted, multiple times, that Petitioner believed the phone would reveal information impacting upon Ferguson's bias, accuracy, truthfulness, sincerity, credibility, reliability, and partiality. (R. p. 59, lines 16-17; p. 64, lines 13-18; p. 64, lines 15-16; p. 65, lines 6-7) *See* Riley, 573 U.S. at 393-94, 396.

With no citation to the Record, Respondent inaccurately asserts Petitioner did not show a "'good and sufficient legal cause' for the continuance," implying the sole "purpose for the requested continuance was to find evidence that Ferguson had dealt drugs for a longer period," "information . . . [regarding] a reduction of his own charge and potential sentence," and "sought merely to explore the cell phone data in the hope of finding additional information which could be used to further impeach Ferguson." (Ret. at 21) The realities of Petitioner's arguments belie this position. (*See* R. p. 59, lines 16-17; p. 64, lines 13-18; p. 65, lines 6-7)

Moreover, Respondent's view that the desire to "explore the cell phone data" was "*merely*" part of a desire to show Ferguson was a liar whose testimony could not be trusted demonstrates a fundamental lack of appreciation for Petitioner's arguments, and the federal constitutional rights of a criminal defendant. (Ret. at 21) (emphasis added) *See* Gracely, 399 S.C. at 372, 731 S.E.2d at 885; Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("'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.*"'") (internal citation omitted) (emphasis added).

Before this Honorable Court, Respondent simply repeats the "proverbial hens' teeth" mantra with respect to the rarity of reversals of denial of motions for a continuance, and the traditional standard regarding upholding denials of such motions, (Ret. at 20-21), all the while ignoring Petitioner's point it is impossible for Petitioner to meet that traditional standard by showing "other evidence . . . [that] could have been introduced, or any other points that could have been raised," because Petitioner has neither the non-functioning disk containing the Ferguson phone dump, nor the phone itself. State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002). Respondent offers no explanation for how Petitioner could possibly meet the bar imposed by McKennedy in the absence of one of those two items, and Petitioner respectfully submits this is because Respondent recognizes the impossibility of doing so. (*See* Ret. at 20-22)

Respondent likewise fails to address Petitioner's point that "[o]n the present record... the conclusion that the verdict hinged upon [Ferguson's] credibility, and [Petitioner] was hindered in his ability to impeach" Ferguson, "simply cannot" be escaped. McMillian, 349 S.C. at 23, 561 S.E.2d at 605. (*Compare* Ret. at 20-22 *with* Pet. at 17 & R. p. 58, lines 10-12; p. 59, lines 16-17;

p. 64, lines 13-18; p. 65, lines 6-7; p. 185, lines 15-16; p. 187, lines 16-25; p. 188, lines 2-4, 7 – p. 189, line 18; p. 191, lines 3-8; p. 194, lines 22-24; p. 211, lines 19-23; p. 220, line 21 – p. 221, line 4; p. 224, lines 21-23; p. 467, lines 20-22)

Respondent similarly pretends the obvious analogy to be drawn between the instant case and State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989), does not exist, (*compare* Ret. at 20-22 *with* Pet. at 18 & 24), considering that, with respect to a phone whose existence and potential evidentiary value were unknown to Respondent before being so advised by Petitioner, (R. p. 32, lines 14-25; p. 56, lines 8-9; p. 57, lines 11-13; p. 61, lines 5-8, 15-18; p. 63, lines 10-12), on the eve of trial Petitioner's counsel "got to look at text messages, but, obviously, [he] couldn't look at the whole phone." (R. p. 153, lines 13-17) *See* Tanner, 299 S.C. at 463, 385 S.E.2d at 834 (noting "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."). 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. *But see* Holmes, 547 U.S. at 324 (noting "'the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'") (internal citation omitted); Riley, 573 U.S. at 393-94, 396 (noting modern cell phones "are in fact minicomputers," that data can "reveal where a person has been," and the "sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions.").

Here, the Court of Appeals' determination that Petitioner "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" is entirely speculative and wholly unjustified. McGill, Op. No. 2023-UP-109, at *2-3. In light of the fundamentally negative impact upon Petitioner's

constitutional right to present a complete defense caused by the trial court's denial of the motion for continuance, this determination by the Court of Appeals is reversible error, and, therefore, the Petition should be granted. *Cf.* Holmes, 547 U.S. at 324.

CONCLUSION

FOR THE REASONS SET forth herein and within the Petition, Petitioner prays this Honorable Court to GRANT the Petition and ISSUE its Writ of Certiorari.

Respectfully submitted,

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This 30th day of August, 2023.