

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

S.C. SUPREME COURT

Letitia H. Verdin, Circuit Court Judge

Opinion No. 5476 (S.C. Ct. App. filed March 29, 2017)
2011-GS-47-06

The State of South Carolina, Respondent,
v.
Clyde Bowen Davis, Petitioner.

APPELLATE CASE NO. 2013-002207

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 20, 2017.

QUESTIONS PRESENTED

- I. **Did the Court of Appeals error in finding that Agent Asbill's testimony that a confidential informant completed a controlled purchase at his residence was inadmissible hearsay and violated the appellant's confrontation rights, however, the admission of this evidence was harmless beyond a reasonable doubt?**

- II. **Did the Court of Appeals error in finding that the trial court did not error in failing to suppress Brock's out-of-court identification?**

STATEMENT OF THE CASE

This is drug conspiracy case driven by inadmissible hearsay testimony from law enforcement and unreliable and biased testimony of known drug user co-defendants. On December 13, 2011, the State Grand Jury indicted Clyde Davis on two counts: Count I accused Davis of conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine and Count II alleged Davis distributed methamphetamine in Greenville County on or around September 8, 2010. State v. Davis, Appellate Case No. 2013-002207, Opinion No. 5476, p. 3.

During pre-trial motions, Davis moved to dismiss the superseding indictment, arguing the State Grand Jury had no subject matter jurisdiction and the State presented no evidence amounting to probable cause on Count II. Additionally, Davis filed a motion to sever Count I from Count II of the indictment. The State consented to Davis' motion to sever and proceeded only on Count I of the indictment. State v. Davis, Appellate Case No. 2013-002207, Opinion No.

5476, p. 3. Davis also moved to suppress Brock's out-of-court identification of Davis, arguing the identification process was unduly suggestive, however, the trial court denied the motion.

The trial began in Greenville County on September 17, 2013 and on September 19, 2013, the jury found Davis guilty of conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine. State v. Davis, Appellate Case No. 2013-002207, Opinion No. 5476, p. 6. The circuit court sentenced him to the mandatory minimum of twenty-five years and issued a \$50,000 fine. The petitioner timely filed his Notice of Appeal. (R. p. 8).

The petitioner briefed the following issues to the Court of Appeals: (1) Did Law Enforcement's testimony that a confidential informant made a controlled purchase from the appellant qualify as inadmissible hearsay which violated the appellant's confrontation rights; (2) Did the trial court err in refusing to exclude an unduly suggestive photo lineup and subsequent in-court identification (3) Did the trial court error in refusing to dismiss the superseding indictment due to the State's abuse of the Grand Jury process (4) Did the State fail to preserve evidence in violation of the appellant's due process rights; and (5) Did the grand jury lack jurisdiction over Count II of the superseding indictment requiring dismissal? (Appellant's Brief).

On December 6, 2016, the Court of Appeals held oral arguments on the above issues. On March 29, 2017, it filed an opinion holding that (1) the circuit court erred in admitting the portion of Agent Asbill's testimony in which he had no personal knowledge of the CI's activities during the controlled purchase because it was inadmissible hearsay and violated Davis's constitutional right to confront witnesses against, however, the error in admitting the testimony was harmless error; (2) affirming the circuit court's decision to admit the photo lineup and in-court identification (3) any issue arising from Count II of the superseding indictment was moot

(4) there was no violation of Davis's due process rights; and (5) the issue regarding Count II of the superseding indictment was moot. State v. Davis, Appellate Case No. 2013-002207, Opinion No. 5476, Appx. 1-16. It therefore affirmed the petitioner's conviction for conspiracy to traffic methamphetamine. Id.

On April 26, 2017, the petitioner timely filed and served his Petition for Rehearing. On June 20, 2017, the Court of Appeals filed an Order denying the Petitioner's Petition for Rehearing. This Petition follows.

ARGUMENT

I. Did the Court of Appeals error in finding that Agent Asbill's testimony that a confidential informant completed a controlled purchase at his residence was inadmissible hearsay and violated the appellant's confrontation rights, however, the admission of this evidence was harmless beyond a reasonable doubt?

"Error is only harmless 'when it could not reasonably have affected the result of the trial.'" State v. Mitchell, 286 S.C. 573, 336 S.E. 2d at 151 (1985). It is impossible to conclude that the testimony offered by Agent Asbill in Davis's trial regarding the *only* controlled purchase alleged to have been made from him would not have affected the result of his trial in a drug conspiracy case. That testimony was fundamental to the State's case and its admission bolstered what was otherwise a case based on nothing more than unreliable co-defendant testimony.

There was no corroborating evidence to Agent Asbill's testimony put forth at trial. There was no evidence of an audio or video recording of the controlled purchase. There were no photographs of the controlled purchase. There were no photographs of the undercover buy money. There were no drugs introduced at trial from the controlled purchase. There was no witness to the controlled purchase to corroborate Agent Asbill's testimony about what happened.

To summarize, there was zero evidence of a controlled purchase of drugs involving Clyde Davis at all without this testimony. Other than Agent Asbill's testimony of Terrance Albert's controlled purchase, the only evidence that implicated the appellant in the alleged Greenville drug conspiracy was the biased and unreliable testimony of Joshua Byers, Amy Brock and Nick Dendy.

Amy Brock never met Clyde Davis. She never purchased drugs from him. She identified him in a "photo lineup" which in actuality was just a single photograph of Clyde Davis's DMV picture without any other photographs to compare it to. She never had any direct contact with Davis in any capacity whatsoever. She admitted to being high during the methamphetamine purchases from Nick Dendy. Those purchases consisted of Dendy either coming into her house or her running out of the house to Dendy's car. She would give the money to Dendy and he would give it to another person who had pulled up. Amy Brock was never told this person's name, never approached the car he was in and never had a face-to-face conversation or interaction with him. She saw him from a distance inside of a car at the closest vantage point.

Nick Dendy changed his story to law enforcement more times than one can count. Prior to trial, Nick Dendy told law enforcement that he got methamphetamine from his cousin Bokie which he then sold to Amy Brock. At trial, he changed his story and denied getting methamphetamine from Bokie for the transactions with Brock, instead saying that he got the drugs from Davis. The inconsistencies in Dendy's cooperation and ultimate testimony to the jury cannot be overlooked or downplayed.

Joshua Byers' testimony consisted of a narrative that on one single occasion at a car wash, Clyde Davis, who was sitting in the passenger seat, handed about a gram of

methamphetamine to Charles Brown who was sitting in the driver's seat. Charles Brown then handed the methamphetamine to Byers who was in the backseat. That interaction was the only time that Byers ever supposedly met Davis or had any dealings with him.

This was the sum total of the admissible testimony against Clyde Davis in his drug conspiracy trial. If Agent Asbill's hearsay testimony had been properly excluded, these statements are all the jury would have had to consider when determining whether Clyde Davis was guilty of conspiring to traffic more than 100 grams of methamphetamine.

The State spent part of its closing argument trying to persuade the jury that they should believe the co-defendants because even given their cooperation, they were still facing offers that carried significant prison time. In closing, the State told the jury that "Nick Dendy is looking at 15 to 18 years. . . what incentive is there to lie for that?" (Tr. P. 422, ln. 19) As it turns out, Nick Dendy was ultimately sentenced to only 8 years in prison. That sentence is barely half of what the State told the jury was the *minimum* he was looking at. Given that a juror's focus should have properly been on only the testimony of the co-defendants, had Asbill's impermissible statements been excluded, each juror determining if the co-defendants had any bias was a proper factor to weigh in consideration of their overall testimony. Someone who was looking at a prison term of 15-18 years, even after cooperating, may not be nearly as inclined to lie and testify to what the State wanted him to as someone who was only looking at 8 years would be.

The instant case has a number of similarities to a recent drug conspiracy case, State v. Gracely, 399 S.C at 374, 731 S.E.2d 880, 886 (2012), that arose out of Pickens County. As was the case in Gracely, all three co-defendants who testified against Clyde Davis at trial were cooperating witnesses with whom the State made plea deals. See Gracely, 399 S.C. at 374, 731

S.E.2d at 885-86. Byers entered into a plea deal with the State and pled guilty to a lesser charge. (Tr. P. 168, ln 12-22). Brock entered into a plea deal with the State, pled guilty to a lesser charge, and received a recommendation of five to eight years (Tr. 258, ln. 7-22). Dendy entered into a plea deal with the State and pled guilty to a lesser trafficking charge (Tr. P. 277, ln. 21-25; 278, ln. 1-9). As in Gracely, these witnesses had significant involvement with illegal drugs and other criminal activities, and cooperated following the possibility of long prison terms. Gracely, 399 S.C. at 377, 731 S.E.2d at 887. Also similar to Gracely, the State in this case chose not to present any physical evidence tying the appellant to the conspiracy. See Gracely, 399 S.C. at 376, 731 S.E.2d at 887. There was no physical evidence in any form presented to the jury to tie Clyde Davis to the activities admitted to by his co-defendants and whom there was substantial physical evidence against each individually.

Agent Asbill's testimony that Terrance Albert, the confidential informant, went to Dobbs Street, that he went to the appellant's house, that he spent time at the appellant's house, that he received a phone call, that he purchased methamphetamine from the appellant and that he purchased the methamphetamine using documented government funds was not harmless. It was crucially important testimony to the State's case to try and tie in the Appellant to the greater "drug conspiracy" they alleged was going on between the co-defendants.

The jury found Clyde Davis guilty on the sole count presented to them—conspiracy to traffic methamphetamine. By its very nature, a conspiracy charge requires a common goal that two or more people are working towards. In his closing, the Assistant Attorney General offered this summary of what needed to be proven. "We've got to prove beyond a reasonable doubt to you that two or more people got together and agreed to commit an unlawful objective or a lawful

objective through unlawful means. Now, this agreement, don't be mistaken, it doesn't have to be a big meeting where everybody in the conspiracy gets together, hashes out the terms and comes to some formal written document that this what we're going to do. That's not necessary. It doesn't have to be in writing. Not everybody has to talk to each other. Not every single person in a conspiracy needs to know each other. That's the law...In this situation, all these people are doing their part to sell meth. They are each doing their part. That's what makes this a conspiracy." (Tr. P. 424 ln. 1-18). There is no question that methamphetamine was being bought and sold between Dendy, Brock, Byers and others. They were all users and would get meth wherever they could over a period of years, sometimes from the same person and sometimes not. What there is a question regarding, is if Clyde Davis was a part of this buying and selling conspiracy that the State claimed. Was Davis "doing [his] part" in furtherance of some common objective to move methamphetamine around the Upstate of South Carolina? In this case, which without Agent Asbill's testimony, would have relied solely on the testimony of the three co-defendants who had plenty of incentive to testify as the State wanted them to, the State could not have proved beyond a reasonable doubt that he was and it is impossible to say that the error in admitting the Agent's testimony did not affect the result of Clyde Davis' trial.

In the State's closing argument, references are made numerous times to Agent Asbill's testimony. "Agent Asbill identified it was a Chrysler 300 during the controlled purchase against Clyde Davis." (R. p. 421, ln. 5-15) This is much more than a passing reference to a controlled purchase. Not only does this statement reference inadmissible testimony as it related to the alleged controlled buy, it also put forth the notion to the jury that Agent Asbill could independently verify some of the co-defendant testimony, ie: what car was used by Dendy's

supplier. The error in admitting this kind of testimony and allowing the jury to consider it in their deliberations could never be harmless.

“Whether an error is harmless in a particular case depends on a host of factors... the factors include the importance of the witnesses testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” State v Gracely, 399 S.C. at 375, Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L.E. 2d 674 (1986). In Gracely, which was also a drug conspiracy case, the testimony presented only corroborated other testimony and the State did not present any physical evidence tying the appellant to the activities charged. The same holds true in the instant case. There was no physical evidence tying Clyde Davis to any of the activities charged. This differed greatly from the situation facing each of his co-defendants who opted to plead guilty. There was substantial physical evidence, including undercover purchases of methamphetamine for some, tying each of them to the purchase and sale of drugs.

The key factor for determining whether a trial error constitutes reversible error is “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), overruled on other grounds by Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001)). “Whether an error is harmless depends on the circumstances of the particular case.” State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). “No definite rule of law governs this finding; rather, the

materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it ‘could not reasonably have affected the result of the trial.’ ” Id. (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)). State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

The Court in Tapp stated that engaging in this harmless error analysis requires the court not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the jury verdict. See State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (harmless error jurisprudence requires that the error not contribute to the verdict obtained). State v. Tapp, 398 S.C. 376, 390, 728 S.E.2d 468, 475 (2012). In conducting a harmless error analysis, the reviewing court looks to the basis on which the jury actually rested its verdict. Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008). “[T]o conclude that the error did not contribute to the verdict, the Court must ‘find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.’ ” Id. (quoting Yates v. Evatt, 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991)). State v. Portillo, 408 S.C. 66, 74, 757 S.E.2d 721, 726 (Ct. App. 2014), aff’d in part, vacated in part, No. 2015-MO-007, 2015 WL 790299 (S.C. Feb. 25, 2015).

The Court of Appeals opinion states that “the jury had more than enough evidence to find Davis conspired to traffic 100 grams or more of methamphetamine.” State v. Davis, Appellate Case No. 2013-002207, No. 5476, p. 15. Respectfully, the Court’s focus is incorrect. See Government of Virgin Islands v. Davis, 561 F.3d 159, 165-66 (3rd Cir. 2009) (“As an initial matter, we are unsatisfied with this conclusion insofar as the Appellate Division focused on

whether the evidence was sufficient to convict despite the error, as opposed to whether there was a reasonable possibility that the error contributed to the jury verdict”) (citing Satterwhite v. Texas, 486 U.S. 249, 258–59, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) (“The question, however, is not whether the legally admitted evidence was sufficient ... but rather, whether the [Government] has proved ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained’”).

Further, the Appellate Court’s focus is wrong when it states that “[f]ocusing on [the conspiracy to traffic] charge, we find the State presented cumulative testimony from Brock, Dendy, and Sekerchak regarding Davis’s involvement in the conspiracy.” Opinion No. 5476, p. 15. The cumulative testimony factor turns on whether the disputed testimony was cumulative. *See, e.g., State v. Rhodes*, 688 So.2d 628, 636 (La. Ct. App. 1997) (any confrontation clause violation that occurred through admission of statement that officer heard from unnamed member of the crowd following a shooting was harmless beyond a reasonable doubt where the statement was merely cumulative of extensive eyewitness testimony); United States v. Wipf, 397 F.3d 677, 682 (8th Cir. 2005) (testimony of psychologist as to statements made by students that he had interviewed regarding gym teacher’s alleged sexual abuse, any such error was harmless beyond a reasonable doubt in prosecution of gym teacher for this abuse, where each of these students testified at trial, and psychologist’s testimony was cumulative of that of students); United States v. Summers, 666 F.3d 192, 204 (4th Cir. 2011) (admission of forensic examiner’s report was harmless beyond a reasonable doubt because the report was “almost wholly cumulative” of the forensic examiner’s live testimony). The Court of Appeals analyzed the very concept of cumulative testimony in this case incorrectly. Agent Asbill’s testimony was not cumulative.

There were no witnesses to the controlled purchase that testified in the same manner as did Agent Asbill. Throughout the trial, the State presented evidence of various controlled purchases. However, this was the only evidence of a controlled purchase that allegedly involved the appellant.

The admission of this evidence was not harmless and the Court of Appeals erred in their finding of such. In the Court of Appeals opinion itself, not once does the Court cite to a standard for what the evidence presented at trial must be for an error in admitting testimony which violated the Confrontation Clause to be considered harmless. Frankly, the Court of Appeals seems to breeze right through the portion of their opinion discussing what makes an error to admit testimony at the Circuit Court level harmless or not. Absent the improperly included testimony of Agent Asbill, the evidence against Clyde Davis as to a conspiracy to traffic methamphetamine was neither cumulative nor overwhelming. It was not strong. It was not even moderately strong. The Court of Appeals opinion, much like the evidence presented against Davis at trial, was legally unsound. The Court of Appeals erred in their analysis and conclusion of whether or not admitting the hearsay testimony of Agent Asbill was “harmless beyond a reasonable doubt”. It was not.

The evidence legally allowed to be presented to a jury is one of the most fundamentally important safeguards a criminal defendant has at trial. The analysis and determination of whether evidence that should not have been presented for the jury’s consideration “reasonably affected the result of the trial” must be thorough and take into consideration the entire big picture of what the jury had before them to find a defendant guilty or not guilty. In this case, the underwhelming evidence presented against Clyde Davis on the charge of conspiracy to traffic methamphetamine

could not have led to a verdict of guilt without the improper hearsay testimony of Agent Asbill included.

II. Did the Court of Appeals error in finding that the trial court did not error in failing to suppress Brock's out-of-court identification?

“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” U.S. v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). “A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification.” State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). “An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” Traylor, 360 S.C. at 81, 600 S.E.2d at 526 (citing Moore, 343 S.C. 82, 540 S.E.2d 445). “It is the likelihood of misidentification which violates a defendant’s right to due process . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” Neil v. Biggers, 409 U.S. at 198, 93 S.Ct. 375, 4 L.Ed.2d 401.

In Neil v. Biggers, the United States Supreme Court developed a two-prong inquiry to determine the admissibility of an out-of-court and in-court identification. “First, a court must ascertain whether the identification process was unduly suggestive. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood

of misidentification existed.” Traylor, 360 S.C. at 81, 600 S.E.2d at 526-27. If the identification was unduly suggestive and there is a substantial likelihood of misidentification, due process requires that the out-of-court identification be excluded and any in-court identification be prohibited. Traylor, 360 S.C. at 84; *see also* Perry v. New Hampshire, 565 U.S. - -, 132 S.Ct. 716, 726, 181 L.Ed.2d 694 (2012); Moore, 343 S.C. at 290, 540 S.E.2d at 449. Not only does the exclusion of this identification evidence protect the defendant’s due process rights, it also “deter[s] law enforcement use of improper lineups, showups, and photo arrays . . .” Perry, 565 U.S. - -, 132 S.Ct. at 726 (citing Manson v. Brathwaite, 432 U.S. 98, 112, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)).

“[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact.” Moore, 343 S.C. at 288, 540 S.E.2d at 448. “In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing Clyburn v. Sumter Co. Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994)). “Generally, the decision to admit an eyewitness identification is at the trial judge’s discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error.” Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing State v. Johnson, 311, S.C. 132, 427 S.E.2d 718 (Ct. App. 1993)). “However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.” Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976), *cert. denied*, 430 U.S. 910, 97 S.Ct. 1183, 51 L.Ed.2d 587 (1977)).

The single-photo show up at issue in this case was unduly suggestive. See Manson, 432 U.S. at 109, 97 S.Ct. 2243, 53 L.Ed.2d 140 (parties agreed that a single-photograph lineup was unduly suggestive); Moore, 343 S.C. at 287 (the trial court erred in finding that a single person show-up was not unduly suggestive); U.S. v. Hines, 387 F.3d 690, 693-94 (8th Cir. 2004) (a single-person photo lineup is unduly suggestive); Michigan v. Woolfolk, 848 N.W.2d 169, 174 (Mich. Ct. App. 2014) (“[s]howing a witness a single photograph is considered to be one of the most suggestive photographic identification procedures”); Mysholowsky v. New York, 535 F.2d 194, 197 (2nd Cir. 1976) (“We have consistently condemned the exhibition of a single photograph as a suggestive practice, and, where no extenuating circumstances justify the procedure, as an unnecessarily suggestive one”¹).

Moreover, there was a substantial likelihood of irreparable misidentification. The following factors should be considered in evaluating the totality of circumstances to determine the likelihood of a misidentification: (1) the witness’s opportunity to view the perpetrator at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Traylor, 360 S.C. at 82, 600 S.E.2d at 527.

First, Brock did not have a sufficient opportunity to view the perpetrator at the time of the alleged transactions. This is not a rape case where Brock “spent a considerable period of time

¹ No emergency or extenuating circumstances existed here. Brock testified that law enforcement first approached her in October 2010 regarding her involvement in methamphetamine. (R. p. 151, ln. 5-8). A month or two later, law enforcement approached her again and showed her the single photograph of the appellant from which she made the identification of the appellant as Dendy’s cousin. (R. p. 154, ln. 9-16).

with [the perpetrator], up to a half an hour” under “artificial light in her house.” Neil, 409 U.S. at 200. In fact, Brock never dealt directly with Dendy’s cousin and never met Dendy’s cousin. She “never went over to where his cousin was.” (R. p. 147, ln. 22-23). She never spoke to Dendy’s cousin. (R. p. 148, ln. 14-16). She never had the opportunity to observe Dendy’s cousin in close proximity, nor was she able to observe him for a considerable period of time. (R. p. 150, ln. 14-20); *See Moore*, 343 S.C. at 289. This factor indicates a very substantial likelihood of irreparable misidentification.

Second, Brock’s degree of attention was insufficient. She was a “casual observer” rather than “the victim of one of the most personally humiliating of all crimes.” Neil, 409 U.S. at 200; *see also Moore*, 343 S.C. at 289 (the witness’s “attention was likely not as acute as it might have been had she been the victim of a crime”). Further, Brock was not an experienced police officer specially trained to make accurate identifications. Manson, 432 U.S. 98 (the witness was a “specially trained, assigned, and experienced officer [who] could be expected to pay scrupulous attention to detail” so that she could “find and arrest” the perpetrator). Moreover, Brock was high on methamphetamine during her observations. (R. p. 330, ln. 1-4). This factor indicates a very substantial likelihood of irreparable misidentification.

Third, Brock gave *no* prior description of Dendy’s cousin, much less an accurate description of the appellant. (R. p. 154, ln. 5-8). *Compare Manson*, 432 U.S. at 115 (no substantial likelihood of misidentification where the description contained the perpetrator’s “race, his height, his build, the color and style of his hair, and the high cheekbone facial feature” in addition to the perpetrator’s clothes); State v. Rogers, 263 S.C. 373, 378, 210 S.E.2d 604, 607 (1974) (no substantial likelihood of misidentification where the witness “told the officer in exact

detail a description of her assailant, which included his age, color of his hair, glasses, missing front teeth, tattoo on arm, and shirt over one pocket of which appeared the word 'Joe' and over the other pocket which appeared 'Sherriff's Department.' She also described the car, stating that the car was light blue in color, had a black interior; brown panel on the dash and that the trunk of the car there was a blue light which looked like the light that goes on top of police cars and there was a radio in the trunk") *with Moore*, 343 S.C. at 289 (there was a substantial likelihood of misidentification when the witness's description was based "primarily on the suspects' clothing and race, and that one was taller than the other"). Again, Brock gave no description other than identifying Dendy's supplier as Dendy's cousin. The appellant is not Dendy's cousin. This factor indicates a very substantial likelihood of irreparable misidentification.

Fourth, Brock's level of certainty was insufficient. At the time she made the identification from the single photograph, she did not mention her level of certainty to law enforcement. (R. p. 155, ln. 8-13). She did not testify as to her level of certainty before the Grand Jury. (R. p. 572, ln. 19-22). It was only on re-direct examination, at the prompting from the prosecutor and over the objection of the appellant, she said did not have trouble identifying the appellant. (R. p. 156, ln. 10-11). She never offered any percentage or qualifier as to her level of certainty. This factor indicates a likelihood of misidentification.

Fifth, the length of time between the transactions and her identification was substantial. In October 2010, Brock was approached by law enforcement about her trafficking of methamphetamine. (R. p. 151, ln. 5-7). She did not make the identification from the single photograph until a month or two later. (R. p. 154, ln. 9-16). This is not a case like *Moore* in which the South Carolina Supreme Court held that 1 ½ to 2 hour time period between the crime

and the confrontation was sufficient to meet this factor. Moore, 343 S.C. at 289. Further, this is not a case like Manson in which the United States Supreme Court held that a two-day period was sufficient to meet this factor because the witness's description of the perpetrator was given within minutes of the crime. Manson, 432 U.S. at 115-16 (the witness's description of the perpetrator "was given . . . within minutes of the crime. The photographic identification took place only two days later. We do not have here the passage of weeks or months between the crime and the viewing of the photograph"). Here, Brock gave no description of Dendy's cousin, and only identified the appellant as Dendy's cousin after she was provided the single photograph of the appellant. This factor indicates a very substantial likelihood of misidentification. Under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification such that the identification was unreliable as a matter of law. Due process required that the out-of-court identification be excluded and Brock's in-court identification be prohibited.

The Court of Appeals chooses to use the language that "meritorious disagreement" exists on the Neil v. Biggers reliability factors but declines to hold that the Circuit Court committed a prejudicial abuse of discretion in admitting Brock's prior identification of Davis because "its decision was supported by the evidence" State v. Davis, Appellate Case No. 2013-002207, Opinion No. 5476, p. 11. To support this conclusion, they cite to "evidence" that is blatantly incorrect. The Court of Appeals opinion states, "Brock's level of certainty was high because she directly identified the man in the photograph as Dendy's cousin when investigators asked who it depicted." State v. Davis, Appellate Case No. 2013-002207, Opinion No. 5476, p. 11. Both clauses of that sentence alone are incorrect. First, as previously noted, Amy Brock never testified

to a level of certainty of her identification. She did not qualify it as being low, moderate, high or any particular percentage. It was clearly and unequivocally confirmed at trial, through the testimony of Nick Dendy himself, that Clyde Davis was *not* Dendy's cousin. While not the main focal point of concern, this statement alone goes to show the Court of Appeals lackluster effort to get simple facts regarding the evidence presented at Clyde Davis' trial correct.

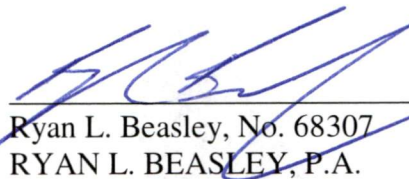
For the Court of Appeals to impart their own opinion or understanding as to the level of certainty and attach it to Brock's identification, whether intentionally or just an oversight, is unacceptable. The Court of Appeals opinion is rife with examples of inconsistencies and errors that make it abundantly clear that they did not properly review and assess the two issues now before the Supreme Court of South Carolina on a Petition for a Writ of Certiorari.

CONCLUSION

By reason of the foregoing arguments, a Writ of Certiorari should be issued to allow full briefing on these issues.

Dated this 8 day of August, 2017

Respectfully Submitted,



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

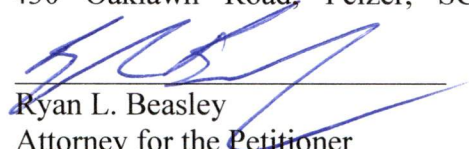
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5476 (S.C. Ct. App. filed March 29, 2017)

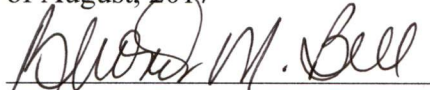
The State of South Carolina Respondent
v.
Clyde Bowen Davis Petitioner

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Alan Wilson, Joshua R. Underwood, Samuel Creighton Waters, and James Clayton Mitchell, III, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Jenny Abbott Kitchings, SC Court of Appeals, P.O. Box 11629, Columbia, SC 29211 and upon Clyde Bowen Davis, #00357153, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29609, this 9 day of August, 2017.


Ryan L. Beasley
Attorney for the Petitioner

SWORN TO BEFORE ME this 9th day
of August, 2017


Notary Public for South Carolina

My Commission Expires: May 19, 2024