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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

App. Case No. 2025-000100

Clyde Bowen Davis, #00357153,..Petitioner,

v.

State of South Carolina,..Respondent.

PETITION FOR WRIT OF CERTIORARI

WILLIAM G. YARBOROUGH, III
LAUREN CAROLE HOBBIS

WGY Law
308 West Stone Avenue
Greenville, South Carolina 29609
(864) 331-1612 | F: 864-271-0711

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

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II. WHETHER THE PCR COURT ERRED IN CONCLUDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE FOR A DIRECTED VERDICT ON THE BASIS THAT THE STATE FAILED TO PROVE PETITIONER CONSPIRED TO TRAFFICK METHAMPHETAMINE IN THE AMOUNT OF 100 GRAMS OR MORE AS INDICTED, OR IN THE ALTERNATIVE, FOR FAILING TO REQUEST A LESSER INCLUDED OFFENSE JURY INSTRUCTION.

STATEMENT OF THE CASE

On December 13, 2011, the State Grand Jury of South Carolina returned a superseding indictment charging the Petitioner Clyde Bowen Davis with conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine and distribution of methamphetamine (Counts I and II). (App. pp. 813-834). Numerous other individuals were also charged alongside Petitioner, and later cooperated with the investigation. (App. pp. 813-834).

Petitioner was represented by Ryan L. Beasley, Esquire. Joshua R. Underwood and Curtis A. Pauling of the South Carolina Attorney General's Office, prosecuted the case. Petitioner proceeded to trial by jury before the Honorable Judge Letitia H. Verdin on September 16-18, 2013. Petitioner made several pretrial motions, including: a motion to sever Count I from Count II, a motion to dismiss pursuant to *Brady v. Maryland*[1] for failure to disclose information pertaining to confidential informants, and a motion to suppress an out-of-court identification of Petitioner as unduly suggestive. (App. pp. 130-206; pp. 215-249). Following *in camera* witness testimony, Petitioner's motions were denied but the State otherwise agreed to try the charges separately and go forward on the conspiracy charge contained in Count I of the superseding indictment only.

The jury ultimately found Petitioner guilty of Count I as indicted and he was sentenced to twenty-five (25) years imprisonment. (App. p. 122, p. 129, pp. 575-580). The State subsequently dismissed Count II as *nolle prosequi.* Petitioner filed a post-trial Motion for Verdict in Arrest of the Judgment as well as a Motion for a New Trial, which challenged a law enforcement officer's testimony regarding a controlled buy as a Confrontation Clause violation as well as constituting inadmissible hearsay. (App. pp. 839-843). The post-trial motions were denied on October 3, 2013. (App. pp. 123-128).

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[1] 373 U.S. 83 (1963).

Petitioner filed a timely appeal with the South Carolina Court of Appeals. (App. pp. 207-213). Trial Counsel continued to represent Petitioner on appeal and raised various issues pertaining to the denial of his pretrial and post-trial motions, as well as evidentiary rulings. (App. pp. 1-46). The Court of Appeals held oral argument before ultimately affirming Petitioner's conviction and sentence. *See State v. Davis*, 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017). (App. pp. 844-859). Petitioner then filed a petition for rehearing which was ultimately denied. (App. pp. 860-878). Petitioner then sought certiorari with this Court which was denied. (App. pp. 879-924).

Petitioner timely filed a PCR application on September 18, 2018, which was later amended in October and December 2019. (App. pp. 1028-1035; pp. 1005-1012). The State filed a Return and Motion for More Definite Statement on January 8, 2019. (App. pp. 1014-1027). Of the amended and supplemental allegations, Petitioner ultimately proceeded on the following ineffective assistance of counsel allegations:

> 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 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 failed to request an instruction on lesser-included offenses
>
> g. Trial Counsel failed to argue for a direct 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 or 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 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.

(App. pp. 1005-1008, p. 929, p. 945, lines 2-10).

An evidentiary hearing was held on July 26, 2023 before the Honorable J. Derham Cole. The PCR Court heard testimony from Petitioner, Trial Counsel Ryan L. Beasley, a witness named Charles Brown, as well as former prosecutor on the case, AAG Joshua R. Underwood. The PCR Court denied relief by way of written order entered on January 13, 2025 and filed January 17, 2025. (App. pp. 925-941). This appeal follows.

STATEMENT OF THE FACTS

The charges arose from an investigation called "Operation Icehouse", which targeted a methamphetamine trafficking network that broadly operated in different groups across multiple counties in South Carolina and into North Carolina and Atlanta, Georgia. (App. p. 499, p. 501, p. 503). The investigation began as early as 2009. (App. p. 501, lines 20-25). All three conspiracies were presented to the State Grand Jury in the same proceeding, though separate indictments were issued for roughly 27 defendants across the three conspiracies. (App. p. 500).

The indictment alleged that the conspiracy at issue here, referred to as the "Greenville Group" or Upstate conspiracy, operated in Greenville and Pickens County from roughly January 1, 2010 through November 8, 2011 and involved a number of users of methamphetamine. (App. pp. 823-834). Those indicted alongside Petitioner for the Upstate conspiracy included: Nicholos Dendy, Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers. (App. pp. 823-834). They were also charged with various related drug offenses and had ties to the investigations into other conspiracy groups at the subject of Operation Icehouse. (App. pp. 823-834). With the exception of Dendy, the other Upstate co-conspirators were admitted methamphetamine addicts[2] with prior criminal histories. (App. pp. 354-355; pp. 396-372; p. 407; pp. 417-420). Except for Petitioner, each member of the Greenville group entered a plea agreement with the prosecution in which they agreed to testify against Petitioner in exchange for dismissal or downgrade of charges and sentencing recommendations. (App. pp. 352-353; pp. 366-369; pp. 393-395; pp. 441-442; pp. 461-462; p. 478). As part of their respective plea agreements, they also agreed to cooperate by providing historical information as well as doing controlled buys from other members from their

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[2] Dendy denied using methamphetamine but admitted to using other drugs including crack cocaine and marijuana. (App. pp. 463, line 10—p. 464, line 2).

group, as well as others not indicted in this conspiracy. (App. pp. 387-388; pp. 411-412; 442-447; p. 478; pp. 482-483). The total drug weight made from controlled buys within the Greenville Group was 88 grams of methamphetamine. (App. p. 501).

The overall investigation arose when Tonya Smith[3] agreed to cooperate with SLED in exchange for mitigation of her then pending charges. (App. pp. 310-312; p. 318, lines 11-24; pp. 496-497, p. 499). She provided information on her sources and the buying and selling between herself and others across the groups, and from 2009 to 2010, she did nine (9) controlled buys with individuals from the Greenville conspiracy and other groups of Operation Icehouse. (App. pp. 312-314; p. 318, lines 11-24; p. 496; p. 499). In a joint effort between SLED and several county investigators, two other individuals, David Norris and Warren Chastain,[4] also worked as confidential informants ("CI") and did controlled buys with members of the Greenville Group[5] as well as the other Operation Icehouse groups in exchange for mitigation of their own pending criminal charges. (App. p. 496, line 22–p. 497, line 8; pp. 331-333; pp. 343-345).

From the controlled buys and historical information, investigators learned that the methamphetamine was funneled into the Upstate of South Carolina from primarily Asheville, as

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[3] Smith was not charged in the conspiracy at issue here but had ties to the other conspiracy groups.

[4] Neither Norris nor Chastain were charged in the Greenville group conspiracy. Chastain was indicted in one of the other conspiracies at the subject of Operation IceHouse. (App. pp. 344-345).

[5] The controlled buys with the CIs made from the Greenville Group included two from Brock, four from Robinson, three from Byers, five from Sekerchak, two from Dendy, and one from Petitioner. (App. p. 501). *But see infra* herein pp. 19-20. In total, 88 grams of methamphetamine was seized from the controlled buys made from the Greenville Group. (App. p. 501). Also note that at trial, there was no information presented regarding chain of custody, purity testing or other forensic testing, nor were the drugs seized entered into evidence.

well Atlanta and other parts of Georgia. (App. p. 499, line 20—p, 500, line 4). Investigators deemed that this was overall a "historical conspiracy" and there was significant overlap of buying and selling between participants across the designated groups and locations over the years. (App. pp. 497-499; pp. 504-505).

At trial, it was the State's theory that Petitioner was at the head of the Upstate conspiracy as the supplier to the other coconspirators. (App. p. 298, likes 19-21; p. 955, lines 6-11). Specifically, the modus operandi of the Upstate conspiracy activity was said to be that typically Brock or Robinson would contact Dendy to buy methamphetamine. (App. pp. 430). Dendy would go to the respective buyer's house to collect the payment and once he received cash in hand, he would then call a man said to be Petitioner to drive to the location to deliver the drugs. (App. pp. 430-433, p. 468, line 23—p. 470, line 9; p. 473, lines 15-24; p. 475, lines 6-10). As part of this routine, Dendy would retrieve the methamphetamine from the driver, who never left the car. (App. p. 469-p. 473; p. 384). Brock and Robinson, while admitted addicts themselves, would use some or all of that methamphetamine. They would also sell some or all it on occasion at a profit to others, including the other Greenville co-defendants, individuals in the other Operation Icehouse groups, and numerous other personal users. Robinson and Brock would even sell to one another back and forth, generally to keep up their own habit. (App. pp. 398-399; pp. 420-422; p. 405; p. 407). Sekerchak and Byers also testified that they sold the methamphetamine they bought in order to make a little money for themselves to support their own drug habit and chase their next high. (App. p. 355; p. 383).

To prove Petitioner was the supplier of the Greenville Group via Dendy, Brock was called to identify Petitioner as the driver from a single photograph from his DMV driving record shown

to her by investigators shortly after her arrest.[6] (App. pp. 439-441). She did not know Petitioner's name and she could not recall the exact make or model of the car. (App. p. 431; p. 434). Like Brock, the others involved in this matter did not know the identity of the person inside the car, and instead only knew him as simply the "cousin" of Dendy. (App. pp. 431-432). Dendy admitted that he and Petitioner in fact are not cousins nor are they related in any fashion. (App. p. 480, lines 12-13). There was also inconsistent testimony as to what car Dendy's supplier drove, the descriptions ranged from a silver Dodge charger, a silver Chrysler, to a black Honda. (App. p. 380; pp. 390-391; p. 434). Moreover, even though Dendy identified Petitioner at trial as the driver that the others saw bringing the methamphetamine, Dendy also stated he was not sure what car Petitioner drives. (App. p. 487, lines 16-18).

The State relied upon Dendy's testimony at trial to prove its case. Dendy testified that Petitioner was his only source and with the methamphetamine that Petitioner supplied, he dealt to Robinson and Brock on approximately 15 or more occasions for 3.5 grams or more. (App. pp. 470, 472, 474). Dendy's testimony regarding Petitioner as not just the supplier to the conspiracy, but the only supplier, was fraught with significant credibility issues, bias, and contradictory statements. Dendy did not deny that he had a personal stake in Petitioner's trial in that his testimony against Petitioner was potentially determinative to the sentence he would ultimately receive. (App. p. 483). Also like the others in the Greenville Group, Dendy's fate in his criminal case benefitted from doing controlled buys. (App. pp. 482-483). Dendy also admitted that he "set up" three other people. (App. p. 483). On the stand, Dendy said he "prayed" that as a result of his cooperation, he would "do better" than the 15-18 year sentence he was currently facing. (App. p. 483).

[6] The identification was hotly contested by the defense and was raised as an appellate issue. (App. pp. 1-46).

Additionally, Dendy admitted on cross-examination that he had previously made several inconsistent statements to law enforcement. (App. pp. 484-485). Dendy had to admit that he had lied to investigators when at first he said that he only dealt to Brock about four times in total, then he changed it to eight times. (App. p. 485). Dendy testified that he told the real story after being confronted with his failed polygraph results, in which he changed his story again by saying he dealt to Brock 14 to 15 times. (App. p. 485; p. 489; p. 492). Dendy maintained that the rendition of events that he gave at trial was consistent with what he told investigators when he told the truth after that failed polygraph. (App. pp. 485-487). Dendy was not given another polygraph to test the veracity of the version of events he claimed were the truth. What's more, is that the polygraph questions he was asked and ultimately found to be deceptive on did not pertain to Petitioner. (App. p. 491). Interestingly, it was not until Trial Counsel informed him on cross-examination did Dendy become aware that if he were to lie on the stand, he would be in violation of the plea agreement and thereby render it void. (App. p. 483). Dendy subsequently admitted that in contrast to his previous testimony that Petitioner was his only supplier, he also used other suppliers, including a "Bokie" or "Bookie", but also potentially others: " I knowed [*sic*] more than Clyde. Yes, sir. I know other people. I know one other person that had it. You know what I'm saying? But he didn't have anything to do with this." (App. pp. 486-487; p. 480, line 23—p. 481, line 4; p. 490). Dendy nevertheless denied that he was "burning" Petitioner in order to save that other supplier or suppliers. (App. p. 486). The State had also even admitted that Dendy had a history of minimizing his involvement and lying to the police (App. p. 351).

ARGUMENT

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. Relief is warranted for its violation when counsel's performance was deficient, and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1985). Counsel is deficient when his performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.* at 688; *see also Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases.") (quoting *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)). However, no deficiency results when an attorney articulates an objectively reasonable strategy. *E.g., Ingle v. State*, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002). The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694; *see also Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.") (citing *Strickland*, 466 U.S. at 694).

I. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE FOR A DIRECTED VERDICT ON THE BASIS THAT THE STATE'S EVIDENCE PROVED MERELY A BUYER-SELLER RELATIONSHIP AND OTHERWISE FAILED TO PROVE THE EXISTENCE OF THE INDICTED CONSPIRACY.

In this case, the State failed to prove the conspiracy alleged in the superseding indictment because the trial evidence merely established a buyer-seller relationship, or at best, the State

presented evidence of multiple conspiracies. Trial Counsel was therefore ineffective for failing to move for a directed verdict on these grounds. The PCR Court's dismissal of the instant PCR is founded upon various errors of law and there is otherwise no evidence of probative value to support its findings.

At the PCR hearing, Trial Counsel testified that the State did not ever have "concrete proof or actually drugs" on Petitioner and that overall, the conspiracy case against him was "weak." (App. p. 946, line 16—p. 947, line 2; p. 960, lines 15-19; p. 965, lines 15-22; p. 966, lines 1-12). He recalled that a SLED agent and an alternative juror expressed surprise that the jury did not return a not guilty verdict. (App. p. 953, lines 3-8). Trial Counsel felt that through Dendy, the State tried to connect Petitioner to a number of methamphetamine addicts and buyers that provided supposed proof of the conspiracy between them, when in actuality, those individuals did not have anything to do with Petitioner. (App. p. 947, lines 3-18). Petitioner likewise testified at the PCR hearing that he was not involved in a conspiracy with the other indicted individuals and did not know them prior to seeing them at trial. (App. pp. 976—979; pp. 981-982). Trial Counsel testified that the State's evidence against Petitioner boiled down to various methamphetamine addicts using, buying, and selling with another and it was their hearsay testimony that the State largely relied upon. (App. p. 966, lines 1-4; p. 960, lines 17-22). There was also testimony about other people and dealings that came into evidence that did not pertain to Petitioner, which the State nonetheless connected to him as prior bad acts or otherwise as an attempt to establish that Petitioner was involved in the Greenville Group. (App. p. 957, lines 9-18; p. 967, lines 9-14).

In moving for a directed verdict at trial, Trial Counsel did not argue on the basis of buyer-seller relationship or multiple conspiracies, and rather largely focused on the inadequate basis for multi-county jurisdiction:

> I'll just make a motion for directed verdict based on the fact that, number one, all the witnesses testify that everything is done within Greenville County. I don't think the statewide Grand Jury would have jurisdiction and this [C]ourt would not have jurisdiction to hear a case not in Greenville County. Number two...these are a bunch of meth addicts buying, selling, using, going all the way back to 2004 with all these different people that weren't even involved in the conspiracy and for the -- I should say -- the alleged conspiracy, I just don't think -- there's no question of fact for the jury to consider that there was any sort of agreement in law. I dont think there was a conspiracy. I think there ought to be a directed verdict.

(App. p. 528, line 16—p. 529, line 6). In light of his summation of the case against his client, Trial Counsel acknowledged that at trial, he had not but could have argued that the State merely established a buyer-seller relationship or made an argument on the basis of multiple-conspiracies. (App. p. 955, lines 12-14; p. 956, lines 14-19; p. 960, lines 5-6; p. 967, lines 4-8).

The PCR Court concluded that Trial Counsel was not ineffective on this ground simply because there was otherwise sufficient evidence tending to prove Applicant was guilty of conspiring to traffic 100 grams or more of methamphetamine. (App. pp. 932-933). The PCR Court erred in several significant aspects. First, the PCR Court disregarded the wealth of information in the record regarding the specific dynamic between the individuals named in the Greenville group and the insufficient showing of agreement or alignment of objectives between them and Petitioner. Recall that upon receiving the methamphetamine from Dendy, that particular buyer, such as Brock or Robinson, would then either use the methamphetamine themselves, resell it to one another or to other codefendants or unnamed persons unrelated to this case. By way of this reselling activity, both the buyers of Dendy and the customers of Robinson and Brock, such as CI's Smith and Norris, conducted themselves wholly independently of Petitioner. (App. pp. 310- 314; pp. 311-322; p. 328; pp. 332-333). These individuals were merely dealing amongst one another and had mutual associations with one another through Dendy for the purpose of supporting their own

methamphetamine addiction. The State's evidence, even if Brock's unreliable and suggestive identification of Petitioner as the driver is to be believed, merely establishes that there may have been dealing or a buyer-seller arrangement between Dendy and Petitioner apart from the conspiracy between the others. "Proof of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy, as is mere association with members of the conspiracy." *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981).

The virtue of being a seller to a reseller, who in turn also resells to another—as the State merely showed here through Petitioner's supposed supplying to Dendy, who sold to others and so forth— does not establish a conspiracy. *State v. Gunn,* is instructive here:

> What is required is a *shared,* single criminal objective, not just similar or parallel objectives between similarly situated people.... It is not enough that a group of people separately intend to distribute drugs in a single area, nor enough that their activities occasionally or sporadically place them in contact with each other. People in the same industry in the same locale (even competitors) can occasionally be expected to interact with each other without thereby becoming co-conspirators. What is needed is proof they intended to act *together* for their *shared mutual benefit* within the scope of the conspiracy charged."

13 S.C. 124, 134, 437 S.E.2d 75, 80-81 (1993) (italics in original).

In this case, as is set forth in *Gunn,* the trial evidence merely established a circle of buyers and addicts operating independently within the same general area in the Upstate to support their own habit, rather than a conspiracy with an agreed upon understanding to further the same goal.

In regard to the lack of proof or agreement or objective between Petitioner and the others, there was also no testimony or evidence that Petitioner, but also Dendy, were aware of what buyers like Brock, Robinson, Sekerchak, and Byers would do with the methamphetamine purchased from Dendy, nor did they have a common shared objective they were working toward together. The individuals charged in the indictment were buying and reselling the methamphetamine supplied by Dendy to one another and to others outside of the scope of the conspiracy without a common

shared objective. Moreover, the evidence was insufficient to establish that the alleged enterprise with Petitioner as the supplier to Dendy was directly dependent upon the success of the reselling ventures carried out by codefendants and others. *State v. Barroso*, 320 S.C. 1, 8-9, 462 S.E.2d 862, 868(Ct.App.1995), reversed on other grounds, 328 S.C. 268, 493 S.E.2d 854 (1997) ("It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe his own benefits were dependent upon the success of the entire venture.”). Further, the fact that there was competition between the resellers of Dendy also has a tendency to show a lack of common objective. For example, Sekerchak testified that as protocol, he did not directly go to Dendy or Petitioner to buy drugs: "Cause we would have called that cutting each other's throat. I always deal with who I deal with to start with straight up." (App. p. 380, lines 12—p. 381, line 2).

Moreover, the dynamic described as the routine Dendy carried out with the others in this case is insufficient to prove the conspiracy charged because it was rather an arm’s length-type of retail dynamic that does not implicate Petitioner's knowledge of the scope of the conspiracy or an interest in the reselling activities of the named codefendants. It is also not as though Petitioner "fronted" drugs to Dendy or anyone else, according to Dendy's testimony. (App. p. 480, lines 15-22). *See Id.; Cf. State v. Hammitt*, 341 S.C. 638, 535 S.E.2d 459 (Ct. App. 2000) (holding that the practice of "fronting" drugs, an arrangement where the buyer pays for the drugs after reselling them, can establish a conspiracy because it “suggests that the seller has an interest in the success of the buyer's re-selling activities, and because it indicates cooperation and trust rather than an arm's length retail-type sale.") .

Further, Robinson and Brock, by virtue of being suppliers in their own right, provided separation from Petitioner and also Dendy to their own customers. Coupled with their independent

operations, the lack of any familiarity by some of the codefendants and others of Petitioner's identity and involvement, as well as Dendy's, further establishes that the participants of this chain of reselling and buying did not share a common mutual objective nor benefitted from the overall venture. For example, Tonya Smith, a buyer of Robinson, had never had discussions with Dendy, and did not know or have any dealings with Petitioner. (App. pp. 322). Norris likewise did not know who Petitioner was , and as for Dendy, although he had heard of Dendy's name, he did not know him or of his relationship with Robinson. (App. pp. 337-338). Norris also did not know who Robinson's supplier was, stating he had merely seen Robinson buy from a person driving a white truck. In regard to Brock, Norris knew of her from middle school and was aware she had a methamphetamine problem, and but had no dealings with her directly regarding methamphetamine. (App. pp. 338).

In sum, the buying, selling and reselling of methamphetamine back and forth between the Greenville Group merely shows a series of buyer-seller relationships otherwise operating independently of one another and is otherwise insufficient to prove a conspiracy here. *See Gunn*, 313 S.C. at 134, 437 S.E.2d at 80 ("[W]e focus here on the sufficiency of the evidence of an *agreement* between the alleged conspirators, and not as the State would have us do, on the alleged common *object*, that is, the importation and distribution of Dilaudid in a defined geographic area.") (italics in original). To combine the associations between the individuals involved in the Greenville Group does not amount to proof of the agreement that is required for a conspiracy. *Id.,* 437 S.E.2d at 81 (holding that although "an agreement to distribute drugs can sometimes be rationally inferred from frequent contacts among defendants and from their joint appearances at transactions and negotiations", a reviewing court must "exercise caution to ensure the proof [of a conspiracy] is not obtained "by piling inference upon inference.") (internal citations omitted).

The State's trial evidence failed to prove the single conspiracy alleged in the indictment and at best, proved the existence of multiple conspiracies, which improperly enlarged or varied from the indictment. As previously discussed, the other individuals named in the Greenville Group and the CI's who testified all had dealings with other Operation IceHouse groups and had other suppliers besides Petitioner as alleged. The CI's and the co-defendants in the Greenville conspiracy had other suppliers as well as other customers unrelated to this matter. (App. p. 314; p. 322). For example, Dendy's testimony showed that he used a man naked Bokie and possibly another individual during the relevant time period to supply him with methamphetamine. Byers, notwithstanding the otherwise undocumented buy with Petitioner and Charles Brown, *see infra* herein pp. 19-20, also had a different main supplier, a man he referred to as "Joey", who was also outside of this conspiracy. (App. p. 362). Sekerchak also had a different supplier by the name of Pam Bryant and his brothers. (App. p. 370). Brock and Robinson, the main resellers of the methamphetamine Dendy supplied, also used other suppliers and had other buyers outside of the Greenville Group. In regard to the CI's who testified in this case, they too were associated with the Greenville Group, as well as many others. For example, Smith testified that she did buy from Robinson, Byers, and Dendy at times throughout the years, but her other suppliers included Felipe Flores, Luke Blankenship, "Tasha" and Chad Moore, individuals who not charged in this conspiracy. (App. p. 314; pp. 318-319, p. 327). In regard to Felipe in particular, Agent Asbill stated Flores was involved in "another" conspiracy but identified him as a "big dealer" and the "big boss" in the area. (App. p. 516, lines 6-10). Flores was also known to be involved with some of the same people as the Greenville group and hung out at the same apartments. (App. p. 516, lines 11-14). As for Chastain, who also casually bought and sold from several members in the Greenville Group, he too used Flores as a supplier as well as individuals outside of the Greenville Group conspiracy,

including Adrian Hernandez, Eduardo Preciado, Malva Martinez, Jason Griffin, and Kimberly Rushton. (App. 344, lines 20-23; p. 351). Norris likewise shared some of the same associations with Smith, Chastain, and the others. (App. pp. 334- 335). The independent arrangements of buying and selling between the Greenville Group as well as with others, as is thoroughly described throughout the record, therefore tended to prove a number of conspiracies rather than the Greenville Group conspiracy alleged in the indictment. *See Gunn*, 313 S.C. at 132-34, 437 S.E.2d at 80-81.

Therefore, Trial Counsel's failure to move for a directed verdict on these grounds constituted as deficient performance which prejudiced Petitioner. There is a reasonable probability that had Trial Counsel made a directed verdict motion on this proper basis, the verdict may have been directed in Petitioner's favor, resulting in an acquittal.

II. THE PCR COURT ERRED IN CONCLUDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE FOR A DIRECTED VERDICT ON THE BASIS THAT THE STATE FAILED TO PROVE PETITIONER CONSPIRED TO TRAFFICK METHAMPHETAMINE IN THE AMOUNT OF 100 GRAMS OR MORE AS INDICTED, OR IN THE ALTERNATIVE, FOR FAILING TO REQUEST A LESSER INCLUDED OFFENSE JURY INSTRUCTION.

In conjunction with the foregoing section, the PCR Court erred in concluding that there was sufficient evidence in the record to prove that Petitioner conspired to traffic methamphetamine in the amount of more than 100 grams but less than 200 grams. At trial, the State contended that the requite drug weight had been met based upon the 88 grams seized during controlled buys of the Greenville Group, as well as the historical information that State witnesses provided in regard to the drugs bought from Petitioner through Dendy. (App. pp. 534-537). As thoroughly discussed

in the preceding section, the State did not present sufficient evidence of an agreement that would establish Petitioner was involved in the conspiracy with the Greenville Group as indicted. In turn, the buying and selling and reselling of various amounts of methamphetamine through Dendy and the others throughout the years cannot be attributed to Petitioner as a co-conspirator. "[O]nce a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy'...'the acts and declarations of any conspirator made during the conspiracy and in furtherance thereof are deemed to be the acts and declarations of every other conspirator and are admissible against all." *See e.g, State v. Gosnell*, 341 S.C. 627, 535 S.E.2d 453 (2000) (quoting *State v. Horne*, 324 S.C. 372, 382, 478 S.E.2d 289, 294 (Ct. App. 1996) and *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (internal citations omitted)).

Therefore, excluding the historical information provided by the State witnesses regarding the methamphetamine they bought from Dendy as supplied by Petitioner, the only drug weight, if believed, that could be attributed to Petitioner was far less than 100 grams of methamphetamine. That remaining drug weight in the record stems from the controlled buy arranged by Agent Asbill between Petitioner and an unidentified CI for 3.5 grams of methamphetamine. (App. p. 511; p. 514). This CI did not testify and there is no video of the purchase. Agent Asbill and the other investigators did not see the controlled buy take place from their squad car parked nearby. (App. pp. 510-511). While there was surreptitious audio recording of the controlled buy transmitting from the CI's wire, none of the voices that can be heard were sufficiently identified to be Petitioner at trial. (App. pp. 508-510; p. 512). The only other occasion in which Petitioner was alleged to have directly participated in the selling of methamphetamine was provided by Byers. Byers claimed that he met Petitioner on one occasion in the summer of 2010 at a car dealership with a

man named Charles Brown, who Byers knew through his cousin's boyfriend. (App. p. 359). Byers testified that while in the backseat of Brown's vehicle, Petitioner handed Brown a bag of methamphetamine, who in turn handed it to Byers. (App. p. 360, lines 10-20; p. 361). Byers could not recall the amount of methamphetamine he bought at that time and estimated that it might have been one gram. (App. p. 361). Byers had no other dealings with Petitioner. (App. p. 361). Byers's testimony greatly contrasts with PCR hearing testimony of Brown and Petitioner, who denied the transaction ever took place. (App. pp. 973-974). At the PCR hearing, Brown also flatly denied that the transaction ever occurred and explained that he did not know Petitioner or Byers that well at the time, let alone had they ever been in a car together. (App. pp. 985-988; p. 992).

In the alternative, Trial Counsel was ineffective for failing to request a jury charge instructing the jury that it could find Petitioner guilty of the lesser-included offense of conspiracy to traffic methamphetamine in an amount less than the more than 100 grams, but less than 200 grams as alleged in the superseding indictment. The PCR Court concluded that Trial Counsel was not ineffective on this basis upon the finding that the lesser-included offense of conspiracy of a lesser-amount such as 28 grams[7] to 100 grams of methamphetamine was not factually supported by the record. (App. pp. 936-937). This is error because in in conjunction with the preceding sections herein, the State's evidence failed to prove Petitioner was involved in the Greenville Group conspiracy as indicted, and therefore the drug weight that was sold by Dendy and resold among the others cannot properly be attributed to Petitioner.

At the PCR hearing, Petitioner testified that Trial Counsel did not present the option of pursuing a lesser-included offense instruction. He explained that he might have wanted Trial

[7] The PCR Court's Order lists "25 grams to 100 grams." (App. p. 936).

Counsel to seek a lesser-included offense instruction as opposed to moving for a directed verdict had it been presented to him, and commented: "I wanted all my options". (App. p. 983). Trial Counsel testified that there may have been opportunity under a defense theory or strategy or another to request a lesser-included offense instruction, which would have resulted in a shorter potential sentencing range. (App. pp. 951-952; p. 958; p. 962; p. 969).

The State's position at the PCR hearing was that such a jury instruction for a lesser-included offense for conspiracy to traffic a lower drug weight was not permissible pursuant to *State v. Gosnell*, maintaining that the conspiracy would have to be for the amount indicted. (App. p. 962). However, this is a misreading of *Gosnell*'s holding. The Court in *Gosnell* did not establish an outright rule prohibiting a jury instruction on a lesser-included offense for a drug conspiracy case. 341 S.C. at 636-37, 535 S.E.2d at 458-59. The Court rather held that such an instruction would be permissible in factually applicable cases: "Conspiracy to traffic in an amount of cocaine contained within a lesser sentencing level than that alleged in the indictment may be proper where the amount involved in the object of the conspiracy is in controversy. In such circumstances, the lesser charge would be an appropriate consideration in defining the scope or object of the conspiracy." *Id.* Moreover, *Gosnell* also can be factually distinguished from the present case due to the unique manner in which the offense was indicted and the manner in which the trial court ultimately came to find a lesser charge was warranted. Thus, in contrast to the PCR Court's findings, a lesser-included offense jury instruction was applicable here because the amount of methamphetamine was in controversy due to the lack of sufficient evidence that Partitioner was involved in the underlying conspiracy with the historical information excluded. Therefore, the PCR Court erred in concluding that Trial Counsel was not ineffective for failing to request such a lesser-included offense jury instruction.

CONCLUSION

In light of the foregoing, the Petitioner respectfully urges this Court to reverse the Order of the PCR Court, vacate his conviction and sentence, and remand for a new trial.

Respectfully Submitted,

William G. Yarborough, III

Lauren C. Hobbis

By: s/ Lauren C. Hobbis
South Carolina Bar # 103190

WGY Law
308 West Stone Avenue
Greenville, South Carolina 29609
(864) 331-1612

ATTORNEYS FOR PETITIONER