

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2025-000100

Clyde Bowen Davis, #00357153,.....Petitioner,

v.

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

APPENDIX - VOLUME III

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INDEX¹

Appellant's Final Brief (App. Case No. 2013-002207), <i>State v. Davis</i> , 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017).....	1-46
Respondent's Final Brief (App. Case No. 2013-002207), <i>State v. Davis</i> , 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017).....	47-85
Appellant's Final Reply Brief (App. Case No. 2013-002207), <i>State v. Davis</i> , 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017).....	86-116
Trial Verdict Form.....	122
Order Denying Defendant's Motion for Verdict in Arrest of the Judgment and Motion for a New Trial, filed Oct. 4, 2013.....	123-128
Sentencing Sheet.....	129
Defendant's Motion to Dismiss the Indictment, filed Sept. 5, 2012.....	130-137
State's Response to Defendant's Motion to Dismiss the Indictment, filed Sept. 13, 2012.....	138-149
Defendant's Reply to Motion to Dismiss the Indictment, filed Oct. 23, 2012.....	150-166
Defendant's Supplemental Discovery Motion, filed Sept. 5, 2012.....	167-170
State's Response to Defendant's Supplemental Discovery Motion, filed Sept. 13, 2012.....	171-174
Defendant's Reply to Supplemental Discovery Motion, filed Oct. 23, 2012.....	175-184
Defendant's Motion for Disclosure of Evidence concerning Confidential Informants, filed Sept. 18, 2012.....	185-195

¹ This Appendix incorporates the record from Petitioner's direct appeal (App. Case No. 2013-002207) *see State v. Davis*, 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017), and the review on certiorari in *State v. Davis*, App. Case No. 2017-001504 (S.C. Sup. Ct. filed Mar. 18, 2018). The pagination of this Appendix continues from that previous appellate record. Please refer to the page number in large, bold text that is centered at the bottom of each page.

Defendant's Motion to Exclude Photo Lineup and all In-Court Identifications made Subsequent Thereto with attached Exhibit 1 (Photo Lineup), filed Sept. 18, 2012.....	196-206
Notice of Intent to Appeal with attached Order, filed with the SC Court of Appeals on Oct. 16, 2013 (App. Case No. 2013-002207).....	207-213
Trial Transcript, Sept. 16-18, 2013 Case No. 2011GS4700006.....	214-581
Pretrial Motions.....	215-248
Testimony (<i>in camera</i>):	
Investigator Chad Ayers, Greenville County Sheriff's Office	
Direct Examination by Curtis Pauling, Esq. of SC Attorney General's Office....	249-257
Cross Examination by Defense Counsel Ryan Beasley, Esq.....	257-260
Redirect Examination by Curtis Pauling, Esq.....	260
Recross Examination by Ryan Beasley, Esq.....	260-261
Amy Brock	
Direct Examination by Curtis Pauling, Esq.....	261-274
Cross Examination by Ryan Beasley, Esq.....	275-276
Redirect Examination by Curtis Pauling, Esq.....	276-277
Recross Examination by Ryan Beasley, Esq.....	277-278
Investigator Chad Ayers, Greenville County Sheriff's Office (Recalled)	
Recross Examination by Ryan Beasley, Esq.....	283-284
Preliminary Instructions to the Jury.....	289-297
Opening Statements:	
Joshua Underwood, Esq. SC Attorney General's Office.....	297-300
Ryan Beasley, Esq.....	300-308
Testimony:	
Tonya Smith	

Direct Examination by Joshua Underwood, Esq.....	309-325
Cross Examination by Ryan Beasley, Esq.....	325-327
David Norris	
Direct Examination by Joshua Underwood, Esq.....	328-351
Cross Examination by Ryan Beasley, Esq.....	351
Joshua Byers	
Direct Examination by Joshua Underwood, Esq.....	352-362
Cross Examination by Ryan Beasley, Esq.....	362-363
Redirect Examination by Joshua Underwood, Esq.....	363-364
Recross Examination by Ryan Beasley, Esq.....	364-365
Brian Sekerchak	
Direct Examination by Curtis Pauling, Esq.....	365-387
Cross Examination by Ryan Beasley, Esq.....	387-389
Redirect Examination by Curtis Pauling, Esq.....	389-391
Michael Robinson	
Direct Examination by Joshua Underwood, Esq.....	393-408
Cross Examination Ryan Beasley, Esq.....	408-411
Redirect Examination by Joshua Underwood, Esq.....	411-412
Amy Brock	
Direct Examination by Curtis Pauling, Esq.....	415-449
Cross Examination Ryan Beasley, Esq.....	449-456
Redirect Examination by Curtis Pauling, Esq.....	456-458
Recross Examination by Ryan Beasley, Esq.....	458-460
Nicholous Dendy	
Direct Examination by Joshua Underwood, Esq.....	460-479
Cross Examination Ryan Beasley, Esq.....	480-488
Redirect Examination by Joshua Underwood, Esq.....	488-491
Recross Examination by Ryan Beasley, Esq.....	491-492
Redirect Examination by Joshua Underwood, Esq.....	493

Recross Examination by Ryan Beasley, Esq.....	493
Agent Ashely Asbill, SLED	
Direct Examination by Joshua Underwood, Esq.....	495-516
Cross Examination Ryan Beasley, Esq.....	516-517
Defendant Clyde Bowen Davis (in camera)	
Examination and advisement by the Court on the right to testify.....	519-522
Jury Instruction Conference and Motions.....	522-531
Closing Arguments:	
Joshua Underwood, Esq.....	532-548
Ryan Beasley, Esq.....	548-558
Jury Instructions.....	558-572
Verdict and Jury Polling.....	575-579
Sentencing.....	579-580
State Grand Jury Transcripts:	
Testimony of Senior Agent Ashley Asbill, Jan. 13, 2011.....	582-603
Testimony of Investigator Chad G. Ayers , Feb. 15, 2011.....	604-653
Testimony of Senior Agent Ashley Asbill, July 12, 2011.....	654-681
Testimony of Amy Brock, Sept. 14, 2011.....	682-720
Testimony of Investigator Chad G. Ayers , Nov. 8, 2011.....	721-747
Testimony of Agent C. Brett Barwick, Dec. 13, 2011.....	748-756
Presentation of Indictment, Deliberations and Voting, Dec. 13, 2011.....	757-812

Indictment, No. 2011-GS-47-06.....	813-822
Superseding Indictment, No. 2011-GS-47-06.....	823-834
Court's Exhibit 1/State's Exhibit 1 (Driving Record of Defendant for Photo Lineup).....	835
Certificate of Appellate Counsel pursuant to Rule 210, SCACR.....	836
Post-Trial Motion for Verdict in Arrest of Judgment and Motion for a New Trial, Sept. 24, 2013.....	839-843
Appellate Opinion in <i>State v. Davis</i> , 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017).....	844-859
Petition for Rehearing, (App. Case No. 2013-002207), <i>State v. Davis</i> , 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017).....	860-877
Order Denying Petition for Rehearing, (App. Case No. 2013-002207), <i>State v. Davis</i> , 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017).....	878
Petition for Writ of Certiorari, <i>State v. Davis</i> , App. Case No. 2017-001504, filed Aug. 8, 2017.....	879-901
Return to Petition for Writ of Certiorari, <i>State v. Davis</i> , App. Case No. 2017-001504, filed Sept. 27, 2017.....	902-922
Order Denying Certiorari, <i>State v. Davis</i> , App. Case No. 2017-001504 (S.C. Sup. Ct. filed Mar. 18, 2018).....	923
Remittitur, <i>State v. Davis</i> , App. Case No. 2017-001504 (S.C. Sup. Ct. filed Apr. 3, 2018).....	924

PCR Court Order of Dismissal, filed Jan. 17, 2025.....	925-941
Transcript of PCR Hearing held on July 23, 2025 before the Honorable J. Derham Cole...	942-1004
Second Amended PCR Application Grounds and Motion, Dec. 20, 2019.....	1005-1008
Amended PCR Application Grounds and Motion, Oct. 2, 2019.....	1009-1013
State's Return and Motion for More Definite Statement, Jan. 8, 2019.....	1014-1027
Post-Conviction Relief Application, Sept. 18, 2019.....	1028-1035

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 dismissal¹ 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

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 (1985), 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. 1, § 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

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-

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

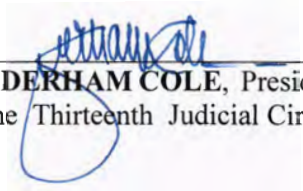


appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

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

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25 JAN 17 AM 10:17
JAY GRESHAM CDC 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

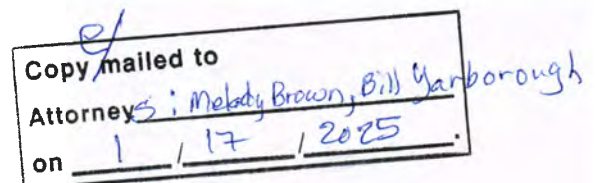
Dear Clerk;

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



STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2018-CP-23-04795
COUNTY OF GREENVILLE	)	
	)	
	)	
	)	
	)	
CLYDE B. DAVIS,	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	
_____	)	

July 26, 2023
Greenville, South Carolina

B E F O R E:

THE HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S:

WILLIAM G. YARBOROUGH, III, ESQ.
Attorney for the Applicant

MELODY J. BROWN, ESQ.
Attorney for the Respondent

CHERYL A. SMITH
Circuit Court Reporter

INDEX

(AW) - Denotes Applicant's Witness
(RW) - Denotes Respondent's Witness

	<u>PAGE</u>
<u>(AW) RYAN BEASLEY:</u>	
Direct Examination by Mr. Yarborough	5
Cross-Examination by Ms. Brown	18
Redirect Examination by Mr. Yarborough	27
<u>(AW) CLYDE DAVIS:</u>	
Direct Examination by Mr. Yarborough	31
Cross-Examination by Ms. Brown	39
Redirect Examination by Mr. Yarborough	43
<u>(AW) CHARLES BROWN:</u>	
Direct Examination by Mr. Yarborough	44
Cross-Examination by Ms. Brown	45
Redirect Examination by Mr. Yarborough	51
Applicant Rests	51
<u>(RW) JOSHUA UNDERWOOD:</u>	
Direct Examination by Ms. Brown	52
Cross-Examination by Mr. Yarborough	54
Redirect Examination by Ms. Brown	61
Respondent Rests	62
Certificate of Reporter	63

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
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There were no exhibits introduced.

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 10:47 AM.)

MS. BROWN: May it please the Court. The next case is Davis vs. State. The case number is 2018-CP-23-4795.

I have the judge's packet to hand up.

I've got the PCR application filed September 18, 2018, included. I have the return and motion for a more definite statement filed by the State January 15, 2019.

Your Honor, there is a pending motion to amend the application. It's filed -- or was filed December 20, 2019.

Included in your packet, Your Honor, are the direct appeal records. These are public records.

I'll bring to Your Honor's attention that this case stems from a statewide grand jury prosecution, but the records that we have included are the direct appeal records available on the South Carolina appellate case management system docket report. They are public records, and it includes everything that went to the South Carolina Court of Appeals for briefing and -- record on appeal, plus petition for writ of certiorari responses that went up to the State Supreme Court. I will hand you that packet, Your Honor.

THE COURT: Mr. Yarborough, you represent the applicant?

1 MR. YARBOROUGH: I am, Your Honor.

2 THE COURT: And has the motion been agreed to as to
3 the amendment?

4 MS. BROWN: We have no objection, Your Honor. We
5 have a copy. We've had it for a while.

6 MR. YARBOROUGH: Yes, sir. I thought it had already
7 been -- I thought they'd already agreed to it.

8 THE COURT: Are you ready to proceed with the
9 application?

10 MR. YARBOROUGH: Yes, sir.

11 THE COURT: Okay.

12 MR. YARBOROUGH: Your Honor, as she told you, this
13 was an extremely hotly contested statewide grand jury case
14 where Mr. Davis was represented by Mr. Beasley. And I
15 call Mr. Beasley as a witness.

16 THE CLERK: Mr. Beasley, please place your left hand
17 on the Bible and raise your right hand.

18 WHEREUPON,

19 RYAN BEASLEY

20 After having been duly sworn, testified as follows:

21 THE CLERK: Thank you. You may be seated. Please
22 state your full name for the record.

23 THE WITNESS: Ryan Lewis Beasley.

24 ///

25 ///

DIRECT EXAMINATION

BY MR. YARBOROUGH:

Q Mr. Beasley, you represented Mr. Davis in this case?

A I did.

Q And for how long did you represent him?

A Oh, God. I guess at least a couple years. But, you know, I've known Clyde for probably going on almost 20 years. I used to play basketball with Clyde back in the day. So I've known him a long time.

Q And is it safe to say this was a hotly contested trial?

A It was.

Q And that trial took place in front of Judge Verdin?

A It did.

Q What was your -- what was your theory of defense?

A You know, one thing about that case as I recall is the State really didn't ever have concrete proof or actually drugs on Clyde. You know, every -- one of the arguments I recall making was every defendant in that case the State had an undercover buy done on that defendant or they caught that defendant with drugs.

Q Right.

A And they did not ever do that with Clyde.

Q Okay. And I know you and I have talked about this before. There wasn't really an objective conspiracy that

1 you felt like was proven by the State?

2 A It was weak.

3 Q And as part of the State's case, they put in a number
4 of -- they put up a number of witnesses that really didn't
5 have anything to do with Clyde, right?

6 A That's correct.

7 Q And at some point, I guess, did you feel like they
8 were trying to use that to try to bolster the conspiracy?

9 MS. BROWN: Your Honor, I'm going to object to the
10 form of the question.

11 BY MR. YARBOROUGH:

12 Q What did you think about it?

13 A Well, you know, I think they were trying -- I think
14 one of the sources of a lot of these individuals I believe
15 is a guy named Dendy. And I think the people they were
16 putting up purchased from Dendy, and then Dendy said he
17 was getting it from Clyde. I think that was how the whole
18 conspiracy played out.

19 Q But, I mean, it was like do you remember the
20 testimony of a Joshua Byers?

21 A Sort of. Was that the guy that was in the backseat
22 of the car?

23 Q Yeah. That was the guy in the backseat of the car.

24 Based on your knowledge, did that have anything to do
25 with this conspiracy?

1 A It's hard for me to remember everything. But I
2 remember that Byers said he got the drugs while he was in
3 the backseat from somebody in the front seat, and he said
4 that he -- I think that Clyde was driving the car or
5 something.

6 Q Right. And do you recall -- and I guess you don't
7 have a trial transcript. I'll note it for the record on
8 page 360 and 361 that person was a guy by the name of
9 Charles Brown. Do you remember that guy?

10 A Sounds right.

11 Q To your knowledge, was Mr. Brown ever called as a
12 witness in this case?

13 A He was not.

14 Q Right. And if you would have had the ability to call
15 Charles Brown, would you have called Charles Brown to say
16 that happened or it didn't happen?

17 A I guess it would depend on if I knew what Charles
18 Brown was going to say before I would call him.

19 Q Did Clyde ever tell you that he thought he could put
20 Charles Brown in your office?

21 A I do not recall that.

22 Q Okay. That's fair enough.

23 There was also some testimony from -- I believe the
24 State's theory was they called an agent to testify about
25 what they saw. Is that -- can you tell the Court a little

1 bit about that? Because I know it was subject of the
2 appeal.

3 A Yeah. So, I mean, I briefed it before court, after
4 court, on appeal, but they allowed that the CI was not
5 present for court. And they allowed the agent to testify
6 to the buy even though he didn't witness the purchase or
7 the buy. And it was highly prejudicial. That was a big
8 moment in the case that I think swayed the jury in my
9 opinion. But unfortunately, the Court of Appeals found
10 harmless error.

11 Q Right. And have you thought about it? Was there a
12 different way you could have attacked that that would not
13 have -- it might have helped the argument on appeal?
14 Could you discuss the -- if you'd have looked at the
15 prejudicial effect of the limited amount of evidence?

16 A Well, you know, it's so hard. You can always beat
17 yourself up on a case, especially when you lose. You
18 think maybe you should have done this or done that. It's
19 hard to pinpoint exactly. But, you know, maybe I could
20 have -- I just don't -- I can't remember. It's been so
21 long. It's been ten years.

22 Q Right.

23 A But, you know, maybe I should have focused on some
24 more issues where I could have articulated it better for
25 the Court of Appeals why it was not harmless error,

1 because that was a pivotal moment because that was the
2 only purchase of Clyde at the time.

3 Q In fact, they didn't have a witness there, right?

4 A They did not.

5 Q Okay. All they had was an agent there. And
6 hindsight is 20/20. But now thinking about it, was that
7 actually part of the conspiracy or were they arguing that
8 was a prior bad act?

9 A I think that was -- they were arguing, I guess, as a
10 prior bad act in which -- honestly, they didn't even know
11 who Clyde was except for this CI that they never were able
12 to produce.

13 Q Right. So if -- that's my point is I believe the
14 State's theory was that that was part of a conspiracy, and
15 in reality, it's hard to say because it was just the
16 agent's view of what happened, right?

17 A Right. And I briefed it. And I even -- when the
18 judge ruled against me, I even said I think you ought to
19 reconsider because this is so highly prejudicial to let
20 somebody testify when they didn't even witness the
21 purchase and they're not the CI. And the Court of Appeals
22 agreed that it was the judge made a mistake.

23 Q It was prejudicial. And I think what the Court of
24 Appeals said was that there was so much evidence against
25 him otherwise.

1 But if you would have argued that, do you think that
2 would have been a different outcome if you'd have argued
3 it was a prior bad act?

4 A It could have, you know. I recall in the Court of
5 Appeals I felt so strong about the issue and I thought we
6 would definitely win that issue and they would have
7 reversed the ruling. And, you know, I did not articulate
8 enough issues that where the harmless error maybe didn't
9 carry today.

10 Q Okay. And I think you and I have tried to go through
11 and talk about -- you made a decision at some point not to
12 ask for a lesser-included offense; is that correct?

13 A I think so.

14 Q Okay. And so he was convicted of -- it went to the
15 jury, and he was convicted of 100 grams to 200 grams; is
16 that right?

17 A Correct.

18 Q And with some of -- and that was 100 to 200 grams in
19 this conspiracy itself, right?

20 A Correct.

21 Q Okay. So if some of these other allegations that
22 were brought up during trial were either prior bad acts or
23 shouldn't have been admitted, do you believe that it would
24 have added up to 100 grams of meth or would it have been
25 less?

1 A I think it was less. And, you know, I think it's
2 hard for me to remember, but I thought maybe that was I
3 may have argued that, that it was less than 100 grams as
4 well, but I can't recall.

5 Q But the record will speak for itself.

6 A Correct. I can't remember.

7 Q Okay. And would you disagree with me if I said I've
8 gone through the record and I found 79 grams of meth in
9 the record?

10 A Yeah. I would agree with that.

11 Q Okay. And so perhaps if you would have asked for a
12 lesser included, you might have gotten one.

13 A Maybe.

14 Q Okay. Let's see. Did you talk to Clyde about ever
15 pleading guilty in this case?

16 A Yes.

17 Q And what was the recommendation?

18 A So I think it was right before we did opening
19 statements, then the attorney general -- assistant
20 attorney general Curtis Pauling I remember came up to me
21 at the table and said that he would let Clyde plea to
22 seven years if we would take a plea. And Clyde and I
23 discussed it at great length. And, you know, it was
24 ultimately his call, and we decided to move forward on the
25 trial.

1 Q Okay. And I think you've shared with me a number of
2 times you regret that.

3 A Well, obviously, we regret it now. But, I mean, I've
4 got to admit we both felt pretty good after closing
5 statements, you know. I mean, I recall even the SLED
6 agent coming up to me and saying we're going to get not
7 guilty after closing statements. And the alternate juror
8 couldn't believe they came back with guilty.

9 Q Wow.

10 Do you remember some questions about the photo lineup
11 that was ---

12 A Yes.

13 Q Yep. Can you tell the Court a little bit about that?
14 And I guess that later it was determined that ---

15 A Well, I know I briefed it at length and I argued it
16 at trial and I briefed it for the Court of Appeals. And I
17 was -- it was -- they just showed, from what I recall,
18 just a driver's license photo of Clyde to identify with
19 one of the main witnesses, Amy Brock, who said he was the
20 one that came to her house, which I thought was very
21 suggestive and I thought it should not have been allowed
22 in the trial. But it was ultimately allowed.

23 Q Right. And did you have a chance to look at the
24 grand jury testimony afterwards or before?

25 A Obviously, I went and looked at it before trial and

1 made notes of all that kind of stuff.

2 Q And was that grand jury consistent with what they
3 said at trial or do you recall?

4 A Oh, God. I can't recall that.

5 Q Okay. If I told you that the grand jury was told
6 that it was a photo spread and then they testified at
7 trial, would that recall your recollection?

8 A Yes. I do recall that. And that was -- and I think
9 I made an issue of that as well.

10 Q You made an issue on appeal of it, but didn't make an
11 issue at trial.

12 A Maybe. Maybe.

13 Q Right. And do you feel like that might have been a
14 significant difference in the case?

15 A Possibly. You know, Judge Verdin was shooting down
16 all my arguments.

17 Q You know, we've talked before about some of the jury
18 charges that were involved in the case. I think there
19 were a number of instructions throughout where it says the
20 truth -- the truth and language. Are you familiar with
21 that?

22 A I vaguely recall you and I discussing it.

23 Q You don't recall ever objecting to that.

24 A I don't think I did, no.

25 Q Okay.

1 A Was that a new opinion that came out about that
2 later?

3 Q That was the new opinion that came out, yeah.
4 Bounced around a number of times.

5 Do you recall, can you tell the Court what the -- I
6 think I asked you this a minute ago -- what the theory was
7 for Mr. Davis's involvement in this conspiracy?

8 A I mean, as I recall, they were saying that Mr. Davis,
9 Clyde, was a main supplier to this conspiracy because they
10 had him at the top of the indictment, top of the food
11 chain.

12 Q If you go back and look, could you have also argued
13 that was more of a buyer-seller relationship versus a ---

14 A Yeah. And I -- yeah.

15 Q And you what? Did you ---

16 A I thought maybe -- I mean, like I said, that's been
17 ten years ago. Maybe I did. Maybe I didn't argue that.
18 I can't remember.

19 Q Right. And I'll just draw your attention. And you
20 don't -- I don't have to show it to you. I'll just ask if
21 you recall your motion for a directed verdict. It's found
22 on page 528 of the transcript and it goes over to page
23 529. It's line 16 through line 6. This was your
24 statement: I'll just make a motion for a directed verdict
25 based on the fact that, number one, all the witnesses

1 testifying everything is done within Greenville County. I
2 don't think the statewide grand jury would have had
3 jurisdiction and this court would not have jurisdiction to
4 hear a case not in Greenville County.

5 Number two, you know there are a bunch of meth
6 addicts selling, using, going all the way back to 2004
7 with all these different people that weren't even involved
8 in the conspiracy. From that I would say the alleged
9 conspiracy. I just think there's no question the fact the
10 jury can consider that was any sort of agreement in law.
11 I don't think there was a conspiracy. Does that kind of
12 vaguely recollect?

13 A Sounds pretty good.

14 Q So if you go back and think about it, you didn't
15 really argue the buyer-seller relationship.

16 A I guess -- I guess I didn't.

17 Q Okay. Now, hindsight, maybe you wish you would
18 have.

19 A Maybe.

20 Q Okay. Tell me, do you remember the -- what was the
21 -- we talked about the photo spread. Do you remember what
22 evidence they gave you on the incident where the agent
23 testified about his -- what he saw? Did they not give you
24 the -- do you remember?

25 A I don't think so. I think there was probably just a

1 report of when they sent -- what was his name? It was the
2 CI. Whenever they, you know, checked him for drugs, you
3 know, before they send them in to do the buy. But I don't
4 remember. I don't recall a whole lot.

5 Q Okay.

6 A I mean, I made a lot of objections and filed a bunch
7 of motions that, you know, I didn't receive a lot of
8 discovery. But that was denied, too.

9 Q And I'm going to walk you through my amended
10 application. And just in that application, we said that
11 the trial counsel failed to challenge the evidence
12 presented by the State as amounting to a material variance
13 from the conspiracy charge in the indictment. And so what
14 I'm asking there is perhaps was there other evidence that
15 came in that was not just in that conspiracy that you
16 could have argued was prior bad acts but the Court of
17 Appeals didn't think so?

18 A Possibly.

19 Q Okay. And there again with the CI buy, the same
20 argument.

21 And the prior bad acts, we discussed that.

22 We discussed the truth and fair language and the jury
23 instruction. You did not object to that, right?

24 A Correct.

25 Q And I guess you feel like you did everything you

1 could on the hearsay argument with the SLED agent?

2 A I thought I did. I mean, I even briefed for the
3 judge with the case law.

4 Q Right. And then finally, I think that you didn't
5 specifically ask for a directed verdict in less than
6 100 grams, right?

7 A I don't think I did.

8 Q Right. And what I just read to you, safe to say.
9 And that could have been a lesser included that the
10 jury could have convicted him of, right?

11 A Possibly.

12 Q And you didn't -- on appeal you didn't raise the
13 issue at that point.

14 A Correct.

15 Q I think you tried to and then they dismissed one of
16 the counts on appeal. I never understood what happened
17 with that. Do you ---

18 A I don't know if it was maybe because I didn't
19 preserve the issue.

20 MR. YARBOROUGH: Okay. I think that's correct. The
21 issue wasn't preserved.

22 Okay. Hold on one second.

23 No further questions. Thank you, Your Honor.

24 Thank you, Mr. Beasley.

25 THE WITNESS: Thank you.

CROSS EXAMINATION

BY MS. BROWN:

Q Good morning.

A Good morning.

Q Just a few questions for you.

I believe you said this was hotly contested.

A Well, it was -- we worked it very hard. I mean, I think both sides worked really hard and we did -- I think both sides did a great job trying the case.

Q And you explored a lot in defenses. You filed motions?

A I think I made Mr. Underwood work as hard as he's ever worked on a drug case.

Q And you knew Mr. Davis prior to representation.

A Correct.

Q Okay. And so you had a good working relationship with him, correct?

A With Mr. Davis?

Q Yes.

A Oh, yeah.

Q And you talked about possible witnesses.

A Yeah.

Q You talked about possible defenses.

A Correct.

Q And you mentioned something in your direct testimony

1 about you could have argued buyer or seller. Well, did he
2 tell you that he was involved in selling drugs?

3 A No. Not that I recall.

4 Q So how could you argue buyer-seller relationship?

5 A Well, I guess you could. Based on the evidence that
6 was presented at trial, you could have argued it.

7 Q So there was evidence that he participated.

8 A Well, there was -- he would have testified that they
9 said that Clyde was there or Clyde drove up and they
10 identified him as driving up and giving it -- some drugs
11 to Mr. Dendy.

12 Q Okay. And I believe I heard you say that the State
13 never had any evidence that there were drugs on Mr. Davis
14 in any time.

15 A And what I meant by that is there was never a formal
16 -- I guess all the defendants at some point or another,
17 the State Law Enforcement caught these individuals with
18 drugs on them or at their house or wherever they were, and
19 that was never the case with Mr. Davis.

20 Q Was there not a distribution charge?

21 A There was. But there was -- there was no testimony
22 to an actual purchase or distribution besides an agent
23 saying there was. But he didn't see it.

24 Q But that distribution charge was dismissed after the
25 conviction for the conspiracy, correct?

1 A Correct.

2 Q Okay. And we talked a little bit this morning about
3 the agent testifying. But isn't it true that the agent
4 observed that buy and ---

5 A He said he -- well, he said he couldn't see it, from
6 what I recall.

7 Q Heard it?

8 A I don't think he heard it.

9 Q You don't think he did. But his testimony was that
10 he had personal knowledge, correct?

11 A Well, he said it happened, but he didn't see it. He
12 couldn't see it from where he was. I think I recall when
13 we proffered his testimony that -- and even before he
14 testified that he couldn't actually see it, where that's
15 when I said he shouldn't be able to testify about it. But
16 the judge overruled me.

17 Q Okay. And to put it in context, Mr. Beasley, and
18 maybe you can explain this a little bit more, but what
19 we're talking about is describing the interaction between
20 a number of people so you can get to a historical record
21 of the conspiracy, correct?

22 A Yeah. A lot of hearsay from what I recall.

23 Q And there's some personal knowledge that the jury can
24 either accept or reject based on credibility, correct?

25 A Yeah.

1 Q Okay. And part of the interactions are properly
2 called res gestae as well, correct?

3 A Yeah.

4 Q And it's a context. It's the same -- it's the same
5 number of people coming together for a purpose, and that's
6 what you have to prove for conspiracy.

7 A Right.

8 Q Okay. Now, you were also asked a few questions about
9 a possible request for a lesser offense. Now, Mr. Davis
10 was indicted for specific conspiracy, 100 to 200, right?

11 A Right.

12 Q Are you aware of case law, the State vs. Gosnell,
13 that if a conspiracy is for a certain amount, 100 to 200,
14 there are no lesser-included offenses? The conspiracy is
15 for that amount.

16 A Not off the top of my head, but I'll take your word
17 for it.

18 Q Okay. Well, just as a factual matter, do you
19 remember arguing to the judge when you were discussing
20 lesser-included-offense possibilities that if the State
21 hadn't carried their burden of proof to show 100 grams or
22 more, it would just be not guilty?

23 A You're asking did I make that argument?

24 Q Yes, sir.

25 A I don't recall, but I would take your word for it.

1 I'd be surprised if I didn't argue it.

2 Q I'm sorry. What did you say?

3 A I would have been surprised if I didn't make some
4 argument about that.

5 Q Oh, okay. Thank you, sir.

6 Now, you also mentioned speaking with Mr. Pauling
7 before trial, and there was an offer of seven years from
8 your recollection?

9 A Yes, ma'am.

10 Q Okay. Did you talk to the lead prosecutor in the
11 case about any plea negotiation?

12 A I can't recall. I just remember Curtis coming over
13 to me, sitting at the table just saying we can do seven is
14 what I recall. That's all -- I mean, that's what I
15 remember.

16 Q That's what you -- okay. And did you take that to
17 Mr. Davis?

18 A Yeah.

19 Q And how did you present it?

20 A I mean, I can't remember exactly how I presented it,
21 but I think I said, hey, they've got seven years on the
22 table, what do you think? It's your call.

23 Q Okay. Was there, at any other time, a plea offer in
24 your recollection?

25 A I'm sure there was, but I think it was too much time

1 for that Clyde and I, you know, talked about we didn't
2 think it was -- we thought it would be worth going to
3 trial on.

4 Q Does a cap of 15 years ring true?

5 A Maybe. I mean, if that was it, that was probably
6 right.

7 Q The photo issue ---

8 A Yes.

9 Q --- as I understand it, you had some indication that
10 there were -- there's a difference in the way that the
11 facts around the identification were discussed in the
12 grand jury compared to the trial, right?

13 A Right.

14 Q But I want to be clear. As far as the identification
15 process, you vetted that at trial, right?

16 A I did.

17 Q Fully. You had the Biggers hearing, correct?

18 A Correct.

19 Q And that was ruled admissible, correct?

20 A Correct.

21 Q Okay. And you raised that in the direct appeal.

22 A Correct.

23 Q And no relief granted.

24 A Correct.

25 Q As I understand your review of the facts, the

1 evidence at trial demonstrated that Mr. Davis was a main
2 supplier. That was the State's presentation.

3 A I think that's -- yeah. I think the State was saying
4 these were the main suppliers.

5 Q Okay. And please forgive me for asking this again
6 because I didn't quite catch your answer. But you were
7 asked were there other bits or pieces of evidence that you
8 could have relied on to say he was not part of the
9 conspiracy, that Mr. Davis was not part of the conspiracy.
10 Can you elaborate on that a little bit?

11 A I was saying there was other things in evidence that
12 said he was not part of the conspiracy?

13 Q You could have argued to show that he was not part of
14 the conspiracy.

15 A You know, I guess I don't recall. I mean, I just
16 remember that, you know, I argued that how slack the State
17 was in the case of this magnitude that they didn't never
18 catch Mr. Davis with any drugs and yet they have him in
19 this conspiracy. And then I also argued how, you know,
20 prejudicial it was about having that SLED agent testify to
21 a buy without a CI, which I thought if that was held out,
22 I think he'd have definitely got a not guilty. But...

23 Q And just in summary, there were a series of witnesses
24 who testified that Mr. Davis did supply those drugs,
25 correct?

1 A Well, one of them was -- I mean, they're all meth
2 addicts, number one. And one of them, you know, never did
3 anything hand-to-hand with him. It was always through
4 another person. And she would see him from the street
5 which is why I argued that the lineup that they gave her
6 was very suggestive to the witness of who it was because
7 they only gave her one option. And I thought that was an
8 issue.

9 And then the other alleged buy was somebody that was
10 sitting in the backseat and got it from another guy in the
11 passenger's seat, and he said Mr. Davis was driving. So
12 these are very weak circumstances from my recollection.

13 Q Which you explored in your cross-examination and you
14 argued forcefully, correct?

15 A Yes. Oh, absolutely. This case haunts me that I
16 still can't believe it was not a not guilty.

17 Q And conspiracies in your practice would be rather
18 hard to prove sometimes, aren't they?

19 A Yeah.

20 Q It's the nature of that particular charge, is it not?

21 A They're tough cases.

22 Q And there was an allegation in the amended
23 application about failure to object to hearsay or other
24 evidence lacking foundation. Is there any specifics there
25 that you want to share with us, something that stands out

1 to you?

2 A Not -- not off the top of my head. I think I
3 objected to a lot in the trial.

4 Q And you were asked about the failure to make a
5 certain directed verdict motion based on maybe his
6 multiple conspiracies instead of one. But that's sort of
7 a way of looking at the evidence, is it not?

8 A Yeah.

9 Q Okay. And isn't it true that it was statewide
10 contact made, or at least multi-county contact made? And
11 we have evidence in the record about Anderson, Pickens and
12 Greenville; isn't that correct?

13 A Yeah. I think there was. But I didn't think as it
14 related to Clyde was in multi counties.

15 Q And there's also an allegation that the indictment
16 was perhaps overly broad, vague, failed to provide
17 sufficient notice. Is this something that you looked at?

18 A I think I briefed it. I can't spit all of that off
19 the top of my head, but I'm pretty sure I put it in
20 writing somewhere.

21 Q And as part of that looking over everything, turning
22 over every stone that you could.

23 A Yes.

24 Q And one other issue in the amended application is
25 abuse of grand jury process. Did you make an argument

1 about abuse of grand jury process?

2 A I don't recall.

3 Q Okay. Would that have been something that ---

4 A I would have assumed I would have looked at that.

5 MS. BROWN: You would have done.

6 No further questions. Thank you, sir. I appreciate
7 it.

8 THE WITNESS: Thank you.

9 MR. YARBOROUGH: Your Honor, just briefly.

10 REDIRECT EXAMINATION

11 BY MR. YARBOROUGH:

12 Q Abuse of the grand jury process, do you remember we
13 talked a minute ago about the identification ---

14 A You're right.

15 Q --- and the argument about the photo spread and that
16 you learned at the time that it wasn't a photo spread, it
17 was actually a show-up?

18 A Correct.

19 Q That was not the information that was presented to
20 the grand jury; isn't that correct?

21 A That's correct. I do recall that now.

22 Q So if they misled the grand jury on that issue, that
23 seems like that could be an abuse of process. Would you
24 agree?

25 A Correct. Yes.

1 Q And if there was not 100 grams proved during the
2 course of the trial, then the possible sentence would have
3 been seven to 25 instead of a mandatory 25; isn't that
4 correct?

5 A Yes.

6 Q And you could have argued that. Hindsight's 20/20.
7 But you did not.

8 A Correct.

9 Q We talked about the agent and he couldn't see him. I
10 mean, it was like -- and actually, you made a very good
11 argument to the Supreme Court. And the Supreme Court,
12 what they ended up saying at the end is that it turned on
13 the overall core strength of the prosecution's case. So
14 perhaps if you could have argued that the case was not as
15 strong because, one, we just talked about the problem with
16 the grand jury; two, there was the thing about this
17 Charles Brown guy that -- and you think if you could have
18 called Charles Brown to say that didn't happen, that
19 probably would have happened. So those were two instances
20 that people said something. The third instance really to
21 convict Clyde was the agent saying that he saw it. And
22 then as I recall, wasn't there a tape played or something?
23 And wasn't the agent asked if he could identify the
24 person's voice?

25 A Right. Yeah. I think there was -- so I guess there

1 was a recording or phone call. But they still couldn't
2 have done it. Even in the phone call it doesn't identify
3 anybody.

4 Q Right. And that would have made a difference, right?

5 A Yeah.

6 Q So if the Supreme Court would have known the
7 weaknesses of the State's case, perhaps they would have
8 reached a different conclusion perhaps because you clearly
9 made an argument where they said this was error, right?

10 A Right.

11 Q I mean, what happened was error. It's just a matter
12 of what they determined, you know. And at the end it went
13 to the strength of the case, which is -- I'm just looking
14 at their order. I mean, I'll read it to you and see if
15 you can -- I'm sure you recall it. Whether such an error
16 is harmless in a particular case -- this is talking,
17 referring to the Davis case -- depends upon a host of
18 factors. These factors include the importance of the
19 witness's testimony. He was a SLED agent that said he --
20 all he said was he sent somebody down there, but the
21 implication at trial was that he saw it, right? Or heard
22 it. Neither one were true, right? So that's the
23 importance of the witness.

24 Was there anything that corroborated it? I don't --
25 you know, because he couldn't identify the voice, it

1 wasn't corroborated, right?

2 A Right.

3 Q And you were given a chance to extensively
4 cross-examine that. You did.

5 So if you look at the -- perhaps if Charles Brown
6 would have been called as a witness, it could have made a
7 difference in the whole case because the strength of the
8 case would have been different because, as I understand
9 it, Charles Brown was the person that saw this happen,
10 right?

11 A Correct.

12 Q And you didn't have Charles Brown available to
13 testify at that point.

14 A I did not. Not that I'm aware of, no.

15 MR. YARBOROUGH: Okay. I don't think I have anything
16 else. Thank you, Mr. Beasley.

17 THE COURT: You may step down.

18 THE WITNESS: Thank you, Judge.

19 MR. YARBOROUGH: I call Mr. Davis.

20 THE CLERK: Mr. Davis, please place your left hand on
21 the Bible and raise your right hand.

22 WHEREUPON,

23 CLYDE DAVIS

24 After having been duly sworn, testified as follows:

25 THE CLERK: Please state your full name for the

1 record.

2 THE WITNESS: Clyde Bowen Davis.

3 THE CLERK: Thank you. You may be seated.

4 DIRECT EXAMINATION

5 BY MR. YARBOROUGH:

6 Q Good morning.

7 A Good morning.

8 Q You're Clyde Davis?

9 A Yes, sir.

10 Q And I believe you just heard Mr. Beasley testify that
11 he was your lawyer in the statewide grand jury case; is
12 that right?

13 A Yes.

14 Q And you're presently at Perry?

15 A Yes, sir.

16 Q And you're doing a sentence of how long?

17 A 25.

18 Q And Mr. Davis, you don't have any legal training,
19 right?

20 A No, sir.

21 Q And I believe you, over the course of you and I
22 meeting many times over the course of this, you and I have
23 talked about this case and about a few things you wish
24 Mr. Beasley would have done differently; isn't that right?

25 A Yes, sir.

1 Q Okay. First of all, let me ask you this. Do you
2 remember ever being offered a seven-year sentence?

3 A No, sir.

4 Q What did the sentence that you thought you were
5 offered?

6 A It was an open plea, seven to 25.

7 Q Okay. So if Mr. Beasley said that you at the last
8 minute got a seven-year sentence, you didn't realize that
9 -- or recommendation, would you have taken it?

10 A Yeah. If he'd have came and gave me the seven years,
11 I'd have took it.

12 Q And so did you come to find out that a man by the
13 name of Charles Brown somehow was involved in the
14 discovery in this case?

15 A Yes. I was reading over my paperwork, and when I was
16 reading it, I kept looking, kept reading, kept reading,
17 and then this Joshua Bowers, I don't -- I don't know this
18 man.

19 Q Right.

20 A I got to reading and it said Charles Brown. I said
21 Charles Brown? And I thought about it. I said I know
22 this guy, you know what I'm saying? I know of him.

23 Q Right.

24 A So when I seen it, I kind of reached out, and that's
25 when I let you know that, listen, this is a key point

1 right here.

2 Q Right.

3 A This is a guy that should have been called to trial.
4 He should have been called to my trial to testify to the
5 behalf of this. Because I don't know Joshua Bower. I
6 never dealt with this man. And he's lying on this man
7 saying that I gave this man some drugs to get him.

8 Q Right. And that didn't happen.

9 A No, sir.

10 Q Right. And you put Charles Brown in contact with me,
11 right?

12 A Yes, sir.

13 Q And this stuff about that you and I have talked at
14 length about going through your transcript, you agree with
15 me that we count 79 grams of meth that could have been
16 referred to you in this case?

17 A So they say. That's what reading the paperwork,
18 that's all they say they had. I never ---

19 Q And that's at the trial.

20 A Right.

21 Q So you would have -- would you have wanted
22 Mr. Beasley to argue that it could have been a lesser
23 included?

24 A Yes, sir.

25 Q And, you know, I'm not -- did y'all discuss that at

1 any point?

2 A No, sir. Not that I know of.

3 Q Okay. Do you wish you would have now?

4 A Yes, sir.

5 Q How about you came to -- you got a copy of your grand
6 jury transcript at some point?

7 A Yes, sir.

8 Q And at that point did you realize -- and I think
9 Mr. Beasley had told you before the problem with the
10 identifications of the photo spreads and, of course, the
11 identification. You do not know anything really about
12 that?

13 A Well, no, I don't. Because I don't know the law. I
14 don't -- I didn't study law.

15 Q Right.

16 A But I know as I got to reading it and understand that
17 this girl Amy Brock went to the state grand jury and said
18 that she picked me out of a photo lineup, but then at
19 trial I know she stated they came to her house and knocked
20 on the door and showed her a single picture of me.

21 Q Right.

22 A So how can we go further with these people telling
23 lies saying that she picked me out of a photo lineup but
24 then get to trial you tell the jury that I'm -- they
25 showed you a single picture of me?

1 MR. YARBOROUGH: Okay. And Your Honor, the grand
2 jury testimony is part of the packet that you have. And I
3 will get you a page of where that testimony is before -- I
4 thought I had it right here, but I'll get it for you.

5 BY MR. YARBOROUGH:

6 Q Did you know any of the people in this case?

7 A No, sir.

8 Q Do you know who -- you knew Nick Dendy, right?

9 A I know of him.

10 Q Know of him. You don't know him?

11 A Don't know him at all. I know of him.

12 Q Were you ever involved in a conspiracy with him?

13 A No, sir.

14 Q Do you know Amy Brock?

15 A No.

16 Q Were you ever involved with a conspiracy with her?

17 A No, sir.

18 Q A Michael Robinson, do you know who that is?

19 A No, sir. I had never seen him until he stepped in
20 the courtroom.

21 Q And Brian Sekerchak?

22 A Sekerchak. Never heard of him till that date he
23 stepped in the courtroom.

24 I know none of these people.

25 Q And there were people that testified about all kinds

1 of drugs that you didn't -- didn't have anything to do
2 with you, right?

3 A No, sir.

4 Q Now, let's talk about this thing with the agent where
5 he ends up testifying about giving money to somebody to go
6 buy drugs from you. The agent admitted that didn't take
7 place, right?

8 A Yes, sir.

9 Q He said that there was not a buy that was made,
10 right?

11 A Yes, sir.

12 Q Okay. And so did you feel like that should have even
13 been admitted anyway?

14 MS. BROWN: Objection. Calls for a legal conclusion.

15 MR. YARBOROUGH: I'm just asking his opinion of what
16 he thought, Your Honor.

17 THE COURT: Overruled.

18 BY MR. YARBOROUGH:

19 Q Did you think that should have been admitted anyway?

20 A No, sir. It shouldn't have been admitted.

21 Q I mean, do you think that hurts your case if somebody
22 says they were trying to buy drugs from you?

23 A Yeah. It hurt me all around. Prejudiced me.

24 Q Okay. It is prejudice. Okay. That was not the
25 answer I was looking for. Thank you.

1 And you and Mr. Beasley never talked about bad acts.
2 That's what that would be called, a bad act.

3 A I don't even know what that is.

4 Q Did you feel like Mr. Beasley tried to try a good
5 case for you? Was he on your side?

6 A I mean, obviously, he did what he could. And, I
7 mean, I don't know the law. I don't know law at all. I
8 got 25 years, so I don't know if he did good or not. I
9 mean, I'm here today still fighting trying to give it
10 back.

11 Q Yeah. And I think they talked about the Supreme
12 Court opinion, and you knew all about that stuff as it was
13 coming out. Did you think you were going to win when you
14 went to the Supreme Court on the issue about the police
15 officer's testimony?

16 MS. BROWN: Objection. Irrelevant.

17 THE COURT: Sustained.

18 BY MR. YARBOROUGH:

19 Q How about this. Do you know what harmless error is?

20 A No, sir.

21 Q Okay. Is there anything else you want the Court to
22 know about your case?

23 A Not really. The only thing I wanted to know is that
24 all these people testifying on me is -- was a bunch of
25 lies to try to save theirselves. All these people been

1 going back and forth to jail numerous of times and quite
2 naturally they seen a fish and they felt like testifying
3 on me because they -- obviously, they gave them all
4 agreement to testify on me for a lesser sentence.

5 Q Right.

6 A And it was no way possible they was supposed to get,
7 because one time I read in the paperwork all of them was
8 looking at 50 to 75 years. And quite naturally, if
9 somebody's telling you that, you'll do anything. You'll
10 testify on anybody.

11 And they took criminals that's been in trouble before
12 and took their word over mine. And I have never been in
13 trouble. I ain't been convicted of no drugs. I've never
14 -- I'm a citizen that was paying taxes, and they took and
15 they ran with this and convicted me. And they got a
16 lesser sentence.

17 Q I mean, and you've read this transcript more than
18 anybody. You've gone through it. I mean, you did not
19 feel there was 100 grams of meth.

20 A No, sir. I have never seen any drugs.

21 Q Right.

22 A I ain't seen no evidence, period, in this whole case
23 the whole time I've been fighting.

24 Q Right. And so you specifically would have liked a
25 directed verdict motion made at that point in your trial;

1 is that correct?

2 A Yes, sir.

3 MR. YARBOROUGH: I don't have any further questions.
4 Thank you.

5 CROSS EXAMINATION

6 BY MS. BROWN:

7 Q Mr. Davis, you started your testimony talking about
8 the plea offers as you understood them; do you recall
9 that?

10 A I don't understand none of the law.

11 Q Okay. Were you offered a plea of seven years to 25,
12 something along those lines? Is that what you said?

13 A That's what was thrown out there. It wasn't never on
14 paperwork. I've never seen it.

15 Q Okay. Were you interested in accepting a plea?

16 A Like I said, if you could have -- if Mr. Ryan could
17 have -- Mr. Beasley could have got me seven years with me
18 knowing I'm already in trouble like they saying, I'd have
19 took the seven years.

20 Q So you would have considered the fact that the State
21 had evidence that you thought was sufficient to convict
22 you.

23 A No, ma'am. I can't -- I can't -- I can't tell you
24 that.

25 Q And you said that you don't know Charles Brown? Is

1 that what you said?

2 A I did not say that.

3 Q You don't have any interaction or a recollection of
4 interaction with him?

5 A No, ma'am, I don't.

6 Q Okay. What about Brian Sekerchak?

7 A I know none of those people.

8 Q Mike Robertson?

9 A I know none of them people.

10 Q No?

11 And you said that you had added up the drugs
12 reflected in the transcript to a number of 79 grams; is
13 that correct?

14 A That's what they said they had that I'd never seen.

15 Q And "they" being?

16 A They said they made buys off all the people in the
17 conspiracy and it amounted up to 78 or 79 grams that they
18 never presented in the courtroom. I never seen it.

19 Q Well, isn't it true that some people said that they
20 would buy regularly within the week?

21 A Well, honestly, I would say anything if I'm trying to
22 get a lesser sentence.

23 Q Isn't it true that they said that there were multiple
24 transactions?

25 A Yes, ma'am.

1 Q So not necessarily a number connected to each
2 transaction.

3 A Well, in they paperwork, they said there was a
4 number. They said it was 78 grams. That came from the
5 State. They said it was 78 grams of methamphetamine, and
6 they never showed it and they never said -- and when
7 Mr. Beasley asked for it, they never could produce it.

8 Q Yes, sir. I see what you're saying. But I think
9 we've already agreed that there were transactions
10 referenced?

11 A Not from me, though.

12 Q Not from you?

13 A No, ma'am.

14 Q You didn't have anything -- I think you said it
15 didn't have anything to do with you at all.

16 A No, ma'am.

17 Q None of these people whatsoever.

18 A No, ma'am.

19 Q You never met them?

20 A No, ma'am.

21 Q Never saw them before?

22 A No, ma'am. Until the day of the courtroom.

23 Q And they all got together and decided it was you?

24 A You've got to take that up with the solicitor. He
25 know more than I do. I don't know.

1 Q Well, I thought it was interesting because you said
2 they're a bunch of liars. That was your opinion.

3 A Yes, ma'am.

4 Q That you didn't have anything to do with it and the
5 jury believed them.

6 A I mean, if you're painting a picture and I don't
7 never get to speak, I never was called at trial.

8 Q That is your choice, is it not, Mr. Davis?

9 A Well, my attorney advised me not to. And I don't
10 know the law, and that's what I was told. I was told not
11 to testify, so that's what I done. Now that me going
12 back, looking at it, I wish I had have because I could
13 have probably persuaded the jury a better way than just
14 having one way of me as Mr. Underwood made me look bad and
15 didn't know me.

16 Q Mr. Davis, you also said that you might have wanted
17 your attorney to argue for a lesser-included offense; is
18 that what I understood you to say?

19 A Yes, ma'am.

20 Q Is that correct? Okay.

21 So you would rather have a lesser-included offense to
22 take to the jury than for your attorney to argue the State
23 hasn't proven the case?

24 A I wanted all my options.

25 Q So either they haven't proven the case, or a lesser

1 included, or a guilty plea, something that would reduce
2 the time.

3 A Well, I don't know the law, ma'am. I can't -- I
4 can't answer those questions because I don't know -- I
5 don't know the law.

6 MS. BROWN: Thank you, Mr. Davis. No further
7 questions.

8 MR. YARBOROUGH: I just have one question.

9 REDIRECT EXAMINATION

10 BY MR. YARBOROUGH:

11 Q I think she might have confused you. You know
12 Charles Brown.

13 A Yeah.

14 Q Okay. You said a minute ago, I think she asked you
15 if you knew Charles Brown. How do you know Charles Brown?

16 A I just know him from the streets, normal.

17 Q Were you ever in a car where there was a drug
18 transaction taking place with him?

19 A No, sir.

20 MR. YARBOROUGH: Right. Thank you. I don't have any
21 further questions of this witness, Your Honor.

22 THE COURT: You may step down.

23 MR. YARBOROUGH: I call Charles Brown.

24 THE CLERK: Mr. Brown, please place your left hand on
25 the Bible and raise your right hand.

1 WHEREUPON,

2 CHARLES BROWN

3 After having been duly sworn, testified as follows:

4 THE CLERK: Please state your full name for the
5 record.

6 THE WITNESS: Charles Marvell Brown.

7 THE CLERK: Thank you. You may be seated.

8 DIRECT EXAMINATION

9 BY MR. YARBOROUGH:

10 Q Please state your name for the record.

11 A Charles Marvell Brown.

12 Q And where are you from?

13 A Greenville, South Carolina.

14 Q And how old are you?

15 A 44.

16 Q Did you grow up around here?

17 A Yes, sir.

18 Q Do you know Clyde Davis?

19 A I've seen him around.

20 Q Right. Did there come a time that you were asked by
21 him about recalling a situation about him being in a car
22 with you? Do you recall that?

23 A Me and him has never just really just -- I mean, you
24 know, other than me seeing him around, I don't really
25 just, you know, come and go. I don't really hang like

1 that.

2 Q Right. Were you surprised to hear that that was in
3 the record of a statewide grand jury trial?

4 A I was shocked.

5 Q You were shocked?

6 A I was shocked.

7 Q Would you have come to court and testify that that
8 didn't happen?

9 A Yeah. Because at the end of the day, I could have
10 got in trouble. So, you know, I don't know -- you know, I
11 mean, if somebody say something like that about me, that
12 could possibly maybe get me in trouble, indict me. So if
13 -- you know, it's hard when somebody speak negative on you
14 or discredit you and you don't have a voice or you're not
15 present to speak on to clear your name.

16 Q Okay. But there's no question you've never been in a
17 car with Clyde Davis.

18 A Oh, no, sir.

19 MR. YARBOROUGH: Okay. Thank you. I don't have any
20 further questions. Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MS. BROWN:

23 Q Mr. Brown, do you know Joshua Byers?

24 A Seen him around as well. He's an addict, so I have
25 seen him in, you know, pretty bad neighborhoods. Because,

1 you know, I -- you know, my mom stayed in the community of
2 Judson, and so I used to see him around, you know, washing
3 cars for people and stuff like that. So, I mean, he do
4 get high, you know. You can tell he's high. That's just
5 about how I know him.

6 Q And you know that personally, from personal
7 knowledge?

8 A I mean, you know, if you see somebody just buying
9 clothes and stuff and always look like they're begging on
10 the corner, I mean, you can put two and two together.

11 Q So you know him to buy drugs.

12 A I mean, he get high, so -- I mean, I don't know. I
13 can't speak for what he do. The only thing I can tell you
14 -- the only thing I can tell you that, you know, every
15 time I see him, he's either begging or he's, you know, not
16 doing well and stuff like that.

17 Q Clyde Davis?

18 A What about him?

19 Q How do you know him?

20 A You know, like I say, I've seen him around. Last
21 time I seen Clyde, he was working for Greenville Water
22 Works.

23 Q Okay. And you know Mr. Davis.

24 A You just asked me about Clyde Davis.

25 Q Yeah. I mean you know him personally.

1 A No. I seen him around.

2 Q Okay.

3 A You know, like, you know, I might see him, you know,
4 speak to a couple of his, you know, family members that I
5 might know or an event or something like that, you know.
6 You speak to somebody before. It's just dealing with him
7 every day and stuff like that. No, ma'am.

8 Q Well, now, see, I understood you to say, first of
9 all, that you've kind of seen him around, didn't really
10 know him. But now you know his family members.

11 A I mean, you know, I'm from Greenville. So, you know,
12 Greenville is like -- it's just as small as Easley, you
13 know. Everybody knows everybody. So, you know, when you
14 see people, you know, out, it's -- you know, it's like you
15 know him but you don't know him because everything is
16 small.

17 Q Well, can you explain to me about how you knew about
18 the bad areas and what you ---

19 A Because I'm from -- I'm from Judson. I know Josh is
20 from that area.

21 Q Okay.

22 A Yes.

23 Q Okay. And you consider a bad area a high-crime area
24 or low income? Or what do you consider a bad area?

25 A I mean, anytime that you see the cops patrolling all

1 the time and you're subject to get pulled over just from
2 being in that area. Like, they pulled over my mom, and
3 she's -- pull her over on the next street. And so, you
4 know, it's just anytime you see patrol -- the police being
5 patrol, that's a bad area.

6 Q Okay. Going back, Mr. Davis [sic], for just a
7 minute, can you testify today of your own personal
8 knowledge that Mr. Davis has never had any involvement in
9 drugs whatsoever?

10 A Like I said, last time I seen Clyde he was working
11 for Greenville Water Works, you know. That's it.

12 Q So you could not say that, could you?

13 A Could I -- can't say what?

14 Q You can't say to your personal knowledge Mr. Davis
15 has never been involved in any kind of drug deal.

16 A Hey, he -- I never know him to have a speeding
17 ticket. So, I mean, technically, if you work for
18 Greenville Water Works, you can't -- you can't even have a
19 felony record for Greenville Water Works. So that in
20 itself should say that -- you know, that the guy don't get
21 in trouble. He don't do nothing.

22 Q And who contacted you to be here today?

23 A The lawyer.

24 And also -- and also, you know, when you're dealing
25 -- when you know people, it's street talk. So you kind of

1 get a whiff of, hey, look, your name came up in -- you
2 know. And once I heard that my name came up in the case,
3 that's -- I think that's really how I ended up reaching
4 out. Because I heard -- I heard some people calling, you
5 know, was telling me that, hey, Josh put your name in
6 something and this and that. And so when I went to --
7 like, what?

8 Q Okay.

9 A Yeah. So, you know.

10 Q So that was when the trial was -- originally
11 happened?

12 A That's when I learned of everything.

13 Q Excuse me. That's when the trial was originally
14 happening?

15 A I don't know -- I don't know at the time when the
16 trial -- this was afterwards. Because if I know the trial
17 was happening and then if I'd have caught wind of this
18 right here, you best believe I'd have been here because I
19 ain't going to let nobody discredit me. You're not going
20 to put my name in something I didn't do.

21 Q You didn't hear anything about the trial? You just
22 heard about the postconviction relief?

23 A No. I just heard afterwards. I didn't here nothing
24 about no postconviction relief. The only thing I know
25 that this been years ago that I heard about this. And

1 from my knowledge that this man's been incarcerated for a
2 long time and that I should have -- you know, if I'd have
3 caught wind of this, I would have been came here because
4 it don't make sense. I'm not going to let nobody put my
5 name in something that I don't have nothing to do with.

6 Q You've never been charged with anything, have you?

7 A What you mean?

8 Q Do you have any criminal charges?

9 A Yes. I've got criminal charges.

10 Q What are those?

11 A I think -- I think it's not about me, is it?

12 Q Sir, what are your criminal charges?

13 A I'm just trying to figure out you're asking me about
14 what's going on and about Joshua Byers, and now you want
15 to question me about me. It's not about me. It's about
16 what happened in this case, correct?

17 MS. BROWN: Your Honor, I would ask the Court to
18 direct the witness ---

19 THE COURT: Answer the question. It's relevant to
20 credibility, sir. Answer the question.

21 THE WITNESS: Yes. I have a criminal history.

22 BY MS. BROWN:

23 Q And please tell us what that is.

24 A Yeah. I have some drug charges.

25 Q And what kind of drug charges are those?

1 A Crack.

2 Q And what exactly was the charge, sir?

3 A I mean, you know, distribution charge for crack, you
4 know. I have sold crack.

5 MS. BROWN: No further questions. Thank you.

6 MR. YARBOROUGH: Just one question.

7 REDIRECT EXAMINATION

8 BY MR. YARBOROUGH:

9 Q You never saw -- you were never in a car with Clyde
10 Davis and Joshua Byers, right?

11 A No, sir.

12 MR. YARBOROUGH: Okay. Nothing further.

13 THE COURT: Thank you. Step down.

14 MR. YARBOROUGH: I don't have any further witnesses,
15 Your Honor.

16 MS. BROWN: Your Honor, the State would call Joshua
17 Underwood, please.

18 THE CLERK: Mr. Underwood, please place your left
19 hand on the Bible and raise your right hand.

20 WHEREUPON,

21 JOSHUA UNDERWOOD

22 After having been duly sworn, testified as follows:

23 THE CLERK: Please state your full name for the
24 record.

25 THE WITNESS: Joshua Richard Underwood.

1 THE CLERK: Thank you. You may be seated.

2 DIRECT EXAMINATION

3 BY MS. BROWN:

4 Q Good morning, Mr. Underwood.

5 A Good morning.

6 Q You've been here today to hear the testimony in the
7 postconviction relief hearing, correct?

8 A Yes.

9 Q And I believe there was some mention about a
10 potential plea offer.

11 A Yes.

12 Q And you were lead counsel in this matter against
13 Mr. Davis, correct?

14 A I was.

15 Q Okay. What kind of plea offers are you aware of?

16 A I don't have the original offer in front of me. My
17 original plea offer in the case would have been in
18 writing.

19 Based on my recollection of similarly situated
20 defendants in the case, that was called Ice House, I
21 believe that the initial offer for Mr. Davis probably
22 would have been a sentence of 18 years. I know that
23 during the course of the case, Mr. Beasley had repeatedly
24 asked me for a lower sentence, and the number that I
25 recall was he was asking for 15 years. For a long time I

1 was not willing to do that as the case had dragged on and
2 we were trying to get the case resolved -- the global case
3 resolved. I eventually acquiesced and said that I would
4 agree to a cap of 15 years. And Mr. Beasley took that to
5 his client, and his client actually turned it down. I
6 remember that very clearly because I was very frustrated
7 because I had been asked numerous times for this offer,
8 then I finally gave the offer and it was turned down.

9 At that time of trial, if there were any other offers
10 made, they would have been made by me, not by Mr. Pauling.
11 Mr. Pauling was assisting me with the case. If I would
12 have made any offers at that point in time, it would have
13 been for a straight-up plea that would have been anywhere
14 within that range of seven to 25 years. I can say with
15 full confidence I never would have offered Mr. Davis a
16 plea to seven years. That never would have been on the
17 table.

18 Q And you've also heard today a few things about
19 testimony by Investigator -- I believe it was Investigator
20 Asbill, if that is the correct way you say it?

21 A Yes, ma'am.

22 Q Okay. And there was a transaction that the
23 investigator described; is that correct?

24 A Yes, ma'am. The -- when you look at the record, it's
25 kind of tricky. Some of what Agent Asbill said was in

1 front of the jury and some of it, I believe, was not. But
2 yes. He provided some limited testimony concerning a
3 controlled purchase that was made from Clyde Davis.

4 Q Okay. And that was an actual amount of drugs
5 returned in that transaction.

6 A As I recall -- as I recall, it was for 3 1/2 grams of
7 methamphetamine.

8 Q And going into trial, you had several witnesses who
9 testified to the conspiracy, correct?

10 A Yes, ma'am.

11 Q And the amount of the drugs would have been in excess
12 of 100 grams.

13 A Definitely. Yes, ma'am.

14 Q And that was the scope of the conspiracy as indicted
15 by the state grand jury, correct?

16 A Yes, ma'am.

17 MS. BROWN: No further questions, Your Honor.

18 CROSS EXAMINATION

19 BY MR. YARBOROUGH:

20 Q Mr. Underwood, how are you?

21 A I'm doing fine, Mr. Yarborough. Yourself?

22 Q Good.

23 Can you explain that to -- what are you saying about
24 the alleged buy? That you're saying that there was
25 actually drugs in that case?

1 A As I recall, yes, sir.

2 Q And that was 3.5 grams?

3 Could you -- when Agent Asbill was asked if he could
4 -- first of all, the informant didn't testify, right?

5 A Correct.

6 Q Okay. So had you ever called an informant -- I mean,
7 have you ever called an agent to testify to what an
8 informant did without the informant being there in front
9 of a jury before?

10 A Well, to clarify what Agent Asbill's testimony was, I
11 believe earlier throughout this hearing it was kind of
12 mischaracterized as to what Agent Asbill actually
13 testified about. What he was permitted to testify about
14 was solely his observations of what he saw and what he
15 heard. He was not permitted and did not testify about
16 anything that the informant told him or things that he
17 didn't see.

18 Q Didn't he testify at trial that he -- the testimony
19 speaks for itself, but didn't he testify he couldn't
20 identify anybody on the tape?

21 A He did. And that ended that line of questioning.

22 Q Yeah. But, I mean -- okay. So he said he couldn't
23 identify anybody on the tape. He said he didn't see it
24 happen, right?

25 A He didn't see the transaction. He saw the vehicle

1 that came to the site of the transaction, and that was the
2 purpose of his testimony.

3 Q And I'm looking at the Supreme Court opinion, okay,
4 Court of Appeals opinion. During -- this maybe will
5 refresh your recollection. During his testimony, Agent
6 Allen did not reveal the CI's identity to the jury. So he
7 didn't give the identity, right? So that's -- you never
8 said who the CI was, right? It wasn't told to the jury.

9 A Not that I recall.

10 Q Okay. Because they said they placed a transmitter,
11 but when they came back, nobody could identify what was on
12 the tape, right?

13 A That's not exactly correct. The voice could not be
14 identified. What took place on the tape could be
15 identified.

16 Q But it never showed Clyde Davis.

17 A That was also not presented to the jury.

18 Q Okay. But the implication was that it was Clyde
19 Davis, right?

20 A Yes.

21 Q Okay. So how is that -- if nobody saw him, no -- no
22 agent testified that they saw him and no CI testified that
23 he -- how is that not prejudicial?

24 A As I recall, I believe that was a house that was
25 associated with Mr. Davis, either his house or his

1 mother's house.

2 Q And -- but nobody ever saw anybody there, right?
3 Period.

4 A The identity of the driver was not able to be
5 confirmed by Agent Asbill. The main purpose of his
6 testimony was to establish the location and the vehicle
7 that showed up to do the transaction which was consistent
8 with testimony from other witnesses in the case who saw a
9 similar vehicle that did have Mr. Davis in it supplying
10 the methamphetamines to other conspirators.

11 Q I mean, they said -- so you're saying the vehicle was
12 the silver Chrysler 300. Was there ever any testimony at
13 trial that that silver Chrysler 300 belonged to Mr. Davis?

14 A There was testimony from a number of individuals
15 placing Mr. Davis in either a silver or gray Chrysler 300
16 or Dodge ---

17 Q But it wasn't a Chrysler 300. It was a silver or
18 gray car, correct?

19 A It was identified throughout various witnesses during
20 both the investigation and at trial of either a
21 Chrysler 300 or a Dodge Charger, which if you're familiar
22 with vehicles, it's essentially the same car with
23 different trim.

24 Q And he couldn't -- he couldn't identify the -- any of
25 the voices on the tape, right?

1 A He was not able to identify what's on the tape. No,
2 sir.

3 Q Couldn't see the transaction take place, right?

4 A That's what he testified.

5 Q And which -- you said that a number of witnesses
6 identified dealing with Mr. Davis during the course of the
7 trial. Which witnesses testified that Mr. Davis sold them
8 drugs? Which witnesses?

9 A Nicholas Dendy did. I believe Amy Brock did. I
10 believe Mr. Sekerchak did. Joshua Byers testified about
11 one transaction with Mr. Davis that was addressed earlier.

12 Q Okay. Let me say this. If Amy Brock didn't testify
13 that she could identify Mr. Davis, would you agree with
14 that?

15 A I don't recall her testifying to that.

16 MR. YARBOROUGH: Okay. Well, let's -- one moment,
17 Your Honor.

18 BY MR. YARBOROUGH:

19 Q While I'm looking for that list, did you ever run a
20 license tag check on that car?

21 A Me personally, no.

22 Q Did any of your agents ever run a license tag check
23 on that car?

24 A I'm sure that they did.

25 Q Was that presented to the jury?

1 A I don't believe so.

2 Q You don't believe so?

3 A I don't recall. I don't remember anything specific
4 about the license plate on any of the vehicles. I know
5 that as a matter of course throughout that type of
6 investigation that's usually done, but I don't remember
7 anything specifically. That was -- that was more than ten
8 years ago.

9 Q Okay. So let me ask you this. So you're saying that
10 -- go back to our line of testimony. You're saying that
11 -- you know that Nick Dendy identified Clyde Davis, right?

12 A Yes.

13 Q Okay. I'll give you that.

14 If we're going back and trying to add up the weight
15 of the drugs presented against Mr. Davis, if I said that
16 Amy Brock, Michael Robinson, Brian Sekerchak -- I can't
17 pronounce that name ---

18 A Sekerchak.

19 Q -- Sekerchak and Warren Chastain, if none of those
20 people ever dealt with Mr. Davis, would you agree that
21 that weight shouldn't have been counted against him?

22 A No.

23 Q Why?

24 A Because this was a conspiracy case. The way that ---

25 Q Yeah. But how did you ever prove that conspiracy?

1 A We clearly established through testimony that
2 Mr. Davis was supplying Nick Dendy and Amy Brock who were
3 then supplying other dealers within the case such as
4 Michael Robinson.

5 Q Okay. But you're talking about supplying -- I
6 believe in Mr. Dendy there was one incident where he sold
7 an eight ball of methamphetamine; isn't that correct?

8 A I'm sure that there was at least that. Yes, sir.

9 Q Okay. And then Amy Brock, she testified that she got
10 drugs four or five times a week for about two months;
11 isn't that right?

12 A I can't remember the specifics.

13 Q Okay.

14 A But I know that it was repeated transactions.

15 Q Okay. If those are the transactions and these other
16 guys were just getting their drugs from them, you can't
17 double count the weight, right?

18 A The weight wasn't double counted, sir.

19 Q Okay. If I will tell you that a number of people
20 have gone through the trial transcript that we can't find
21 more than 79 grams of methamphetamines, would you agree
22 that the proper charge would have been 25 to 100 and not
23 100 to 200?

24 A There was more than 100 grams, sir.

25 MR. YARBOROUGH: I don't have any further questions.

1 Thank you.

2 THE COURT: Mr. Yarborough is through, Ms. Brown. Do
3 you have anything else?

4 MS. BROWN: I do have a few questions.

5 REDIRECT EXAMINATION

6 BY MS. BROWN:

7 Q Mr. Yarborough asked you about your testimony
8 identifying Mr. Davis. And isn't it true that several
9 people saw him but didn't necessarily know his name?

10 A That's correct.

11 Q And isn't it true that that's why you had to do a
12 little bit of the showing of the photograph to make sure
13 you had the right individual?

14 A That's correct.

15 Q And that right individual was Mr. Davis.

16 A That's correct. He also went by a nickname.

17 Q And that nickname was?

18 A As I recall, it was Red.

19 Q And these individuals also connected Mr. Davis with
20 the silver or gray car that you were describing earlier.

21 A That's correct.

22 Q And you took all of those bits and pieces and you
23 showed them to the jury because they painted the picture
24 of the conspiracy, correct?

25 A Yes, ma'am.

1 MS. BROWN: No further questions, Your Honor.

2 THE COURT: You may step down.

3 THE WITNESS: Thank you, Your Honor.

4 MS. BROWN: Nothing further from the State, Your
5 Honor.

6 THE COURT: I'll review it and issue an order.

7 (WHEREUPON, proceedings concluded at 12:07 PM.)

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1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA)4 COUNTY OF GREENVILLE)
5
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South
9 Carolina, do hereby certify that the foregoing is a true,
10 accurate and complete Transcript of Record of the
11 proceedings had and evidence introduced in the trial of
12 the captioned case, relative to appeal, in the Court of
13 Common Pleas for Greenville County, South Carolina, on the
14 26th day of July, 2023.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.
17

18 July 31, 2024
19
20

21 *Cheryl A. Smith*

22 Cheryl A. Smith, CVR-M

23 Court Reporter
24
25

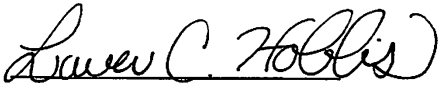
FILED
CLERK OF COURT
PAID
2019 DEC 30 PM 3:58
APPLICATION
ON RELIEF

- 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.

Respectfully submitted,

WILLIAM G. YARBOROUGH III
LAUREN C. HOBBS

By: 

State Bar Number: 103190

William G. Yarborough III, Attorney at Law, LLC
308 West Stone Avenue Greenville, SC 29609
(864) 331-1612

December 20, 2019

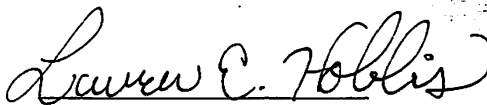
Greenville, SC

CERTIFICATE OF SERVICE

The undersigned certifies that one (1) true copy of the Amended PCR Application was served upon the Respondent this day, 20th day of December 2019, through the United States mail with sufficient postage attached addressed to:

South Carolina Attorney General's Office
Attention: Assistant Attorney General Johnny E. James
Post Office Box 11549
Columbia, South Carolina 29211

This 20th day of December 2019



Lauren C. Hobbis, SC Bar #103190
William G. Yarborough III, Attorney at Law, LLC

FILED-CLERK OF COURT
PAUL R. WATKINS, JR.
CLERK

2019 DEC 20 PM 3:58

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Clyde Bowen Davis,
S.C.D.C. No. 357153

Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-23-04795

MOTION TO AMEND APPLICATION
FOR POST-CONVICTION RELIEF

FILED-CLERK OF COURT
PAUL B. WILSON
CLERK
2019 OCT -2 PM 2:24

NOW COMES the Applicant, Clyde Bowen Davis, by and through undersigned counsel, William G. Yarborough III, and moves this Honorable Court for leave to amend the application for post-conviction relief (APCR).

Applicant amends grounds I(b) and II raised in his initial APCR as follows in order to render it cognizable for post-conviction relief:

- I. Material witnesses and co-conspirators, Joshua Byers and Michael Robinson, have expressed intent on several occasions to recant their testimony from this trial and are willing to be called as witnesses for this hearing. This new testimony amounts to newly discovered evidence entitling applicant to a new trial.

Applicant respectfully submits the following grounds and supporting facts to be considered as part of his APCR:

I. Ineffective assistance of trial counsel

- a. Trial counsel failed to request jury charges for lesser-included offenses. Since the amount of methamphetamines for the six-person conspiracy group was in controversy, trial counsel failed to request jury charges for lesser-included

offenses of both Trafficking Methamphetamines between 28-100 grams and 10-28 grams.

- b. Trial counsel failed to object to the judge's language during the jury instructions which unconstitutionally shifted both the presumption of innocence and burden of proof in favor the State and against the Defendant.

The trial court erred by instructing the jury their duty was to determine the "truth" and by using language that confused the rights of the respective parties. The instructions unconstitutionally shifted the burden of proof and presumption of innocence and were confusing and ambiguous, pursuant *State v. Daniels*, and *State v. Beaty*. 401 S.C. 251, 737 S.E.2d 473 (2012), 423 S.C. 26, 813 S.E.2d 502 (2018). The trial judge charged the jury:

"It is your exclusive duty to determine what the facts are. You do that based upon commonsense examination and evaluation of the testimony and other evidence... You twelve jurors alone will decide what weight, value and effect that is to be given to any particular testimony or other evidence... 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..."

In *State v. Beaty*, the Supreme Court addressed the propriety of similar language in the trial judges opening remarks which the Court found no reversible error because the truth language was contained in a mere statement to the jury, rather than a charge on the law, and was not attached to reasonable doubt or circumstantial evidence. *Id.* at 34, 813 S.E.2d at 506. The Court in *State v. Beaty* nonetheless agreed:

"These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those

facts alone render the verdict the jury believes best serves its perception of justice.”

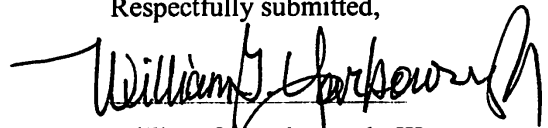
Id. Accordingly, the Court instructed trial judges “to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt.”

Here, the jury charge begins referencing how the jury is to weigh circumstantial and direct evidence while subsequently adding truth language and additional statements which confuse the jury of who the burden of proof and presumption of innocence belongs to, thus tainting the overall jury instructions. The truth language in Applicant's case was similar to the language the Court found improper and erroneous, although a harmless error, in *Beaty*. However, unlike *Beaty*, the truth language here constitutes reversible error because it was used to describe the jury's purpose after mention of how the jury is to weigh various types of evidence. The truth language caused the jury to readily decide the facts based upon what they believed more likely to be true, more similar to a preponderance of the evidence standard, rather than basing their conclusions upon the evidence presented and to the degree of beyond a reasonable doubt. Moreover, the context which the judge remarked the State has a right to “a fair and impartial trial,” confused the jury of their role, confused the jury of the rights of the respective parties, eroded the presumption of innocence for the Defendant, and unconstitutionally shifted the burden of proof to the Defendant. Ultimately, the language of the jury charges were confusing, ambiguous, and unconstitutionally burden shifting and trial counsel failed to object.

Further, Applicant submits that these grounds raise a genuine issue of material fact, which is not sufficiently resolved by the trial record and can only be resolved by an evidentiary hearing. The amendments herein are not expected or intended to cause to the Respondent undue delay, prejudice, or a substantial need for additional preparation or investigation.

WHEREFORE, Applicant respectfully requests this Honorable Court to allow Applicant leave to amend his APCR and to elicit testimony on the grounds raised herein at the upcoming evidentiary hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William G. Yarborough, III", with a long horizontal line extending to the left and a large, stylized flourish at the end.

William G. Yarborough, III
Attorney for the Applicant
308 W. Stone Ave.
Greenville, SC 29606
(864) 331-1612
SC Bar No.: 10271

Greenville, SC
October 1, 2019

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Clyde Bowen Davis, S.C.D.C. No. 357153)

Plaintiff,)

vs.)

State of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-23-04795

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

2019 OCT -2 PM 2:24
FILED
CLERK OF COURT
THIRTEENTH JUDICIAL CIRCUIT
GREENVILLE, SC

Plaintiff's Attorney: William G. Yarborough, III, Bar No. 10271 Address: 308 Stone Ave Greenville, SC 29609 Phone: 864-331-1612 Fax (864) 271-0711 E-mail: wgyarborough@gmail.com Other: N/A		Defendant's Attorney: _____, Bar No. ____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Application for Post Conviction Relief Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☒ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted _____			
SECTION III: Motion Fee			
☐ PAID - AMOUNT: \$ _____ ☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

JB 11/11/19

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
	)	
CLYDE BOWEN DAVIS,	)	
S.C.D.C. No. 357153	)	Case No. 2018-CP-23-04795
Applicant,	)	
	)	
v.	)	RETURN AND MOTION FOR A MORE
	)	DEFINITE STATEMENT
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

In response to the post-conviction relief application filed September 18, 2018, filed on behalf of Clyde Bowen Davis (Applicant) by retained counsel, William G. Yarborough, III, the State of South Carolina (Respondent) would show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections following convictions arising out of 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.

On September 16, 2013, Applicant proceeded to a jury trial in the Greenville County Court of General Sessions before the Honorable Letitia H. Verdin, circuit court judge. Ryan L. Beasley, Esquire, represented Applicant. Assistant Attorneys General Joshua R. Underwood and Curtis A. Pauling of the South Carolina Attorney General's Office prosecuted the case. During pre-trial motions, 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. Maryland¹ 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; the State agreed to try the charges separately and elected to go forward on only Count I of the superseding indictment, the more serious of the two charges. 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 Applicant to the mandatory minimum sentence of twenty-five years imprisonment.²

Thereafter, Applicant filed a written Motion for Verdict in Arrest of Judgment and Motion for a New Trial, arguing the law enforcement officer's testimony regarding a confidential informants undercover purchase was inadmissible hearsay and violated his confrontation rights, as well as challenging the out-of-court identification on Applicant based on coercive police tactics. Judge Verdin denied the motions by a written order on October 3, 2013.

Applicant filed a timely notice of appeal and was represented again on appeal by Ryan L. Beasley. In his brief to the South Carolina Court of Appeals, Applicant argued:

- 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.

¹ 373 U.S. 83 (1963).

² The State subsequently filed a *Nolle Prosequi* regarding Count II due to the conviction and sentence regarding Count I.

V. The State Grand Jury lacked jurisdiction over County II of the superseding indictment requiring dismissal.

Following briefing and oral argument, the Court of Appeals affirmed Applicant's conviction and sentence in a published opinion. State v. Clyde Bowen Davis, 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017). In its opinion, the Court of Appeals determined any issues pertaining to Count II were moot because Count II was dismissed. Id. Regarding any purported impropriety of the grand jury process, the Court of Appeals held Applicant's appellate arguments differed from his arguments to the trial court, and accordingly, were not preserved for appellate review. Id. Regarding the alleged Brady violation, the Court of Appeals found the trial court properly denied this motion because Applicant failed to establish the State was ever in possession of or suppressed the information pertaining to the confidential informant nor did he establish that it was relevant to his guilt or innocence. Id. As to the identification, the Court of Appeals held the trial court did not abuse its discretion in determining the identification was admissible based on the evidence presented. Id. Finally, as to Applicant's hearsay argument, the Court of Appeals found the testimony from the law enforcement officer was inadmissible hearsay and violated Applicant's confrontation rights, but nonetheless was harmless based on the other properly admitted evidence establishing Applicant's guilt and his ability to vigorously cross-examine his co-defendants. Id.

Applicant, through counsel Beasley, filed a petition for rehearing, which was denied by the Court of Appeals on June 20, 2017. Applicant then petitioned for certiorari to the South Carolina Supreme Court, which was denied by the Court on March 28, 2018. The remittitur was returned to the circuit court on April 3, 2018.

II. Summary of Facts Adduced at Trial

In this trial, the State presented a historical case to prove the existence of and Davis' connection to the conspiracy. The State's case included the testimony of codefendants and admitted coconspirators Nicholous Dendy, Amy Brock, Michael Robinson, Brian Keith Sekerchak, and Joshua Byers. The State also presented testimony from Tonya Smith and David Norris, who were not charged, and Warren Chastain who was charged in a separate indictment resulting from the same investigation. South Carolina Law Enforcement (SLED) Agent Ashley Asbill also testified.

Amy Brock testified that she was using, buying, and selling methamphetamine during the time alleged in this indictment. Another methamphetamine dealer, Michael Robinson, introduced her to Nicholous "Nick" Dendy who became her regular supplier of methamphetamine. (Tr. p. 243, line 6 – p. 245, line 4; p. 287, lines 9-16). Brock's methamphetamine transactions with Dendy usually took place at her home in Greenville County. (Tr. 245, lines 11-15). When she would order methamphetamine from Dendy he would never bring it with him. (Tr. p. 247, line 12). 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. (Tr. p 194-196; p. 248, line 4; p. 289, line 15 – p. 290, line 2; p. 291, line 6 – p. 292, line 1). 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. (Tr. p 194-196; p. 248, line 4; p. 289, line 15 – p. 290, line 2; p. 291, line 6 – p. 292, line 1). This scenario took place up to 4 times a week between the Spring of 2010 and October or November 2010. (Tr. p. 246, lines 1-4; p. 251, line 10- p. 252, line 20; p. 91, lines 20-23). 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. (Tr. p. 250, lines 12-24; p. 252, line 25 – p. 253, line 5). Dendy's testimony corroborated the methamphetamine transaction pattern described by Brock. (Tr. p. 289, line 13 – p. 290, line 2; p. 291, line 6 – p. 292, line 1).

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 Davis in which Brock gave money to Dendy and Dendy gave the money to Davis in exchange for methamphetamine. (Tr. pp. 194-195; p. 199, lines 17-21). He described the same scenario except that he testified that Davis would drive a black Honda or silver Dodge Charger. (Tr. p. 196, lines 1-2).

Michael Robinson sold methamphetamine for Dendy and was also supplied by Brock. (Tr. p. 213, lines 15-19; p. 219, line 7 – p. 220, line 19; p. 136, line 14 – p. 137, line 22). When Dendy sold methamphetamine to Robinson he would get the drugs from Davis and give the money to Davis who then gave Dendy his share of the profit. (Tr. p. 285, lines 2-12).

After informing law enforcement that the methamphetamine sold by Dendy was supplied by someone believed to be his cousin, Brock was shown a single photograph of Davis whom she identified as Dendy's supplier. (Tr. p. 69, line 8 – p. 70, line 6; p. 71, line 20 – p. 72, line 3; Court's Exhibit 1/State's Exhibit 1; p. 89, line 5 – p. 90, line 19; p. 255, line 18 – p. 257, line 3). The trial court conducted a hearing pursuant to Neil v. Biggers, after which the court ruled to allow testimony concerning the photographic identification of Davis by Brock and subsequent in-court identification of Davis by Brock. (Tr. pp 64 – 102). Brock and Dendy both made in-court identifications of Davis as the man who supplied Dendy with methamphetamine. (Tr. p. 264, line 9 – p. 265, line 13; p. 295, lines 3-18).

III. Post-Conviction Relief Allegations and Relief Sought

In his application for post-conviction relief, filed by retained counsel Yarborough, 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.

As requested relief, Applicant states he is seeking the reversal of his conviction and a new trial.

Attached herewith and incorporated herein are the records of the South Carolina State Grand Jury Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the motion and trial transcripts, and the appellate records (including the record on appeal). Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV. Response to Allegations of Ineffective Assistance of Counsel

Applicant alleges his trial counsel, Ryan Beasley, was ineffective for a variety of reasons, including failure to move for a directed verdict based on a failure to produce evidence of requisite weight of 100 grams of methamphetamine to prove the charge of trafficking 100 grams

or more of methamphetamine, failure to object to hearsay statements, failure to cross examine witness David Norris, failure to object or exclude evidence under best evidence rule where 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, failure to investigate and cross-examine relevant witnesses about the chain of custody and the failure to confirm substance of drug where neither Chad Ayers or Ashley Asbill (two testifying officers) testified how they determined the substance to be meth. Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases.

Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

Applicant alleges trial counsel was ineffective for failing to move for a 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. However, the record reflects that trial counsel made a timely directed verdict motion at the close of the State's case:

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 court would not have jurisdiction to hear a case not in Greenville county. Number two, uh, you know, these are a bunch of meth addicts buying, selling and 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 it — there's no question of fact for the jury to consider that there was any sort of agreement in law. I don't think there was a conspiracy. I think there ought to be a directed verdict.

Tr. P. 344. In his directed verdict motion, defense counsel argued the State had failed to present evidence of any sort of conspiracy between Applicant and the co-conspirators, and thereby, was also challenging that the State had presented evidence he had trafficked more than 100 grams of methamphetamine. This allegation is wholly without merit.

Applicant also makes the vague allegation that trial counsel was ineffective for failing to object to hearsay statements. However, Applicant provides no specific instances from the record to support this general allegation. Without more information, it is impossible for Respondent to respond, and therefore, Respondent requests Applicant amend this allegation to provide sufficient specificity.

Applicant alleges trial counsel was ineffective for failing to cross examine State's witness David Norris. At trial, the State called David Norris, a confidential informant who was working with law enforcement. Norris testified he became addicted to methamphetamine in late 2009 or early 2010 and was arrested for possession of methamphetamine before he became a confidential informant. (Tr. 145-47). He described how he became a confidential informant and the process of making a controlled buy. (Tr. 147-48). He testified he bought drugs from Michael Robinson

and Brian Sekerchak and described his involvement in the drug trade. (Tr. 148-57). Notably, he never mentioned Applicant in his testimony. Despite a lack of any testimony pertaining to him, Applicant generally alleges trial counsel was ineffective for failing to cross-examine Norris without stating why counsel should have cross-examined Norris or what benefit would have been derived from cross-examination.

Applicant also argues trial counsel was ineffective for failing to object or exclude evidence under best evidence rule; specifically, that “[t]he 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.” Again, Applicant has failed to argue how many such objection would have made any impact on his case, which was a historical conspiracy case that centered on the testimony from the various users and co-conspirators.

Finally, Applicant argues trial counsel was ineffective for failing to investigate and cross-examine relevant witnesses about the chain of custody and the failure to confirm substance of drug; specifically, for failing to cross-examine Chad Ayers or Ashley Asbill as to how they determined the substance to be meth. Again, Applicant has failed to argue how many such objection would have made any impact on his case, which was a historical conspiracy case that centered on the testimony from the various users and co-conspirators.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. Response to Allegation of Recanted Testimony

Applicant also alleges he two of his co-conspirators Joshua Byers and Michael Robinson, wish to recant material testimony. Why not pled, it appears Applicant is alleging this recanted testimony amounts to newly discovered evidence entitling him to a new trial.

The Uniform Post-Conviction Relief Act provides aperson may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). When an applicant is seeking a new trial based on this provision, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). Additionally, to be successful on such a claim, the applicant must establish that the purported newly discovered evidence: (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983)

Here, Applicant has failed to present any evidence that meets these five factors. Additionally, Respondent notes that recanted testimony should be viewed by the post-conviction relief court with the strictest scrutiny as it is often unreliable. See State v. Wright, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977) (recanted testimony is normally unreliable and should be subjected to the closest scrutiny). Respondent submits Applicant cannot establish he is entitled to a new trial based on recanted testimony, but without any more information as to the nature of this testimony, it is impossible to fully respond.

VI. Any Future Amendments and Invocation of Discovery

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII. Response to Any and All Other Allegations

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII. Request for an Evidentiary Hearing

WHEREFORE, having made its Return, Respondent requests Applicant provide a more definite statement of his claims, and an evidentiary hearing be held on any claims so requiring one.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

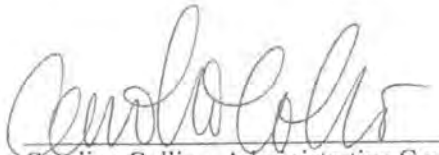
1/8, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	
	)	2018-CP-23-04795
CLYDE BOWEN DAVIS. #357153,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

William G. Yarborough, III, Esquire
William G. Yarborough III, Attorney at Law, LLC
522 North Church Street
Greenville, South Carolina 29601

DATED this the 9th day of January, 2019.


Caroline Collins, Administrative Coordinator
For Respondent

FORM 5

STATE OF SOUTH CAROLINA

County of Greenville

Clyde Bowen Davis #357153

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2018-CP-23-04795

APPLICATION FOR
POST-CONVICTION RELIEF

18 SEP 18 PM 1:56
Paul Wickensimer CDD BUL SC

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence Greenville County Court of
General Sessions, 305 East North Street, Greenville, South Carolina 29601
3. Name(s) of co-defendant(s) (if any) Nicholous Dendy, Amy Brock, Michael Robinson,
Brian Keith Sekerchak, Joshua Byers and Wareen Chastain.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011 - GS - 47 - 06; Conspiracy to Trafficking Methamphetamine (more than 100 grams but less than 200 grams)
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) September 18, 2013
- (b) Twenty-Five (25) years and a fine of Fifty Thousand (50,000) dollars.
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Affirmed
- iii. _____
- (c) the date of each such result:
- i. March 29, 2017
- ii. March 28, 2018
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. South Carolina Court of Appeals: State v. Davis, 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017)
- ii. South Carolina Supreme Court: State v. Davis, 2017-001504 (2018)
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of trial counsel
- (b) Two material witnesses and co-conspirators, Joshua Byers and Michael Robinson, wish to recant material testimony.
- (c) See sepearte attachment.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See sepearte attachment.
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? See 8(a)(ii), (b)(ii)
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Petition for Writ of Certiorari to review decision of Court of Appeals
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Supreme Court
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

i. Affirmed

ii.

iii.

iv.

(d) the date of each such disposition:

i. Date used for Supreme Court Affirmed

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

ii.

iii.

(b) the proceedings in which each ground was raised:

i.

ii.

iii.

Revised 3/2003

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of counsel is not recognizable for appeal
(b) _____
(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No
(b) your trial, if any? Ryan L. Beasley
(c) your sentencing? Ryan L. Beasley
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Ryan L. Beasley
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Ryan L. Beasley

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
i. Ryan L. Beasley, 650 East Washington Street, Greenville SC 29601
ii. _____
iii. _____
(b) the proceedings at which each such attorney represented you:
i. Trial, sentencing, appeals
ii. _____
iii. _____

19. State clearly the relief you seek in filing this application:

Reverse conviction and grant new trial

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Clyde Bowen Davis, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

5/ William Gr. Yarbrough
on behalf of Clyde Bowen Davis

SWORN to and subscribed before me this 18
day of September, 2018.

Christie S. Pappas (L.S.)
Notary Public

My Commission Expires: 02-14-2028

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, _____.

Notary Public

My Commission Expires: _____

Revised 3/2003

Continued from PCR Application

Section Ten (10):

- I. Ineffective assistance of trial counsel
- II. Two Material witnesses and co-conspirators, Joshua Byers and Michael Robinson, wish to recant material testimony.

Section Eleven (11):

- I. 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 100grams 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.
- II. Material witnesses and co-conspirators, Joshua Byers and Michael Robinson recanted material, incriminating testimony.