

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge
Appellate Case No. 2017-001504

THE STATE,

Respondent,

vs.

CLYDE BOWEN DAVIS,

Petitioner.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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STATEMENT OF ISSUES PRESENTED

- I. The Court of Appeals correctly affirmed the trial court's admission of Amy Brock's out-of-court identification and subsequent in-court identification of Davis by finding that the trial court's decision to admit the identifications was not an abuse of discretion but was supported by the evidence.
- II. The Court of Appeals correctly found that any error in admitting hearsay during the testimony of Agent Asbill was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Procedural History

The State Grand Jury indicted Petitioner, Clyde Bowen Davis, by way of a Superseding Indictment for Unlawful Drugs on December 13, 2011. Davis was named as a defendant in Counts I and II. Count I accused Davis of Trafficking Methamphetamine, 100-200 Grams (Conspiracy). Count II accused Davis of Distribution of Methamphetamine.

Davis was tried by the Honorable Letitia H. Verdin and a jury between September 16 -18, 2013. Davis made a pre-trial request to sever the charges. 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.¹ The jury found Davis guilty of Count I, as indicted, and the Circuit Court sentenced Davis to 25 years imprisonment.

On or about September 24, 2013, Davis filed a written Motion for Verdict in Arrest of Judgment and Motion for a New Trial. Those motions were denied by a written order on October 3, 2013.

Davis timely filed and served a Notice of Intent to Appeal. The Court of Appeals affirmed the conviction and sentence by Opinion No. 5476 filed on March 29, 2017. Davis' Petition for Rehearing was denied on June 20, 2017. Davis served his Petition for Writ of Certiorari on August 9, 2017. This Return follows.

¹ The State subsequently filed a *Nolle Prosequi* regarding Count II due to the conviction and sentence regarding Count I.

Factual History

In this trial Clyde Bowen Davis only faced the charge of Trafficking Methamphetamine, 100-200 Grams (Conspiracy). 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. Agent Ashley Asbill, of the South Carolina Law Enforcement Division, 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. (R. p. 306, line 6 – p. 308, line 4; R. p. 350, lines 9-16). Brock's methamphetamine transactions with Dendy usually took place at her home in Greenville County. (R. p. 308, lines 11-15). When she would order methamphetamine from Dendy he would never bring it with him. (R. p. 310, 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. (R. pp. 257-259; R. p. 311, line 4; R. p. 352, line 15 – p. 353, line 2; R. p. 354, line 6 – p. 355, 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. (R. p. 257-259; R. p. 311, line 4; R. p. 352, line 15 – p. 353, line 2; R. p.

354, line 6 – p. 355, line 1). This scenario took place up to 4 times a week between the Spring of 2010 and October or November 2010. (R. p. 309, lines 1-4; R. p. 314, line 10- p. 315, line 20; R. p. 154, 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. (R. p. 313, lines 12-24; R. p. 315, line 25 – p. 316, line 5). Dendy's testimony corroborated the methamphetamine transaction pattern described by Brock. (R. p. 352, line 13 – p. 353, line 2; R. p. 354, line 6 – p. 355, line 1).

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. (R. p. 709; R. p. 132, line 8 – p. 133, line 6; R. p. 134, line 20 – p. 135, line 3; R. p. 152, line 5 – p. 153, line 19; R. p. 318, line 18 – p. 320, line 3). The Circuit 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. (R. pp. 127 – 165). Brock and Dendy both made in-court identifications of Davis as the man who supplied Dendy with methamphetamine. (R. p. 327, line 9 – p. 328, line 13; R. p. 358, lines 3-18).

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. (R. pp. 257-258; R. p.

262, lines 17-21). He described the same scenario except that he testified that Davis would drive a black Honda or silver Dodge Charger. (R. p. 259, lines 1-2).

Michael Robinson sold methamphetamine for Dendy and was also supplied by Brock. (R. p. 276, lines 15-19; R. p. 282, line 7 – p. 283, line 19; R. p. 199, line 14 – p. 200, 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. (R. p. 348, lines 2-12).

At trial, Agent Asbill testified that he participated in a controlled purchase operation in which law enforcement agents intended to purchase methamphetamine from Clyde Davis. (R. p. 386, lines 12-14; R. p. 387, lines 6-13). 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 Davis. (R. p. 391, lines 14-22). The informant went to Davis' residence on Dobbs Street for a period of time. (R. p. 388, lines 11-16). During the controlled purchase operation Agent Asbill was able to identify a silver/gray Chrysler 300 as a vehicle of interest, the same type of vehicle described by Amy Brock and Brian Sekerchak. (R. p. 390, lines 1-7). After going to Davis' residence, the CI returned to the law enforcement agents with 3.5 grams of methamphetamine. (R. p. 393, lines 11-17).

ARGUMENT

- I. **The Court of Appeals correctly affirmed the trial court's admission of Amy Brock's out-of-court identification and subsequent in-court identification of Davis by finding that the trial court's decision to admit the identifications was not an abuse of discretion but was supported by the evidence.**

Davis contends that the Court of Appeals demonstrated a "lackluster effort to get simple facts regarding the evidence presented at Clyde Davis' trial correct," that the Court of Appeals "impart[ed] their own opinion or understanding as to the level of certainty and attach[ed] it to Brock's identification, whether intentionally or just an oversight is unacceptable," and that 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 asses the two issues now before the Supreme Court of South Carolina on a Petition for a Writ of Certiorari." (Petition for a Writ of Certiorari. p. 18). On the contrary, the Court of Appeals properly reviewed and assessed the issues brought before this Court in Davis' Petition for a Writ of Certiorari and correctly applied the law to the facts of the case in affirming the admission of Brock's identifications and the conviction. The facts and evidence as presented at trial and found in the record are simply not in Davis' favor.

In criminal cases, the appellate court reviews only errors of law and is bound by the trial court's factual findings unless those findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). "The admission or

exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” State v. Hughes, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001). The reliability of an eyewitness identification is a mixed question of law and fact which becomes a matter of law for the appellate court when the evidence only supports one reasonable inference. State v. Liverman, 398 S.C. 130, 137-138, 727 S.E.2d 422, 425 (2012). “Accordingly, a trial court’s decision to allow the in-court identification of an accused will not be reversed absent an abuse of discretion or prejudicial legal error.” State v. Tisdale, 338 S.C. 607, 611, 527 S.E.2d 389, 391 (2000)

A trial court must suppress an out-of-court identification of the accused if the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification because such a procedure violates due process. State v. Dukes, 404 S.C. 553, 558, 745 S.E.2d 137, 139 (Ct. App. 2013)(citing Liverman, 398 S.C. at 138, 727 S.E.2d at 425). The subsequent in-court identification by the witness is inadmissible if the suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). Trial courts must utilize the two-pronged inquiry, as developed by the Supreme Court of the United States in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), to determine if an out-of-court

identification must be suppressed to satisfy due process requirements. Liverman, 398 S.C. at 138, 727 S.E.2d at 425.

The first prong requires the court to determine if the identification resulted from “unnecessarily suggestive” police identification procedures. Biggers, 409 U.S. at 198-199, 93 S.Ct. at 381-382, 34 L.Ed.2d at 410-411; see also Traylor, 360 S.C. at 81, 600 S.E.2d at 526 (stating that the standard is “unduly suggestive”); Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (using the standard of “unnecessary and unduly suggestive”). If the court determines the out-of-court identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. Dukes, 404 S.C. at 557-58, 745 S.E.2d at 139. Single person show-up identifications are generally disfavored by the courts because their nature is suggestive. State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003)(citing State v. Blasingame, 338 S.C. 240, 525 S.E.2d 535 (Ct.App.1999)). However, this suggestive nature is mitigated by the witness’s prior knowledge of the accused converting a procedure normally considered unduly suggestive into a mere confirmation. Liverman, 398 S.C. at 141-42, 727 S.E.2d at 427-28 (citing State v. Taylor, 594 N.W.2d 158 (Minn.1999))(holding that a show-up identification procedure was not suggestive but confirmatory where a witness previously singled out her assailant by nickname and had seen him around her building at least ten times before the identification took place); People v. Rodriguez, 79 N.Y.2d 445, 583 N.Y.S.2d 814, 593 N.E.2d 268, 272 (1992)(“A court’s invocation of the ‘confirmatory identification’ exception is thus tantamount to a conclusion that, as a matter of law, the witness is so

familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification.”).

The single-photograph identification procedure used by police with Amy Brock was not unduly or impermissibly suggestive. The police had information that Dendy was supplied methamphetamine by Clyde Davis. Investigator Ayers showed Brock a driver's license photograph of Davis and simply asked her who was in the picture to which she responded that it was Nick Dendy's cousin who provided Nick and her with methamphetamine. (R. p. 151, line 14 – p. 153, line 21; R. p. 131, line 3 – p. 133, line 15; R. p. 318, line 2 – p. 320, line 3). Investigator Ayers did not suggest who was featured in the photograph or that the person depicted in the photograph was the person Brock would know as Dendy's cousin. (R. p. 152, line 25 – p. 153, line 21). Brock did not know his name but identified Dendy's supplier as an individual she believed to be his cousin. She had seen the man she thought to be Dendy's cousin, Davis, at her home ten times or more. This identification method is also less suggestive than a show-up identification because Brock was shown a photograph of Davis in civilian clothes instead of seeing him in a secure location after he had been taken into custody. This procedure was not impermissibly suggestive because it was merely a confirmation that the supplier was the person Brock knew as Nick's cousin and the police did not suggest that the person in the photograph was a drug dealer or in any way suggest who he was or what connection, if any, he may have to Brock or Dendy. Therefore, the out-of-court identification and in-court identification were both properly admitted at trial and there is no need to further analyze the out-of-court identification procedure.

Even when a suggestive procedure has been used, an identification may still be reliable under the totality of the circumstances. Brown, 356 S.C. at 504, 589 S.E.2d at 785 (citing Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401; State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The reliability of the identification is the linchpin in determining its admissibility. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Blassingame, 338 S.C. at 251, 525 S.E.2d at 541.

The second prong of the Biggers inquiry determines the reliability of an identification under the totality of the circumstances by considering the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation. State v. Simmons, 384 S.C. 145, 166-67, 682 S.E.2d 19, 30 (Ct. App. 2009).

Brock's identification of Davis passes the first factor of reliability. Brock had numerous opportunities to view Dendy's methamphetamine supplier on her own property during daylight hours. The supplier came to her house regularly more than once a week beginning in Spring 2010 until October or November 2010. (R. p. 314, line 6 – p. 316, line 5). Sekerchak testified that he saw Clyde Davis bring methamphetamine to Dendy at Brock's residence on at least 10 occasions. (R. pp. 257-259; R. p. 262, lines 17-21). See State v. Taylor, 594 N.W.2d 158 (Minn.1999)(approving a show-up identification procedure where witness previously singled out her assailant by nickname and had seen him around her building at least ten

times before the identification took place). The transactions between Dendy and Davis at Brock's residence may have been short in duration but they were high in frequency. The number of times the supplier came to her residence provided ample opportunity for Brock to observe him. When the supplier arrived at her house, Brock would often go outside to Dendy's car to give him the money for drugs. Dendy would then go to his supplier who was parked directly behind him in a short driveway to make the exchange of money for methamphetamine. This would place Brock approximately a car-length away from Dendy's supplier during broad daylight where she would easily be able to see the supplier through an open car window as she testified. This repeated scenario suggests a reliable identification because Brock was given frequent opportunities to see Dendy's supplier on her property, during daylight, and from the close proximity equivalent to the length of a car.

No error was found when a trial court found the identification reliable and admissible where an informant was shown a single photograph in State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005)(vacated in part on other grounds, State v. Roach, 377 S.C. 2, 659 S.E.2d 107 (2008). In Roach the crack-smoking informant was shown a photograph of Roach and identified him as the person from whom he had been purchasing crack during a four-month period. Like the informant in Roach, Brock had a high degree of attention when observing Dendy's supplier. She was not a "casual observer" as Davis asserts in his Petition. She was a coconspirator and drug user who had a vested interest in knowing who was providing her methamphetamine. This would enhance her degree of attention, not diminish it. Therefore, Brock had a sufficient

degree of attention at the times she observed Dendy's supplier to substantiate a reliable identification of Davis.

Admittedly, there is no evidence in the record that Brock provided a physical description of Dendy's supplier to the police prior to the single-photograph identification. However, she was not being asked to identify someone she had only seen on one occasion. Instead, Brock was asked to identify a methamphetamine supplier she had seen on her property numerous times whom she singled out as someone she thought to be Dendy's cousin. This was a confirmation identification as accepted in Liverman, 398 S.C. 130, 727 S.E.2d 422. In addition, her identification of Davis is cumulative. During his testimony, Sekerchak identified Dendy's supplier by name, Clyde Davis. Even more compelling, Dendy testified that Clyde Davis was his supplier of methamphetamine and identified Davis in open court, without objection. Therefore, under the totality of the circumstances, this was still a reliable identification.

Brock's level of certainty at the time of confrontation sufficiently suggests a reliable identification of Davis as Dendy's methamphetamine supplier. When asked if she recognized who was in the photograph presented by Inv. Ayers, Brock simply responded that it was Dendy's supplier who she thought was Dendy's cousin. There is nothing in the record to indicate that she was uncertain or doubtful in any way about her identification from the single photograph. In fact, Brock testified at the Neil v. Biggers hearing and during the trial that she had no trouble identifying the individual in the photograph. (R. p. 319, lines 14-16; R. p. 155, line 8 – p. 156, line11).

The amount of time between Brock's observations of Dendy's supplier and the presentation of the single photograph was not so great that it would diminish the

reliability of Brock's identification of Davis from the photograph. The lapse of one month between a crime and the photographic identification is not long enough to render an identification unreliable. See Simmons, 384 S.C. at 170, 682 S.E.2d at 32. Brock testified that the presentation of the photograph was a month or two after she was first approached by Inv. Ayers in October 2010. (R. p. 154, lines 9-16). Brock's methamphetamine arrangement with Dendy and Davis was still ongoing until October or November 2010. That means that the identification took place very close to the end of her dealings with Dendy and his supplier, possibly while they were still taking place, but after she had seen Dendy's supplier numerous times over several months. Under the totality of the circumstances, this suggests that Brock's identification of Davis as Dendy's supplier was timely and reliable.

The trial court, who is in the best position to perceive and judge the credibility of the witnesses, ruled that Brock's out-of-court identification of Davis was not impermissibly suggestive and that under the totality of the circumstances there was no substantial likelihood of misidentification. The trial court's rulings are supported by the evidence and not by an error of law, thus the rulings should not be disturbed on appeal. Therefore, the Court of Appeals correctly found that Brock's out-of-court identification and her in-court identification were properly admitted so the Petition should be denied.

II. The Court of Appeals correctly found that any error in admitting hearsay during the testimony of Agent Asbill was harmless beyond a reasonable doubt.

Davis also contends that the Court of Appeals erred in finding that the admission of certain portions of Agent Asbill's testimony was harmless error because the Court "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." The Court of Appeals concisely identified the applicable case law and correctly applied the law to the facts of the case.

Davis' Petition understates the overall strength of the State's case. The State presented a strong historical conspiracy case without considering the testimony that the Court of Appeals determined to be hearsay and a violation of the Confrontation Clause. The combined testimony of Amy Brock, Nick Dendy, Brian Sekerchak, Joshua Byers, Michael Robinson, Tonya Smith, Warren Chastain, and David Norris clearly proved the existence of a trafficking conspiracy involving more than 100 grams of methamphetamine. As stated above, Brock and Sekerchak both identified Clyde Davis as the person they saw supply Dendy with methamphetamine that was then distributed to them. Dendy also testified that the methamphetamine that he sold to the other members of the conspiracy was directly supplied to him by Clyde Davis. When viewed together this evidence presents a very strong case proving guilt beyond a reasonable doubt even without the testimony of Agent Asbill.

If the trial court committed error by allowing certain portions of Agent Asbill's testimony, such error is harmless beyond a reasonable doubt and does not require reversal. A violation of the defendant's Sixth Amendment right to cross-examine witnesses is not reversible if the defendant was not unfairly prejudiced or if the error

was harmless beyond a reasonable doubt. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991). “The materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Gillian, 360 S.C. 433, 455, 602 S.E.2d 62, 73 (Ct. App. 2004). The improper denial of a defendant’s right to confront a witness is not *per se* reversible error, but is subject to a harmless-error analysis to determine if the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012). When determining if a Confrontation Clause violation is harmless error appellate courts may consider a number of factors, including:

“the importance of the witness’ 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.”

Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438. (emphasis added).

Davis exaggerates the importance of Agent Asbill’s testimony. The State’s case did not rely on the controlled purchase of methamphetamine from Clyde Davis to prove that he was guilty of trafficking by conspiracy. The State did not even mention details of the controlled purchase transaction itself during its closing argument. (R. pp. 411-427). In closing argument the State did remind the jury that during an attempt to purchase methamphetamine Agent Asbill personally saw a Chrysler 300 at Davis’ residence. That portion of testimony is not hearsay because it is not an out of court statement by anyone. Instead this portion of testimony addresses his own visual observation that provides a possible connection of a Chrysler 300, the same type of car described by Davis’ codefendants as the type of car driven to deliver methamphetamine, to Davis.

In fact, the State specifically argued to the jury that the case was about a conspiracy agreement, not individual distributions of methamphetamine. (R. p. 417, lines 16-21). Terrance Albert, the confidential informant used in the controlled purchase, was never alleged to be a conspirator with Davis. Therefore, the controlled purchase and the drugs obtained from it were not important to the State's case because the controlled purchase was not part of the conspiracy agreement. The crux of the State's case and Davis' conviction was not Asbill's testimony about the controlled purchase but the testimony from Davis' coconspirators and other methamphetamine users and dealers about the historical conduct of Davis along with his coconspirators and the historical, aggregate weight of methamphetamine associated with that conduct which amounted to more than 100 grams without including the amount associated with the controlled purchase by Terrance Albert. Thus, any error associated with Agent Asbill's testimony was harmless beyond a reasonable doubt because it was not important to the case and could not have attributed to the conviction by the jury.

To a certain extent, Agent Asbill's testimony about one transaction is generally cumulative. The testimony that the Court of Appeals found to be erroneously admitted generally states that on one occasion Clyde Davis sold methamphetamine. While no other witness testified about that specific transaction, the testimony was still cumulative in the sense that Amy Brock, Nick Dendy, Brian Sekerchak, and Joshua Byers all testified that Clyde Davis had on occasions sold methamphetamine. Therefore any error in the admission of the testimony of Agent Asbill was harmless beyond a reasonable doubt because the testimony was generally cumulative in nature.

As stated above, the State presented a very strong historical conspiracy case. Removing the hearsay testimony from Agent Asbill about one transaction with someone who was not involved in the conspiracy does not affect the overall strength of the prosecution's case. Therefore, any error in admitting Agent Asbill's testimony about the controlled purchase is harmless beyond a reasonable doubt.

Davis incorrectly compares this case to the facts in State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). In Gracely, this Court found that it is was not harmless error when the trial court prohibited defense counsel from cross examining cooperating codefendant witnesses about the mandatory minimum sentences they avoided by entering into plea agreements with the State. In that case each and every one of the non-law enforcement witnesses was tainted by the Confrontation Clause violation and there was no untainted evidence to corroborate their testimony.

Here, the Court of Appeals found error in only a part of Agent Asbill's testimony and correctly found that error to be harmless beyond a reasonable doubt. Unlike in Gracely, in this case there were no restrictions placed on the cross examination of the codefendant witnesses. This lack of restrictions produced both corroborative and cumulative evidence making any error in the admission of Agent Asbill's testimony harmless beyond a reasonable doubt.

Therefore, after analyzing and applying the Van Arsdall factors and Gracely, any error associated with Agent Asbill's testimony about the controlled purchase is harmless beyond a reasonable doubt because of the overall strength of the prosecution's case, the testimony in question was not important to the prosecution's case, the testimony was cumulative, and there were no other restraints on the extent of cross-examination.


CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 27, 2017

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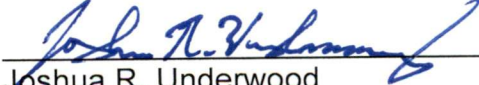
Opinion No. 5476 (S.C. Ct. App. filed March 29, 2017)

PROOF OF SERVICE

I, Joshua R. Underwood, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by delivering a copy of the same to:

Ryan L. Beasley, Esquire
650 E. Washington Street
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.
This 27th day of September, 2017.


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