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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Common Pleas

APPEAL FROM GREENVILLE COUNTY
(Post Conviction Relief)
Honorable J. Derham Cole, Circuit Court Judge

CLYDE BOWEN DAVIS, #00357153 ..... PETITIONER

V.

STATE OF SOUTH CAROLINA. ..... RESPONDENT

Appellate Case No. 2025-000100

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I.

Whether the PCR Court erred in finding trial counsel was not ineffective for failing to move for a directed verdict on the basis that the State's evidence proved merely a buyer-seller relationship and otherwise failed to prove the existence of the indicated conspiracy.

II.

Whether the PCR Court erred in concluding that trial counsel was not ineffective for failing to move for a directed verdict on the basis that the State failed to prove Petitioner conspired to traffick methamphetamine in the amount of 100 grams or more as indicted, or in the alternative, for failing to request a lesser included offense instruction.

STATEMENT OF THE CASE

Petitioner Clyde Bowen Davis appeals from the denial of relief from his Greenville County post-conviction relief (PCR) action. Petitioner through counsel, William G. Yarborough, Esq., filed the initial application on September 18, 2018. (App. 1028-1035). The State made its return and moved for a more a definite statement on January 15, 2019. (App. 1014-1027). Counsel filed amendments to the allegation on December 20, 2019, which were ultimately accepted as the controlling claims to be addressed in the action:

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

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

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

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

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

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

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

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

i. the State had presented evidence of multiple conspiracies rather than sufficient evidence of the single conspiracy charged in the

indictment and did not present sufficient evidence from which a jury could find Applicant guilty of the single conspiracy charged in the indictment;

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

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

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

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

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

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

(App. 928-929).

An evidentiary hearing was held on July 26, 2023, at the Greenville County Courthouse with the Honorable J. Derham Cole presiding. Petitioner and his counsel, Mr. Yarborough, were present. Senior Assistant Deputy Attorney General Melody J. Brown of the South Carolina Attorney General's Office represented Respondent. Petitioner called trial counsel Ryan Beasley Esq., to testify along with another witness, Charles Brown. Petitioner also testified on his own behalf. The State called former Assistant Attorney General Joshua R. Underwood, one of the prosecutors in Applicant's case. At the conclusion of the hearing, the court took the matter under

advisement. By Order of dismissal dated January 13, 2025, and filed January 17, 2025, the PCR court denied relief and dismissed with prejudice. (App. 925- 940).

The Trial Proceedings

On December 13, 2011, in a superseding indictment, the State Grand Jury indicted Petitioner 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. (App. 824). Jury trial proceedings began on September 16, 2013. The Honorable Letitia H. Verdin presided. Ryan L. Beasley, Esq., represented Petitioner. 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, Petitioner moved to dismiss the superseding indictment, arguing the State Grand Jury had no subject matter jurisdiction and that the State failed to present evidence to establish probable cause as to Count II. Petitioner also moved to sever Count I from Count II, moved to dismiss the indictment pursuant to *Brady v. Maryland*[1] based on a purported failure to disclose information pertaining to confidential informants, and moved to suppress an out-of-court identification as unduly suggestive. The trial court denied the motion to dismiss the superseding indictment, (App. 237-241), and the State agreed to try the charges separately electing to go forward on only Count I of the superseding indictment, (App. 215, 217). The trial court denied Applicant's motions to suppress the identification, (App. 285-286), and Petitioner's jury trial on Count 1 proceeded. The jury convicted as indicted, (App. 122, 575), and the trial court sentenced

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

Petitioner to the mandatory minimum sentence of twenty-five years imprisonment, (App. 129, 580).[2]

Petitioner thereafter 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 Petitioner's confrontation right. Petitioner also 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. (App. 123-128). Petitioner timely appealed.

The Direct Appeal

Trial counsel, Mr. Beasley, continued to represent Petitioner during Petitioner's direct appeal, and raised the following issues in the final brief of appellant filed on July 14, 2015, in the South Carolina Court of Appeals:

> 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 Count II of the superseding indictment requiring dismissal.

(App. 6).

[2] The State subsequently *nolle prossed* Count II in light of the conviction and sentence regarding Count I.

Following briefing and oral argument, the Court of Appeals affirmed the conviction and sentence in a published opinion. *State v. Davis*, 420 S.C. 50, 800 S.E.2d 138 (Ct. App. 2017). Petitioner filed a petition for rehearing, which was denied by the Court of Appeals on June 20, 2017.[3] Petitioner then sought review by filing a petition for writ of certiorari in our South Carolina, which was denied on March 28, 2018.

As noted above, Petitioner thereafter filed his post-conviction relief which was denied. This appeal follows.

[3] Petitioner has incorporated by reference all appellate court documents. *See* App. 1 n. 1, referencing Appellate Case No. 2013-002207 and 2017-001504.

GENERAL SUMMARY OF THE FACTS

The conviction was a result of charges after investigation of a major drug conspiracy in Greenville County:

> From 2009 to 2011, law enforcement officials were involved in "Operation Icehouse," a complex, interagency investigation into the sale of methamphetamine in upstate South Carolina. During the operation, investigators used CIs to make controlled purchases of the drug from suspected dealers, and they soon learned Michael Robinson was selling methamphetamine he had purchased from either Amy Brock or Nicholous "Nick" Dendy. [FN 1]
>
> In September or October 2010, Investigator Chad Ayers and another officer with the Greenville County Sheriff's Office met with Brock at her Greenville home. Brock admitted she had been buying methamphetamine from Dendy after meeting him through Robinson. During a typical deal, Brock told the investigators that Dendy would either come inside her home or meet her outside in the driveway. After giving money to him, Brock alleged Dendy would take it to a silver car, which she believed was being driven by Dendy's cousin, and retrieve the methamphetamine for her. Brock stated that, although she never learned his name, she had seen Dendy's cousin in his car when she met Dendy in the driveway to buy methamphetamine.
>
> About a month after their first visit, Investigator Ayers and another officer returned to Brock's home. They showed her a color photograph of Clyde Davis from a copy of his South Carolina Department of Motor Vehicles (DMV) driving record and folded down any identifying information. When Investigator Ayers asked Brock who the man was, she identified him as Dendy's cousin. Then, on or around September 8, 2010, South Carolina Law Enforcement Division (SLED) Agent Brunson Ashley Asbill had a CI complete a controlled purchase of methamphetamine from Davis at Davis's home.
>
> > [FN 1] Through controlled purchases by other CIs, investigators also found Brian Sekerchak had been buying methamphetamine from Brock and selling it to others. Additionally, investigators discovered Joshua Byers had sold methamphetamine to Brock three to five times and he once bought an ounce of the drug from Dendy.

Davis, 420 S.C. at 55, 800 S.E.2d at 140.

As a result of the facts from the investigation, the State Grand Jury secured the indictment for the one charge for which Petitioner was tried: conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine. *Id.,* at 55-56, 800 S.E.2d at 140-141. The Court of Appeals further summarized the facts adduced at trial:

> The case was called for a jury trial in Greenville County on September 17, 2013. … The State began its "historical case," of what law enforcement coined as the "Greenville Conspiracy," with testimony from two CIs involved in purchases of methamphetamine from Robinson, Sekerchak, Byers, and Dendy, and from a cooperating defendant in a separate trafficking conspiracy who had bought methamphetamine from Sekerchak and Brock.
>
> Byers, one of Brock's suppliers, testified he met Davis one time through his cousin's boyfriend in a vehicle at a local car wash. While Byers sat in the back seat, he claimed Davis gave approximately one gram of methamphetamine to his cousin's boyfriend in the driver seat. Byers said his cousin's boyfriend then passed the drugs back to him, which he later resold.
>
> Sekerchak testified he and his brother purchased methamphetamine from Brock and Dendy on numerous occasions, which they would resell. Sekerchak stated he waited in the car while his brother went into Brock's house to give them the money. According to Sekerchak, Davis drove up in either a black Honda or silver Dodge Charger and Dendy came outside to exchange the money for methamphetamine. Sekerchak stated Dendy and Brock sometimes mentioned they had to wait on Davis to deliver the drugs.
>
> 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. Robinson maintained he never met Davis.
>
> 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 from spring 2010 to October or November 2010. She stated she was able to see the person in a silver car on numerous occasions because roughly half of the deals occurred in her driveway during daylight hours. When the State showed Davis's DMV driving record to Brock in the

courtroom, she reaffirmed her prior identification of Davis as Dendy's supplier.

Dendy testified he sold between 3.0 and 3.5 grams of methamphetamine, which he got from Davis, to Robinson on at least fifteen occasions. Dendy stated he first met Brock during a visit to Robinson's home. After they developed a buyer-seller relationship, Dendy stated he would go to Brock's house to collect her money and then call Davis to bring the amount of methamphetamine that Brock requested. Dendy testified Brock asked for a quarter ounce of the drug nine to ten times and an eight-ball five to six times. When Davis arrived, Dendy said he would go out to meet him and exchange the money for methamphetamine. Dendy confirmed that Brock would sometimes come outside next to where he and Davis completed the transactions. On cross-examination, Dendy admitted Davis was not his cousin.

Last, the State called Agent Asbill, the SLED investigator who initiated the CI's undercover purchase of methamphetamine from Davis. …

… Agent Asbill stated that, while he was parked at a nearby school, the CI went to Davis'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. … [the agent testified:]

Agent Asbill: The confidential informant returned to us with a purchase of methamphetamine.

The State: And how much methamphetamine was it?

Agent Asbill: Approximately 3.5 grams.

Davis, 420 S.C. at 56–59, 800 S.E.2d at 141-142 .

On these facts, the jury convicted Petitioner as charged.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters "depends on the specific issue" before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings "and will uphold them if there is evidence in the record to support them." *Smalls*, 422 S.C. at 180, 810 S.E.2d at 839 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, pure questions of law will be reviewed de novo without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

Ineffective Assistance Claims

To show a violation of the Sixth Amendment, an 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*. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. " *Strickland,* at 700.

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").

Moreover, courts must apply the *Strickland* standard with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* at 689-690. For a fair analysis of an applicant's claim, the claims must be considered within the context of the case: "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*, at 690.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*, at 690–91. As a general matter, where counsel testifies as to his or her trial strategy, and that strategy is consistent with the facts and laws, counsel will not have failed in his duty to provide adequate and acceptable representation. *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). *See also Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

ARGUMENT

Petitioner's arguments on both questions presented in his petition center more on disagreement with the disposition below (and, for that matter, the jury's verdict) rather than showing that the PCR court's ruling lacks factual support or was influenced by an error of law. As such, particularly considering the standard of review as set out above, Petitioner fails to show further review of this ordinary application of *Strickland* to the facts of this case is warranted. This Court should denied certiorari review.

I. The PCR judge appropriately afforded deference to trial counsel's decision not to use a particular phasing of "mere[] buyer-seller relationship" in moving for a directed verdict when the trial record shows that counsel adequately expressed the concept that a conspiracy was not shown; therefore, Petitioner failed to show deficiency in representation at all.

Relevant Facts:

Strickland mandates that counsel must be afforded wide deference in the strategic choices that he makes at trial. *See* 466 U.S. at 689-91. Here, counsel did not use the phrase "buyer-seller relationship" but made the following motion for directed verdict at trial:

> I'll just make a motion for directed verdict 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 thee different people that weren't even involved in the conspiracy and for the - - I should say - - the alleged conspiracy, I just don't think - - there's no question of fact for the jury to consider that there was any sort of agreement in law. I don't think there was a conspiracy. I think there ought to be a directed verdict.

(App. 528-529).

The trial judge denied the motion noting, "I think there is at least enough evidence to submit that the case to the jury." (App. 529). The record supports that, as the trial judge found, there

was indeed enough evidence to send the case to the jury. *See, e.g., State v. Prather,* 429 S.C. 583, 608, 840 S.E.2d 551, 564 (2020) ('"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.'") (quoting *State v. Hernandez,* 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)).

Basically, the evidence showed a consistency of interaction among a discrete group of individuals who profited from the arrangement. Amy Brock testified that she was using, and selling methamphetamine, and another dealer, Michael Robinson, introduced her to Nicholous "Nick" Denny who became her regular supplier. (App. 427, 471). Brock's transactions with Dendy generally took place at her home in Greenville County. (App. 430). When she ordered from Dendy, he did not bring the methamphetamine with him; rather, he would arrive, Dendy took the money, then they would wait together for his supplier to arrive, a man Brock believed was Dendy's cousin, and who she identified as Petitioner from a picture shown to her by law enforcement. (App. 430-431, 439-441).[4] When Petitioner arrived, Dendy would give him the money from Brock and Petitioner gave Brock the methamphetamine. (App. 436). The State's case showed that this was not a single event; this action took place consistently, up to 4 times per week during the Spring of 2010 through October or November of 2010. (App. 430-437).

Dendy's testimony corroborated this system. (App. 473-476). Further, Dendy testified that Petitioner paid him (various amounts) for moving the drug money from Amy to Petitioner and the methamphetamine from Petitioner to Amy. (App. 475-476). Additionally, Brian Sekerchak testified that Brock supplied him with drugs, and he was present for at least 10 of the transactions as described. (App. 378-379). Further, Sekerchak noted that he did not attempt to go directly to

[4] Further, a purchase by a CI made direct from Petitioner was also in evidence. (App. 501). That purchase alone was 3.5 grams of methamphetamine. (App. 514).

Dendy and Petitioner because that would be "cutting each other's throat" in dealing methamphetamine, *i.e.,* he respected the established connections for moving the drugs. (App. 380-381). Similarly, Michael Robinson both sold methamphetamine for Dendy and testified he was supplied by Brock. (App. 397-407).

Argument for Review:

Petitioner argues in the petition before this Court that the evidence presented at trial did not conclusively show that all the individuals moving the drugs in question worked in tandem; rather, the evidence showed they worked in a loose "circle of buyers and addicts operating independently within the same general area … to support their own habit" who did not share "the same goal." (Pet. 14; *see also* 16). Therefore, so Petitioner argues, counsel should have moved for a directed verdict based on what the evidence failed to show. (Pet. 18).

Discussion:

Petitioner's argument lack support. As a first point, Petitioner highlights trial counsel's testimony in the PCR hearing that he "could have argued that the State merely established a buyer-seller relationship or made an argument on the basis of multiple-conspiracies." (Pet. 13). However, trial counsel's testimony was not as clearly supportive of that point as it may seem at first glance.

While counsel agreed that he could so argue, he also clarified that he was not sure that he had not, noting "that's been ten years ago." (App. 955). When refreshed with a reading of the directed verdict motion made, trial counsel responded, "[s]ounds pretty good." (App. 956). Trial counsel, when pressed about whether he "really argue[d] the buyer-seller relationship," counsel responded, "I guess - - I guess I didn't." (App. 956). When asked whether, in "hindsight, maybe you wish you would have," he responded, "maybe." (App. 956). On cross-examination, trial

counsel testified that Petitioner never admitted to him that Petitioner sold drugs; but he "guess[ed] you could. Based on the evidence that was presented at trial, you could have argued it," which in turn admitted there was evidence the petitioner was identified as giving drugs to Dendy. (App. 960). Indeed, counsel admitted there was evidence that Petitioner gave drugs to Dendy, (App. 960), an individual the State identified a co-conspirator. Even so, and critically, the trial transcript was part of the record that the PCR court reviewed, and the PCR court reasonably considered the basic argument was included in the motion.

Thus, as a second point, and based on an objective reading of the trial record, the PCR court reasonably determined that "[a]rguably, that motion does question the 'buyer-seller' aspect[.]" (App. 933). Consequently, based on that finding, again a finding fully and fairly supported by the record, counsel could not be deficient as he made the argument Petitioner complains should have been made. Petitioner argues, however, that the directed verdict motion "largely focused on the inadequate basis for multiple-county jurisdiction," and notes trial counsel's testimony at the PCR that he "could have argued that the State merely established a buyer-seller relationship or made an argument on the basis of multiple-conspiracies." (Pet. 13). But, as demonstrated above, the record supports the PCR court's finding that the directed verdict motion covered the concept, and also demonstrates that the jurisdictional argument was only one of two points made. In short, the record more fully supports the PCR court's ruling than Petitioner's argument.

Additionally, the PCR court further found, though, that "even if trial counsel's motion is not sufficient to specifically address the 'buyer-seller' relationship rather than a single conspiracy, there was sufficient evidence in the case tending to prove [Davis] was guilty of conspiring to traffic in 100 grams or more of methamphetamine." (App. 933). Consequently, applying the directed

verdict standard, a "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" based on the evidence offered during the State's case. (App. 933-934). Thus, there could be no prejudice. The case law explaining necessary proof for a conspiracy supports that conclusion. For example, in *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993), our Court explained that the '"agreement to distribute drugs can sometimes 'rationally be inferred' from 'frequent contacts' among the defendants and from 'their joint appearances at transactions and negotiations.'" 313 S.C. at 134, 437 S.E.2d at 81 (quoting *U.S. v. Evans*, 970 F.2d 663 (10th Cir. 1992) (quoting *U.S. v. Esparsen*, 930 F.2d 1461, 1472 (10th Cir. 1992)). *Gunn* is instructive here.

In *Gunn,* the evidence showed not only "specific drug transactions between the alleged conspirators," but also frequent contacts by phone; however, there was "no evidentiary significance" to just showing phone contact as the individuals has various business including "car repair and sales" and "raising gamecocks." *Id.,* 313 S.C. at 135, 437 S.E.2d at 81). Here, there was not simple inference by association. Rather, as demonstrated by the above referenced trial testimony, the individuals show close connection and joint participation at various time to the buying and selling of methamphetamine, and an interrelationship and dependence in trafficking over 100 grams of the drug. The interconnected benefits from their joint and repeat participation supports submission of the case to the jury. *Id. See also State v. Hammitt*, 341 S.C. 638, 645, 535 S.E.2d 459, 463 (Ct. App. 2000), *aff'd*, 351 S.C. 634, 572 S.E.2d 263 (2002) ("evidence tends to establish a conspiracy" when "the seller has an interest in the success of the buyer's re-selling activities … because it indicates cooperation and trust" rather than an arm's length retail-type sale.") (quoting *United States v. Ferguson,* 35 F.3d 327, 331 (7th Cir.1994)); *State v. Gosnell*, 341 S.C. 627, 636, 535 S.E.2d 453, 458 (Ct. App. 2000) (" The gravamen of conspiracy is the

agreement ***or*** mutual understanding.") (emphasis added). Thus, while "a buyer-seller relationship" alone "is inadequate to tie the buyer to a larger conspiracy," *Gunn,* 313 S.C. at 134, 437 S.E.2d at 81, the evidence presented in Petitioner's trial supports that a mere "buyer-seller relationship" was not the case between these individuals.

Moreover, the precise issue here is an ineffective assistance claim regarding the directed verdict motion. Even if the phrasing "buyer-seller relationship" had been used, the evidence still would have been sufficient given that the conspiracy could be shown by the co-conspirators repeatedly regular appearances together and dependency of the arrangement for everyone's benefit. *Gunn, supra, Hammitt, supra, Gosnell, supra.* Thus, the PCR court reasonably denied the ineffective assistance of counsel claim with full support of the record and case law.

Therefore, based on the foregoing, Petitioner has failed to demonstrate that this issue warrants further review. Certiorari review of this issue should be denied.

II. The PCR judge appropriately afforded deference to trial counsel's decision not to move for a directed verdict on an argument that the evidence failed to show participation in the indicted conspiracy because the evidence failed to show agreement to move 100 grams or more – or in the alternative to request a "lesser offense" conspiracy – where the evidence did show well over 100 grams moved by the identified co-conspirators and a "lesser offense" conspiracy is not viable under established state law.

Relevant Facts:

At trial, in discussing potential instructions for the jury, counsel mentioned instructions based on the jury finding the drug amount shown beyond a reasonable doubt was less than 100, but did not requested a lesser-included instruction based on amount. When the trial court asked for clarification, counsel responded, that he was not asking for a lesser included instruction, but was "saying if it's less than 100, it's not guilty." (App. 525).

Petitioner argued to the PCR court that it was error not to move for directed verdict on the basis that State failed to show the "requisite weight of 100 grams of methamphetamine" in support of the charge. (*See* App. 927, 928-929). Petitioner also alleged that counsel was ineffective for failing to request an instruction on a "lesser offense." (App. 928). The PCR court rejected both arguments.

As to the first, the PCR court found the evidence supported the required showing of 100 grams or more, thus, counsel was not deficient in not making that argument. (App. 933). In reaching that conclusion, the PCR court had previously set out the relevant evidence concerning weight. The Court noted that "law enforcement seized 88 grams of methamphetamine" from controlled buys from co-conspirators alone, and "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." (App. 931). Further, in discussing the weight in a related allegations, the PCR court noted that Court of Appeals review of the amounts at issue that exceeded 100 grams:

> 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. Robinson maintained he never met Davis.
>
> 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 from spring 2010 to October or November 2010. …
>
> Dendy testified he sold between 3.0 and 3.5 grams of methamphetamine, which he got from Davis, to Robinson on at least fifteen occasions. …

Davis, 420 S.C. at 57, 800 S.E.2d at 141–42. (*See* App. 934).

As to the second, the PCR court found counsel was not deficient as counsel's understanding that a "lesser offense" conspiracy would not be appropriate as a matter of law. (App. 936-937). Relying on *State v. Gosnell,* 341 S.C. 627, 535 S.E.2d 453 (Ct.App. 2000), the PCR court reasoned that because the evidence of trial demonstrated the amount was above 100 grams, "charging the lesser amount as a lesser included offense would result in a conviction of an uncharged conspiracy." (App. 935).

Argument for Review:

Petitioner argues in the petition before this Court that the evidence presented at trial did not conclusively show the amount of over 100; rather, any "historical information" on amounts must be discounted because a conspiracy was not shown, thus, the only amount from Petitioner was the 3.5 grams from the CI purchase. (Pet. 19). As to the "lesser-included offense of conspiracy" for a lesser amount, Petitioner argues that is not factually supported either because the State failed to show the conspiracy, and also because the PCR court erred in interpretating and applying *Gosnell* because *Gosnell* does not prohibit the instruction "where the amount involved in

the object of the conspiracy is in controversy." (Pet. 21, quoting *Gosnell,* 341 S.C. at 636-37, 535 S.E.2d at 458-59).

Discussion:

Again, Petitioner's argument lacks support. Telling though, is that the only argument that Petitioner has to avoid the conclusion the evidence supported the amount over 100 grams is, well, to simply not count the evidence. The amounts shown during the conspiracy directly support the amount *for that very conspiracy.* Petitioner's argument depends on viewing the co-conspirators as acting separate and apart from Petitioner; but they did not. The evidence fully and fairly supports the joint actions, joint meetings, and joint benefits of the mutual arrangement. (*See* conspiracy discussion *supra*). Thus, all the amounts during the conspiracy are aggregated to determine the correct range. *See Gosnell*, 341 S.C. at 637, 535 S.E.2d at 458 ("if the defendant's actions, however slight, are sufficient to establish his participation in the conspiracy, then he is guilty of the charged conspiracy").

Further, the argument that the PCR court misconstrued *Gosnell* also misses the mark. The PCR court did not determine that *Gosnell* barred any instruction on a lesser range; only that the facts must support the instruction. Specifically, in *Gosnell,* the conspiracy was to "traffick in 400 or more grams of cocaine" and "[t]he evidence at trial clearly established that the amount … far exceeded 400 grams." 341 S.C. at 636, 535 S.E.2d at 458. The members of the conspiracy, thus, were all responsible for that greater amount. 341 S.C. at 636-637, 535 S.E.2d at 458. In that case, the error was in instructing the jury on the lesser amount:

> …by charging the lesser amount as a lesser included offense, the court committed reversible error because it allowed the jury to convict Gosnell of ***a different, uncharged conspiracy***. *Id.* Conspiracy to traffic in an amount of cocaine contained within a lesser sentencing level than that alleged in the indictment may be proper where the amount involved ***in the object of the conspiracy*** is

> in controversy. In such circumstances, the lesser charge would be an appropriate consideration in defining the scope or object of the conspiracy, ***and it would apply to each alleged conspirator***.

Gosnell, 341 S.C. at 637, 535 S.E.2d at 459 (emphasis added).

The PCR court, then, correctly applied *Gosnell*, and determined that trial counsel had not been deficient in declining to ask for instruction on the lesser amount.

Again, Petitioner has failed to show further review is warranted. Both the facts and relevant case law support the PCR judge's rulings. Certiorari review of this issue should be denied.

CONCLUSION

Based on the foregoing, this Court should deny the petition.

Respectfully submitted,

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