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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County Court of Common Pleas
The Honorable J. Derham Cole, Circuit Court Judge

Lower Case No. 2018CP2304795

Clyde Bowen Davis, #357153.....Petitioner,

v.

The State of South Carolina.....Respondent

NOTICE OF APPEAL

The Applicant-Petitioner, Clyde Bowen Davis, hereby appeals the Order of Dismissal, issued by the Honorable J. Derham Cole. Undersigned received notice of the judgment on January 17, 2025. A copy of the Order of the Dismissal is attached. This Notice is forwarded to the Greenville County Clerk of Court.

Respectfully submitted,

William G. Yarborough, III
Lauren Carole Hobbis
By: s/ Lauren C. Hobbis, #103190
William G. Yarborough III, Attorney at Law, LLC
308 West Stone Avenue
Greenville, South Carolina 29609
(864) 331-1612

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Clyde Bowen DAVIS, #357153 Applicant, v. The STATE of South Carolina, Respondent.	)	IN THE COURT OF COMMON PLEAS **ORDER OF DISMISSAL** (*with prejudice*) Civil Action No. **2018-CP-23-04795**

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This matter comes before the Court by way of an application for post-conviction relief filed on September 18, 2018, by Clyde Bowen Davis. Respondent made its return and motion for a more definite statement on January 15, 2019. Applicant amended his allegations on December 20, 2019.

An evidentiary hearing was held before the Court on July 26, 2023, at the Greenville County Courthouse. Applicant was present with counsel William G. Yarborough Esq. Senior Assistant Deputy Attorney General Melody J. Brown of the South Carolina Attorney General's Office represented Respondent. At the start of the hearing, the Court clarified with the parties if Applicant's amended allegations satisfied Respondent's motion for a more definite statement to which Respondent agreed. (PCR Tr. at 3 and 4). Applicant, trial counsel Ryan L. Beasley Esq., and Charles Brown testified. The State called former Assistant Attorney General Joshua R. Underwood, previously one of the prosecutors in Applicant's case, to testify.

After consideration of the testimony and after reviewing and considering the record, arguments presented by counsel, and statutory and case law, this Court advised the parties by summary order issued on July 28, 2023, that Applicant failed to carry his burden of proof to show either deficiency in representation or that any purported deficiency supported a reasonable probability of a different result. At that same time, the court also requested that counsel for the State prepared a proposed final order of dismissal[1] denying the applicant's request for relief and

[1] The proposed order was provided to counsel for Applicant prior to this Court's acceptance. Applicant's counsel was allowed sufficient time to review the proposed order while this Court made its own detailed review. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a "proposed order should be transmitted to opposing counsel" for review and that counsel "should … alert preparing counsel and the PCR court as to any deficiencies in the proposed order.").

dismissing the application with prejudice.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections following convictions arising from indictments returned by the South Carolina State Grand Jury. On December 13, 2011, the State Grand Jury of South Carolina indicted Applicant by superseding indictment for Trafficking in Methamphetamine (Conspiracy) (100-200 grams) and Distribution of Methamphetamine (2011-GS-47-0006, Counts I and II) as part of a multi-count, multi-defendant indictment stemming from an investigation into a methamphetamine trafficking ring.

Trial proceedings began on September 16, 2013 before Circuit Judge Letitia H. Verdin and a jury. Ryan L. Beasley, Esq., represented Applicant. Now Assistant Attorney General Joshua R. Underwood and Curtis A. Pauling of the South Carolina Attorney General's Office prosecuted the case.

Applicant moved to dismiss the superseding indictment, arguing the State Grand Jury had no subject matter jurisdiction and the State failed to present evidence to establish probable cause as to Count II. Applicant also moved to sever Count I from Count II, moved to dismiss the indictment pursuant to *Brady v. Maryland*[2] based on a purported failure to disclose information pertaining to confidential informants, and moved to suppress an out-of-court identification of Applicant as unduly suggestive. The trial court denied Applicant's motion to dismiss the superseding indictment, and the State agreed to try the charges separately electing to go forward on only Count I of the superseding indictment. Following motions hearings, the trial court denied Applicant's motions to suppress the identification and his *Brady* motion. The case proceeded to trial on Count I. The jury convicted Applicant of Count I as indicted and the trial court sentenced him to the mandatory minimum sentence of twenty-five years imprisonment.[3] Applicant then filed a Motion for Verdict in Arrest of Judgment and Motion for a New Trial in which he argued that the testifying law enforcement officer's assertions regarding a confidential informant's undercover purchase was inadmissible hearsay and violated Applicant's confrontation rights. He also

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2 373 U.S. 83 (1963).

3 The State subsequently filed a *Nolle Prosequi* regarding Count II due to the conviction and sentence regarding Count I.

challenged the out-of-court identification based on alleged coercive police tactics. Judge Verdin denied the motions by a written order on October 3, 2013.

DIRECT APPEAL

Applicant timely filed and served a notice of appeal. Applicant's trial counsel continued to represent Applicant on appeal raising the following issues:

I. Law enforcement's testimony that a confidential informant made a controlled purchase from Applicant was inadmissible hearsay and violated Applicant's Confrontation Rights.
II. The trial court erred in refusing to exclude an unduly suggestive photo lineup and subsequent in-court identification.
III. The trial court erred in refusing to dismiss the superseding indictment due to the State's abuse of the grand jury process.
IV. The State failed to preserve evidence in violation of the Applicant's due process rights.
V. The State Grand Jury lacked jurisdiction over County II of the superseding indictment requiring dismissal.

The Court of Appeals affirmed Applicant's conviction and sentence in a published opinion. *State v. Davis*, 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017). A petition for rehearing was denied on June 20, 2017. Applicant petitioned for certiorari review in the South Carolina Supreme Court, which was denied on March 28, 2018 and the remittitur returned to the circuit court on April 3, 2018.

ALLEGATIONS

In his initial application for post-conviction relief, Applicant alleges he is being held in custody unlawfully due to the following allegations:

1. Ineffective assistance of trial counsel
    a. Failure to move for directed verdict on the State's failure to produce evidence of requisite weight of 100 grams of methamphetamine to prove the charge of trafficking 100 grams or more of methamphetamine.
    b. Failure to object to hearsay statements.
    c. Failure to cross examine witness David Norris.
    d. Failure to object or exclude evidence under best evidence rule.
        i. The State produced no audio, video, or the actual drugs from any of the alleged exchanges or transaction to prove the charges to

the jury, even though Ashley Asbill claimed they received 88 grams in controlled purchases.

e. Failure to investigate and cross-examine relevant witnesses about the chain of custody and the failure to confirm substance of drug.

i. Neither Chad Ayers or Ashley Asbill (two testifying officers) testified how they determined the substance to be meth.

2. Two material witnesses and co-conspirators, Joshua Byers and Michael Robinson, wish to recant material testimony.

On December 20, 2018, Applicant amended his application to clarify his allegations:

I. Trial counsel was ineffective pursuant to *Strickland v. Washington* 466 U.S. 668 (I 985), in violation of Applicant's right to the effective assistance of counsel under the Sixth Amendment, as applied through the Fourteenth Amendment, and its counterpart in the South Carolina State Constitution. U.S. Const. amend. VI; S.C. Const. art. l, § 14.

a. Trial Counsel failed to challenge the evidence presented by the State as amounting to a material variance from the conspiracy charged in the indictment.

b. Trial Counsel failed to argue that the controlled buy between he and a CI was inadmissible on the grounds that it amounted to improper, prejudicial other bad act evidence irrelevant to the conspiracy charged in the indictment.

c. Trial Counsel failed to object to or move to exclude prejudicial other conduct, amounting to bad acts or not involving Applicant, that were irrelevant or not a part of the conspiracy charged in the indictment.

d. Trial Counsel failed to object to improper and prejudicial "truth" and "fair" language in the jury instructions.

e. Trial Counsel failed to object to improper and prejudicial hearsay and other testimony lacking proper foundation.

f. Trial Counsel failed to request an instruction on lesser-included offense(s).

g. Trial Counsel failed to argue for a directed verdict on each of the following grounds:

i. the State had presented evidence of multiple conspiracies rather than sufficient evidence of the single conspiracy charged in the indictment and did not present sufficient evidence from which a jury could find Applicant guilty of the single conspiracy charged in the indictment;

ii. the State failed to present sufficient evidence of the requisite drug weight and had also double-counted amounts, as well as counted amounts from historical information and drug transactions/exchanges that were outside of the single conspiracy charged in the indictment and unconnected to Applicant;

iii. the evidence presented by the State amounted to a material enlargement of variance from the conspiracy charged in the indictment;

iv. The State had failed to present sufficient evidence that the crime charged spanned multiple counties

h. Trial Counsel was ineffective for failing to challenge the sufficiency of the indictment in regard to Count I on constitutional grounds in that it was overly broad and vague and thus insufficient to provide notice.

i. Trial Counsel was ineffective for failing to raise a jurisdictional defect challenge and challenge the state grand jury process in regard to Count I of the indictment.

j. On appeal, trial counsel failed to preserve or brief the specific issue raised in the relevant objection/motion: both Count I and Count II should be dismissed because the State abused the grand jury process by failing to present evidence amounting to probable cause.

This Court accepts and considered the allegations of the amended application as the controlling allegations and address only those in this order.

SUMMARY OF FACTS FROM TRIAL

Amy Brock testified that she was using, buying, and selling methamphetamine during the time frame alleged in this indictment. Another methamphetamine dealer, Michael Robinson, introduced her to Nicholous "Nick" Dendy who became her regular supplier of methamphetamine. (Trial Tr. pp. 243-245; p. 287). Brock's methamphetamine transactions with Dendy usually took place at her home in Greenville County. (Trial Tr. p. 245). When she would order

methamphetamine from Dendy he would never bring it with him. (Trial Tr. p. 247). When Dendy would arrive Brock would pay him for the drugs and then they would wait for Dendy's supplier, believed by Brock to be Dendy's cousin. (Trial Tr. pp. 194-196; p. 248; pp. 289-292). When the supplier would arrive in a silver car, possibly a [Chrysler] 300 or Dodge Charger, Dendy would give him the money provided from Brock in exchange for the methamphetamine that Dendy then gave to Brock. (Trial Tr. pp. 194-196; p. 248; pp. 289-292). This scenario took place up to 4 times a week between the Spring of 2010 and October or November 2010. (Trial Tr. p. 246; pp. 251-252; p. 91). On approximately half of these occasions Brock went outside with Dendy at the time the supplier came to her house and she was able to see the supplier in his car, during daylight. (Trial Tr. p. 250; pp. 252-253). Dendy's testimony corroborated the methamphetamine transaction pattern described by Brock. (Trial Tr. pp. 289-292). Brock and Dendy both made in-court identifications of Applicant as the man who supplied Dendy with methamphetamine. (Trial Tr. pp. 264-265; p. 295).

Brian Sekerchak testified that Amy Brock regularly supplied him with methamphetamine and that he was present during at least ten such transactions between Brock, Dendy, and Applicant in which Brock gave money to Dendy and Dendy gave the money to Applicant in exchange for methamphetamine. (Trial Tr. pp. 194-195; p. 199). He described the same scenario except he testified that Applicant would drive a black Honda or silver Dodge Charger. (Trial Tr. p. 196).

Michael Robinson sold methamphetamine for Dendy and was also supplied by Brock. (Trial Tr. p. 213; pp. 219-220, pp. 136-137). When Dendy sold methamphetamine to Robinson, he would get the drugs from Applicant and give the money to Applicant who then gave Dendy his share of the profit. (Trial Tr. p. 285).

At trial Agent Asbill testified he participated in a controlled purchase operation in which law enforcement agents intended to purchase methamphetamine from Applicant. (Trial Tr. pp. 322-330). As part of that operation, the confidential informant and his vehicle were searched to confirm that the CI did not possess any methamphetamine, the CI was provided an audio transmitter, and the CI was issued documented funds to use before being sent to purchase methamphetamine from Applicant. (Trial Tr. p. 324). The informant went to Applicant's residence on Dobbs Street for a period of time and received a phone call. (Trial Tr. p. 325). During the controlled purchase operation, Agent Asbill was parked at a school located nearby, along with other law enforcement surveilling the situation. (Trial Tr. p. 326). Agent Asbill was able to identify

a silver/gray Chrysler 300 as a vehicle of interest, the same type of vehicle described by Brock and Sekerchak. (Trial Tr. p. 327). After going to Applicant's residence, the CI returned to the law enforcement agents with 3.5 grams of methamphetamine. (Trial Tr. p. 330).

Agent Asbill testified that controlled purchases were also made off of Applicant's co-conspirators, including: two controlled purchases off of Brock, four off of Robinson, three off of Byers, five off of Sekerchak and two off of Dendy – all associated with the conspiracy. (Trial Tr. p. 317). Off of those controlled buys and the search warrant, including the controlled purchase involving Applicant, law enforcement seized 88 grams of methamphetamine. However, Agent Asbill testified that amount does not include the transactions law enforcement received information on, i.e. the transactions Applicant's co-conspirator's testified to at trial. (Trial Tr. p. 317, p. 331).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to reviewing and considering the record and the argument of counsel, this Court also considered the testimony and evidence presented at the evidentiary hearing and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance Claims

To establish ineffective assistance of counsel the applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.*

To conduct a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Further, it is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland,* at 689. It is the applicant's burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRCP. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("the burden of proof is on the applicant to prove the

allegations in his application").

Failure to Challenge the Indictment (Allegations H and I)

Allegations of crimes spanning multiple counties will establish subject matter jurisdiction in the State Grand Jury. *See State v. Evans*, 322 S.C. 78, 81 470 S.E.2d 97, 98 (1996) (citing *State v. Wilson*, 315 S.C. 289, 433 S.E.2d 864 (1993)). Our Supreme Court has rejected "the contention that an indictment was overly broad in failing to set forth specific details of the conspiracy alleged therein," and that the indictment "is sufficient if it apprises the defendant of the elements of the offense intended to be charged and apprises the defendant what he must be prepared to meet." *State v. Evans*, 322 S.C. 78, 81 470 S.E.2d 97, 98-99 (1996) (citing *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993)).

The indictment in this case demonstrates that sufficient notice has been met and Applicant was notified of the specific time frame of events alleged and the sentencing parameters he was facing. *See State v. Gunn*, 313 S.C. 124, 129-130, 437 S.E.2d 75, 78 (1993) ("It is not necessary to detail the evidence of the conspiracy in the indictment nor to recite the facts connecting all the accused with one another in the web of the conspiracy, nor to describe the conspiracy with the same degree of particularity required in describing a substantive offense."). The indictment lists the charge of Trafficking Methamphetamine (conspiracy) in violation of S.C. Code Ann. § 44-53-375(C)(3) in the amount of one hundred (100) grams or more but less than two hundred (200) grams of methamphetamine from about January 1, 2010, until November 8, 2011, in Greenville and Pickens County. Because the multi-county aspect is not an element of the trafficking offense, the State is not required to prove that the conspiracy at issue spanned multiple counties. *See Evans*, ("the mere fact that an indictment is handed down by a State Grand Jury rather than a county grand jury does not change the elements of the offense."). As such, Applicant's allegations related to any jurisdictional defect of the indictment, or allegation that the indictment was insufficient as to provide notice, is meritless, and he fails to show any deficiency in counsel's representation in declining to object to the indictment on that ground.

Failure to Move for Directed Verdict on Alleged Deficiencies
in the Indictment and/or Variances from Allegations (Allegations A and G)

Given that there is no basis for challenging the indictment, counsel would not have been required under prevailing professional norms to move for a directed verdict. "Counsel is not required to engage in the filing of futile motions." *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir.

1984); *see also Moody v. Polk,* 408 F.3d 141, 151 (4th Cir. 2005) (citing *Murray v. Maggio*). *See also Truesdale v. Moore*, 142 F.3d 749, 756 (4th Cir. 1998) ("It is certainly reasonable for counsel not to raise unmeritorious claims."). Applicant has failed to carry his burden of showing ineffective assistance. *Strickland, supra.*

Further, Applicant has failed to show the counsel should have challenged the sufficiency of the evidence otherwise. (*See Sufficiency Challenge, infra*). Similar to the proceeding analysis, because the argument lacks merit, counsel would not be deficient under prevailing norms to not raise a basis for a direct verdict motion that lacks merits in light of the evidence actually presented. Again, Applicant has failed to carry his burden of proof.

Applicant asserted that trial counsel failed to move for a directed verdict on the ground that Applicant and his co-defendants were within a buyer-seller relationship rather than participating in a conspiracy. At the evidentiary hearing, Mr. Yarborough relied upon the following portion from the trial transcript regarding trial counsel's motion for a directed verdict:

> [Y]ou know there are a bunch of meth addicts, selling, using going all the way back to 2004 with all these different people that weren't even involved in the conspiracy. From what I would say the alleged conspiracy. I just think there's no question the fact the jury can consider that was any sort of agreement in law. I don't think there was conspiracy.

(PCR Tr. p. 15). Essentially, trial counsel argued that the State had not established a conspiracy, but rather had only presented a variety of drug addicts who had sold and used drugs at different times.

Arguably, that motion does question the "buyer-seller" aspect. However, even if trial counsel's motion is not sufficient to specifically address a buyer-seller relationship rather than a single conspiracy, there was sufficient evidence in the case tending to prove Applicant was guilty of conspiring to traffic in 100 grams or more of methamphetamine.

When considering a motion for a directed verdict, the trial judge looks to the existence or nonexistence of evidence, rather than the weight of the evidence and views the evidence in the light most favorable to the State. *See State v. Horne*, 324 S.C. 372, 379, 478 S.E.2d 289, 293 (Ct. App. 1996). Viewed in the light most favorable to the State, there was sufficient evidence in the case tending to prove Applicant was guilty of conspiring to traffic in 100 grams or more of methamphetamine. Trial counsel's failure to move for a directed verdict on these grounds was not

deficient performance which prejudiced petitioner, and the case was properly submitted to the jury considering the State's evidence. Applicant failed to carry his burden of proof considering the record.

Failure to Sufficiently Challenge the Evidence (Allegations B, C, and E)

Applicant additionally raises allegations as to the sufficiency of the State's evidence in proving the elements of the trafficking conspiracy.

The State's theory placed Applicant as the main supplier in the chain of distribution of methamphetamine transactions from approximately January of 2010 through November of 2011. Through testimony of numerous co-conspirators, the State presented a pattern in which Applicant was a main supplier and seller of methamphetamine, selling to Dendy and Brock, who would further sell to Robinson, Sekerchake and Byers. Dendy specifically testified that he would receive his share of the profit after he gave Applicant payment from the buyer. (Trial Tr. pp. 291-292). The conspiracy charged in the indictment was an agreement to traffic in 100 grams or more, but less than 200 grams of methamphetamine identified to occur from about January of 2010 to November of 2011. The testimony presented by cooperating co-conspirators indicated an amount surpassing 100 grams of methamphetamine sold initially by Applicant. The Court of Appeals references testimony from admitted co-conspirators describing the amount distributed by Applicant and further sold:

> Dendy testified he sold between 3.0 and 3.5 grams of methamphetamine, which he got from Davis [Applicant] to Robinson on at least fifteen occasions.
>
> Brock testified she bought between a "half-eighth" to a quarter ounce, or approximately 7.0 grams, of methamphetamine up to several times a week from Dendy and his cousin [Applicant] from spring 2010 to October or November 2010.
>
> Robinson testified he purchased an "eight-ball," or 3.5 grams, of methamphetamine a week from Dendy, which he resold to others for about a year. During that period, Robinson also said he bought about 1.5 grams of methamphetamine from Brock every week.

State v. Davis, 420 S.C. at 57-58, 800 S.E.2d at 141-142.

The indictment as charged depicted the proper weight of methamphetamines distributed in the 100 grams to 200 grams range, rather than the less than 100 grams range which Applicant argues is the proper weight based on the State's evidence.

At the evidentiary hearing, counsel testified that the defense at trial was aimed to challenge the State's physical evidence against Applicant. He argued that the State did not have concrete proof of drugs in Applicant's possession which was unlike his co-conspirator's circumstances where they were caught with drugs in an undercover buy. (PCR Tr. 5). Trial counsel conceded that he could have argued a buyer-seller relationship based on the evidence presented at trial which he clarified could have been that Applicant drove up to the location and was identified giving drugs to Dendy. (PCR Tr. 19). This Court construes the argument to reflect Applicant's position that the individual bad acts from the other co-conspirators should not be used against him. However, the co-conspirators tied him to the conspiracy rather than showing individual, unrelated acts. Applicant's argument lacks merit.[4]

Applicant also alleges that trial counsel should have attempted to exclude and argue that Agent Asbill's testimony regarding Applicant's participation in a controlled buy between he and a CI was improper bad act evidence, irrelevant to the conspiracy charged in the indictment.

At trial, Investigator Asbill testified that he and another officer placed a transmitting device on the CI and gave him documented government money to obtain methamphetamine from Applicant. Investigator Asbill testified that while he was parked at a nearby school, the CI went to Applicant's residence on Dobb Street, spent a period of time there, and received a phone call. Agent Asbill also noted he saw a silver Chrysler 300 in the area, but he did not see who was driving the car. He stated that the CI returned with a purchase of methamphetamine of approximately 3.5 grams.[5] Trial counsel objected arguing that the testimony was inadmissible and on appeal, counsel

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[4] Applicant testified that he had never been in a car with Charles Brown as a drug sale occurred as was alleged in certain testimony at trial. (*See* PCR Hearing Trans. at 43). Applicant presented the testimony of Charles Brown at the PCR hearing. (*See* PCR Hearing Trans. at 43-51). This Court finds Mr. Brown was evasive and not in the least credible. Notably, Mr. Brown refused to initially answer questions about his criminal history, and only when directed by the Court, did he admit he had prior history for selling crack cocaine. (PCR Hearing Trans. 50-51). Mr. Brown's testimony that he was "shocked" to find his name mentioned in connection with drug charges in a State Grand Jury trial is particularly not credible.

[5] The Court of Appeals found Investigator Asbill's testimony regarding the CI's activities during the purchase of the methamphetamine to be inadmissible hearsay on the basis that Investigator Asbill had no personal knowledge of the CI's activities during the controlled purchase and relayed to the jury the CI's multiple implied statements to him upon return for debriefing that he had, in fact, gone to Davis's residence

argued that Agent Asbill's testimony that the CI completed a controlled purchase at his residence was inadmissible hearsay and violated his confrontation rights. The Court of Appeals agreed but found the trial court's error to be harmless. Applicant's argument that he now sets forth alleges that if counsel had objected and argued on the basis that the aforementioned transaction was inadmissible as prejudicial conduct amounting to bad acts that are irrelevant to the conspiracy charge, the result would have been favorable to Applicant at trial and on appeal.

Even if trial counsel had preserved an objection on the ground that Agent Asbill's testimony demonstrated irrelevant prior bad acts without exception, the Court of Appeals harmless error analysis remains unchanged. Considering the testimonial evidence against Applicant, the harmless error analysis remains applicable, as Applicant's co-conspirator's testimonies provide sufficient evidence of Applicant's involvement in the conspiracy. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. Trial counsel made an objection that he believed to be reasonable under the circumstances, and the Court of Appeals supported his basis for objection, finding the testimony to be inadmissible hearsay. The allegation that trial counsel should have made a different objection on different grounds merely analyzes counsel's performance in hindsight, which *Strickland* emphatically instructs is not a reasonable basis to find deficiency in counsel's performance. Even if the entirety of Agent Asbill's testimony was never heard by the jury, the harmless error analysis remains the same noting that Applicant's co-conspirators provided ample evidence sufficient to support a finding of guilt. As such, trial counsel did not act deficiently, and even if he did, Applicant cannot prove resulting prejudice.

Failure to Request Lesser Included Charge (Allegation F)

Applicant is not entitled to a lesser included offense instruction considering the testimony from co-conspirators depicted transactions surmounting 100 grams, and a lesser included offense of 25 grams to 100 grams is not factually supported. *See State v. Gosnell*, 341 S.C. 627, 635, 535 S.E.2d 453, 458 (Ct. App. 2000) ("[t]he trial court may and should refuse to charge on a lesser-

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and purchased methamphetamine. *State v. Davis*, 420 S.C. at 66, 800 S.E.2d at 146. However, the appellate court found the admission of hearsay to be harmless beyond a reasonable doubt noting the jury had more than enough evidence to find Applicant conspired to traffic 100 grams or more of methamphetamine from co-conspirator's testimony. *Id*, at 69.

included offense where there is no evidence that the defendant committed the lesser rather than the greater offense."). While true that a lesser charge may be appropriate in circumstances where the amount is in controversy, the evidence at trial established that the amount of methamphetamine distributed by Applicant exceeded 100 grams, and charging the lesser amount as a lesser included offense would result in a conviction of an uncharged conspiracy. *See id,* 341 S.C. at 635-637, 535 S.E.2d at 458-459.

Failure to Object to "Truth" and "Fair" Language (Allegation D)

As to the allegation that trial counsel failed to object to improper and prejudicial "truth" and "fair" language in the jury instructions, this Court finds that trial counsel did not act deficiently.

Applicant presented no support as to this allegation. Trial counsel testified that he did not recall objecting to the jury instruction and that he was aware a new opinion came out about truth-seeking jury instructions after Applicant's trial. (PCR Tr. p. 14). There was no further testimony as to whether or why trial counsel should have objected to this charge. The jury instructions Applicant references in this case are as follows:

> It is your exclusive duty to determine what the facts are. You do that based upon your own commonsense examination and evaluation of the testimony and other evidence received during the trial of this case. You twelve jurors alone will decide that weight, value and effect that is to be given to any particular testimony or other evidence received. Your ultimate goal is to simply reach the truth in this matter and, by doing so, you will have fulfilled your obligation as jurors and that is to give both the State and the defendant a fair and impartial trial based upon the evidence presented and the law applicable in this case.

(Trial Tr. p. 375).

Our Court of Appeals considered the truth-seeking language in *State v. Ostrowski*, 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021) finding that though the circuit court used a truth-seeking instruction, "when viewed in their entirety, [the] instructions were 'substantially correct' and unlikely to mislead the jury." *Id.* at 435 S.C. at 401, 867 S.E.2d. 288. The *Ostrowski* Court does not go without acknowledgment that our Supreme Court "has urged judges to avoid suggesting to jurors at any point during a trial that they should embark on a search for truth rather than basing their decision solely on the evidence and their inferences from that evidence." *Id.* at 435 S.C. at 400, 867 S.E.2d at 287. However, such language must also be considered with "the court's jury

charge as a whole in light of the evidence and issues presented at trial." *Id.* at 435 S.C. at 399, 867 S.E.2d. 287 (citing *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* at 435 S.C. at 400-401, 867 S.E.2d. 287 (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.*

Ostrowski is instructive here. A review of the complete charge supports the jury was unlikely to be misled. At Applicant's trial, the court informed and further reminded the jury that the State has the burden of proving the allegations that are set forth in the indictment, the burden of proving each of the essential elements of any crime charges, and the burden of proving the guilt of the Applicant to the satisfaction of the jury beyond a reasonable doubt before a verdict of guilty can be returned. *See* Trial Tr. pp. 376, p. 379, p. 383. The trial court repeatedly emphasized that the State's case must be proven beyond a reasonable doubt – referenced 13 times during the jury instructions. *See* Trial Tr. pp. 376-386. *See*, e.g., *Pradubsri*, 420 S.C. at 640–41, 803 S.E.2d at 730 (affirming conviction when "the circuit court referenced the 'beyond a reasonable doubt' standard at least twenty times during its instructions" and used a "robe of righteousness" simile).

Even so, considering the ample testimony corroborated amongst co-conspirators implicating Applicant, any alleged erroneous jury instruction could not have contributed to the guilty verdict. Even if Applicant could support that allegation of trial counsel error on this claim, the instruction as a whole properly conveyed the law to the jury and there is not a reasonable likelihood the jury applied the judge's instructions to convict Applicant on less than proof beyond a reasonable doubt. As such, trial counsel did not act deficiently, and Applicant suffered no prejudice from counsel's failure to object.

Failure to Challenge Grand Jury Process (Allegation J)

Lastly, as to Applicant's allegations regarding trial counsel's failure to preserve or brief the issue of abuse of the grand jury process, Applicant has failed to show any support as to this allegation.

Applicant appears to raise two main concerns regarding the State's presentation of evidence to the grand jury – Investigator' Ayers testimony regarding Brock's identification and that the State presented no evidence concerning the CI's veracity or reliability in the alleged controlled purchase of methamphetamine.

As to the identification, trial counsel properly raised preserved the issue. The trial court addressed Applicant's objection to the identification pursuant to *Neil v. Biggers*, 409 U.S. at 198–200, 93 S.Ct. 375, noting that investigators' strategy of showing only one photograph of Applicant to Brock was unduly suggestive and "concerning," however, under the totality of the circumstances, Brock's out-of-court identification was reliable enough to submit to the jury. The Court of Appeals affirmed the trial court's decision to admit the identification finding that the trial court did not abuse of discretion in admitting Brock's prior identification of Applicant because its decision was supported by the evidence. Specifically, as to Investigator's Asbill's testimony regarding Brock's identification of Applicant, the evidence before the grand jury was sufficient to indict Applicant even if Investigator Asbill's description of the multiple photo line up vs. single photo identification was described inaccurately.

As to the evidence concerning the CI's veracity or reliability in the alleged controlled purchase of methamphetamine, the State presented investigator Asbill at the grand jury proceeding who testified as to his investigation involving the CI. Our Supreme Court has long held that an indictment founded upon hearsay evidence is not a basis to dismiss. *See State v. Williams*, 263 S.C. 290, 295-296, 210 S.E.2d 298, 301 (1974). Further, the identification procedure was accurately described to the jury by Brock herself, with the Court of Appeals holding that the circuit court did not err in its analysis find that the identification was supported by enough evidence to submit to the jury.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would support a grant of relief on the application. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

In the event Applicant wishes to appeal this decision he must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 13th day of January, 2025.

J. DERHAM COLE, Presiding Judge
The Thirteenth Judicial Circuit Court

STATE OF SOUTH CAROLINA
THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

J. DERHAM COLE
JUDGE

180 MAGNOLIA STREET, 2ND FLOOR
POST OFFICE BOX 1744
SPARTANBURG, SOUTH CAROLINA 29304-1744
TELEPHONE: (864) 596-2685
FAX: (864) 596-3592
E-MAIL: jcolcj@sccourts.org

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JAY GRESHAM CLK OF CT
GVL SC

January 14, 2025

The Hon. Jay Gresham
Greenville County Clerk of Court
305 E North St
Greenville, SC 29601-2121

Re: 2018-CP-23-04795
Clyde Bowen Davis, SCDC #357153 v. The State of South Carolina

Dear Clerk;

Enclosed please find for filing an order(s) with reference to the above-captioned case(s). Upon entry of the order(s), please serve notice upon the affected parties in accordance with *Rule 77(d) of the South Carolina Rules of Civil Procedure*. Thank you in advance for your usual and capable assistance in this matter.

With kindest personal regards, I remain,

Sincerely yours,

J. Derham Cole
Resident Judge
The Seventh Judicial Circuit

Copy mailed to
Attorneys: Melody Brown, Bill Yarborough
on 1/17/2025.