

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

APPENDIX
VOLUME I

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
State Grand Jury

Letitia H. Verdin, Circuit Court Judge

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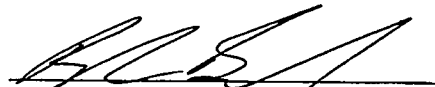
State of South Carolina Respondent

v.

Clyde Bowen Davis Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. LAW ENFORCEMENT'S TESTIMONY THAT A CONFIDENTIAL INFORMANT MADE A CONTROLLED PURCHASE FROM THE APPELLANT WAS INADMISSIBLE HEARSAY AND VIOLATED THE APPELLANT'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 APPELLANT'S DUE PROCESS RIGHTS.
- V. THE STATE GRAND JURY LACKED JURISDICTION OVER COUNT II OF THE SUPERSEDING INDICTMENT REQUIRING DISMISSAL.

STATEMENT OF THE CASE

This is a conspiracy to traffic methamphetamine case driven by a one-person photograph lineup and hearsay testimony. Operation Ice House was an investigation into three methamphetamine conspiracies: the North Carolina Conspiracy, the Atlanta Conspiracy, and the Greenville Conspiracy. All three of these Conspiracies were presented to the State Grand Jury in the same proceeding; however separate indictments were issued for each Conspiracy.

The appellant was indicted in the Greenville Conspiracy. Count I of the Superseding Indictment charged the appellant, Nicholous Dendy, Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers conspired to traffic more than 100 grams, but less than 200 grams, of methamphetamine. (R. p. 698).

Count II of the Superseding Indictment charged that on September 8, 2010, the appellant distributed, dispensed, or delivered methamphetamine to a Confidential

Informant. (R. p. 698). Discovery revealed that this Confidential Informant was Terrance Albert. Terrance Albert was not an alleged co-conspirator in the Greenville Conspiracy, nor was he involved in the North Carolina or Atlanta conspiracies. The Distribution of Count II was not a substantive offense of the Conspiracy charge of Count I.

The appellant filed a Motion to Dismiss Count II of the Indictment due to the State Grand Jury's lack of jurisdiction. (R. p. 9-16; R. p. 29-45). The State argued that the State Grand Jury had jurisdiction over Count II due to the following testimony of Agent Ayers:

On a totally separate case, we had a gentleman that stated he - - that he could deal with Nick Dendy. We sent him to Dendy. Dendy says I get my methamphetamine from [the appellant], who is my cousin. So, Dendy sends another one of our Informants directly to [the appellant]. We purchased methamphetamine from [the appellant].

(R. p. 24). In the State's response brief, it revealed for first time that this Informant was Terrance Albert. (R. p. 24). This is when the appellant learned that there were actually two alleged drug transactions between Terrance Albert and the appellant:

- 1) A transaction on September 8, 2010, which formed the basis of Count II ("We did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion") (R. p. 610, ln. 25; R. p. 611, ln. 1-2) ("Transaction Number 1"). Transaction Number 1 formed the basis of Count II.
- 2) Another transaction, date unknown ("On a totally separate case, we had a gentleman that stated he - - that he could deal with Nick Dendy. We sent him to Dendy. Dendy says I get my methamphetamine from [the appellant], who is my cousin. So, Dendy sends another one of our Informants directly to [the appellant]. We purchased methamphetamine from [the appellant]") (R. p. 513, ln. 1-6; *see also* R. p. 17-18) ("Transaction Number 2").¹

¹ The State revealed that this Confidential Informant was Terrance Albert for the first time in its Response to the Defendant's Motion to Dismiss the Indictment, which was filed on the same date as its Response to the Defendant's Supplemental Discovery Motion. The State's assertion in its Response to the Defendant's Supplemental Discovery Motion that it had "already identified the confidential informant referred to by Investigator Ayers as Terrance Albert" was misleading. (R. p. 52).

The appellant was not indicted for conduct alleged in Transaction Number 2.

Transaction Number 1, which formed the basis for Count II, was an alleged sale of methamphetamine from the appellant to Terrance Albert. It did not involve Dendy or any of the other co-conspirators.

The State asserted that the State Grand Jury had jurisdiction over Transaction Number 1 due to Transaction Number 2, yet the appellant did not have any discovery regarding Transaction Number 2. The appellant made numerous requests for the discovery but none was produced. (*See* R. p. 46-49, R. p. 54-63, R. p. 64-74).

In addition to moving to dismiss Count II due to a lack of jurisdiction, the appellant also moved to dismiss the Indictment due to the State's discovery violations. First, the State did not produce discovery relating to Terrance Albert's work as a confidential informant on other cases. The State claimed that it did not "think that it's proper for the State to have to find every single time that he's worked as a confidential informant if there were no problems with those cases." (R. p. 105, ln. 21-24). Second, the State did not produce any discovery regarding Transaction Number 2.

After the jury was picked, the State claimed that it did not have any discovery regarding Transaction Number 2 because it "was aborted before it ever got at that far." (R. p. 104, ln. 7-8). The State represented that "[i]t was a matter of Terrance Albert had arrangements with Nick Dendy to buy a certain amount of dope on a certain day. They had a wire." (R. p. 104, ln. 13-16). But, it did not preserve any evidence regarding Transaction Number 2.

Although the State failed to preserve evidence relating to Transaction Number 2, it continued to rely on Transaction Number 2 to support the jurisdiction of the State Grand

Jury over Count II. It argued that because Dendy was involved in Transaction Number 2, he was *potentially* involved in Transaction Number 1. It then argued that because of Dendy's *potential* involvement in Transaction Number 1 (which formed the basis of Count II), Count II was tied to the conspiracy of Count I because Dendy was a co-conspirator of Count I:

Also, Your Honor, just to clarify, as far as whether or not this undercover purchase constitutes a charge related to subject matter jurisdiction of the State Grand Jury, whether Nick Deny bought dope from [the appellant] and resold it, whether he was involved in arranging and brokering a deal with [the appellant], that shows evidence of a conspiracy arrangement.

This is just a substantive count of Distribution of Methamphetamine.² [The appellant] is charged with a Conspiracy to Traffic Methamphetamine in this area. Therefore, it's connected, this distribution is connected to that charge of conspiring to traffic methamphetamine, particularly the fact that another individual, Nick Dendy, is potentially involved at least at some small level in arranging the deal, Your Honor.

(R. p. 106, ln. 5-21). Despite the State's apparent failure to preserve discovery relating to Transaction Number 2, and then using Transaction Number 2 to support the validity of the Indictment, the Court denied the appellant's motions to dismiss. (R. p. 120, ln. 3-14).

Count I was severed from Count II, and on September 17, 2013, the trial began on Count I. At trial, the State presented evidence of various controlled purchases between the co-conspirators. However, none of these controlled purchases involved the appellant.

² The appellant consistently disputed that Count II was a substantive count of the conspiracy alleged in Count I. Terrance Albert's alleged controlled purchase of methamphetamine from the appellant provided the basis for Count II. However, Terrance Albert was not a co-conspirator. "[O]ne cannot enter into a conspiracy with another who only feigns acquiescence in a crime; such as an informer or undercover agent." State v. Holmes, 277 S.C. 232, 233, 285 S.E.2d 353, 354 (1981). Count II therefore was not a substantive crime of Count I. See U.S. v. Jimenez-Recio, 537 U.S. 270, 274-75, 123 S.Ct. 819, 822, 154 L.Ed.2d 744 (2003).

The State then called Agent Asbill to testify about a controlled purchase between Terrance Albert and the appellant (i.e. Transaction Number 1). Agent Albert did not witness this controlled purchase and Terrance Albert never testified. Over the repeated objections of the appellant, law enforcement was permitted to testify that, in fact, this controlled purchase occurred:

Q: Agent Asbill, this investigation went on for a long period of time. You may have mentioned this already. Out of all the controlled purchases that were made, were there controlled purchases made against [the appellant] or attempted against [the appellant]?

A: Yes.

Q: Explain that to the jury please.

[Appellant's Counsel]: Objection, Your Honor. I don't think there's been any - - there's been no testimony for him - - everything else will be hearsay.

Court: All right. Your objection is noted. . .

...

Q: Agent Asbill, without going into what any particular person said, after [Terrance Albert] was wired, what took place?

A: [Terrance Albert] went to Dobb Street, a residence on Dobb Street which was [the appellant's] residence. [Terrance Albert] spent a period of time there. [Terrance Albert] received a phone call.

[Appellant's counsel]: Objection, Your Honor. Again, I mean, he's testifying to what this [Terrance Albert] heard and was doing.

[Assistant AG]: He just said [Terrance Albert] received a phone call. He didn't say what anyone said, Your Honor.

[Appellant's counsel]: He was saying that [Terrance Albert] was going here and doing this and he got a phone call, [Terrance Albert] got a phone call.

The Court: I'm going - - I'm going to allow him to testify to that. . . .

Q: Agent Asbill, where were you located during the controlled purchase?

A: I was parked at the school that was located nearby.

(R. p. 385, ln. 10-25; R. p. 386, ln. 1-5; R. p. 388, ln. 11-25; R. p. 389, ln. 1-2, ln. 7-10).

Agent Asbill did not witness Terrance Albert go to Dobb Street, he did not witness Terrance Albert go into the appellant's residence, he did not witness Terrance Albert spending a period of time at the appellant's residence, and he did not witness Terrance Albert receiving a phone call. Nevertheless, the Court permitted this testimony.

Out of the presence of the jury, Agent Asbill testified that although listened to an audio recording of the alleged controlled purchase, he could not identify Terrance Albert or the appellant from that audio recording. (R. p. 391, ln. 6-20). Despite not being able to identify the appellant or Terrance Albert on the audio recording, and not observing the appellant or Terrance Albert during the alleged controlled purchase, Agent Asbill was permitted to testify that Terrance Albert made a controlled purchase of methamphetamine from the appellant:

Q: We were discussing a controlled purchase against [the appellant]. What were the results of the controlled purchase?

A: [Terrance Albert] returned to us with a purchase of methamphetamine.

Q: And how much methamphetamine was it?

A: Approximately 3.5 grams.

Q: And was that paid for with documented government funds?

A: That is correct.

Q: Is that the only controlled purchase attempted against [the appellant]?

A: Yes, sir. The only one I'm aware of.

(R. p. 393, ln. 11-23).

This controlled purchase was crucial to the State's case. It was the *only* alleged controlled purchase law enforcement made that involved the appellant. Over the repeated objections of the appellant, evidence that this controlled purchase occurred was permitted even though (1) Terrance Albert did not testify; (2) Agent Asbill did not witness the controlled purchase; (3) Agent Asbill could not identify the appellant or Terrance Albert from the tape recording of the controlled purchase; (4) the State refused to produce discovery of previous controlled purchases made by Terrance Albert; and (5) the State failed to preserve the exculpatory evidence of Transaction Number 2.

Other than Agent Asbill's testimony of Terrance Albert's controlled purchase with the appellant, the only evidence that implicated the appellant was that of cooperating witnesses Joshua Byers, Amy Brock, and Nick Dendy, with whom the State made deals.

Brock never met the appellant. She testified before the Grand Jury that she purchased methamphetamine from Dendy, and Dendy purchased methamphetamine from his cousin. (R. p. 572, ln. 9-15). She testified that she identified the appellant as Dendy's cousin from a "photo lineup":

Q: Okay. Did you ever meet his cousin?

A: No, sir.

Q: Do you know what he looked - - did you ever get a good look at him?

A: Yeah, they gave me a photo lineup and I positively identified him in that.

Q: Okay. And that's the cousin, not Nick Dendy?

A: Yeah, that's the cousin, not Nick.

(R. p. 572, ln. 16-25).

Similarly, Investigator Ayers testified before the Grand Jury that Brock "picked" the appellant out of a "photo lineup":

When we approached Amy Brock, she states that Dendy shows up to her house and then calls his cousin to show up. His cousin shows up in a car, Dendy walks out to his cousin, gives the money, he gets the methamphetamine. We showed Brock a photo lineup and she picked [the appellant] out as being the one who delivers the methamphetamine to Dendy.

(R. p. 513, ln. 6-12). The appellant is not Dendy's cousin. (R. p. 359, ln. 12-14).

This "photo lineup" was not produced in response to the appellant's discovery motions. (See R. p. 76). The appellant eventually learned that this "photo lineup" was actually a single photograph of the appellant. (R. p. 709).

The appellant brought a motion to suppress this identification. At the appellant's Neil v. Biggers hearing, 409 U.S. 188, 198, 93 S.Ct. 375, 4 L.Ed.2d 401 (1972), Brock testified that she was getting methamphetamine from Nick Dendy. (R. p. 142, ln. 9-16). She would call Dendy, and he would come to her house 30 minutes to an hour later. (R. p. 143, ln. 16-19). He would arrive at her house and pull into the driveway. (R. p. 144, ln. 7-9). Sometimes Dendy would then wait outside, and sometimes he would come into her house. (R. p. 144, ln. 12-18). Dendy's cousin would then come over, but his cousin never went into Brock's house. (R. p. 145, ln. 23-25; R. p. 146, ln. 1). Dendy would come into her house, she would give Dendy the money, and he would run outside. (R. p. 146, ln. 6-10). Brock did not see Dendy's cousin during this time. (R. p. 146, 11-17). Sometimes,

Brock would go outside to hand Dendy the money. (R. p. 146, ln. 13-17). However, 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 met Dendy’s cousin. (R. p. 148, ln. 19, 20). She did not know the name of Dendy’s cousin. (R. p. 153, ln. 17-21). She was high on methamphetamine during these purchases. (R. p. 330, ln. 1-4).

In October 2010, law enforcement approached Brock and asked her where she got methamphetamine. (R. p. 151, ln. 5-7). She explained the above transactions involving Dendy and his cousin. (R. p. 151, ln. 11-13). She never gave a description of Dendy’s cousin to law enforcement. (R. p. 154, ln. 5-8).

A month or two later, Agent Ayers approached Brock with the single photo of the appellant. (R. p. 154, ln. 9-16). From the single photo of the appellant, Brock identified the appellant as Dendy’s cousin. (R. p. 153, ln. 15-18). Agent Ayers testified that he did not use a six-person photo lineup because he already had information that the appellant was supplying Dendy. (R. p. 138, ln. 5-18). When appellant’s counsel asked Agent Ayers how he had that information, he testified that he did not know and that he would have to look back at his notes. (R. p. 138, ln. 5-8).

The court requested that Agent Ayers look back through some old interviews to determine how he received the information the appellant was supplying Dendy. (R. p. 140, ln. 5-10). Agent Ayers spent some time doing this, however he did not find the source of this information. (R. p. 158, ln. 4-9). He stated that there was “another notebook at my office” that he was “going to try to get a hold of.” (R. p. 158, ln. 8-9).

The next day, Agent Ayers told the court that to the best of his recollection, "Terrance Albert was the one that provided [the appellant's] name." (R. p. 163, ln. 13-14). This discovery was never produced to the appellant.

The court denied the appellant's Neil v. Biggers motion. (R. p. 165, ln. 10-11). The appellant requested that the court reconsider his previous motions and that nothing could be brought up about Terrance Albert unless Terrance Albert was produced as a witness. (R. p. 165, ln. 17-21). The court again denied the appellant's motions. (R. p. 166, ln. 10-11). The appellant again explained to the court the importance of the discovery surrounding Terrance Albert:

Your Honor, I think it's a material piece of evidence. It's exculpatory that fact that Terrance [Albert] - - the only reason they even went to Amy Brock is because of [Terrance Albert]. Its starts from the beginning. I don't see how we can move forward unless I have this witness here. He's given a statement. Law enforcement is basing everything on this witness. He's got to be present. I think it's very prejudicial to my client for them to rely on this and then not produce it. It's very prejudicial.

(R. p. 166, ln. 17-25; R. p. 167, ln. 1-2). The court again denied the appellant's motions. (R. p. 167, ln. 3-4).

At trial, Brock testified she would call Dendy to get methamphetamine. (R. p. 309, ln. 17-20). Dendy would drive over to her house. (R. p. 309, ln. 21-24). Sometimes Dendy would go into her house and other times she would run out to Dendy's car. (R. p. 309, ln. 24-25; R. p. 310, ln. 1-2). Brock would give money to Dendy, and Dendy would give money to another person who had pulled up. (R. p. 309, ln. 11-15). Dendy never told Brock this other person's name. (R. p. 310, ln. 21-22). However, Dendy told Brock that the other person was his cousin. (R. p. 311, ln. 1-4). Brock testified that she identified Dendy's cousin through the single-photo lineup shown to her by Ayers. (R. p. 318, ln. 15-

24; R. p. 319 ln. 1-2). She then made the in-court identification of the appellant as Dendy's cousin. (R. p. 327, ln. 13-19; R. p. 328, ln. 2-12).

Dendy's cousin is Bokie, not the appellant. (R. p. 359, ln. 12-14). Prior to trial, Dendy told law enforcement that he got methamphetamine from his cousin Bokie. (*See* R. p. 365, ln. 1-4). At trial Dendy changed his story and denied getting methamphetamine from Bokie. (R. p. 365, ln. 4-8). He testified that the transactions with Brock and his cousin were actually transactions with Brock and the appellant. (R. p. 354, 6-25; R. p. 355, ln. 1).

The jury found the appellant guilty of Conspiracy to Traffic Methamphetamine, more than 100 grams but less than 200 grams. (R. p. 454, ln. 17-24). The appellant was sentenced to 25 years imprisonment and a \$50,000 fine. (R. p. 459, ln. 15-17). The appellant filed a post-trial motion pursuant to Rules 4 and 29 of the South Carolina Rules of Criminal Procedure. By Order dated October 4, 2013, the trial court denied the appellant's post-trial motion. (R. p. 2-7). The appellant timely filed his Notice of Appeal. (R. p. 86).

ARGUMENT

I. LAW ENFORCEMENT'S TESTIMONY THAT A CONFIDENTIAL INFORMANT MADE A CONTROLLED PURCHASE FROM THE APPELLANT WAS INADMISSIBLE HEARSAY AND VIOLATED THE APPELLANT'S CONFRONTATION RIGHTS.

The trial court permitted Agent Asbill to testify that Terrance Albert made a controlled purchase of methamphetamine from the appellant. Agent Asbill did not witness this controlled purchase and he could not identify the appellant or Terrance Albert from the voice recording of the alleged transaction. Terrance Albert did not testify. Agent Asbill's testimony that Terrance Albert purchased methamphetamine from the appellant,

without being a witness to this purchase or having Terrance Albert testify to this purchase, was inadmissible hearsay and violated the appellant's confrontation rights.

Agent Asbill did not witness the controlled purchase, yet he testified that Terrance Albert made the controlled purchase from the appellant:

Q: Agent Asbill, this investigation went on for a long period of time. You may have mentioned this already. Out of all the controlled purchases that were made, were there controlled purchases made against [the appellant] or attempted against [the appellant]?

A: Yes.

Q: Explain that to the jury please.

[Appellant's Counsel]: Objection, Your Honor. I don't think there's been any - - there's been no testimony for him - - everything else will be hearsay.

...
Q: Agent Asbill, without going into what any particular person said, after [Terrance Albert] was wired, what took place?

(R. p. 385, ln. 10-20, R. p. 388, ln. 11-13). Agent Asbill did not witness Terrance Albert go to the appellant's house to make the controlled purchase. Nevertheless, he was permitted to testify that Terrance Albert went to the appellant's residence on Dobb Street to make the purchase. Although he was not there, Agent Asbill was further permitted to testify that Terrance Albert received a phone call while at the appellant's residence:

A: [Terrance Albert] went to Dobb Street, a residence on Dobb Street which was [the appellant's] residence. [Terrance Albert] spent a period of time there. [Terrance Albert] received a phone call.

[Appellant's counsel]: Objection, Your Honor. Again, I mean, he's testifying to what [Terrance Albert] heard and was doing.

[Assistant AG]: He just said [Terrance Albert] received a phone call. He didn't say what anyone said, Your Honor.

[Appellant's counsel]: He was saying that [Terrance Albert] was going here and doing this and he got a phone call, [Terrance Albert] got a phone call.

The Court: I'm going - - I'm going to allow him to testify to that. . . .

Q: Agent Asbill, where were you located during the controlled purchase?

A: I was parked at the school that was located nearby.

(R. p. 388, ln. 14-25; R. p. 389, ln. 1-2, ln. 7-10).

Agent Asbill apparently listened to an audio recording from an alleged controlled purchase, however he could not identify the voices in that audio recording as either Terrance Albert or the appellant. (R. p. 391, ln. 13-16). Nevertheless, over the repeated objections of the appellant, his testimony that a controlled purchase occurred between Terrance Albert and the appellant continued:

Q: We were discussing a controlled purchase against [the appellant]. What were the results of the controlled purchase?

A: [Terrance Albert] returned to us with a purchase of methamphetamine.

Q: And how much methamphetamine was it?

A: Approximately 3.5 grams.

Q: And was that paid for with documented government funds?

A: That is correct.

Q: Is that the only controlled purchase attempted against [the appellant]?

A: Yes, sir. The only one I'm aware of.

(R. p. 393, ln. 11-23).

This testimony was inadmissible hearsay. Again, Agent Asbill did not witness the controlled purchase. He did not witness Terrance Albert go to Dobbs Street, he did not witness Terrance Albert go to the appellant's house, he did not witness Terrance Albert spending time at the appellant's house, he did not witness Terrance Albert receiving a phone call, and he did not witness Terrance Albert purchase methamphetamine from the appellant. He apparently listened to an audio recording, but could not identify Terrance Albert or the appellant from that audio recording. Yet, he was permitted to testify over the repeated objections of the appellant.

Terrance Albert's verbal and nonverbal conduct were "statements" under Rule 801. (See Rule 801(a), SCRE, defining statement to include both "an oral or written assertion" and "nonverbal conduct of a person, if it is intended by the person as an assertion"). They were offered by Agent Ayers in evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. The State never asserted that the statements were offered for some other matter. The State never asserted that this hearsay was admissible under the Rules of Evidence, court rule, or by statute. State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) ("Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute"). In fact, the testimony of Agent Asbill was inadmissible hearsay that was improperly admitted.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." Jennings, 394 S.C. at 477, 716 S.E.2d at 93 (quoting State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Jennings, 394 S.C. at 477-78, 716

S.E.2d at 93 (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Here, the trial court ruled that Agent Asbill's testimony was not hearsay because Agent Asbill "testified only to what he observed while monitoring the buy." (R. p. 5). This conclusion is without evidentiary support.

Terrance Albert made the statements that he went to Dobbs Street, he went to the appellant's house, he spent time at the appellant's house, he received a phone call, he purchased methamphetamine from the appellant, and he paid for the methamphetamine in documented government funds. These were not Agent Asbill's statements. Agent Asbill did not witness any of these events. At the time these statements were made, Agent Asbill was parked at a school. Despite the trial court's conclusion, Agent Asbill did not testify only to what he observed while monitoring the buy. The very testimony that there was a buy between Terrance Albert and the appellant was hearsay. The trial court abused its discretion in admitting this hearsay evidence.

Further, admission of this evidence violated the appellant's confrontation rights. "The Sixth Amendment guarantees a criminal defendant the right 'to be confronted with the witnesses against him.'" State v. Dinkins, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (quoting U.S. Const. amend. VI). The right to confront witnesses is "bedrock procedural guarantee that applies to both federal and state prosecutions." Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004) (citing Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)); *see also* U.S. Const., Am. VI; S.C. Const., Art. 1, Sect. 14. "The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be

challenged at trial.” State v. Haygood, 409 S.C. 420, 432, 762 S.E.2d 69, 75 (Ct. App. 2014) (quoting State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). “The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness’s demeanor and assess his credibility.” Dinkins, 339 S.C. at 601, 529 S.E.2d at 559 (citing State v. Cooper, 291 S.C. 351, 354, 353 S.E.2d 451, 453 (1987)). “[E]ven if a statement is admissible hearsay, the Confrontation Clause may operate to render the otherwise admissible hearsay evidence inadmissible if it is testimonial in nature.” Haygood, 409 S.C. at 434, 762 S.E.2d at 76 (citing Crawford, 541 U.S. at 68).

Terrance Albert’s statements here were testimonial in nature. “Included within the ‘core class of testimonial statements’ by the court in Crawford are ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” Haygood, 409 S.C. at 434, 762 S.E.2d at 76 (quoting Crawford, 541 U.S. at 51-52). An objective witness here would reasonably believe that Terrance Albert’s statements would be available for use at a later trial. In fact, Terrance Albert was apparently working with law enforcement to obtain evidence that could be later used against the appellant at trial. The very purpose of Terrance Albert’s statements was to give law enforcement evidence that it could use against the appellant at trial. Admission of these statements violated the appellant’s confrontation rights requiring reversal. *See* Haygood, 409 S.C. at 453-54, 762 S.E.2d at 87.

The trial court erroneously held that admission of these statements did not violate the appellant’s confrontation rights because the appellant had the opportunity to cross examine Agent Asbill. (R. p. 6). “The Confrontation Clause provides ‘in all criminal

prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.’” State v. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (quoting U.S. Const. amend. VI). The witness against the appellant was Terrance Albert, not Agent Asbill. Terrance Albert made the statements, not Agent Asbill. Agent Asbill did not witness any of these statements, nor could he identify the voices in the audio recording as Terrance Albert and the appellant. The appellant was completely denied the opportunity to cross exam Terrance Albert.

The admission of this evidence was not harmless. *See* Jennings, , 394 S.C. at 478, 716 S.E.2d at 93 (“[i]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice . . . such error is deemed harmless when it could not have reasonably affected the result of the trial”); Gracely, 399 S.C. at 375, 731 S.E.2d at 886 (“[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis”). It caused prejudice and could have reasonably affected the result of the trial.

In fact, this hearsay evidence was crucial to the State’s case. Throughout the trial, the State presented evidence of various controlled purchases. However, this was the only evidence of a controlled purchase that involved the appellant. The evidence was not cumulative. *See* Gracely, 399 S.C. at 375, 731 S.E.2d at 886; Jennings, 394 S.C. at 478, 716 S.E.2d at 93.

There was no corroborating evidence to Agent Asbill’s testimony. *See* Gracely, 399 S.C. at 375, 731 S.E.2d at 886. 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 buy money, and there were no drugs introduced from the

controlled purchase. Further, there were no witness to the controlled purchase to corroborate Agent Asbill's testimony.

Further, the appellant was completely prevented from cross examining Terrance Albert or even another witness to the controlled purchase. *See Gracely*, 399 S.C. at 375, 731 S.E.2d at 886. The State never called Terrance Albert to testify. It never called a witness to the controlled purchase to testify. The appellant had no opportunity for meaningful cross examination.

Other than Agent Asbill's testimony of Terrance Albert's controlled purchase, the only evidence that implicated the appellant in the conspiracy was that of Joshua Byers, Amy Brock, and Nick Dendy.

Brock never met the appellant. Brock testified that she purchased methamphetamine from Dendy, who told her he got the methamphetamine from his cousin. (R. p. 310, ln. 23-25; R. p. 311, ln. 1-4). Brock identified the appellant as Dendy's cousin from a single photo "lineup" of the appellant. (R. p. 318, ln. 2-7). In reality, Bokie is Dendy's cousin, not the appellant. (R. p. 359, ln. 12-14).

Prior to trial, Dendy told law enforcement that he got methamphetamine from his cousin Bokie. (R. p. 365, ln. 1-4). At trial Dendy changed his story and denied getting methamphetamine from Bokie. (R. p. 365, ln. 4-8). He testified that the transactions with Brock and his cousin were actually transactions with Brock and the appellant. (R. p. 354, 6-25; R. p. 355, ln. 1).

Byers testified that at a car wash, the appellant handed about a gram of methamphetamine to Charles Brown, and then Charles Brown handed the methamphetamine to Byers. (R. p. 239, ln. 14-15; R. p. 240, ln. 16-18). Charles Brown

was in the driver's seat, the appellant was in the front passenger's seat, and Byers was sitting behind Charles Brown. (R. p. 240, ln. 3-9). This was the only time that Byers met the appellant and the only time Byers had any dealings with the appellant. (R. p. 238, ln. 20-23).

Similar to Gracely, all three of these individuals were cooperating witnesses with whom the State made 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. (R. p. 231, ln. 11-22). Brock entered into a plea deal with the State, pled guilty to a lesser charge, and received a recommendation of five to eight years. (R. p. 321, ln. 7-22). Dendy entered into a plea deal with the State, pled guilty to a lesser charge, and received a recommendation of 15 – 18 years. (R. p. 340, ln. 21-25; R. p. 341, 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 as in Gracely, the State here 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.

Agent Asbill's testimony that Terrance Albert went to Dobbs Street, he went to the appellant's house, he spent time at the appellant's house, he received a phone call, he purchased methamphetamine from the appellant, and he paid for the methamphetamine using documented government funds was not harmless. Given the State's heavy reliance on circumstantial evidence, and the abysmal credibility of the State's witnesses, the error caused prejudice and could have reasonably affected the results of the trial. See Gracely,

399 S.C. at 375, 731 S.E.2d at 886; Jennings, 394 S.C. at 478, 716 S.E.2d at 93. This case must be reversed and remanded for a new trial.

II. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE AN UNDULY SUGGESTIVE PHOTO LINEUP AND SUBSEQUENT IN-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 lineup here 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”³).

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 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.

³ 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).

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 'Sheriff'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). 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. This case should therefore be reversed and remanded for a new trial.

III. THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE SUPERSEDING INDICTMENT DUE TO THE STATE'S ABUSE OF THE GRAND JURY PROCESS.

Ordinarily, the Court does not inquire into the nature of sufficiency of the evidence before a Grand Jury. State v. Thrift, 312 S.C. 282, 302, 440 S.E.2d 341, 352 (1994). However, an exception to this rule exists where the defendant makes a colorable claim of misconduct in the abuse of Grand Jury proceedings. Thrift, 312 S.C. at 302-03.

"A grand jury was originally used to protect the citizenry from abuses by the crown. The evolution in the United States was to serve the same purpose. The prosecutor should present the evidence and instruct on the law. The grand jury is more than a mere instrument of the prosecution." Thrift, 312 S.C. at 304, fn 15. The South Carolina Supreme Court "shares with the nation's founders a concern that on occasions prosecuting officers

will expand too far and abuse the powers granted to them. A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." State v. Capps, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981).

At trial, as detailed in Section I, *supra*, Agent Asbill testified that Terrance Albert made a controlled purchase of methamphetamine from the appellant (i.e. Transaction Number 1). However, before the State Grand Jury, Agent Ayers testified regarding a second transaction, Transaction Number 2:

On a totally separate case, we had a gentleman that stated he - - that he could deal with Nick Dendy. We sent him to Dendy. Dendy says I get my methamphetamine from [the appellant], who is my cousin. So, Dendy sends another one of our Informants directly to [the appellant]. We purchased methamphetamine from [the appellant].

(R. p. 513, ln. 1-6). As outlined above, after many motions, the State revealed to the appellant that this Informant was Terrance Albert.

The only logical conclusion from Agent Ayers' testimony was that Terrance Albert said he could deal with Nick Dendy. Law enforcement sent Terrance Albert to Nick Dendy, who in turn said go to the appellant. Based on Nick Dendy's instructions, Terrance Albert went to the appellant and made a controlled purchase of methamphetamine.

However, this is not what happened. At trial, the State revealed that there was no such purchase or attempted purchase of methamphetamine:

First, Your Honor, the reason that the State has not provided any documentation about control purchase on Nick Dendy involving Terrance Albert is because there was no control purchase attempt. That was aborted before it ever got that far. There was conversation of Terrance Albert - - just my understanding from law enforcement that Terrance Albert was involved in a conversation with Nick Dendy and was told to make a purchase with [the appellant]. There was no actual attempt to make a control purchase. It was a matter of Terrance Albert had arrangements with

Nick Dendy to buy a certain amount of dope on a certain day. They had a wire. None of that ever happened, Your Honor. That is why there was no report that because it didn't get that far.

(R. p. 104, ln. 3-18). The State did not attempt to correct this false Grand Jury testimony.

Moreover, the testimony before the Grand Jury regarding the "photo lineup" was false. Agent Ayers testified that he Brock "picked" the appellant out of a "photo lineup":

When we approached Amy Brock, she states that Dendy shows up to her house and then calls his cousin to show up. His cousin shows up in a car, Dendy walks out to his cousin, gives the money, he gets the methamphetamine. We showed Brock a photo lineup and she picked [the appellant] out as being the one who delivers the methamphetamine to Dendy.

(R. p. 513, ln. 6-12).

Similarly, Brock testified before the Grand Jury that she identified the appellant in a "photo lineup:"

Q: Okay. Did you ever meet his cousin?

A: No, sir.

Q: Do you know what he looked - - did you ever get a good look at him?

A: Yeah, they gave me a photo lineup and I positively identified him in that.

Q: Okay. And that's the cousin, not Nick Dendy?

A: Yeah, that's the cousin, not Nick.

(R. p. 572, ln. 16-25).

"Picking" somebody out connotes choosing between more than one person. *See* Cambridge Dictionaries Online, available at <http://dictionary.cambridge.org/us/dictionary/american-english/pick>, defining "pick" as "to take some things and leave others"; The Free Dictionary, available at www.thefreedictionary.com, defining "pick" as

“to select from a group”; Oxford Dictionaries, available at <http://www.oxforddictionaries.com/definition/english/pick>, defining “pick” as “choose (someone or something) from a number of alternatives.”

Similarly, a “photo lineup” connotes more than one photo being shown. *See* Black’s Law Dictionary, 6 ed., defining “lineup” as “[a] police identification procedure by which the suspect in a crime is exhibited, along with others with similar physical characteristics, before the victim or witness to determine if he can be identified as having committed the offense.” Agent Ayers’ testimony and Brock’s testimony that Brock “picked” the appellant out of a “photo lineup” was false.

Not only did the State, via Agent Ayers, present false evidence. The State, via the Assistant Attorney General, also failed to correct the false evidence. “As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), [the United States Supreme Court] made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.” Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). “The failure to correct false evidence is as reprehensible as its presentation.” Riddle v. Ozmint, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006); *see also* Washington v. State, 324 S.C. 232, 235, 478 S.E.2d 833, 834-35 (1996) (“The United States Supreme Court . . . stated that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice; the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears”). The Rules of Professional Conduct also require a lawyer to correct such false evidence. Rule 3.3(a)(3) (“A lawyer shall not knowingly . . . offer evidence that the

lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal").

In addition to presenting false evidence regarding Transaction Number 2 and the "photo lineup," the State failed to present evidence which would amount to probable cause with respect to Count II. To establish probable cause, the State must present evidence showing the confidential informant's reliability or veracity. State v. Adolphe, 314 S.C. 89, 93, 441 S.E.2d 832, 834 (Ct. App. 1994); *see also* State v. Johnson, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990) (an affidavit was defective because "it [did] not set forth any information as to the reliability of the informant nor was the information corroborated"). The State presented no evidence to the Grand Jury showing Terrance Albert's reliability or veracity. For example, it did not present evidence of how and when Terrance Albert was searched for money and drugs, whether an officer watched Terrance Albert make the control buy, whether Terrance Albert immediately turned drugs over to police, when Terrance Albert turned drugs over to police, and whether Terrance Albert was searched after the alleged control buy.

Where there is a "colorable claim of prosecutorial misconduct in the grand jury proceeding, the next inquiry is whether the defendant was sufficiently prejudiced by the admission of the evidence so as to warrant dismissal of the indictment." Thrift, 312 S.C. at 303. The appellant was sufficiently prejudiced by the admission of the evidence to warrant dismissal of the Indictment. The appellant was indicted on Count II without probable cause. The trial court denied the appellant's motions to dismiss Count II. Further, without the false evidence regarding the "photo lineup," there was no evidence presented

to identify the appellant as Dendy's cousin. The State used the Grand Jury as "a mere instrument of the prosecution," Thrift, 312 S.C. at 304, fn. 15, 440 S.E.2d 341, and therefore the superseding indictment should have been dismissed.

IV. THE STATE FAILED TO PRESERVE EVIDENCE IN VIOLATION OF THE APPELLANT'S DUE PROCESS RIGHTS.

"Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (2004) (citing California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2548, 81 L.Ed.2d 413 (1984)). "This standard requires criminal defendants be afforded a meaningful opportunity to present a complete defense." Hutton, 358 S.C. at 631, 595 S.E.2d at 881. "To establish a due process violation where the State fails to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, **or** (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." Hutton, 358 S.C. at 631, 595 S.E.2d at 881 (citing State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001)) (bold added). Although the appellant need only show that either (1) or (2) above, both (1) and (2) are met here.

On December 12, 2011, the appellant served Rule 5 and Brady Motions on the Attorney General's Office requesting discovery. (R. p. 46). The appellant knew that Terrance Albert worked as a confidential informant in Transaction Number 1 and, at the time, Terrance Albert was incarcerated. He was not named in the Indictment or Superseding Indictment at issue here, so appellant's counsel knew that he was charged with some sort of crime in some other case. The appellant had no discovery regarding Terrance

Albert's charges, his cooperation, or his cooperation with the prosecuting agency. The appellant requested this specific discovery regarding Terrance Albert in a Supplemental Discovery Motion:

Count II charges that on September 8, 2010, the defendant distributed, dispensed, or delivered methamphetamine to an undercover informant. (Superseding Indictment, Count II). It is the State's position that Terrance Albert is this undercover informant. However, Terrance Albert is not a member of the alleged conspiracy. While the alleged undercover buys regarding conspiracy of Count I were all made between alleged co-conspirators, there is no evidence that Albert ever purchased methamphetamine from, or sold methamphetamine, to any of the alleged co-conspirators. Further, there is no evidence that Count II is a substantive offense of Count I. As stated on-the-record on September 4, 2012, the defendant requests all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions regarding Terrance Albert, including, but not limited to, all such discovery relating to Terrance Albert's current incarceration.

(R. p. 47-48). In response to the appellant's request, the State stated that it did not have the duty to disclose the requested information because Terrance Albert was not being prosecuted via the Attorney General's Office and that the Attorney General's Office did not enter into the plea or proffer agreements with Terrance Albert. (R. p. 52).

At the time the appellant filed his Supplemental Discovery Motion, he did not know that Terrance Albert was also the "Informant" referenced in Agent Ayers' Grand Jury Testimony regarding Transaction Number 2. The appellant therefore requested the information regarding this "Informant," and all related law enforcement records, reports, notes, and statements relating to Transaction Number 2. (R. p. 48). In response, the State stated the following:

The State has already identified the confidential informant referred to by Investigator Ayers as Terrance Albert. The State has already turned over Mr. Albert's criminal history and again contends that the State has fulfilled its duty to disclose. If the Defendant desires any additional information in

this regard, the State respectfully requests that a hearing be scheduled and that the Defendant be required to establish why he is entitled to and why the State should provide such information.

(R. p. 52).⁴

By the time the case was called for trial, the State had not produced the requested discovery. During pre-trial motions, the State asserted that it did not have to produce discovery relating to Terrance Albert's work as a confidential informant on other cases because it did not "think that it's proper for the State to have to find every single time that he's worked as a confidential informant if there were no problems with those cases." (R. p. 105, ln. 21-24).

During pre-trial motion hearings, the State also told the trial court that it did not have discovery regarding Transaction Number 2 because "it didn't get that far":

First, Your Honor, the reason that the State has not provided any documentation about control purchase on Nick Dendy involving Terrance Albert is because there was no control purchase attempt. That was aborted before it ever got [] that far. There was conversation of Terrance Albert - - just my understanding from law enforcement that Terrance Albert was involved in a conversation with Nick Dendy and was told to make a purchase with [the appellant]. There was no actual attempt to make a control purchase. It was a matter of Terrance Albert had arrangements with Nick Dendy to buy a certain amount of dope on a certain day. They had a wire. None of that ever happened, Your Honor. That is why there was no report of that because it didn't get that far.

(R. p. 104, ln. 3-18).

⁴ The State revealed that this Confidential Informant was Terrance Albert for the first time in its Response to the Defendant's Motion to Dismiss the Indictment, which was filed the same day as its Response to the Defendant's Supplemental Discovery Motion. The State's assertion that it "already identified" the confidential informant was misleading.

Although the State failed to preserve discovery relating to Transaction Number 2, it continued to rely on Transaction Number 2 to support the alleged validity of the Superseding Indictment:

Also, Your Honor, just to clarify, as far as whether or not this undercover purchase constitutes a charge related to subject matter jurisdiction of the State Grand Jury, whether Nick Dendy bought dope from [the appellant] and resold it, whether he was involved in arranging and brokering a deal with [the appellant], that shows evidence of a conspiracy arrangement.

This is just a substantive count of Distribution of Methamphetamine. [The appellant] is charged with a Conspiracy to Traffic Methamphetamine in this area. Therefore, it's connected, this distribution is connected to that charge of conspiring to traffic methamphetamine, particularly the fact that another individual, Nick Dendy, is potentially involved at least at some small level in arranging the deal, Your Honor.

(R. p. 106, ln. 5-21).

Moreover, during pre-trial motions, the appellant and the trial court asked Agent Ayers how he got the appellant's photo for the single photo "photo lineup." (R. p. 138, ln. 5-19; R. p. 140, ln. 5-9). Again, Brock only told investigators that Dendy's supplier was Dendy's cousin. She never provided law enforcement with a physical description of the supplier.

Agent Ayers spent some time looking back through some old interviews, however he did not find the source for the photo. (R. p. 158, ln. 4-9). He stated that there was "another notebook at my office" that he was "going to try to get a hold to." (R. p. 158, ln. 8-9). The next day, Agent Ayers told the trial court that to the best of his recollection, Terrance Albert provided law enforcement with the appellant's name. (R. p. 163, ln. 13-14). Using the appellant's name (as provided by Terrance Albert), Agent Ayers got the appellant's driver's license photo, which he then used for the "photo lineup." (R. p. 163, ln. 13-18).

The State never preserved discovery regarding Terrance Albert's identification of the appellant. For example, the State preserved no evidence indicating why Terrance Albert thought the appellant was Dendy's cousin, how Terrance Albert made the identification of the appellant, when he made the identification, where he made the identification, under what circumstances he made the identification, and to whom he made the identification. Nevertheless, it was permitted to introduce evidence of the single photo "lineup" and Brock's subsequent in-court identification.

The State was also permitted to present the hearsay testimony of Agent Asbill regarding the controlled purchase between Terrance Albert and the appellant despite (1) the State's failure to produce discovery relating to Terrance Albert's incarceration and work as a confidential informant on other cases; (2) the State's failure to preserve the discovery regarding Terrance Albert's identification of the appellant; and (3) the State's failure to preserve evidence relating to Transaction Number 2.

The State's bad actions throughout this case demonstrate that its failure to preserve evidence was done in bad faith. The Assistant Attorney General had the duty to use "every legitimate means" to bring about a just result. Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935); *see also* State v. Liberte, 336 S.C. 648, 657, 521 S.E.2d 744, 749 (Ct. App. 1999). The United States Supreme Court has repeatedly emphasized the prosecutor's responsibility for fair play, and the South Carolina Rules of Professional Conduct demand it. Kyles v. Whitley, 514 U.S. 419, 438-40, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); S.C. Rules Prof. Conduct, Rule 3.4.

Here, the Assistant Attorney General implied that the State had discovery regarding Transaction Number 2, but it would not produce the discovery because the appellant failed

to “establish why he is entitled to and why the State should provide such information.” (R. p. 52). It was not until after the jury was picked that the State revealed that it did not have the requested discovery.

Agent Ayers’ testified before the Grand Jury regarding Transaction Number 2, however he apparently did not preserve the evidence because it did not get as far as his testimony implied. Agent Ayers also testified before the Grand Jury that Brock “picked” the appellant out of a “photo lineup.” Neither Agent Ayers nor the Assistant Attorney General attempted to correct this testimony. Further, the Assistant Attorney General never corrected Brock’s testimony that she “picked” the appellant out of a “photo lineup.” The State’s continuous bad acts demonstrate that its failure to preserve discovery was done in bad faith.

Even if the State’s failure to preserve the evidence was not done in bad faith, the evidence possessed an exculpatory value apparent before the evidence was destroyed and the appellant could not obtain other evidence of comparable value by other means. At the time Transaction Number 2 occurred, its exculpatory value was apparent.

The evidence regarding Transaction Number 2 was materially exculpatory. It showed that there was no conspiracy agreement between the alleged co-conspirators. That is, it showed that Dendy did not wait for the appellant to deliver the drugs to him, so that he could then deliver the drugs to Terrance Albert. It instead showed a buyer-seller relationship. Further, the very fact that Terrance Albert *did not* purchase methamphetamine from the appellant during Transaction Number 2 was also materially exculpatory. If Dendy sent Terrance Albert to the appellant to purchase methamphetamine, but then Terrance Albert did not make the purchase, it shows that the appellant was not

selling methamphetamine and was not conspiring to distribute methamphetamine. It showed there was no conspiracy because Dendy did not take part in arranging a deal to purchase methamphetamine from the appellant. The purchase never happened. Moreover, it showed that Dendy told Terrance Albert that Dendy purchased methamphetamine from his cousin. Dendy then sent Terrance Albert to his cousin. The appellant is not Dendy's cousin.

Further, the evidence regarding Transaction Number 2 was materially exculpatory because the State used Transaction Number 2 to argue that the Grand Jury had jurisdiction over Count II. Transaction Number 1, not Number 2, formed the basis of Count II. There was no evidence whatsoever that Dendy (or any other co-conspirator) was involved in Transaction Number 1. The appellant argued that the State Grand Jury had no jurisdiction over Count II because there was no evidence that Count II had multi-county significance. If anything, Count II was a simple buyer-seller relationship between Terrance Albert and the appellant.

The State argued that because Dendy was involved in Transaction Number 2, he was "potentially involved at least at some level" in arranging Transaction Number 1. (R. p. 106, ln. 18-21). Again, there was no evidence that Dendy was involved in arranging Transaction Number 1. Nevertheless, the State based jurisdiction on this "potential" due to Dendy's involvement in Transaction Number 2. The Court agreed and denied the appellant's motion. (R. p. 110, ln. 20-24).

Evidence that Dendy did not arrange a purchase of methamphetamine in Transaction Number 2 would have completely discredited the State's argument. In other

words, evidence that Dendy did not arrange a purchase of methamphetamine in Transaction Number 2 shows the buyer-seller relationship as argued by the appellant.

Further, evidence of Transaction Number 2 was materially exculpatory because it directly contradicted Terrance Albert's statement that he was approached by the appellant about buying methamphetamine, rather than being sent to the appellant by Dendy. (*See* R. p. 36; R. p. 101, ln. 12-15; R. p. 103, ln. 9-24).

Moreover, evidence of Terrance Albert's cooperation with the State on other cases and his charges brought by other prosecuting agencies was materially exculpatory. It was irrelevant whether the State was prosecuting Terrance Albert *via* the Attorney General's Office or the State was prosecuting Terrance Albert *via* some other agency. Either way, the State of South Carolina was prosecuting Terrance Albert for at least one crime. The *State* cannot evade its duty to produce discovery just because the Attorney General's Office was not investigating the crime or the Attorney General's Office did not enter into a plea or proffer agreement.⁵ Whether the Attorney General's Office was representing the State, or some other prosecutorial agency was representing the State, the relevant party was still the State of South Carolina. This evidence showed a prototypical form of bias on the part of Terrance Albert. *State v. Gillian*, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004). The appellant had the right to expose this evidence to the jury "the facts from which jurors could appropriately draw inferences relating to the reliability" of Terrance Albert. *Gillian*, 360 S.C. at 451, 602 S.E.2d at 71.

⁵ Plea and proffer agreements are entered into between the *State* and the defendant, not the prosecuting agency and the defendant.

The State argued that it did not have to produce some of the requested discovery because the appellant would be able to cross exam Terrance Albert. (R. p. 110, ln. 12-14). Yet, the State never called Terrance Albert to testify. The trial court instead permitted Agent Asbill's improper hearsay testimony, which violated the appellant's confrontation rights. *See* Section I, *supra*. Moreover, the appellant was prejudiced because he did not have the evidence to refute the State's assertion that the State Grand Jury had jurisdiction over Transaction 1/Count II due to Dendy's "potential" involvement in Transaction 2. The withholding and failing to preserve this materially exculpatory evidence violated the appellant's due process rights. Illinois v. Fisher, 540 U.S. 544, 547, 124 S.Ct. 1200, 1202, 157 L.Ed.2d 1060 (2004).

The appellant could not obtain other evidence of comparable value by other means. Despite the State's assertion pre-trial, it never called Terrance Albert to testify at trial. The trial court instead permitted Agent Asbill's improper hearsay testimony, which violated the appellant's confrontation rights. *See* Section I, *supra*. The appellant was thus not able to cross examine Terrance Albert regarding this evidence. Moreover, the State did not call Agent Ayers to testify at trial, therefore the appellant was not able to cross examine him regarding this evidence. The appellant had no way of obtaining other evidence of comparable value by other means.

The State's bad acts permeated this entire case: from law enforcement's false testimony before the Grand Jury and its failure to preserve discovery to the Assistant Attorney General's failure to correct the false testimony, deceitful discovery responses, refusal to produce discovery regarding Terrance Albert's cooperation with other State agencies, arguments about the "potential" involvement of Dendy in Transaction Number

2, and the presentment of Agent Asbill's hearsay testimony. Due process demands that this case be dismissed.

V. THE STATE GRAND JURY LACKED JURISDICTION OVER COUNT II OF THE SUPERSEDING INDICTMENT REQUIRING DISMISSAL.

Subject matter jurisdiction of a State Grand Jury is limited to cases enumerated in Section 14-7-1630 of the South Carolina Code. S.C. Code Ann. § 14-7-1630. For jurisdiction to vest in the State Grand Jury for a crime involving narcotics, the crime must be "of a multi-county nature or has transpired or is transpiring or has significance in more than one county of this State." S.C. Code Ann. § 14-7-1630; *see also State v. Wilson*, 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993) ("multi-county impact is necessary to establish jurisdiction of the State Grand Jury"). "[T]he State Grand Jury may properly return an indictment alleging a single-county offense. However, such a charge conveys subject matter jurisdiction **only when the offense has multi-county significance** and the indictment contains this allegation." *Wilson*, 315 S.C. at 292 (bold added).

With respect to Count II, there was no evidence presented to the Grand Jury (or before the Court) demonstrating that Count II was a substantive count of the Conspiracy. There was no evidence presented to the Grand Jury (or to the Court) linking the alleged distribution of Count II to the Conspiracy. There was no evidence presented to the Grand Jury (or to the Court) that this alleged distribution of drugs was of a multi-county nature, transpired, was transpiring, or had a significance in more than one count of this State.

The Indictment was insufficient as a matter of law, and the State abused the Grand Jury process by presenting a claim over which the Grand Jury had no jurisdiction. *Evans v. State*, 363 S.C. 495, 510, 611 S.E.2d 510, 519 (2005). ("An indictment which is a nullity would be insufficient, as a matter of law, to give the required notice to a defendant. In such

cases, a defendant's challenge does not assert a disqualification which affects only a member of a body otherwise lawful, nor a mere irregularity in doing that which the law requires, which assumes a power to act; but goes to the existence of the grand jury as a body, that it is void as such, and that indictment is therefore a nullity") (internal citations and quotations omitted). In alternative to the remedies discussed above, Count II should be dismissed.

CONCLUSION

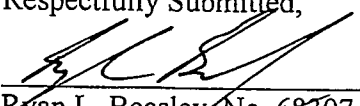
The trial court erred in refusing to dismiss the Superseding Indictment due to the State's repeated discovery violations and abuse of the Grand Jury process. Counts I and II of the Superseding Indictment must therefore be dismissed.

In the alternative, this case must be reversed and remanded for a new trial because the trial court erred in permitting the State to present hearsay testimony that Terrance Albert made a controlled purchase from the appellant in violation of the appellant's confrontation rights. It further erred in refusing to exclude the unduly suggestive single-photo lineup of the appellant and Amy Brock's subsequent in-court identification.

As an alternative to these remedies, Count II of the Superseding Indictment should be dismissed because the State Grand Jury lacked jurisdiction.

Dated this 14th day of July, 2015

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
State Grand Jury

Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2013-002207

Trial Case No.: 2011-GS-47-06

The State of South Carolina Respondent

v.

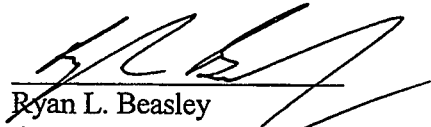
Clyde Bowen Davis Appellant

CERTIFICATE OF COMPLIANCE

I, Ryan L. Beasley, counsel for the appellant Clyde Bowen Davis, hereby certify
that this Final Brief complies with Rule 211(b).

Dated this 14th day of July, 2015

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

Trial Court Case No.: 2011-GS-47-06

Appellate Case No.: 2013-002207

THE STATE,

Respondent,

vs.

CLYDE BOWEN DAVIS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. All but two of the issues presented by Appellant are procedurally barred from this appeal because the only final judgment appealed by Appellant is the Order Denying Defendant's Motion for Verdict in Arrest of the Judgment and Motion for a New Trial, thus limiting Appellant to the issues raised to the trial court and decided by that Order.
- II. The trial court did not commit reversible error by allowing testimony from a law enforcement agent about what he observed as part of a controlled drug purchase when the confidential informant who made the purchase did not testify at trial because the agent's testimony was not hearsay and did not violate the defendant's right to confrontation.
- III. The trial court properly admitted testimony about the photographic identification of Davis by Brock and the subsequent, in-court identification of Davis by Brock because the identification process was not unduly suggestive nor was there a substantial likelihood of misidentification.
- IV. The State did not fail to preserve evidence in violation of Davis' due process rights nor did it violate its duty to disclose material evidence pursuant to *Brady v. Maryland*.
- V. Davis' allegations of abuse of the grand jury process should be dismissed because they are procedurally barred for not being preserved for review in the trial court, there are no colorable claims of prosecutorial misconduct, and Davis was not sufficiently prejudiced to warrant dismissal of the indictment.

STATEMENT OF THE CASE

Clyde Bowen Davis appeals the Circuit Court's October 3, 2013 Order Denying Defendant's Motion for Verdict in Arrest of the Judgment and Motion for a New Trial. Clyde Bowen Davis was indicted by the State Grand Jury on December 13, 2011 by way of a Superseding Indictment for Unlawful Drugs. Davis is named as a defendant in Counts I and II. Count I accuses Davis of being involved in a conspiracy to traffick 100 grams to 200 grams of methamphetamine. Count II accuses Davis of distributing 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. 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, through his attorney, filed a written Motion for Verdict in Arrest of Judgment and Motion for a New Trial. As stated above, that motion was denied by a written order on October 3, 2013. Davis, again through his attorney, timely filed and served a Notice of Intent to Appeal. This appeal follows.

STATEMENT OF FACTS

In this trial Clyde Bowen Davis only faced the charge of conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine. 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).

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).

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).

ARGUMENT

- I. ALL BUT TWO OF THE ISSUES PRESENTED BY APPELLANT ARE PROCEDURALLY BARRED FROM THIS APPEAL BECAUSE THE ONLY FINAL JUDGMENT APPEALED BY APPELLANT IS THE ORDER DENYING DEFENDANT'S MOTION FOR VERDICT IN ARREST OF THE JUDGMENT AND MOTION FOR A NEW TRIAL, THUS LIMITING APPELLANT TO THE ISSUES RAISED TO THE TRIAL COURT AND DECIDED BY THAT ORDER.

In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina, 57-58 (The South Carolina Bar – CLE Division 1999) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments.” J'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (“Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal.”); “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(argued one ground in support of circumstantial evidence charge at trial and another ground in support of the charge on appeal). No point will be considered which is not set forth in the statement of issues on appeal. Rule 208(b)(1)(B), SCACR; State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000)(it is error for an appellate court to consider issues not raised to it); Prioleau, 345 S.C. 404, 548 S.E.2d 213. An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995).

A. Davis' arguments on appeal are limited to those made in Defendant's Motion for Verdict in Arrest of Judgment and Motion for a New Trial because the only judgment listed in the notice of intent to appeal is the trial court's Order Denying Defendant's Motion for Verdict in Arrest of the Judgment and Motion for New Trial.

When an appellant serves notice of intention to appeal from one judgment but fails to serve notice of appeal on other judgments from the same case the appellate court has no jurisdiction to review any judgments not included in the notice of intention to appeal. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 375-76, 171 S.E.2d 155, 157 (1969); see In re Estate of Cretzmeyer, 365 S.C. 12, 14, 615 S.E.2d 116, 116 (2005)(circuit court only has appellate jurisdiction over matters that are properly appealed). "A portion of a judgment that is not appealed presents no

issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.” Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006)(quoting Austin v. Specialty Transp. Servc., 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct.App.2004)). Even if an error is preserved at the trial level, the appellant must make timely service of the notice of appeal to present that issue to the appellate court for review. Ulmer, 369 S.C. at 490-91, 632 S.E.2d at 861.

The only judgment properly before this Court is the trial court’s Order Denying Defendant’s Motion for Verdict in Arrest of the Judgment and Motion for New Trial. (R. pp. 2-7). Appellant’s Notice of Intent to Appeal explicitly states that “Clyde Bowen Davis appeals the Order of the Honorable Letitia H. Verdin dated October 2, 2013 and attached hereto.” (R. pp. 86-92). No other judgments or orders were listed in the Notice of Intent to Appeal. No supplemental or amended notices were filed in a timely manner. Therefore, because the Notice of Intent to Appeal only listed one judgment as the subject of the appeal all remaining judgments and underlying issues are procedurally barred from this appeal even if they were otherwise properly preserved.

The only issues timely raised by Appellant to the trial court with sufficient specificity and ruled upon by the trial court in the pertinent Order were those in the written Defendant’s Motion for Verdict in Arrest of Judgment and Motion for a New Trial. (Supp R. pp. 1-4). Therefore, only three issues were properly preserved for this appeal. These issues are: (1) Did the State Grand Jury lack the requisite subject matter jurisdiction to indict Davis in Count I of the superseding indictment;

(2) Did the trial court err in admitting testimony from Agent Asbill when Appellant objected on the grounds of hearsay and the Sixth Amendment right to confrontation; and (3) Did the Court err in admitting the out-of-court and subsequent in-court identifications of Davis by Amy Brock. (Supp. R. pp. 1-4; R. pp. 2-7). Davis does not list the first issue, pertaining to subject matter jurisdiction, in his Statement of Issues on Appeal. Thus, that issue is abandoned and should not be considered on appeal. All other issues are procedurally barred from this appeal and should be dismissed.

B. None of Appellant's Arguments concerning the dismissal of Count II of the indictment are properly before the appellate court because a motion to quash an indictment is not immediately appealable.

The United States Constitution does not grant a right to appellate review of criminal convictions. State v. Miller, 289 S.C 426, 346 S.E.2d 705 (1986)(citing Abney v. U S., 431 U.S. 651, 97 S.Ct. 2034, 82 L.Ed.2d (1984); Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975)). The right to appeal a criminal conviction in South Carolina Courts is conferred by statute. Miller, 289 S.C 426, 346 S.E.2d 705; S.C Code Ann. §14-3-330 (1976). To exercise this statutory right to an appeal, a criminal defendant must come within the terms of section 14-3-330. Miller, 289 S.C 426, 346 S.E.2d 705. Our Supreme Court has repeatedly ruled that a criminal defendant may not appeal until sentence is imposed. State v. Isaac, 405 S.C. 177, 183, 747 S.E.2d 677, 680 (2013)(citing numerous examples of criminal matters that were not immediately appealable and required a final judgment).

Specifically, a criminal defendant cannot immediately appeal a motion to quash or dismiss an indictment because such an appeal is only permitted after a final judgment. State v. Parker, 267 S.C. 317, 227 S.E.2d 677 (1976); State v. McMillan, 189 S.C. 444, 1 S.E.2d 626 (1939).

Large portions of Davis' brief, namely Arguments III, IV, and V, address matters that are not properly before this Court. This appeal follows Davis' conviction on Count I of the indictment. The State agreed to sever the charges and only proceed to trial on Count I, leaving Count II to be determined in a separate trial. (R. p. 96). Davis argues in this appeal under Arguments III and V, as in his pre-trial motions, that the State Grand Jury lacked probable cause and subject matter jurisdiction in regard to Count II, requiring that the indictment be quashed or dismissed. Davis **alleges** in Argument III that the State abused the grand jury process while presenting evidence relevant to the controlled purchase of methamphetamine that resulted in Davis being charged with distribution of methamphetamine under Count II of the indictment. In Argument III, Davis also argues that the State failed to present sufficient evidence for probable cause as to Count II because there was no testimony as to the veracity or reliability of the informant¹. In Argument IV, Davis **alleges** due process violations surrounding the distribution of methamphetamine charged in Count II and argues that the **alleged** preservation violations require that case to be dismissed.

¹ Testimony that an informant conducted a controlled purchase under the supervision of law enforcement can constitute probable cause. See State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct.App.2003).

The appeal of these questions is premature **at this time**. It is well settled law that these questions are not properly before the Court because Davis has not yet received judgment and a sentence under Count II of the Superseding Indictment and a motion to quash or dismiss an indictment is only appealable from a final judgment in the Circuit Court. Parker, 267 S.C. at 324, 227 S.E.2d at 679 (citing State v. McMillan, 189 S.C. 444, 1 S.E.2d 626). South Carolina precedent requires this Court to hold that these portions of the appeal are premature and must be dismissed. State v. Burbage, 51 S.C. 284, 287, 28 S.E. 937, 938 (1898); McMillan, 189 S.C. 444, 1 S.E.2d 626; Parker, 267 S.C. 317, 227 S.E.2d 677; Miller, 289 S.C. 426, 346 S.E.2d 705; Isaac, 405 S.C. 177, 183, 747 S.E.2d 677, 680. “No good reason appears, although the questions presented by the appeal are important, why they should be considered at this time...Furthermore, [Davis] can suffer no harm. Upon appeal from any final judgment that may be had, all questions [prematurely] raised by the [appeal] may be made available to [Davis].” McMillan, 189 S.C. at 444, 1 S.E.2d at 627. Therefore, this Court should dismiss the matters prematurely addressed by Davis’ brief in Arguments III, IV, and V “without prejudice to the right of [Davis] to raise all the questions here presented upon appeal by him from any final judgment that be had in the case.” McMillan, 189 S.C. at 444, 1 S.E.2d at 627.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ALLOWING TESTIMONY FROM A LAW ENFORCEMENT AGENT ABOUT WHAT HE OBSERVED AS PART OF A CONTROLLED DRUG PURCHASE WHEN THE CONFIDENTIAL INFORMANT WHO MADE THE PURCHASE DID NOT TESTIFY AT TRIAL BECAUSE THE AGENT'S TESTIMONY WAS NOT HEARSAY AND DID NOT VIOLATE THE DEFENDANT'S RIGHT TO CONFRONTATION.

Davis incorrectly argues in his first argument that portions of Agent Asbill's testimony were inadmissible hearsay and violated Davis' right to confront witnesses against him. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." Rule 801(a), SCRE; State v. Roach, 364 S.C. 422, 427, 613 S.E.2d 791, 794 (Ct.App. 2005). "Gestures, such as pointing a finger may be hearsay if the gestures were intended as communication." State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996)(firemen pointing to an individual after state trooper asks who was driving the vehicle was hearsay because the gestures were intended as communication).

In State v. Sachs, the defendant challenged, on hearsay grounds, agent testimony that an informant, Sachs' sister, had accompanied officers to the federal courthouse, typed affidavits for search warrants, and delivered a package in a controlled delivery operation. 264 S.C. 541, 567, 216 S.E.2d 501, 515 (1975). This testimony was not inadmissible hearsay because it was based upon the witness'

observations and did not relate any conversations between the officers and the informant. Sachs, 264 S.C. 541, 567, 216 S.E.2d 501, 515.

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).

Agent Asbill's testimony was strikingly similar to that in Sachs. Agent Asbill personally participated in the controlled purchase operation against Davis. His testimony was based upon his own observations. At no time did Asbill testify about any statements made by the informant, Albert, whether verbal, nonverbal, gestures, or otherwise. Asbill's testimony did not contain any hearsay statements because the substance of the testimony was based solely on his own observations, therefore it was properly admitted.

Davis also asserts that Asbill's testimony violated Davis' Sixth Amendment right to confrontation. "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. "State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (citing State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). One can prove a violation of these rights "by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination..." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (citing Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986)) (emphasis in original). The Sixth Amendment provides a defendant the right to call witnesses who are favorable to him, but does not provide the right to compel the State to call the witnesses of the defendant's choosing. It is not the right to confront all witnesses who may be adverse to the defendant, but instead is the right to meaningfully cross-examine those witnesses whom the State calls. See Graham, 314 S.C. at 385, 444 S.E.2d at 527 ("Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses").

Agent Asbill was the witness presented by the State against Davis regarding the controlled buy. Asbill did not relate any statements, verbal or otherwise, of Terrance Albert. Therefore, there is no legal construction to properly claim that Albert was a witness against Davis. Davis unfairly compares this issue with the

facts at issue in State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). In Gracely, the defendant was prohibited from confronting almost all of the witnesses against him about the minimum sentences they avoided by accepting plea deals with the State. At trial, defense counsel had and took the opportunity to completely and meaningfully cross-examine Agent Asbill regarding the controlled buy. (R. p. 389, lines 1-5; pp. 332-33). The fact that counsel could not cross-examine Terrance Albert, whom Davis believes was a more appropriate witness to testify about the controlled buy, did not in fact violate Defendant's Sixth Amendment rights. Davis was not prohibited from calling Terrance Albert as a witness in Davis' defense. Therefore, Davis' rights to confront the witnesses against him and to call witnesses in his defense were properly protected and the testimony of Agent Asbill was proper.

If the trial court committed error by allowing Agent Asbill's testimony, such error is harmless 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 impeach a witness for bias 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. Van Arsdall, 475 U.S. 673, 106

S.Ct. 1431. 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).

The State’s case did not heavily 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 the controlled purchase itself during its closing argument. (R. pp. 411-427). In fact, the State specifically argued to the jury that the case was about conspiracy, not distributions of methamphetamine. (R. p. 417, lines 16-21). The crux of the State’s case and Davis’ conviction was the testimony of Davis’ coconspirators, not Asbill’s testimony about the controlled purchase. Also, there was no evidence contradicting Asbill’s testimony on material points. Therefore any possible error in allowing Agent Asbill’s testimony is harmless because the testimony did not prejudice Davis and could not have reasonably affected the outcome of the trial.

III. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY ABOUT THE PHOTOGRAPHIC IDENTIFICATION OF DAVIS BY BROCK AND THE SUBSEQUENT, IN-COURT IDENTIFICATION OF DAVIS BY BROCK BECAUSE THE IDENTIFICATION PROCESS WAS NOT UNDULY SUGGESTIVE NOR WAS THERE A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

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. Blassingame, 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 witness previous 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). 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 she 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. 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.

This Court found no error 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 brief. 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 time 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, line 11).

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 testimony concerning Brock's out-of-court identification and her in-court identification were properly admitted.

Assuming, *arguendo*, that the trial court erred by admitting both the out-of-court and in-court identifications of Clyde Davis by Amy Brock such error would be harmless. Davis did not suffer any unfair prejudice by the admission of these two identifications. There was no disputing at trial that Nick Dendy supplied Michael Robinson and Amy Brock with methamphetamine or that Dendy's supplier would bring the methamphetamine to him at Brock's residence. Brian Sekerchak

corroborated that on at least ten occasions Clyde Davis brought methamphetamine to Dendy at Brock's residence. Dendy provided the most important testimony and in-court identification when he identified Clyde Davis as his supplier of methamphetamine. Brock's identifications of Davis were corroborated and cumulative. Therefore, any error was harmless beyond a reasonable doubt.

IV. THE STATE DID NOT FAIL TO PRESERVE EVIDENCE IN VIOLATION OF DAVIS' DUE PROCESS RIGHTS NOR DID IT VIOLATE ITS DUTY TO DISCLOSE MATERIAL EVIDENCE PURSUANT TO *BRADY V. MARYLAND*.

"The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." State v. Moses, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (Ct.App.2010)(quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). When asserting a Brady violation, a criminal defendant must demonstrate the evidence was: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the defendant's guilt or innocence or was impeaching. Moses, 390 S.C. at 515, 702 S.E.2d at 402.

In addition to the Brady duty to disclose material evidence favorable to the defendant, the State has the duty to preserve evidence that is favorable to the defendant. Moses, 390 S.C. at 518, 702 S.E.2d at 403. The State's duty to preserve potentially useful evidence is not absolute so a defendant must demonstrate that the State destroyed evidence in bad faith or destroyed evidence

that possessed an exculpatory value that was apparent before the destruction of the evidence and the defendant could not obtain comparable evidence by other means. Moses, 390 S.C. at 518, 702 S.E.2d at 404; Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); State v. Mabe, 306 S.C. 355, 358-59, 412 S.E.2d 386, 388 (1991); see also State v. Cheesboro, 346 S.C. 526 , 538, 552 S.E.2d 300, 307 (2001)(finding “[t]he State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant.”). “Furthermore, whatever duty the Constitution imposes on the State to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense.” State v. Hutton, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004)(quoting California v. Trompette, 467 U.S. 479, 488, 104 S.Ct. 2528 (1984)(internal citations omitted)).

Davis alleges that the State violated his due process rights by failing to preserve evidence that would have been favorable to him. However, Davis fails to meet his burden to demonstrate that the State destroyed evidence in bad faith or destroyed evidence that possessed apparent exculpatory value. In fact, Davis fails to demonstrate that the State destroyed any evidence at all. The record does not support the assertion that any evidence was destroyed by the State. The record does reflect that the favorable evidence Davis would have this Court believe was destroyed by the State in bad faith never existed. The State provided all Brady material to defense counsel and made inquiries to confirm that all information that needed to be turned over was collected and provided to defense counsel. (R. p.

104, line 3 – p. 107, line 22). No evidence was suppressed by the State. The State could not destroy what never existed. Because the State did not destroy *any* evidence, there was no failure to preserve evidence favorable to Davis so the indictment should not be dismissed and the conviction should not be reversed.

Further, the imagined evidence would not have possessed exculpatory value to Count I of the superseding indictment. There was only one attempt to conduct a controlled purchase of methamphetamine from Clyde Davis. (R. p. 109, lines 9-17; R. p. 330, lines 11-23). Terrance Albert, the confidential informant used during that purchase, was never a coconspirator with Davis, Dendy, and Brock. While the controlled purchase of methamphetamine from Davis is proper evidence to prove that he was involved in a conspiracy to traffick methamphetamine, that operation was not the core of the conspiracy offense alleged in Count I for which Davis was convicted. The State's case centered around a historical conspiracy established through the testimony of coconspirators, specifically Dendy, Brock, Sekerchak, and Robinson. Had the evidence described by Davis actually existed it would not exculpate Davis from the conspiracy. Therefore, even if this evidence ever existed it would not have been expected to play a significant role in Davis' defense of Count I. Thus, the State would not have violated its preservation of evidence duties even if it had destroyed the evidence that never existed in the first place.

Finally, Davis' argument focusses on obtaining information to discredit and impeach Terrance Albert concerning his purchase of methamphetamine from Davis. This argument is moot and Davis would have suffered no prejudice because Albert

did not testify at trial. The impeachment evidence claimed to have possibly existed and been destroyed would not have been admissible without Albert testifying as a witness. Therefore, the potential evidence would have had no exculpatory value at all.

The State did not violate its duty to provide favorable evidence to Davis or to preserve evidence that might have been favorable to Davis because the State provided all the information in its possession, inquired to learn if any additional evidence existed, and determined that no additional evidence existed to provide to Davis.

V. DAVIS' ALLEGATIONS OF ABUSE OF THE GRAND JURY PROCESS SHOULD BE DISMISSED BECAUSE THEY ARE PROCEDURALLY BARRED FOR NOT BEING PRESERVED FOR REVIEW IN THE TRIAL COURT, THERE ARE NO COLORABLE CLAIMS OF PROSECUTORIAL MISCONDUCT, AND DAVIS WAS NOT SUFFICIENTLY PREJUDICED TO WARRANT DISMISSAL OF THE INDICTMENT.

Davis alleges abuse of the grand jury process. As explained above, this issue is procedurally barred because it was not included in Defendant's Motion for Verdict in Arrest of Judgment and Motion for a New Trial or the Order denying those motions. (Supp. R. pp. 1-4; R. pp. 2-7). This issue is also barred because it was not raised to *and* ruled upon by the trial court. Therefore the issue is again not preserved for review on appeal.

Although this issue is not properly before this Court, it will be briefly discussed here out of an abundance of caution. The courts will only entertain this type of challenge to an indictment if there is a colorable claim of prosecutorial

misconduct in the grand jury proceeding. State v. Thrift, 312 S.C 282, 303, 440 S.E.2d 341, 352 (1994). Only if there is a colorable claim of prosecutorial misconduct will the court move to the next step in the analysis which is to determine if the defendant was sufficiently prejudiced so as to warrant dismissal of the indictment. Thrift, 312 S.C. at 303, 440 S.E.2d at 352-53.

First, Davis claims that the State committed prosecutorial misconduct resulting in prejudice by presenting the testimonies of Inv. Ayers and Agent Asbill regarding the controlled purchase of methamphetamine from Davis by a confidential informant, Terrance Albert. There was discussion about this incident during pre-trial motions, however the trial court did not rule on this particular issue which is why it is not properly preserved to be reviewed on appeal. (R. pp. 97-110). There is no colorable claim of misconduct here because even though the testimony may seem confusing, Ayers and Asbill both testified truthfully. (R. p. 513, lines 1-16; R. p. 610, line 25 – p. 611, lines 1-7; R. p. 387, lines 9-13; R. p. 393, lines 11-23). Therefore there was no misconduct. The trial court made no findings of prosecutorial misconduct so there can be no colorable claim. Without a colorable claim of misconduct the Court cannot proceed to the inquiry into prejudice. Even if such an inquiry were made, there is no prejudice because at the time of the indictments it was clearly presented to the State Grand Jury that there was one controlled purchase of methamphetamine from Clyde Davis as evidenced by the true-bill indictment of Count II.

Next Davis claims that there is a colorable claim of prosecutorial misconduct because Ayers and Brock both testified to the State Grand Jury that she identified Clyde Davis by way of a photo-lineup. As both testified during the Neil v. Biggers hearing it was actually a single photograph of Clyde Davis. Admittedly, this erroneous evidence was mistakenly presented to the grand jury and was not corrected. However, there is no evidence in the record that this was done intentionally or recklessly. This issue was never presented to the trial court so there is no finding of prosecutorial misconduct. Without such a finding there is no colorable claim and the analysis ends. Even if there were misconduct, the difference between a photo-lineup and single photograph identification does not create sufficient prejudice against the defendant when determining probable cause to warrant dismissal of the indictment.

Finally, Davis claims that the State committed prosecutorial misconduct by presenting an indictment, alleging Count II, to the State Grand Jury without sufficient evidence to establish probable cause. This claim has no merit. First, it is the State Grand Jury who determines whether or not there is probable cause, not the State and certainly not the defendant. Second, he bases this allegation on a claim that the State did not present evidence concerning the reliability and veracity of the CI. This is not true. Testimony was presented that the distribution of methamphetamine alleged in Count II was the result of a controlled purchase. Testimony concerning a controlled purchase can establish probable cause. State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct.App.2003).

There was no abuse of the grand jury process in this investigation. Thus this argument by Appellant should be dismissed.

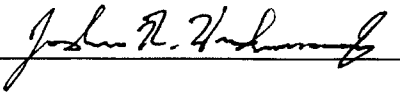
CONCLUSION

Based upon the foregoing arguments, the State respectfully requests that this Court affirm the trial court's rulings, verdict, and sentencing.

Respectfully submitted,

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August 10, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2013-002207

THE STATE,

Respondent,

vs.

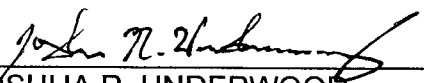
CLYDE BOWEN DAVIS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR.

This 10th day of August, 2015.



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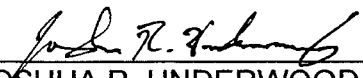
Appellant.

PROOF OF SERVICE

I, Joshua R. Underwood, certify that I have served the within Final Brief of Respondent and Supplemental Record on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Ryan L. Beasley, Esquire, 650 E. Washington Street, Greenville, South Carolina 29601.

I further certify that all parties required by Rule to be served have been served.

This 10th day of August, 2015.



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THE STATE OF SOUTH CAROLINA
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State Grand Jury

Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2013-002207

Trial Case No.: 2011-GS-47-06

State of South Carolina Respondent

v.

Clyde Bowen Davis Appellant.

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REPLY TO RESPONDENT'S STATEMENT OF THE FACTS

The appellant disputes the respondent's statement that Brian Sekerchak was present during at least ten transactions "between Brock, Dendy, and [the appellant] in which Brock gave money to Dendy and Dendy gave the money to [the appellant] in exchange for methamphetamine." (Response at 4). There was no such testimony. Sekerchak did not know the appellant, never saw the alleged transaction between Dendy and his supplier, and never saw Dendy's supplier. (R. p. 258, ln. 17-23; R. p. 263, ln. 11-16). Sekerchak said that although he did not see Dendy's supplier, he thought it was the appellant because Brock and Dendy said "that's Clyde." (R. p. 263, ln. 13-18). This directly contradicted Brock's testimony that she did not identify the appellant by his name because she did not know his name. (R. p. 331, ln. 14-25; R. p. 332, ln. 1-3). She only knew Dendy's supplier as "Dendy's cousin." Moreover, Sekerchak never testified that he observed Brock give money to Dendy in exchange for methamphetamine. (R. p. 262, ln. 22-25; R. p. 263, ln. 1). He was not present when these transactions allegedly occurred. (R. p. 262, ln. 22-25; R. p. 263, ln. 1).

The appellant also disputes the respondent's assertion that Dendy, Brock, and Sekerchak described the same scenario. (Response at 4). According Brock, Dendy's supplier would pull into Brock's driveway and deliver the methamphetamine to Dendy. (R. p. 309, ln. 9-12). According to Sekerchak, Dendy's supplier "never pulled in [Brock's] driveway" and instead "sat on the side of the road." (R. p. 263, ln. 11-16). Dendy did not testify whether supplier pulled in to the driveway or sat on the side of the road. (R. p. 340-372).

With respect to the car Dendy's supplier drove, Brock testified "[i]t was a silver car. I don't know if it was a 300. It was some new car like that." (R. p. 313, ln. 10-11). Sekerchak testified that the supplier drove two cars, one "black, like, Honda" and sometimes a "silver Dodge Charger." (R. p. 259, ln. 1-2). Dendy testified that he did not know what kind of car the appellant drove or what kind of car his cousin Bokie drove. (R. p. 366, ln. 1-2, 16-18).

Brock testified that Dendy said his cousin supplied him with the methamphetamine, which then he sold to Brock. (R. p. 327, ln. 13-15). Dendy admitted that his cousin (who is Bokie, not the appellant) supplied him with methamphetamine, but claimed that this was not the same methamphetamine that he sold to Brock. Dendy testified that he and Brock had sex, while Brock testified she never had sex with Dendy. (R. p. 333, ln. 18-21; R. p. 360, ln. 9-12).

Moreover, Michael Robinson never testified that the appellant supplied the drugs to Dendy, who in turn supplied them to Robinson. (*See* Response at 4). Robinson never met the appellant. (R. p. 285, ln. 4-5). There is no evidence that Robinson knew who supplied the methamphetamine to Dendy. (R. p. 272, ln. 11 – 291, ln. 15).

ARGUMENT

I. LAW ENFORCEMENT'S TESTIMONY THAT A CONFIDENTIAL INFORMANT MADE A CONTROLLED PURCHASE FROM THE APPELLANT WAS INADMISSIBLE HEARSAY AND VIOLATED THE APPELLANT'S CONFRONTATION RIGHTS.¹

This issue is properly before this Court and the respondent does not argue otherwise. The respondent erroneously reasons that because Agent Asbill participated in

¹ For ease of reference, the appellant follows the order of the issues as set forth in his Opening Brief.

a "controlled purchase *operation*," he could testify to events that he did not observe. (Response at 13). Although Agent Asbill did not observe a controlled purchase, he testified that Terrance Albert made a controlled purchase of 3.5 grams of methamphetamine from the appellant:

Q: . . . Out of all the controlled purchases that were made, were there **controlled purchases made against [the appellant]** or attempted against [the appellant]?

A: Yes.

Q: Agent Asbill, did you participate in any **controlled purchases against [the appellant]**?

A: Yes, I did.

Q: . . . After [Terrance Albert] was wired, what took place?

A: [Terrance Albert] went to Dobb Street, a residence on Dobb Street which was [the appellant's] residence. [Terrance Albert] spent a period of time there. [Terrance Albert] received a phone call.

Q: Agent Asbill, where were you located during the **controlled purchase**?

A: I was parked at the school that was located nearby.

Q: We were discussing a **controlled purchase against [the appellant]**. What were the results of the **controlled purchase**?

A: [Terrance Albert] returned to us with a **purchase of methamphetamine**.

Q: And how much methamphetamine was it?

A: Approximately **3.5 grams**.

Q: And was that paid for with documented government funds?

A: That is correct.

Q: Is that the only **controlled purchase attempted against [the appellant]**?

A: **Yes, sir.** The only one I'm aware of.

(R. p. 385, ln. 10-15; R. p. 386, ln. 12-14; R. p. 388, ln. 12-16; R. p. 389, ln. 7-10; R. p. 393, ln. 11-23) (bold added).²

²The respondent also incorrectly states that Agent Asbill, Brock, and Sekerchak all described the same type of car. (Response at 13). Agent Asbill testified that the vehicle "appeared to me to be a Chrysler 300" that was either silver or grey. R. p. 390, ln. 4-7).

The respondent attempts to liken Agent Asbill's testimony to the officer in State v. Sachs, 264 S.C. 541, 567, 216 S.E.2d 501, 515 (1975), who testified that the appellant's sister "accompanied the officers to the federal courthouse, typed the affidavits for the search warrants, and delivered the package." (See Response at 12-14). This was not hearsay because the testifying officer witnessed these events. Id. Here, Agent Asbill did not witness the controlled purchase. Where a testifying officer does not witness a controlled purchase of drugs, the officer's testimony that the confidential informant made a purchase of drugs from the appellant is "clearly inadmissible hearsay." Alcantar v. Florida, 987 So.2d 822, 825 (Fla. Ct. App. 2008) (citation omitted).

The respondent claims that Agent Asbill did not "relate any statements, verbal or otherwise, of Terrance Albert." (Response at 14).³ Even if this characterization is correct, which the appellant disputes, Agent Asbill's testimony was still inadmissible hearsay and the trial court's ruling to the contrary was based on an error of law. "Even though the witness does not quote or paraphrase the extrajudicial statement, when the inference to be drawn by the testimony is that an out-of-court declarant implicated the defendant in a crime, the testimony is hearsay and inadmissible." Diaz v. Florida, 890 So.2d 556, 558 (Fla. Ct. App. 2005) (citations omitted); *see also* Washington v. Johnson, 811 P.2d 687, 691 (Wash. Ct. App. 1991); New Jersey v. Bankston, 307 A.2d 65, 68 (N.J. 1973) (where the logical inference to be drawn from the officer's testimony implicates the defendant in

Brock testified that "[i]t was a silver car. **I don't know if it was a 300.** It was some new car like that." (R. p. 313, ln. 10-11) (bold added). Sekerchak testified that there were two cars, a "black, like, Honda" and sometimes a "silver Dodge Charger." (R. p. 259, ln. 1-2).³ The trial court reached the same conclusion, holding that "Agent Asbill did not testify to anything Albert said to him regarding the controlled buy, which would be inadmissible hearsay." (R. p. 5).

a crime, the testimony is inadmissible hearsay); New Jersey v. Alson, 711 A.2d 363, 369 (N.J. Ct. App. 1998) (same); Missouri v. Johnson, 538 S.W.2d 73, 77 (Mo. Ct. App. 1976) (where the inference was that a non-testifying witness implicated the appellant in a crime, the appellant was denied the right to confront witnesses against him and the testimony constituted inadmissible hearsay); State v. King, -- S.C. --, -- S.E.2d --, 2015 WL 1813949, *5 (Ct. App. April 22, 2015) (officer's testimony that she learned through her investigation that more than one shot was fired, but she did not have any personal knowledge of the number of shots fired, was inadmissible hearsay).

The respondent erroneously argues that State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), is distinguishable because the appellant was permitted to cross examine Agent Asbill. (Response at 15). The witness against the appellant was Terrance Albert, not Agent Asbill. It was impossible for the appellant to completely and meaningfully cross-examine Agent Asbill regarding the controlled purchase because Agent Asbill did not witness the controlled purchase. The appellant was completely prohibited from confronting Terrance Albert. See Massachusetts v. Taliba, 929 N.E.2d 1001, *1 (Mass. Ct. App. 2010) (unpublished) (where a testifying officer did not witness the alleged controlled purchase of drugs inside the appellant's apartment, the officer's testimony that the informant "turned over an amount of cocaine they had purchased from [the appellant's] address" violated the appellant's confrontation rights. As stated by the Court, "[the officer's] testimony made the informant a percipient witness to a drug transaction inside the defendant's apartment, and without the informant being available for cross-examination, the admission of such testimony was error"); Freeman v. Georgia, 765 S.E.2d 631, 637 (Ga. 2014) ("the crux of the officer's testimony – that the CI claimed to have purchased crack cocaine from a person

named 'Trace' . . . was to establish that the person named 'Trace,' was involved with the illegal drug activity occurring at the Thoms Drive residence." The appellant's Confrontation rights were violated because he had no opportunity to cross-examine the CI); Diaz, 890 So.2d at 558 ("[w]here the inescapable inference from [the] testimony . . . is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated").

In arguing that the errors were not harmless beyond a reasonable doubt and did not prejudice the appellant, the respondent focuses on one factor - - the importance of the witness's testimony in the prosecution's case. (Response at 16). While the appellant disagrees with the respondent's assessment of this factor (as addressed below), a single factor is not dispositive. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); State v. Black, 400 S.C. 10, 29, 732 S.E.2d 880, 891 (2012); Gracely, 399 S.C. at 375, 731 S.E.2d at 886.⁴

Agent Asbill's testimony was not cumulative, and the appellant was completely prevented from cross examining Terrance Albert. (See Opening Brief at 19-20). The respondent does not dispute this. It further does not dispute the appellant's characterization of Byers, Brock, and Dendy's testimony. (See Opening Brief at 19-20). As in Gracely, these witnesses had significant involvement with illegal drugs and other criminal activities,

⁴The respondent states that "there was evidence contradicting Asbill's testimony on material points," however does not give a citation for this proposition. (Response at 16). There was no evidence contradicting or confirming Agent Asbill's testimony. The *only* evidence that the controlled purchase of methamphetamine was made from the appellant was that of Agent Asbill, who did not even witness the purchase."

and cooperated following the possibility of long prison terms. Gracely, 399 S.C. at 377, 731 S.E.2d at 887. Also as in Gracely, here the State chose not to present any physical evidence tying the appellant to the conspiracy or even to any of the vehicles observed by Agent Asbill, Brock, and Sekerchek. See Gracely, 399 S.C. at 376, 731 S.E.2d at 887. The respondent does not dispute the State's substantial reliance on circumstantial evidence and the credibility of its witnesses.

The respondent erroneously asserts that the State did not heavily rely on Agent Asbill's hearsay testimony and "did not even mention the controlled purchase itself during its closing argument." (Response at 16). Agent Asbill testified that that law enforcement seized 88 grams of methamphetamine involving the conspiracy, which included the controlled purchase made from the appellant:

Q: And how did the investigation of this particular conspiracy group play out from the beginning?

A: From the beginning - - very beginning, we made, uh, some **controlled purchases from** Amy Brock, from, uh, Michael Robinson, Josh Byers, Keith Sekerchak and Nick Dendy and, uh, **[the appellant]**.

Q: ... can you summarize how many **controlled purchases** you made on each person in this conspiracy?

A: Yes, sir. Amy Brock, we made, uh, I believe it was two. **[The appellant], we made one.** Michael Robinson, we made, uh four. Josh Byers, we made three. Keith Sekerchak, we made, uh, five. Nick Dendy, we made two.

Q: And out of those individuals, how much actual methamphetamine was seized?

A: Just off the controlled buys and the search warrant was approximately **88 grams**.

(R. p. 379, ln. 18-25; R. p. 380, ln. 1-16) (bold added). After testifying that Terrance Albert made a 3.5 gram controlled purchase of methamphetamine from the appellant using government funds, Agent Asbill testified that these 3.5 grams was included in the 88 gram figure:

Q: Agent Asbill, earlier you testified that there were **88 grams of actual methamphetamines seized in this investigation. Does this include the 3.5 grams you just mentioned?**

A: Yes, it does.

(R. p. 394, ln. 15-19). During closing, the State focused on these 88 grams of methamphetamine, which included Terrance Albert's alleged 3.5 gram controlled purchase from the appellant:

Remember, Agent Asbill testified that out of their **controlled purchases** and busts in this case, just in this part of the case. Remember, it was a big investigation. Just this part, **they have 88 grams of actual methamphetamine.**

(R. p. 417, ln. 7-11) (bold added). It again asserted that a controlled purchase was made against the appellant:

The car, the silver Chrysler 300 or the Dodge Charger, whichever it is. Agent Asbill identified it was a Chrysler 300 **during the controlled purchase against [the appellant.]**

(R. p. 421, ln. 5-8) (bold added). Again, Agent Asbill's testimony was the only evidence of a controlled purchase that involved the appellant. There was no corroborating evidence or witnesses to the controlled purchase, and Agent Asbill did not even witness the controlled purchase. *See Gracely*, 399 S.C. at 375, 731 S.E.2d at 886. This case should be reversed and remanded for a new trial.

II. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE AN UNDULY SUGGESTIVE PHOTO LINEUP AND SUBSEQUENT IN-COURT IDENTIFICATION.

This issue is properly before this Court and the respondent does not argue otherwise. (*See* Response at 17-24). Despite the respondent's argument, this case does not arise under the trial court's discretion to admit evidence under the Rules of Evidence. (*See* Response at 17). Unlike *Perry v. New Hampshire*, -- U.S. --, 132 S.C. 716, 721, 181

L.Ed.2d 694 (2012), and State v. Tisdale, 338 S.C. 607, 618, 527 S.E.2d 389, 395 (Ct. App. 2000), here the State arranged the suggestive photo identification. “[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.” State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (citations omitted). Nevertheless, even if the standard of review is abuse of discretion, the trial court abused its discretion and committed prejudicial legal error as demonstrated below. The evidence supports but one reasonable inference, the single photo lineup was unduly suggestive and Brock’s identification was not so reliable that no substantial likelihood of misidentification existed. Moore, 343 S.C. at 288, 540 S.E.2d at 448.

“First, the court must determine whether the identification resulted from ‘unnecessarily suggestive’ police procedures.” State v. Dukes, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) (citations omitted). The respondent agrees that single person showup identifications are generally disfavored by the courts because they are suggestive by their nature. (Response Brief at 19). However, it mistakenly relies on State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), to argue that the single photo lineup here was not unnecessarily suggestive. (Response p. 19). Liverman arose out of the second prong of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), not the first prong. Dukes, 404 S.C. at 559-60, 745 S.E.2d at 140.

Nevertheless, Brock’s alleged “knowledge” of the appellant is qualitatively different than the witness’s knowledge in Liverman. In Liverman, the witness’s knowledge of the appellant came well before the crime occurred. The witness knew the appellant for approximately seven years, the witness’s aunt lived at the same apartment complex as the

appellant, the witness and the appellant hung out at the apartment complex, the witness knew the appellant's nickname "Baby Jesus" and identified him by this nickname, and the witness and the appellant were friends. Liverman, 398 S.C. at 135-36, 727 S.E.2d at 424. Similarly in Minnesota v. Taylor, 594 N.W.2d 158 (Minn. 1999) (cited in Liverman and by the respondent), the victim's "knowledge" of the appellant came prior to the crime at issue. The witness had been introduced to the appellant before the crime occurred, the witness saw him around her apartment building and in the neighborhood at least ten times prior to the crime, and the witness was able to identify the appellant by his nickname and the appellant answered to that nickname. Taylor, 594 N.W.2d at 161-62.

Here, the only "knowledge" Brock had of the appellant was as a witness to the alleged crime itself. She did not know the appellant outside of her observations as a witness. She was not friends with the appellant, she never met the appellant, and she never spoke to him. (R. p. 148, ln. 14-16, 19, 20). The appellant's nickname is not "Dendy's cousin" and the appellant is not Dendy's cousin.⁵ The inherent problem with the respondent's position is that it would turn the mere fact of being a witness to a crime into having the requisite "knowledge" of the suspect to permit confirmatory identifications. "[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." New York v. Rodriguez, 593 N.E.2d 268, 272 (N.Y. 1992). This is not the case here.

⁵ The respondent also improperly characterizes Brock's testimony to imply that Dendy's cousin actually went to Brock's house. (See Response at 20-21). Again, "Dendy's cousin" never went to Brock's house and Brock "never went over to where his cousin was." (R. p. 145, ln. 23-25; R. p. 146, ln. 1; R. p. 147, ln. 22-23).

The respondent's assertion that law enforcement did not suggest that the person in the photograph was a drug dealer or may have a connection to Brock is disingenuous. (Response at 20). Prior to the single photo lineup, law enforcement went to Brock's house and approached her about dealing methamphetamine. (R. p. 130, ln. 4-6). Sometime later, but still before the single photo lineup, law enforcement again met with Brock to discuss her methamphetamine dealing. (R. p. 130, ln. 5-8). During this meeting she admitted that she was purchasing methamphetamine from Dendy, however she could only identify Dendy's supplier as "Dendy's cousin." (R. p. 100, ln. 6-8; R. p. 151, ln. 11-13; R. p. 154, ln. 9-16). When law enforcement approached Brock with single photo lineup, the confrontation by its very nature indicated law enforcement's belief that they had identified "Dendy's cousin."

The trial court erroneously found that "the [appellant] was already known to law enforcement." (R. p. 164, ln. 22-23). The respondent makes a similar erroneous statement that "police had information that Dendy was supplied methamphetamine by [the appellant]." (Response at 19). Law enforcement testified that this information came from Terrance Albert. (R. p. 138, ln. 5-9; R. p. 163, ln. 13-14). However, the State failed to preserve discovery regarding this information, which was exculpatory because it revealed that Terrance Albert was wrong. (R. p. 138, ln. 5-19; R. p. 140, ln. 5-9; R. p. 158, ln. 4-9; R. p. 163, ln. 13-18) (*See* Sections III, IV, *infra*). The appellant vigorously objected to the consideration of Terrance Albert's identification, which was overruled. (R. p. 166, ln. 17-25; R. p. 167, ln. 1-2).

The single photograph lineup was not less suggestive than a showup identification. (*See* Response at 20). The photo does not show the appellant in typical civilian clothes.

(See Response at 20; R. p. 709; R. p. 132, ln. 16-23). At most, it shows the very top of a dark colored shirt. (R. p. 709). This photograph is no different than a typical booking photograph. In fact, a single photo lineup is more like a showup than a lineup because of the one-on-one confrontation. The use of a photographic showup would be more disfavored than a corporeal showup because the very use of a photograph demonstrates the lack of exigency normally required to justify the use of a corporeal showup. See Manson v. Brathwaite, 432 U.S. 98, 109, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140 (1977); Louisiana v. Martin, 595 So.2d 592, 595 (La. 1992); Biggers, 409 U.S. at 198, 93 S.Ct. 375. As stated in the appellant's opening brief, there were no emergency or exigent circumstances here, and the respondent does not claim otherwise. The single photo lineup here was unduly and unnecessarily suggestive.

Under the second prong of Biggers, "the court must decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Spears, 393 S.C. 466, 480, 713 S.E.2d 324, 331 (Ct. App. 2011) (citing Moore, 343 S.C. at 287, 540 S.E.2d at 447). The appellant and the respondent agree that there are five factors relevant to reliability. State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527 (2004); (Response at 20-21).

First, the court must examine the opportunity of the witness to view the perpetrator at the time of the crime. Contrary to the respondent's argument, (Response at 21), Sekerchak never testified that he "saw" the appellant bring methamphetamine to Dendy. (R. p. 258, ln. 17-23; R. p. 263, ln. 11-16); *see also* Reply to Respondent's Statement of the Facts, *supra*. Moreover, as explained above, Sekerchak's testimony directly contradicts

Brock's testimony. (R. p. 145, ln. 23-25; R. p. 146, ln. 1; R. p. 147, ln. 22-23; R. p. 263, ln. 9-10; R. p. 309, ln. 8-16).⁶

In attempting to argue that this factor supports reliability, the respondent again erroneously relies on Taylor in which the Minnesota court approved a confirmatory showup identification procedure. (Response at 21). However, as explained above, Taylor is categorically different than the case here because in Taylor, the victim knew the appellant prior to the crime at issue. Taylor, 594 N.W.2d at 161-62. Along the same line, the respondent attempts to liken this case to State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005).⁷ In Roach (like in Liverman and Taylor), the witness's knowledge of the appellant came prior to the crime at issue. The witness in Roach testified that with the twenty dollars the police had given him, he went to Roach's home and purchased drugs directly from Roach. Roach, 364 S.C. at 425, 613 S.E.2d at 792. The witness knew Roach for approximately four months prior to this purchase, had direct contact with Roach, and had purchased drugs directly from Roach many times in the past. Roach, 364 S.C. at 429, 613 S.E.2d at 794-95. Here, Brock had no knowledge of the appellant prior to the crime she allegedly witnessed, never had contact with the appellant, and never made a purchase of drugs from the appellant. Brock's "knowledge" of the appellant derives solely from being a witness to the crime alleged. The trial court's conclusion that Brock identified the appellant "by relationship to the person that she dealt with on a regular basis" is erroneous.

⁶In discussing this factor, the respondent again mischaracterizes the evidence as the transactions occurring at Brock's house. (Response brief at 21).

⁷In Roach the issue before the Court was whether the trial court made a determination as to the reliability of the identification. Roach, 364 S.C. at 429, 613 S.E.2d at 795. Here, it is undisputed that the trial court made such determination. Nevertheless Roach, like Liverman and Taylor, is distinguishable.

(R. p. 164, ln. 9-21). Brock had no relationship with the appellant and had never dealt with him, much less dealt with him on a regular basis. (R. p. 147, ln. 22-24; R. p. 148, ln. 14-16; R. p. 150, ln. 14-20). She had only identified the appellant as "Dendy's cousin," and that identification was wrong. Dendy's cousin is Bokie who sold Dendy methamphetamine. (R. p. 359, ln. 12-14; R. p. 366, ln. 4-9). The respondent does not dispute this. The first Biggers factor cannot support a finding of reliability.

With respect to the second factor, the witness's degree of attention, the respondent again attempts to liken this case with Roach. (Response at 22). However, in Roach, the witness directly purchased drugs from the appellant for a four month period. Brock never dealt with Dendy's cousin, never spoke to Dendy's cousin, never met Dendy's cousin, and "never went over to where his cousin was." Roach, 364 S.C. at 429, 613 S.E.2d at 794-95. (R. p. 147, ln. 22-23; R. p. 148, ln. 14-16). Without citation, the respondent speculates that Brock was not a "casual observer" because she had an interest in knowing who was providing her methamphetamine. (Response at 22). Brock's testimony directly contradicts the respondent's assertion. Brock made no attempt to closely view Dendy's cousin or even determine Dendy's cousin's name:

- Q: When you said referred to as his cousin, did Nick Dendy refer to him as his cousin?
A: Yeah.
Q: He said my cousin was coming over?
A: Yeah. Yes, sir.
...
Q: Okay. Now, on the occasions when Nick [Dendy] would come inside how [would] the transactions occur? Would the other individual, Nick's cousin, also come in?
A: No. He would never come in.
Q: Okay. What would happen?
A: [Nick Dendy] would just come in. I would give him the money when he did come inside.
Q: Nick Dendy would come in?

- A: Nick Dendy. Yeah, only him come inside. He would just come in. I would give him the money. Then he would run outside and bring back the methamphetamine.
- Q: Okay. Now, when he would run outside - -
- A: To the other person that was in the driveway.
- Q: Did you see the other person that was in the driveway?
- A: Uh, not when I was in the house. The times that I ran outside to get them from [Dendy], to hand [Dendy] the money, when the person was already outside and the other car, I could see him. He never come inside the house. I did not see him that way.

(R. p. 145, ln. 14-18, 23-25; R. p. 146, ln. 1-17). Brock was not “the victim of one of the most personally humiliating of all crimes,” Biggers, 409 U.S. at 200, nor did she even attempt to pay “scrupulous attention to detail.” See Manson, 432 U.S. at 115. She was not interested in finding (let alone arresting) Dendy’s cousin. The respondent admits that any observations that Brock did make were “short in duration.” (Resonse at 21). Any attention that she paid to Dendy’s cousin was significantly compromised by the fact that she was high on methamphetamine when she made the observations. (R. p. 330, ln. 1-4). This factor cannot support a finding of reliability.

The third factor requires the court to examine the accuracy of the witness’s prior description of the perpetrator. The trial court’s conclusion that Brock “had already identified the defendant” is erroneous. (R. p. 164, ln. 21-22). The respondent does not dispute that Brock gave *no* prior description of Dendy’s cousin, much less an accurate description of the appellant. (Response at 22). To the extent that “Dendy’s cousin” is a description of the perpetrator, Brock’s description is wrong because the appellant is not Dendy’s cousin. The respondent nevertheless argues that the lack of description is somehow mitigated by Brock’s alleged “knowledge” and Sekerchak’s testimony. (Response at 22, relying on Liverman). Again, the “knowledge” that Brock allegedly had of the appellant is qualitatively different than the knowledge of the witness in Liverman.

Moreover, even if Sekerchek's testimony could mitigate Brock's lack of description, Sekerchek never saw the appellant bring methamphetamine to Dendy and his testimony directly contradicts Brock's testimony. *See* Reply to Respondent's Statement of Facts, *supra*. This factor cannot support a finding of reliability.

Fourth, Brock's level of certainty was insufficient. The respondent argues that because Brock did *not* indicate whether she was certain or uncertain of her identification, this lack of indication "sufficiently suggests a reliable identification." (Response at 23). The respondent's reasoning is flawed because it assumes that Brock would have told law enforcement if she was uncertain in her identification. As stated by the Supreme Court in Biggers, this factor is "the level of certainty demonstrated by the witness **at the confrontation**." Biggers, 409 U.S. at 199, 93 S.Ct. at 382, 34 L.Ed.2d 401 (bold added); *see also* Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (stating the factor as "the level of certainty demonstrated by the witness **at the confrontation**"). At the confrontation, Brock never expressed her level of certainty. The respondent does not dispute this. The trial court's finding that Brock identified the appellant with "a high level of certainty" was based on an error of law and is without evidentiary support. (R. p. 165, ln. 4-5).

At most, on re-direct examination, over the objection of the appellant, the prosecutor asked Brock "[d]id you have any trouble identifying him?" to which Brock answered "[n]o, sir." (R. p. 156, ln. 9-10). Courts across the country have rejected this use of certainty or confidence in the Biggers reliability analysis. *See* New Jersey v. Henderson, 27 A.3d 872, 900 (N.J. 2011); Brodes v. Georgia, 614 S.E.2d 766, 770 (Ga. Sup. Ct. 2005); Massachusetts v. Santoli, 680 N.E.2d 1116 (Mass. 1997). This factor cannot support a finding of reliability.

Fifth, with respect to the length of time between the crime and the identification, the respondent claims that the lapse of one to two months “was not so great that it would diminish the reliability of Brock’s identification of [the appellant] from the photograph.” (Response at 23). However, the issue is not whether the lapse of time “would diminish the reliability” of the identification. The reliability of the identification is already diminished due to the unnecessarily suggestive single photo lineup. Biggers, 409 U.S. at 198, 93 S.Ct. 375, 4 L.Ed.2d 401. The issue is whether, despite the unnecessarily suggestive single photo lineup, Brock’s identification was so reliable that no substantial likelihood of misidentification existed. State v. Singleton, 395 S.C. 6, 14, 716 S.E.2d 332, 336 (Ct. App. 2011) (citing Moore, 343 S.C. at 287, 540 S.E.2d at 447).

The respondent’s reliance on State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009), is misplaced. In Simmons, the photographic lineup was not unduly suggestive, as was the single photo lineup here. Simmons, 384 S.C. at 168-69, 682 S.E.2d at 31. Further, in Simmons, the Court found that the other four Biggers factors indicated the identification was reliable. Simmons, 384 S.C. at 169-70, 682 S.E.2d at 31-32. Here, the other four Biggers factors do not support a finding of reliability.

The respondent claims that the error was harmless beyond a reasonable doubt and there was no unfair prejudice because Sekerchak corroborated Brock’s identification. (Response at 24-25). However, Sekerchak did not corroborate Brock’s identification, nor did Sekerchak “identify” the appellant. Sekerchak never saw the appellant bring methamphetamine to Dendy. (R. p. 258, ln. 17-23; R. p. 263, ln. 11-16). In fact, he never saw the supplier who sat on the side of the road. (R. p. 258, ln. 17-23; R. p. 263, ln. 11-16). Sekerchak did not know the appellant. (R. p. 258, ln. 22-23). He did not have

conversations with the appellant or even Dendy. (R. p. 259, ln. 3-11). Sekerchak never testified that he saw the appellant bring methamphetamine to Dendy. (R. p. 258, ln. 17-23; R. p. 263, ln. 11-16); *see* Reply to Respondent's Statement of the Facts, *supra*. Moreover, Sekerchak's testimony directly contradicted Brock's testimony. (R. p. 145, ln. 23-25; R. p. 146, ln. 1; R. p. 147, ln. 22-23; R. p. 263, ln. 9-10; R. p. 309, ln. 8-16); *see also* Reply to Respondent's Statement of the Facts.

Dendy's cousin is Bokie, not the appellant. (R. p. 359, ln. 11-13). Dendy admitted that Bokie supplied him with methamphetamine, but he claimed that this was not the same methamphetamine he sold to Brock and Robinson. (R. p. 366, ln. 4-10; R. p. 369, ln. 4-20). The appellant's theory was that the transactions between Dendy and his cousin were, in fact, transactions between Dendy and his cousin. (R. p. 364, ln. 14-25; R. p. 365, ln. 1-23; R. p. 432, ln. 9-11). If Dendy's cousin supplied the methamphetamine to Dendy, which Dendy then supplied to Brock and Robinson, Bokie was the co-conspirator, not the appellant. Brock's identification of the appellant as Dendy's cousin was crucial to the State's case.

Even further, Sekerchak, Brock, and Dendy, were cooperating witnesses with whom the State made deals. *See Gracely*, 399 S.C. at 374, 731 S.E.2d at 885-86; (R. p. 246, ln. 16-25; R. p. 247, ln. 1-25; R. p. 248, ln. 1-7; R. p. 321, ln. 7-22; R. p. 340, ln. 21-25; R. p. 341, 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 as in *Gracely*, the State here 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. The admission of Brock's identification prejudiced the appellant and was not harmless beyond a reasonable doubt.

III. THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE SUPERSEDING INDICTMENT DUE TO THE STATE'S ABUSE OF THE GRAND JURY PROCESS.

The respondent confuses issue preservation with the jurisdictional requirement of filing a notice of appeal. (*See* Response at 7-9). The appellant was not required to raise every issue in its post-trial motion in order to preserve the issues for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). Moreover, the appellant was not required to list all issues appealed in its notice of appeal. *See* Rule 203, SCRAP. The trial court denied the appellant's motion for verdict in arrest of the judgment and an entry of acquittal, or in the alternative, for a new trial. (R. p. 2). A motion for a verdict in arrest of judgment is to "prevent entry of judgment on the grounds of the insufficiency of the indictment . . ." State v. Taylor, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001) (citation omitted). The respondent's entire argument here is based on the insufficiency of the indictment and seeks the relief of an acquittal that was denied in its post-trial motion. Nevertheless, any omission in the notice of appeal was a clerical error because the respondent has not shown any prejudice. Charleston Lumbar Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 478, 458 S.E.2d 431 (Ct. App. 1995); State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700, 701-02 (2002) (citing Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899); Babace v. Moisture Warranty Corp., 2012 WL 10826255, *2 (Ct. App. 2012) (unpublished) ("In any event, [the respondent] has not shown any prejudice resulting from the omission of the date of the initial judgment. Accordingly, the omission is of a clerical nature only").

The issue before this Court is not three separate issues as the respondent suggests. (Response at 29-30). The appellant presented this issue to the trial court with sufficient specificity to inform the trial court judge of the point being urged by the appellant. State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). In fact, the very argument presented in the Defendant's Motion to Dismiss the Indictment was that "the State abused the Grand Jury proceedings by its presentation of these charges." (R. p. 9; *see also* R. p. 16, "[t]he Superseding Indictment is insufficient, and the State abused the Grand Jury proceedings by its presentation of these charges"; R. p. 44). The trial court ruled on all of the appellant's motions, and expressly stated that they would all be preserved for appeal. (R. p. 120, ln. 12-14).⁸

Moreover, this issue is not premature with respect to Count II.⁹ (*See* Response at 9-11). The appellant made a challenge to the indictment on the ground of insufficiency before the jury was sworn. State v. Gentry, 363 S.C. 93, 101-02, 610 S.E.2d 494, 500 (2005). This issue was extensively briefed, argued, and ruled upon by the trial court

⁸Further, the appellant repeatedly raised the alleged truthfulness of Agent Ayers' testimony before the Grand Jury, objected to why there was no discovery produced with respect to this testimony, and objected to the fact that the State was using false testimony to support its argument that the Superseding Indictment was proper. (*See, e.g.*, R. p. 9; R. p. 29 - 38; R. p. 62; R. p. 97, ln. 15-23; R. p. 99, ln. 4-7; R. p. 101, ln. 9-12; R. p. 103, ln. 9-14; R. p. 108, ln. 1-9; R. p. 109, ln. 1-4; R. p. 110, ln. 18-19; R. p. 116, ln. 1-24; R. p. 125, ln. 4-7; R. p. 166, ln. 17-25; R. p. 167, ln. 1-2). The appellant also repeatedly questioned the Grand Jury testimony regarding the photo lineup, how Agent Ayers came about the information that the appellant was supplying Dendy, and why this discovery was not produced to the defense. (*See, e.g.*, R. p. 75-77; R. p. 138, ln. 5-19; R. p. 140, ln. 1-15; R. p. 158, ln. 4-13; R. p. 162, ln. 21-25; R. p. 163, ln. 1-24; R. p. 165, ln. 17-21; R. p. 166, ln. 1-25; R. p. 167, ln. 1-2). The appellant also objected to moving forward without this discovery or Terrance Albert being produced as a witness. (R. p. 108, ln. 21-25; R. p. 109, ln. 1-8; R. p. 166, ln. 17-25; R. p. 167, ln. 1-2). The appellant argued that the State failed to present evidence which would amount to probable cause with respect to Count II. (*See, e.g.*, R. p. 13-15; R. p. 41-43; R. p. 111, ln. 2-25; R. p. 112, ln. 1-25; R. p. 113, ln. 1-13; R. p. 116, ln. 1-24).

⁹The respondent does not claim Issue III is premature with respect to Count I.

without objection from the State. The parties address the merits of this issue in their briefs before this Court. It would be a waste of judicial resources for the Court to only look at the sufficiency of the indictment with respect to Count I and not examine Count II. *See State v. Hewins*, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014) (deciding issue in the interest of judicial economy). It would also be a waste of this State's resources to try the appellant on Count II only to have any conviction overturned on appeal.

Here there was deliberate prosecutorial misconduct, thus prejudice need not be shown. *State v. Quattlebaum*, 388 S.C. 441, 448, 527 S.E.2d 105, 109 (2000). The respondent admits that that Agent Ayers' testimony and Brock's testimony before the Grand Jury regarding the photo lineup was false. (Response at 29-30). It further admits that it failed to correct the false evidence. (Response at 29-30). With respect to Agent Ayers' testimony regarding Transaction Number 2, the respondent now claims that while it "may seem confusing," it was truthful. (Response at 29). However, if Agent Ayers' testimony was truthful, then the State's representation to the trial court in pretrial motions was not truthful. (*See* Opening Appellate Brief at 27-28).

In arguing that the grand jury establishes probable cause, the respondent misses the point. (*See* Response at 30). The State used the grand jury as a "mere instrument of the prosecution." *See State v. Thrift*, 312 S.C. 282, 304, fn. 15, 440 S.E.2d 341 (1994). The only evidence presented to the Grand Jury with respect to Count II was "[w]e did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion. (R. p. 610-611). There was no evidence presented showing the Confidential Informant's reliability or veracity. *State v. Adolphe*, 314 S.C. 89, 93, 441 S.E.2d 832, 834 (Ct. App. 1994); *see also State v. Johnson*, 302 S.C. 243, 247, 395 S.E.2d

167, 169 (1990) (an affidavit was defective because “it [did] not set forth any information as to the reliability of the informant nor was the information corroborated”).

This is not a case like Thrift in which the record demonstrated that the State handled the case “in complete good faith and in accord with the highest of ethical and professional standards.” Thrift, 312 S.C. at 303, 440 S.E.2d at 353. The State’s bad acts permeated this entire case. The State consistently evaded its duty to produce discovery. (*See, e.g.*, R. p. 37-41; R. p. 100, ln. 1-25; R. p. 101, ln. 1-16). It then relied on that same discovery to oppose the defendant’s Motion to Dismiss the Indictment. (*See, e.g.*, R. p. 39-41; R. p. 97, ln. 25; R. p. 98, ln. 1-25; R. p. 99, ln. 1-25). It further used false grand jury testimony to oppose the defendant’s Motion to Dismiss the Indictment. (*See, e.g.*, R. p. 24; R. p. 33, 34; R. p. 104, ln. 3-18; R. p. 107, ln. 25; R. p. 108, ln. 1-25; R. p. 109, ln. 1-9). It relied on Terrance Albert’s false identification of the appellant as Dendy’s supplier as its basis to use a single photo lineup of the appellant, yet it did preserve this discovery. (R. p. 138, ln. 5-19; R. p. 140, ln. 5-9; R. p. 158, ln. 4-9; R. p. 163, ln. 13-18). Even if there was no deliberate prosecutorial misconduct, the appellant clearly presented a colorable claim of prosecutorial misconduct. Thrift, 312 S.C. at 303, 440 S.E.2d at 352.

As the appellant consistently argued in pretrial motions, he was prejudiced. It is inescapable that picking someone out of a photo lineup is more reliable than identifying the appellant as Dendy’s cousin from a single photo - - especially when the appellant is not Dendy’s cousin. Without Agent Ayers’ false testimony that law enforcement sent Terrance Albert to Nick Dendy, who in turn said go to the appellant, (*see* Opening brief at 26-28), Brock’s identification was the only evidence presented to the grand jury that tied the appellant to the conspiracy alleged in Count I. The State also used Agent Ayers’ false

testimony to support the alleged validity of the Superseding Indictment and to rebut the appellant's pretrial motions. (R. p. 106, ln. 13-21; R. p. 21; R. p. 33-34). Moreover, the appellant was indicted on Count II for which there was no probable cause. There is grave doubt that the decision to indict was free from substantial influence of such violations. *See Thrift*, 312 S.C. at 303-04, 440 S.E.2d at 353. This case should be dismissed.

IV. THE STATE FAILED TO PRESERVE EVIDENCE IN VIOLATION OF THE APPELLANT'S DUE PROCESS RIGHTS.

This issue is preserved for appeal. The respondent does not dispute that this issue was extensively briefed and argued before the trial court. (*See* Opening brief at 31-36). The trial court specifically held that all of the appellant's motions would be preserved. (R. p. 120, ln. 12-14). The appellant was not required to raise every issue in his post-trial motion to preserve those issues for appeal. *Wilke*, 330 S.C. at 77, 497 S.E.2d at 734. The respondent seeks an acquittal, the remedy that was denied in his post trial motion. Moreover, this issue also was raised with respect to the *Biggers* motion, which the respondent agrees is properly before this Court. Nevertheless, any omission in the notice of appeal was a clerical error that did not cause any prejudice to the respondent. *See* Section III, *supra*.

The State cannot evade its duty under *Brady*, Rule 5, and related jurisprudence by failing to preserve evidence. The respondent does not dispute the appellant's recitation of the events regarding the discovery disputes in this case. (*See* Opening brief at 31-36). Rather, it argues that there was no violation of the appellant's due process rights *because* the State never preserved this evidence in the first place. (Response Brief at 25-27). In other words, the State claims that because it preserved no evidence regarding how Terrance Albert made the identification of the appellant, when he made the identification, where he

made the identification, under what circumstances he made the identification, and to whom he made the identification, the appellant's due process rights were not violated. Similarly, because it preserved no evidence that Terrance Albert said he could deal with Nick Dendy, law enforcement sent Terrance Albert to Nick Dendy, who in turn said go to the appellant, to whom Terrance Albert went and was *not* able to make a controlled purchase of methamphetamine, the appellant's due process rights were not violated.¹⁰ The respondent's position is illogical because it would permit law enforcement to only record events and statements that are helpful to the State, while completely disregarding events and statements that are favorable to the defendant.

The State has the obligation to preserve evidence that is favorable to the defendant. State v. Moses, 390 S.C. 502, 518, 702 S.E.2d 395, 403 (Ct. App. 2010). The respondent claims that this discovery would "not have been expected to play a significant role in [the appellant's] defense of Count I." (Response at 27). This could not be further from the truth. It shows that Dendy did not wait for the appellant to deliver the drugs to him, so that he could then deliver the drugs to Terrance Albert. (*See* R. p. 99, ln. 8-25). The very fact that Terrance Albert *did not* purchase methamphetamine from the appellant, after apparently being sent to the appellant by Dendy, is materially exculpatory. If Dendy sent Terrance Albert to the appellant to purchase methamphetamine, but then Terrance Albert did not make the purchase, it shows that the appellant was not selling methamphetamine and was not conspiring with Dendy to distribute methamphetamine. (*See* R. p. 101, ln. 2-16).

¹⁰ *See* State's representations to the trial court that the controlled purchase was not made. (R. p. 104, ln. 3-18).

Although Terrance did not testify at trial, the appellant still suffered prejudice. (*See* Response at 27-28). The exculpatory evidence showed that there was no conspiracy agreement and that the indictment should have been dismissed during pretrial motions. It also contradicts Agent Asbill's inadmissible hearsay testimony that Terrance Albert purchased methamphetamine from the appellant. It further contradicts Agent Asbill's testimony that the appellant was involved in this conspiracy. (R. p. 379, ln. 18-20). It supports the appellant's theory that Bokie, not the appellant, was the conspirator. The discovery also shows that the trial court's conclusion in the Biggers hearing - - that the appellant was already known to law enforcement as Dendy's supplier - - was false. Transaction Number 2, which allegedly demonstrated the appellant's involvement in the conspiracy and provided the basis for law enforcement to show Brock a single photo of the appellant, never even occurred. The appellant suffered substantial prejudice from the State's failure to preserve this evidence.

V. THE STATE GRAND JURY LACKED JURISDICTION OVER COUNT II OF THE SUPERSEDING INDICTMENT REQUIRING DISMISSAL.

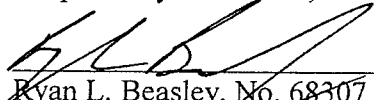
The respondent does not dispute the merits of the appellant's argument, however asserts that this issue is premature. (Response at 9-11). This issue was extensively briefed, argued, and ruled upon by the trial court without objection from the State. It would be a waste of judicial resources for the Court to only examine the indictment with respect to Count I and not examine Count II. *See Hewins*, 409 S.C. at 113, 760 S.E.2d at 824. Moreover, it would offend notions of fundamental fairness, fair play, and substantial justice to permit an indictment to stand, and the appellant to be tried on a charge, over which the grand jury lacked jurisdiction.

CONCLUSION

This Court should grant the appellant relief as outlined in his opening brief.

Dated this ____ day of July, 2015

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
State Grand Jury

Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2013-002207

Trial Case No.: 2011-GS-47-06

The State of South Carolina Respondent

v.

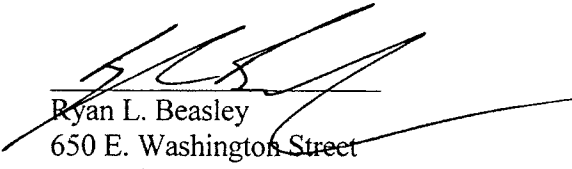
Clyde Bowen Davis Appellant

CERTIFICATE OF COMPLIANCE

I, Ryan L. Beasley, counsel for the appellant Clyde Bowen Davis, hereby certify
that this Final Reply Brief complies with Rule 211(b).

Dated this 14th day of July, 2015

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Volume One of Two

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Latitia H. Verdin, Circuit Court Judge

C.A. No.: 2011-GS-47-06

The State of South Carolina Respondent

v.

Clyde Bowen Davis Appellant

APPELLATE CASE NO. 2013-002207

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

The State of South Carolina,

v.

Clyde Bowen Davis,

Defendant.

IN THE COURT OF GENERAL SESSION
THE THIRTEENTH JUDICIAL CIRCUIT

Indictment #: 2011-GS-47-06

VERDICT

FILED

SEP 18 2013

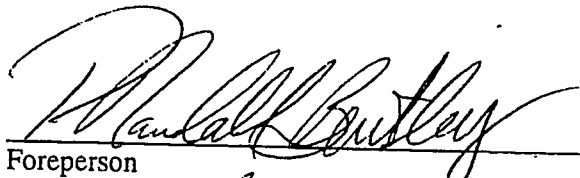
JAMES R. PARKS
CLERK, STATE GRAND JURY

WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT:

☐ Not Guilty of Conspiracy to Traffick Methamphetamine (more than 100 grams but less than 200 grams)

OR

☒ Guilty of Conspiracy to Traffick Methamphetamine (more than 100 grams but less than 200 grams)


Foreperson

Date: 9/18/13

STATE GRAND JURY OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

State of South Carolina,

v.

Clyde Bowen Davis,

Defendant.

COURT OF GENERAL SESSIONS

CASE NO. 2011-GS-47-06

ORDER DENYING DEFENDANT'S
MOTION FOR VERDICT IN ARREST
OF THE JUDGMENT AND MOTION
FOR A NEW TRIAL

RECEIVED

OCT 17 2013

55 Court of Appeals

FILED

OCT 04 2013

JAMERIE RKS
CLERK, STATE GRAND JURY

THIS MATTER is before the Court on Defendant's motion for a verdict in arrest of the judgment and an entry of acquittal, or, in the alternative, for a new trial, pursuant to Rules 4 and 29 of the South Carolina Rules of Criminal Procedure. On September 18, 2013, a jury found Defendant guilty of conspiracy to traffick methamphetamine, 100 to 200 grams, and this Court sentenced him to 25 years in the South Carolina Department of Corrections. In his motion, Defendant argues (1) the State Grand Jury lacked the requisite subject matter jurisdiction to indict Defendant for conspiracy to traffick methamphetamine; (2) the Court erred in admitting testimony in violation of Defendant's constitutional right to confront witnesses and of the South Carolina Rules of Evidence; and (3) the Court erred in admitting out-of-court and subsequent in-court identifications of Defendant. Defendant's motions are denied.

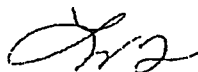
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Subject Matter Jurisdiction of the State Grand Jury

Defendant argues the State Grand Jury lacked subject matter jurisdiction to indict Defendant for conspiracy to traffick methamphetamine, in violation of South Carolina Code subsection 14-7-1630 (A)(1) (Supp. 2012). Defendant's challenge on this issue is timely, as "issues related to subject matter jurisdiction may be raised at any time." *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). Subsection 14-7-1630(A)(1) "requir[es] an allegation of multi-county significance in an indictment to establish subject matter jurisdiction in the State Grand Jury." *State v. Evans*, 322 S.C. 78, 81, 470 S.E. 2d 97, 98 (1996). Defendant argues count 1 of the superseding indictment in this case only alleges a conspiracy to traffick methamphetamine occurred in Greenville County. The indictment alleges the Defendant "did, in Greenville County and Pickens County of South Carolina . . . conspire to sell, manufacture, deliver, purchase, or bring into this State" between one hundred and two hundred grams of methamphetamine. This Court finds the indictment sufficient to vest subject matter jurisdiction over this case in the State Grand Jury pursuant to the requirements of South Carolina Code subsection 14-7-1630(A)(1).

Admissibility of Testimony of SLED Agent Ashley Asbill

Defendant argues this Court erred in admitting the testimony of South Carolina Law Enforcement Division (SLED) Agent Ashley Asbill, as his testimony was irrelevant, unduly prejudicial, and violated the Confrontation Clause and the South Carolina Rules of Evidence. Agent Asbill testified about his involvement in and observation of a controlled buy between the Defendant and Terrance Albert, who was working undercover for SLED. Defendant argues Agent Asbill's testimony regarding Defendant's purchase from Albert, who did not testify, was



irrelevant to the conspiracy charge. Defendant also argues that because Albert was working undercover and thus did not acquiesce to the conspiracy, the fact that Defendant sold drugs to Albert could not be proof of a substantive crime committed under the alleged conspiracy. Defendant relies on *State v. Wilson*, 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993), for the proposition that "only the *substantive crimes* committed in furtherance of the conspiracy are admissible as circumstantial evidence of the conspiracy" (Defendant's motion, pg. 3) (emphasis added by Defendant), and argues Agent Asbill's testimony is therefore irrelevant and inadmissible under Rule 402 of the South Carolina Rules of Evidence.

Defendant's interpretation and quotation of *Wilson* are inaccurate. The underlying crime in a conspiracy is the mutual agreement or understanding. *Wilson* states "the substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope," but not to the exclusion of other evidence, as the Defendant asserts through the misquoted language. 315 S.C. at 294, 433 S.E.2d at 867-68. In fact, "the State is entitled to prove 'the whole history of the conspiracy, from its commencement to its conclusion,' as well as overt acts done in furtherance of the conspiracy since from those overt acts, 'an inference may be drawn as to the existence and object of the conspiracy.'" *Id.* (citing *State v. Hightower*, 221 S.C. 91, 69 S.E.2d 363 (1952)).

The State did not introduce evidence of the controlled buy between Defendant and Albert to prove a conspiracy existed between them. Defendant is correct that someone working for law enforcement cannot be a co-conspirator. See *State v. Holmes*, 277 S.C. 232, 233, 285 S.E.2d 353, 354 (1981) (citing *U.S. v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967)). A person cannot escape

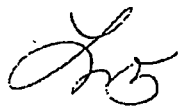


prosecution for participation in a conspiracy, however, simply because one other actor with whom they interact is a government agent and does not have the requisite criminal intent to form a conspiracy. See *United States v. Jimenez Recio*, 537 U.S. 270, 275, 123 S. Ct. 819, 822, 154 L. Ed. 2d 744 (2003) ("the fact that a conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant"). The fact that Albert was working undercover and therefore lacked the intent to enter into a conspiracy with Defendant does not erase Defendant's actions in furtherance of the greater conspiracy, nor does it discount Agent Asbill's testimony. Defendant's argument, that his alleged sale of drugs to Albert could not be a substantive crime used to prove the existence of the conspiracy because Albert was not a co-conspirator, fails.

Additionally, Defendant's assertion that Agent Asbill's testimony was irrelevant and was inadmissible hearsay is incorrect. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402, SCRE. Agent Asbill testified to his personal observations of the Defendant during the controlled buy, which was an overt act committed by Defendant in furtherance of the conspiracy alleged in the indictment in this case. "The State is permitted great latitude in the introduction of circumstantial evidence to establish the existence of a conspiratorial agreement." *Wilson*, 315 S.C. at 294, 433 S.E.2d at 867-68. Agent Asbill did not testify to anything Albert said to him regarding the controlled buy, which would be inadmissible hearsay, but rather testified only to what he observed while monitoring the buy. Agent Asbill's testimony was relevant, was not hearsay, and was properly admitted.

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Finally, Defendant argues that the State's failure to call Terrance Albert to testify regarding the controlled buy violated Defendant's Sixth Amendment right to confront adverse witnesses. "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (citing *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). One can prove a violation of these rights "by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination" *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986)) (emphasis in original). The Sixth Amendment provides a defendant the right to call witnesses who are favorable to him, but does not provide the right to compel the State to call the witnesses of the defendant's choosing. It is not the right to confront all witnesses who may be adverse to the defendant, but instead is the right to meaningfully cross-examine those witnesses whom the State calls. *See Graham*, 314 S.C. 385, 444 S.E.2d 527 ("Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses"). Defendant had and took the opportunity to meaningfully cross-examine Agent Albert regarding the controlled buy. The fact that Defendant could not cross-examine Terrance Albert, whom Defendant believes was a more appropriate witness to testify about the controlled buy, did not in fact violate Defendant's Sixth Amendment rights.



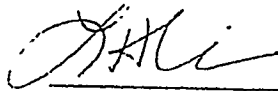
Admissibility of Identifications

Defendant repeats the arguments from his pre-trial motion to exclude the photo lineup and any subsequent in-court identifications, arguing the lineup was unduly suggestive and subject to misidentification. This Court held a pre-trial hearing in accordance with *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), where SLED Agent Chad Ayers testified to the circumstances surrounding the photo lineup and the witnesses' identification of Defendant. This Court found the identification process was not unduly suggestive, nor was there a substantial likelihood of misidentification. *See State v. Traylor*, 360 S.C. 74, 600 S.E. 2d 523 (2004). Subsequent to that finding, this Court allowed Amy Brock, the witness who identified Defendant in the photo lineup, and other witnesses to identify Defendant in court. Defendant does not raise any new points of law as to this issue.

Conclusion

Defendant's motion for verdict in arrest of judgment and motion for a new trial are denied.

IT IS SO ORDERED.



LETITIA H. VERDIN
CIRCUIT COURT JUDGE
THIRTEENTH JUDICIAL CIRCUIT

Greenville, South Carolina

October 3, 2013



STATE OF SOUTH CAROLINA

SEP 18 2013

IN THE COURT OF GENERAL SESSIONS

COUNTY OF

GREENVILLE

JAMES L. PARKS
CLERK, STATE GRAND JURY

STATE

VS.

CLYDE BOWEN DAVIS

INDICTMENT/CASE#: 2011 -GS- 47 -06 COUNT I

AKA:

A/W#: DIRECT PRESENTMENT

Race: B

Sex: M

Age: 36

Date of Offense: 1/1/2010 - 11/08/2011

DOB: 8/24/1977

SS#: 248-39-7816

S.C. Code §: 44-53-375(C)(3)

CDR Code #: 0368

Address

City, State, Zip

DL# SC 7608132

SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: TRAFFICKING METHAMPHETAMINE, 100-200 GRAMS (CONSPIRACY) (1ST OFFENSE)

In violation of § 44-53-375(C)(3) of the S.C. Code of Laws, bearing CDR Code # 0368

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45 (CSC w/minor 1st or Lewd Act)

The charge is: ☐ As indicted, ☒ Lesser Included Offense,

☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation,

☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

76207

Assistant Attorney General

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 210 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$50,000; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐

☐ Set by SCDPPPS

Attend Voc Rehab. Or Job Corp. _____

Recipient: _____

May serve W/E beginning

Substance Abuse Counseling ☐

*Fine:

\$14-1-206 (Assessments 107 5%)	\$	50,000
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$5,375.00
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	\$100.00
\$56-5-2995 (DUI Assessment)	\$12	\$
\$56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
\$14-1-212 (Law Enforce. Funding)	\$25	\$
\$14-1-213 (Drug Court Surcharge)	\$150	\$25.00
\$50-21-114 (BUI Breath Test Fee)	\$50	\$150.00
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90 5 (SCCJA Surcharge)	\$5	\$5.00
3% to County (if paid in installments)	\$	\$8.40
TOTAL	\$	\$5,425.28

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk

Court Reporter:

Presiding Judge

Judge Code:

Sentence Date

FILED

STATE GRAND JURY OF SOUTH CAROLINA

SEP 05 2012

State of South Carolina,

v.

Clyde Bowen Davis,

Defendant.

Case No.: 2011-GS-47-06 JAMES R. PARKS
CLERK, STATE GRAND JURY

**DEFENDANT'S MOTION TO
DISMISS THE INDICTMENT**

NOW COMES the defendant, Clyde Bowen Davis, by and through his attorney, Ryan L. Beasley, hereby moves to dismiss the Superseding Indictment because the State Grand Jury lacked subject matter jurisdiction to indict the defendant for the crimes alleged therein. The Superseding Indictment is a nullity, and the State abused the Grand Jury proceedings by its presentation of these charges. The Superseding Indictment is further insufficient with respect to Count II because the State presented no evidence that would amount to probable cause, thereby abusing the Grand Jury proceedings by its presentation of this charge.¹

Operation Ice House was an investigation into three alleged methamphetamine conspiracies: the North Carolina Conspiracy, the Atlanta Conspiracy, and the Greenville Conspiracy. All three of these Conspiracies were presented to the Grand Jury in the same proceeding, however separate indictments were issued for each alleged Conspiracy.

Count I of the Superseding Indictment charges the defendant, Nicholous Dendy, Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers as co-conspirators in the Greenville Conspiracy from January 1, 2010 through November 8, 2011. The State told the Grand Jury that the Greenville Conspiracy was limited to Greenville County:

¹ The original Indictment is also a nullity and is insufficient for the same reasons as discussed herein with respect to the Superseding Indictment.

The third crew is the Greenville Crew. We were only able to structure it through the informant "T.M." and as high as we've been able to go and it hasn't gotten out of Greenville County, but, you know, we feel sure that at some point it will . . .

(Grand Jury Testimony, 7/12/11, p. 20).

Count II of the Superseding Indictment charges that on September 8, 2010, the defendant allegedly distributed, dispensed, or delivered methamphetamine to an undercover informant. (Superseding Indictment, Count II). Discovery has revealed that this Confidential Informant was Terrance Albert. However, Terrance Albert is not an alleged co-conspirator in the Greenville Conspiracy. The State does not even allege that he was involved in the North Carolina or Atlanta Conspiracies. The alleged distribution of Count II is not a substantive offense of the Conspiracy charge in Count I. In fact, the only evidence presented to the Grand Jury on Count II was the following:

We did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion.

(Grand Jury Testimony, 11/8/11, pp. 16-17).

Subject matter jurisdiction of a State Grand Jury is limited to cases enumerated in Section 14-7-1630 of the South Carolina Code. S.C. Code Ann. § 14-7-1630. For jurisdiction to vest in the State Grand Jury for a crime involving narcotics, the crime must be "of a multi-county nature or has transpired or is transpiring or has significance in more than one county of this State." S.C. Code Ann. § 14-7-1630; *see also State v. Wilson*, 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993) ("multi-county impact is necessary to establish jurisdiction of the State Grand Jury"). "[T]he State Grand Jury may properly return an indictment alleging a single-county offense. However, such a charge conveys subject matter jurisdiction **only when the offense has multi-county significance** and the indictment contains this allegation." *Wilson*, 315 S.C. at 292 (bold added).

The jurisdiction over the subject matter of a proceeding is fundamental and “depends upon the authority granted by the Constitution and the laws of the state.” State v. Gorie, 256 S.C. 539, 541, 183 S.E.2d 334, 335 (1971). The lack of subject matter jurisdiction may be raised at any time, even sua sponte by the Court, and cannot be waived. Gorie, 256 S.C. at 541; Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006). The acts of the Grand Jury with respect to a matter as to which it has no jurisdiction are void. *See* Godwin, 370 S.C. at 223. Here, the Grand Jury lacked subject matter jurisdiction, thus the indictment is a nullity and insufficient as a matter of law to give notice to the defendant. *See* Evans v. State, 363 S.C. 495, 510, 611 S.E.2d 510, 518 (2005).

Ordinarily, the Court does not inquire into the nature of sufficiency of the evidence before a Grand Jury. State v. Thrift, 312 S.C. 282, 302, 440 S.E.2d 341, 352 (1994). However, an exception to this rule exists where the defendant makes a colorable claim of misconduct in the abuse of Grand Jury proceedings. Thrift, 312 S.C. at 302-03. Here, the State abused the Grand Jury proceedings by presenting charges for which the Grand Jury had no jurisdiction. Moreover, it abused the Grand Jury proceedings by presenting a charge without presenting evidence that would constitute probable cause for that charge. “It is noteworthy that a grand jury was originally used to protect the citizenry from abuses by the crown. The evolution in the United States was to serve the same purpose. The prosecutor should present the evidence and instruct on the law. The grand jury is more than a mere instrument of the prosecution.” Thrift, 312 S.C. at 304, fn 15.

I. COUNT II SHOULD BE DISMISSED BECAUSE THE GRAND JURY LACKED SUBJECT MATTER JURISDICTION TO CHARGE THE CRIME ALLEGED THEREIN.

Again, the only evidence presented to the Grand Jury with respect to Count II, the charge alleging distribution of methamphetamine on September 8, 2010, was the following:

We did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion.

(Grand Jury Testimony, 11/8/11, pp. 16-17).

To vest subject matter jurisdiction in the State Grand Jury, the crime alleged must be “of a multi-county nature or has transpired or is transpiring or has significance in more than one county of this State.” S.C. Code Ann. § 14-7-1630(A)(1). This jurisdiction is fundamental, and a challenge thereto may be brought at any time. Godwin, 370 S.C. at 223.

The State Grand Jury lacked subject matter jurisdiction to indict the defendant on Count II. There was no evidence presented to the Grand Jury (or even produced in discovery) demonstrating that Count II is a substantive count of the Conspiracy. There is no evidence presented to the Grand Jury (or produced in discovery) linking the alleged distribution on September 8, 2010 to the alleged Conspiracy. There was no evidence presented to the Grand Jury (or produced in discovery) that this alleged distribution of drugs on September 8, 2010 was of a multi-county nature, transpired, was transpiring, or had a significance in more than one county of this State. The indictment therefore is insufficient as a matter of law, and the State abused the Grand Jury process by presenting a claim over which the Grand Jury had no jurisdiction. See Evans, 363 S.C. at 510 (“An indictment which is a nullity would be insufficient, as a matter of law, to give the required notice to a defendant. In such cases, a defendant’s challenge does not assert a disqualification which affects only a member of a body otherwise lawful, nor a mere irregularity in doing that which the law requires, which assumes a power to act; but goes to the existence of the grand jury as a body, that it is void as such, and that indictment is therefore a nullity”) (internal citations and quotations omitted).

It is the defendant's position that he need not show prejudice when the Grand Jury lacked subject matter jurisdiction to indict him. See Evans, 363 S.C. at 512 ("the circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity or proves the disqualification of an individual juror. Otherwise, the defendant's constitutional right to demand that his case be considered by a grand jury which is properly established and constituted under the law would have no force and effect"). Nevertheless, as demonstrated below, the defendant has been substantially prejudiced.

Due process requires that a criminal defendant be properly served with a valid indictment. Evans, 363 S.C. at 509. The defendant's due process rights have been violated by being served with an indictment in which the Grand Jury had no jurisdiction to return. The defendant has been prejudiced by the State's misconduct in its abuse of the Grand Jury proceedings by presenting this charge. The defendant is being forced to defend this charge in Court. If he is found guilty and sentenced for the crime alleged, he will be further prejudiced by serving a sentence for the crime over which Grand Jury had no jurisdiction. For these reasons, the Court should dismiss Count II of the Superseding Indictment.

II. COUNT II SHOULD ALSO BE DISMISSED BECAUSE THE STATE ABUSED THE GRAND JURY PROCESS BY NOT PRESENTING EVIDENCE THAT WOULD AMOUNT TO PROBABLE CAUSE.

As stated above, the evidence presented to the Grand Jury with respect to Count II was the following:

We did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion.

(Grand Jury Testimony, 11/8/11, pp. 16-17). "In order to return a 'true bill' of indictment, twelve or more state grand jurors must find that probable cause exists for the indictment and vote

in favor of it.” S.C. Code Ann. § 14-7-1750. The State committed misconduct in abusing the Grand Jury process by not presenting evidence that would amount to probable cause. It instead impermissibly used the Grand Jury as “a mere instrument of the prosecution.” Thrift, 312 S.C. at 304, fn 15.

In Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court adopted a totality of the circumstances test when using a confidential informant to support probable cause. “Under this formula, veracity and basis of knowledge are treated as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is ‘probable cause’ . . .”. State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 802-03 (1997) (internal quotation omitted).

To establish probable cause, the State must present evidence showing the confidential informant’s reliability or veracity. State v. Adolphe, 314 S.C. 89, 93, 441 S.E.2d 832, 834 (Ct. App. 1994); *see also* State v. Johnson, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990) (an affidavit was defective because “it [did] not set forth any information as to the reliability of the informant nor was the information corroborated”). Here, the State presented no evidence to the Grand Jury showing the confidential informant’s reliability or veracity. It presented no evidence that the alleged purchase of methamphetamine was made in the officer’s presence. *See* Lapp v. S.C. Dept. of Motor Vehicles, 387 S.C. 500, 505, 692 S.E.2d 565, 568 (Ct. App. 2010). It presented no evidence to establish that any alleged controlled by was properly conducted. For example, it did not present evidence of how and when Terrance Albert was searched for money and drugs, whether an officer watched Albert make the control buy, whether Albert immediately turned drugs over to police, when Albert turned drugs over to police, and whether Albert was searched after the alleged control buy.

The evidence presented to the Grand Jury with respect to Count II would be insufficient to support probable cause for the Court to issue an arrest warrant or to bind the defendant over for trial after a preliminary hearing. This Court should not permit the State to use the Grand Jury as its instrument by presenting evidence that does not amount to probable cause. This Court should therefore dismiss Count II.

III. COUNT I SHOULD ALSO BE DISMISSED BECAUSE THE GRAND JURY LACKED SUBJECT MATTER JURISDICTION TO CHARGE THE CRIME ALLEGED THEREIN.

The Greenville Conspiracy alleged in Count I, by the State's own admission, was a crime occurring, transpiring, and having significance in Greenville County:

The third crew is the Greenville Crew. We were only able to structure it through the informant "T.M." and as high as we've been able to go and it hasn't gotten out of Greenville County, but, you know, we feel sure that at some point it will . . .

(Grand Jury Testimony, 7/12/11, p. 20). The State's "feeling" that at some point the Greenville Conspiracy will move out of Greenville County does not vest subject matter jurisdiction with the Grand Jury. In fact, a "feeling" or a "hunch" does not even meet the reasonable suspicion standard, let alone probable cause. State v. Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000).

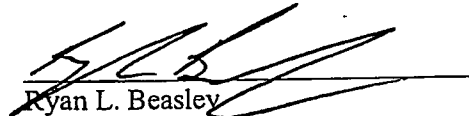
The jurisdiction over the subject matter of a proceeding is fundamental, and can be raised at any time. Gorie, 256 S.C. at 541; Godwin, 370 S.C. at 223. The Grand Jury must have subject matter jurisdiction over the crime alleged in Count I for it to validly indict the defendant for this alleged crime. S.C. Code Ann. § 14-7-1630; *see also* Wilson, 315 S.C. at 292. By the State's own admission, the Greenville Conspiracy had not gotten out of Greenville County. The State impermissibly used the Grand Jury as "a mere instrument of the prosecution" by presenting this charge. Thrift, 312 S.C. at 304, fn 15.

Although the defendant need not show prejudice, *see Evans*, 363 S.C. at 512, he has been prejudiced by the State's presentment of this charge. He is being forced to defend this charge in Court, and he may be found guilty and be sentenced for a crime over which the Grand Jury had no jurisdiction. Moreover, the defendant's due process rights have been violated by being served with an invalid indictment. *Evans*, 363 S.C. at 512. For these reasons, the Court should dismiss Count I.

IV. CONCLUSION

This Court should dismiss Counts I and II of the Superseding Indictment because the State Grand Jury lacked subject matter jurisdiction to indict the defendant for the crimes alleged therein. The Superseding Indictment is insufficient, and the State abused the Grand Jury proceedings by its presentation of these charges. The Superseding Indictment is further insufficient with respect to Count II because the State presented no evidence that would amount to probable cause, and the State further abused the Grand Jury proceedings by its presentation of this charge. This case should therefore be dismissed.

Dated this 27th day of August, 2012
Greenville, South Carolina


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Greenville, SC 29601
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(864) 672-1406 (fax)
rlb@ryanbeasleylaw.com
Attorney for the defendant

FILED

SEP 13 2012

STATE GRAND JURY OF SOUTH CAROLINA

JAMES R. PARKS
CLERK, STATE GRAND JURY

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

State of South Carolina)

) Case No.: 2011-GS-47-06

) vs.)

) Clyde Bowen Davis,)

) STATE'S RESPONSE TO DEFENDANT'S
) MOTION TO DISMISS THE INDICTMENT

) Defendant.)

_____)

The Defendant, by and through his attorney, Ryan L. Beasley, has moved to dismiss Superseding Indictment Number 201-GS-47-06 alleging that the State Grand Jury lacked subject matter jurisdiction and that insufficient evidence was presented to establish probable cause. As discussed below, the State asserts that the State Grand Jury had proper subject matter jurisdiction to investigate and return indictments regarding all aspects of the case known as "Operation Ice House" and that sufficient evidence was presented to the State Grand Jury to establish probable cause for each count against Clyde Bowen Davis in this superseding indictment. Thus, Defendant's Motion to Dismiss the Indictment should be denied.

The case known as Operation Ice House involves an investigation into the trafficking of methamphetamine (ice) throughout the Counties of Greenville, Pickens, and Anderson. The investigation identified three groups commonly referred to as the North Carolina Crew, the Atlanta Crew, and the Greenville Crew based on the identified location of the methamphetamine source for each group. These groups were eventually broken into four conspiracies for purposes of indictment. Conspirators in the Greenville

Crew, including the Defendant, were originally indicted for trafficking 28 grams but less than 100 grams of methamphetamine by conspiracy. That indictment was returned on November 8, 2011 and assigned the case number of 2011-GS-47-06. A superseding indictment was returned on December 13, 2011 in which the same defendants were charged with trafficking 100 grams or more but less than 200 grams of methamphetamine by conspiracy.

I. THE STATE GRAND JURY POSSESSED SUBJECT MATTER JURISDICTION TO INVESTIGATE AND CHARGE THE CRIME ALLEGED IN SUPERSEDING INDICTMENT 2011-GS-47-06, COUNT I.

The General Assembly created the State Grand Jury to improve the State's ability to detect and eliminate criminal activity involving illegal drugs that have significance in more than one county because ". . . these crimes are most effectively detected and investigated by a grand jury system with the authority to cross county lines." S.C. Code Ann. § 14-7-1610 (Supp. 2011). The State Grand Jury has subject matter jurisdiction over "any crime arising out of or in connection with a crime involving narcotics, dangerous drugs, or controlled substances, if the crimes are of a multi-county nature or have significance in more than one county of this state." State v. Evans, 322 S.C. 78, 81, 470 S.E.2d 97, 98 (1996). *See also* S.C. Code Ann. § 14-7-1630(A)(1) (Supp. 2011).

The allegation of multi-county significance in the indictment will sufficiently demonstrate that the State Grand Jury acted within its jurisdiction. Evans, 322 S.C. at 81, 470 S.E.2d at 98. This jurisdictional mandate requires only that an otherwise valid indictment contain an allegation of multi-county significance to vest the State Grand Jury with subject matter jurisdiction. State v. James, 321 S.C. 75, 472 S.E.2d 38 (Ct. App.

1996). This mandate refers to the subject matter jurisdiction of the State Grand Jury's investigation, not the nature of the crime itself because "multi-county impact" does not become an element of a trafficking offense solely because the indictment is returned by the State Grand Jury rather than a county grand jury. Evans, 322 S.C. at 81, 470 S.E.2d at 99.

The State Grand Jury can return an indictment alleging a single-county offense if the offense has multi-county significance and the indictment contains such an allegation. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). A defendant can attack the subject matter of the State Grand Jury by challenging the sufficiency of the evidence presented at the grand jury proceedings so long as such a challenge is made before the trial jury is sworn. State v. Green, 337 S.C. 67, 72, 522 S.E.2d 602, 604 (Ct. App. 1999).

The State Grand Jury had subject matter jurisdiction to investigate and charge the offenses alleged in this superseding indictment. Count I of the superseding indictment alleges that the Defendant, Clyde Bowen Davis, was part of a methamphetamine trafficking conspiracy taking place in Greenville and Pickens Counties. Count I further alleges that such activity occurred and/or had significance in more than one county of this state.

When viewed as a whole, the superseding indictment clearly demonstrates multi-county activity pertaining to the conspiracy. Brian Keith Sekerchak, a named co-conspirator, was also charged with five counts of distribution of methamphetamine (Counts XIII – XVII) and one charge of possession with intent to distribute methamphetamine (Count XVIII). These substantive charges are all in furtherance of the

greater conspiracy alleged in Count I. Three of Sekerchak's substantive charges occurred in Greenville County (XIII, XIV, & XVII) while the other half occurred in Pickens County (XV, XVI, & VIII). The superseding indictment alleges that substantive offenses in furtherance of the conspiracy took place in two different South Carolina counties. This conspiracy crossed county lines, thereby vesting the State Grand Jury with subject matter jurisdiction to investigate and charge the offense alleged in Count I of this superseding indictment.

This conspiracy has a multi-county impact beyond the substantive counts alleged in the superseding indictment, which was presented to the State Grand Jury. The testimony of Agent Asbill, Investigator Ayers, and Agent Barwick clearly demonstrates that the State Grand Jury was investigating drug trafficking activity that was taking place in multiple counties of South Carolina. The first two pages of Defendant's motion take a selective quotation of Agent Asbill's SGJ testimony on July 12, 2011 out of context.

"The third crew is the Greenville Crew. We were only able to structure it through the informant 'T.M.' and as high as we've been able to go and it hasn't gotten out of Greenville County, but, you know, we feel sure that at some point it will . . ."

(SGJ Testimony of B. Ashley Asbill, 7/12/11, p. 20). This testimony was part of a case summary being presented to the new State Grand Jury panel because the investigation had been initiated with the prior State Grand Jury panel. Leading into this quotation Agent Asbill had described the makeup of two other methamphetamine trafficking crews and identified each crew by the geographical source the crew used for methamphetamine. The third crew was identified as the Greenville Crew because the highest identified source of methamphetamine was in Greenville. During the two pages of testimony that

follow the quotation utilized by the Defendant, Agent Asbill went on to explain a multi-county significance by testifying that all three crews were commingled and that these individuals were selling methamphetamine in Greenville, Pickens, and Anderson Counties. (SGJ Testimony of B. Ashley Asbill, 7/12/11, pp. 21-22).

Investigator Ayers provided similar testimony to the State Grand Jury while referring to visual aids depicting pictures of the various conspirators and crews.

Investigator Ayers testified as follows:

“A. Like I said, there are several individuals, lower tier people that have dealt and, again, I just -- I stress the fact that you see how many people here have the blue line around them and, again, the blue line around them means they are in multiple groups. So, if -- I mean, there are several of these - multiple of these individuals that are in all three conspiracies and are all dealing with each other in these groups, North Carolina, Greenville, and Atlanta.

Q. So is it fair to say that despite which crew these individuals might appear in, the [effect] of their drug trafficking is having an impact on multiple Counties in South Carolina?

A. Big time.”

(SGJ Testimony of Investigator Chad Ayers, 11/8/11, 9:28 – 10:03, pp. 24-25). During testimony related to presenting the superseding indictment Agent Brett Barwick summarized that after the joint investigation between the Pickens County Sheriff's Office, the Greenville County Sheriff's Office and SLED, the agents were able to determine that the defendants named in Count I of this superseding indictment conspired together to traffic methamphetamine throughout the Upstate of South Carolina. (Presentation of Indictment, 12/13/2011, p. 4). The described interaction between the

different crews under investigation demonstrates that the actions of each crew created an impact on multiple counties of this state.

Regardless of how the State divided the various individuals involved into separate conspiracy indictments, the overall effect of the alleged offenses, as demonstrated through the investigation before the State Grand Jury, had a multi-county impact that vests that body with subject matter jurisdiction. Further, the conspiracy alleged in Count I of this superseding indictment clearly takes place in both Greenville and Pickens Counties as evidenced by one of the conspirators distributing methamphetamine in both counties in furtherance of the conspiracy. Therefore, the State Grand Jury properly had subject matter jurisdiction to investigate and subsequently charge the methamphetamine trafficking conspiracy alleged in Count I.

II. THE STATE GRAND JURY POSSESSED SUBJECT MATTER JURISDICTION TO INVESTIGATE AND CHARGE THE CRIME ALLEGED IN SUPERSEDING INDICTMENT 2011-GS-47-06, COUNT II.

As previously explained, the State Grand Jury had subject matter jurisdiction to investigate and charge the conspiracy alleged in Count I. As a result, it also had jurisdiction to investigate and charge the distribution offense alleged in Count II. The State Grand Jury has subject matter jurisdiction to investigate and charge any "crime involving narcotics, dangerous drugs, or controlled substances, **or a crime arising out of or in connection with** a crime involving narcotics, dangerous drugs, or controlled substances. . . if the crime is of a multi-county nature or has transpired or is transpiring or has significance in more than one county of this State." S.C. Code Ann. § 14-7-1630(A)(1) (Supp. 2011)(emphasis added). The State Grand Jury's investigation focused

on a methamphetamine trafficking conspiracy in which the Defendant was subsequently charged as a conspirator. The information presented to the State Grand Jury indicated that Clyde Davis was at the top of this particular conspiracy. The actual distribution of methamphetamine, the same substance involved in the conspiracy, clearly arises out of or in connection with the conspiracy. Thus, the State Grand Jury had subject matter jurisdiction to consider the distribution charge alleged in Count II because it had jurisdiction to consider the conspiracy alleged in Count I.

Defendant claims that the Count II charge of distribution is not a substantive offense of the Count I conspiracy because Terrance Albert, the confidential informant who made the purchase, is not an alleged co-conspirator. This suggestion that a distribution of methamphetamine by the defendant at the top of a methamphetamine conspiracy is not related to the conspiracy lacks merit.

A defendant cannot conspire with an agent of law enforcement who only feigns to agree to violate the drug code. State v. Holmes, 277 S.C. 232, 285 S.E.2d 353 (1981). However, the State may use evidence of the amount of drugs involved in various drug transactions as proof of the scope of the conspiracy to establish the elements of conspiracy to traffic. Wilson, 315 S.C. at 294, 433 S.E.2d at 868.

Accepting Defendant's argument would declare that no undercover drug buys could ever be part of a multi-county conspiracy because a defendant cannot conspire with an agent of law enforcement who only feigns to agree to violate the drug code. That conclusion defies clear, established case law that the State may use just such drug transactions to prove the elements of conspiracy to traffic. Defendant's conclusion would

greatly hinder the ability of the State Grand Jury to assist the State's investigations into multi-county criminal drug activity. The General Assembly meant to improve, not hinder, the State's ability to investigate and charge this type of crime. S.C. Code Ann. § 14-7-1610 (Supp. 2011). Therefore the law requires that a distribution offense such as the one alleged in Count II can be a substantive offense of a trafficking conspiracy as alleged in Count I.

Assuming, for the sake of argument, that Defendant's assertion were correct, the distribution charge is still a substantive charge of the conspiracy. The Defendant is charged as a conspirator in Count I, which is enough to tie the substantive distribution charge to the conspiracy. Furthermore, Agent Ayers ties the distribution charge to the conspiracy by describing the connection between the Defendant, Terrance Albert, and Nick Dendy (an indicted co-conspirator) when testifying that:

"On a totally separate case, we had a gentleman that stated he -- that he could deal with Nick Dendy. We sent him to Dendy. Dendy says I get my methamphetamine from Clyde Davis, who is my cousin. So Dendy sends another one of our Informants directly to Clyde Davis."

(SGJ Testimony of Investigator Chad Ayers, 2/15/11, p. 31).

Clearly the distribution charge alleged in Count II arises out of or in connection with the conspiracy alleged in Count I thus granting the State Grand Jury with subject matter jurisdiction.

In addition to arising out of and in connection to another crime that has a multi-county impact, the Count II distribution charge itself has a multi-county impact. Even though the distribution alleged in Count II only took place in Greenville County, it has

significance in more than one county because is part of the conspiracy that has already been established to have transpired and have significance in both Greenville and Pickens Counties. If the conspiracy has significance in multiple counties, so must all of the substantive offenses that combine to form the conspiracy. Therefore, the distribution of methamphetamine that Count II alleges occurred in Greenville County also has significance in Pickens County because the distribution is part of the greater conspiracy that involves both counties.

In summary, the State Grand Jury had subject matter jurisdiction to consider the charge alleged in Count II of the superseding indictment because the offense arose out of and in connection with the conspiracy alleged in Count I and the offense has significance in multiple counties because it is part of a greater conspiracy spanning over multiple counties.

III. THE STATE PRESENTED SUFFICIENT EVIDENCE TO THE STATE GRAND JURY TO ESTABLISH PROBABLE CAUSE AND CHARGE THE CRIME ALLEGED IN SUPERSEDING INDICTMENT 2011-GS-47-06, COUNT II.

A determination of the existence of probable cause depends upon the totality of the circumstances surrounding the information at the disposal of the State Grand Jury. State v. Goodwin, 351 S.C. 105, 567 S.E.2d 912 (Ct. App. 2002)(addressing an officer's probable cause for an arrest); State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999). Probable cause exists when the facts and circumstances within the State Grand Jury's knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense. Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225

(1964)(original addressing probable cause from the perspective of an arresting officer).
“In determining the presence of probable cause for arrest, the probability cannot be technical but must be factual and practical considerations of everyday life on which reasonable, prudent and cautious men, not legal technicians, act.” Gist v. Berkeley County Sheriff's Dept., 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999)(internal citations omitted).

There was more than sufficient evidence presented to the State Grand Jury to establish probable cause for the crime of Distribution as charged in Count II. The Defendant incorrectly claims that the only evidence presented to the State Grand Jury regarding Count II was testimony by Investigator Ayers that “[w]e did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion.”

As previously stated, Investigator Ayers also testified about this purchase on February 15, 2011. The procedures of a controlled purchase were explained to the State Grand Jury through the testimony of multiple law enforcement officers, cooperating defendants, and confidential informants. More importantly, when presenting the original indictment to the State Grand Jury, Investigator Ayers testified as follows:

- “Q. Please present to the Grand Jury what information and evidence the State has to establish probable cause for Count II.
- A. September 8, 2010, a Confidential Informant, working under the direct control of the Greenville County Sheriff's Office, did purchase an amount of what I have listed as 3.7 grams of a crystal-like substance from Mr. Clyde Bowen Davis. This buy took place at 112 Dobb Street, Greenville,

South Carolina 29611. This methamphetamine was placed into the lab for analysis and I do not have the lab sheet with it.

Q. Was it field tested for methamphetamine?

A. Yes, it was.

Q. And did it come back positive for methamphetamine?

A. It did come back positive for methamphetamine.

Q. And what was the field weight?

A. 3.7 grams.”

(SGJ Testimony of Investigator Chad Ayers, 11/8/2011, 10:24 a.m. – 1:17 p.m. p. 30).

When the superseding indictment was presented to the State Grand Jury Agent Barwick testified that:

“On September 8, 2010, Law Enforcement Agents associated with this case supervised a controlled purchase of methamphetamine from Clyde Bowen Davis. This was a Confidential Informant purchase that took place at 112 Dobbs Street in Greenville, South Carolina. The substance purchased by Agents tested positive for methamphetamine in an amount of 3.51 grams.”

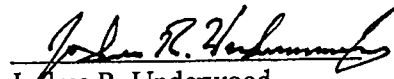
(Presentation of Indictment, 12/13/2011, p. 5).

The information presented to the State Grand Jury concerning Count II sufficiently establishes probable cause that Clyde Bowen Davis did distribute methamphetamine in Greenville County on September 8, 2010 as alleged.

IV. CONCLUSION

The State Grand Jury had subject matter jurisdiction to investigate and charge the offenses alleged in Counts I and II of this superseding indictment and sufficient information was presented to the State Grand Jury to establish probable cause for the offense alleged in Count II. Therefore, Defendant's Motion to Dismiss the Indictment should be denied.

Respectfully submitted,



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September 13, 2012
Columbia, South Carolina

STATE GRAND JURY OF SOUTH CAROLINA

OCT 23 2012

State of South Carolina,

v.

Clyde Bowen Davis,

Defendant

Case No.: 2011-GS-47-06

JAMES R. PARKS
CLERK, STATE GRAND JURY**DEFENDANT'S REPLY
TO MOTION TO DISMISS
THE INDICTMENT****I. THE COURT SHOULD DISMISS COUNT II BECAUSE THE GRAND JURY LACKED SUBJECT MATTER JURISDICTION TO CHARGE THE CRIME ALLEGED THEREIN.**

The State argues that S.C. Code Ann. § 14-7-1630(A)(1) vests jurisdiction in the Grand Jury over any offense that arises out of, or is connected to, multi-county drug offense. (Response p. 6). This is not the law. S.C. Code Ann. § 14-7-1630(A)(1) vests subject matter jurisdiction in the State Grand Jury for a crime that arises out of or in connection with the multi-county drug offense only if such crime is of multi-county nature or has transpired or is transpiring or has significance in more than one county of this State:

a crime involving narcotics, dangerous drugs, or controlled substances, or a crime arising out of or in connection with a crime involving narcotics, dangerous drugs, or controlled substances including, but not limited to, money laundering as specified in Section 44-53-475, obstruction of justice, perjury or subornation of perjury, or any attempt, aiding, abetting, solicitation, or conspiracy to commit one of the aforementioned crimes **if the crime is of multi-county nature or has transpired or is transpiring or has significance in more than one county of this State . . .**

S.C. Code Ann. § 14-7-1630(A)(1) (emphasis added). That is, for subject matter jurisdiction to vest in the State Grand Jury, the crime that "arises out of or in connection to" the multi-county drug crime must also have transpired, or have significance, in more than one county of this State.

This reading of the statute, requiring the crime which “arises out of or in connection to” have significance in more than one county, is also supported by South Carolina Supreme Court’s decisions. In State v. Wilson, the Court held that “the State Grand Jury may properly return an indictment alleging a single-county offense. However, such a charge conveys subject matter jurisdiction only when the offense has multi-county significance and the indictment contains this allegation.” Wilson, 315 S.C. 289, 292, 433 S.E.2d 864 (1993). Further, in State v. Evans, the Court held that “the State Grand Jury was given subject matter jurisdiction over, *inter alia*, any crime arising out of or in connection with a crime involving narcotics, dangerous drugs, or controlled substances, if the crimes are of a multi-county nature or have significance in more than one county of this state.” Evans, 322 S.C. 78, 81, 470 S.E.2d 97, 98 (1996) (citing S.C. Code Ann. § 14-7-1630) (emphasis added). Moreover, if there is any ambiguity in the statute, it must be strictly construed and resolved in favor of the defendant. Cooper v. South Carolina Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008); Hinton v. South Carolina Dept. of Probation, Parole, and Pardon Services, 357 S.C. 327, 335, 592 S.E.2d 335, 339 (Ct. App. 2004).

Here, for subject matter jurisdiction to vest in the State Grand Jury over Count II, the crime alleged therein must be of multi-county nature or has transpired or is transpiring or has significance more than one county of this State. The State presented no evidence to the Grand Jury support this multi-county nature or significance, nor was there any such evidence produced in discovery. Even if this multi-county significance was not required, there is no evidence that Count II arose out of, or is connected with, Count I.

Through various arguments, the State asserts that Count II is a substantive crime of Count I. It therefore concludes that (1) Count II arose out of or is connected with Count I, and (2)

because Count I is of a multi-county nature, Count II must be of a multi-county nature (Response pp. 6-9). The State's various arguments are futile and unsupported by case law. Count II is not a substantive crime of Count I. Further, because Count II does not have multi-county significance, the Grand Jury did not have subject matter jurisdiction over Count II.

"The essence of a conspiracy is the agreement." *Wilson*, 315 at 292; *see also Iannelli v. U.S.*, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975) ("[c]onspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act"). Thus, Count I alleges that the defendant, Nicholous Dendy, Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers all agreed to commit the unlawful act of selling, manufacturing, delivering, purchasing, or bringing into this State, 100-200 grams of methamphetamine. The substantive crimes of this conspiracy would be the specific methamphetamine transactions between the co-conspirators themselves. *See U.S. v. Jimenez-Recio*, 537 U.S. 270, 274-75, 123 S.Ct. 819, 822, 154 L.Ed.2d 744 (2003) (discussing a conspiracy and the relative substantive crime of the conspiracy). This is why the **"substantive crimes committed in furtherance of the conspiracy"** constitute circumstantial evidence of the existence of the conspiracy, its object, and scope." *Wilson*, 315 S.C. at 294 (emphasis added). Despite the State's contention, *Wilson* does not stand for the proposition that any drug transaction by an alleged co-conspirator may be used to prove the scope and elements of a conspiracy. (Response p. 7); *Wilson*, 315 S.C. at 294.

In its Response, the State fails to distinguish alleged drug transactions between the six alleged co-conspirators, and the defendant's alleged drug sale to Terrance Albert. As a matter of law, and as acknowledged by the State, Terrance Albert's alleged purchase of methamphetamine from the defendant on September 8, 2010 *cannot* make Albert a co-conspirator. (Response p. 7). This is because "one cannot enter into a conspiracy with another who only feigns acquiescence

in a crime . . .” State v. Holmes, 277 S.C. 232, 233, 285 S.E.2d 353, 354 (1981) (citing U.S. v. Chase, 372 F.2d 453, 459 (4th Cir. 1967)). Because Terrance Albert is not a co-conspirator, the defendant’s alleged sale of drugs to him on September 8, 2010 *cannot* be a substantive crime of the alleged conspiracy. See Jimenez-Recio, 537 U.S. at 274-75.

The State asserts that “clear, established case law” holds that an undercover drug transaction with a person who is not a co-conspirator may be used to prove the elements of the conspiracy. (Response p. 7). It thus concludes that because such undercover drug transaction is admissible, it must be a substantive offense. (Response pp. 7-8). Despite such claimed “clear, established case law” on the claimed admissibility of this evidence, the State cites none. In fact, Wilson holds the opposite: only the *substantive crimes* committed in furtherance of the conspiracy is admissible as circumstantial evidence of the conspiracy. Wilson, 315 S.C. at 294. Moreover, the State’s conclusion that the admissibility of evidence defines a substantive crime, thus confers subject matter jurisdiction, is nonsensical. Whether or not an alleged offense is a substantive crime of a conspiracy is not determined by the admissibility of evidence.

The State argues that Count II is a substantive crime of Count I because “the defendant is charged as a conspirator in Count I, which is enough to tie the substantive distribution charge to the conspiracy.” (Response p. 8). The State’s argument begs the question by assuming that the distribution charge of Count II is a substantive crime. Nevertheless, charging the defendant as an alleged co-conspirator in Count I is not “enough” to make Count II a substantive crime of Count I, and the State cites no cases to support its proposition. In fact, there is no agreement between Terrance Albert and the alleged co-conspirators to distribute methamphetamine. As a matter of law, Terrance Albert could not have formed such agreement by his alleged purchase of

methamphetamine from the defendant on September 8, 2010, therefore this alleged purchase cannot be a substantive crime of the agreement. See Holmes, 277 S.C. at 233.

The State asserts that by creation of the State Grand Jury Act, the General Assembly meant to improve, not hinder, the State's ability to investigate multi-county criminal drug activity. (Response p. 8). It then makes the leap, again unsupported by any case law, that the law therefore "requires that a distribution offense such as the one alleged in Count II can be a substantive offense of a trafficking conspiracy as alleged in Count I." (Response p. 8). Nowhere in the Code does the General Assembly permit Courts to construe a non-substantive crime to constructively make it a substantive crime for the purpose of conferring subject matter jurisdiction in the State Grand Jury. In fact, the General Assembly did just the opposite. It limited subject matter jurisdiction of the State Grand Jury to specific delineated offenses. S.C. Code Ann. § 14-7-1630. Even further, if there is any ambiguity, it must be construed in favor of the defendant. Cooper, 377 S.C. at 496; Hinton, 357 S.C. at 335.

The State asserts that Agent Ayers ties the alleged distribution charge of Count II to the alleged conspiracy of Count I by the following Grand Jury testimony:

On a totally separate case, we had a gentleman that stated he - - that he could deal with Nick Dendy. We sent him to Dendy. Dendy says I get my methamphetamine from Clyde Davis, who is my cousin. So, Dendy sends another one of our Informants directly to Clyde Davis. We purchased methamphetamine from Clyde Davis.

(Response p. 8). In its Response, the State claims for the first time that this Confidential Informant is Terrance Albert. (Response p. 8).

Despite the State's contention, Agent Ayers' testimony does not confer subject matter jurisdiction in the State Grand Jury. As explained above, for subject matter jurisdiction to vest in the State Grand Jury over Count II, Count II must have transpired, or have significance, in more

than one county of this State. S.C. Code Ann. § 14-7-1630(A)(1); Wilson, 315 S.C. at 292; Evans, 322 S.C. at 81 (citing S.C. Code Ann. § 14-7-1630). There is no testimony (or discovery produced) that the defendant's alleged methamphetamine sale to Terrance Albert transpired, or had significance, in more than one county of this State.

Even taking the State's assertion as true, that subject matter jurisdiction vests in the State Grand Jury over a crime so long as it is connected to a multi-county crime, there was no such evidence presented to the Grand Jury here. Investigator Ayers did not explain to the Grand Jury that the "Confidential Informant" sent to the defendant by Nick Dendy was Terrance Albert. Further, as demonstrated below, Count I does not have a multi-county significance. Therefore, even if Count II was "connected" to Count I, subject matter jurisdiction would still be lacking over Count II. Moreover, as also demonstrated below, the State should be estopped from relying on this testimony because it has repeatedly violated Brady and Rule 5 by failing to produce the related discovery to the defendant. The indictment is insufficient as a matter of law, and the State abused the Grand Jury process by presenting a claim over which the Grand Jury had no jurisdiction. *See Evans*, 363 S.C. at 510.

As referenced above, the State has not produced *any* discovery regarding this alleged transaction between Terrance Albert and Nick Dendy. The defendant has repeatedly requested all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions regarding Terrance Albert, including, but not limited to, all such discovery relating to Terrance Albert's incarceration. (Defendant's Supplemental Discovery Motion p. 3). Either the State is withholding such discovery from the defendant or the State

failed to preserve such discovery. Either way, as demonstrated more fully below, the State has violated the defendant's due process rights and Rule 5, therefore this case should be dismissed.

"The *Brady* disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998). "The prosecution has the duty to disclose regardless of whether the defendant makes a specific request." Kennerly, 331 S.C. at 452. "This rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police." Kennerly, 331 S.C. at 452.

Like Brady, Rule 5 has "the same goal of ensuring the criminal defendant's right to a fair trial." Kennerly, 331 S.C. at 454. Rule 5 also guarantees the defendant's access to pre-trial discovery by requiring the prosecution to "respond to the defendant's request for disclosure no later than thirty (30) days after the request is made." S.C. Rule Crim. Pro., Rule 5(a)(3). Also, like Brady, Rule 5 not only "applies to evidence within the actual possession of the prosecution" but also to "evidence within the possession of other government agencies." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220 (citing State v. Gullede, 326 S.C. 220, 487 S.E.2d 590 (1997)).

The defendant has been prejudiced by the State's withholding of this discovery. As testified by Investigators Ayers, the State sent Terrance Albert to Nick Dendy to purchase methamphetamine. Nick Dendy then allegedly told Terrance Albert that he (Nick Dendy) gets methamphetamine from the defendant. Nick Dendy then allegedly sent Terrance Albert to the defendant. Again, no discovery regarding these transactions has been produced. There is no record of the buy money the State used when it allegedly sent Terrance Albert to Nick Dendy to purchase methamphetamine. The State produced no police report, notes, or memos regarding it

sending Terrance Albert to Nick Dendy to purchase methamphetamine. The State produced no discovery regarding the date when it sent Terrance Albert to Nick Dendy, or the location of the Terrance Albert/Nick Dendy transaction. There is no surveillance footage or notes produced of the State sending Terrance Albert to Nick Dendy.

This discovery is extremely important, exculpatory, and relevant to the defense, including the defendant's preparation of this Motion to Dismiss and Reply. The State is using this alleged evidence to support its position that the State Grand Jury had subject matter jurisdiction over Count II. Over nine months ago, the defendant was entitled to this discovery so that he could investigate and evaluate the evidence. (*See* Rule 5, requiring that discovery be produced within 30 days of the defendant's request). The defendant was further entitled to use the discovery to support this Motion to Dismiss and Reply brief. The State's withholding of law enforcement records, after defendant's counsel has made a general request that included them, deprives the defendant of due process. *See Anderson v. South Carolina*, 709 F.2d 887, 888 (4th Cir. 1983).

Even further, the discovery is exculpatory because it indicates that there was no conspiracy agreement between the alleged co-conspirators. That is, it shows that Nick Dendy did not wait for the defendant to deliver the drugs to him, so that he could then deliver the drugs to Terrance Albert. It also exculpatory because it directly contradicts Terrance Albert's statement that he was approached by the defendant about buying methamphetamine, rather than being sent to the defendant by Nick Dendy. The requested discovery goes directly to the veracity and reliability of Terrance Albert as a confidential informant, when (and in what manner) Terrance Albert began cooperating as a confidential informant, and whether Terrance Albert has been untruthful (or truthful) to law enforcement in the past. The State has continuously failed to produce this discovery in violation of both Brady and Rule 5.

The State also has been impermissibly evading its duty to disclose discovery by playing word games with the defense. The Court should not permit it to do so. In defense counsel's August 31, 2012 email to the Assistant Attorney General, defense counsel reiterated his request for "all police reports/notes/memos regarding Terrance Albert." Defense counsel explained the following:

It is the State's position that Terrance Albert was a confidential informant and made a controlled purchase from my client. This discovery is extremely important, exculpatory, and relevant to the defense. For example, it will show whether (and in what capacity) Terrance Albert made controlled purchases from other individuals, and when (and in what manner) he began cooperating with the State. This information goes directly to the veracity and reliability of Terrance Albert as a confidential informant. It is further exculpatory as to why (and when) Terrance Albert began cooperating with the State (for example, was he a concerned citizen or was he caught committing a crime, and if so, what crime and in what capacity). The discovery will also show whether Terrance Albert has been untruthful (or truthful) to law enforcement in the past, and whether it is reasonable for law enforcement to rely on his alleged truthfulness in my client's case. The State's withholding of this discovery is in direct violation of Rule 5 and Brady.

The Assistant Attorney General's response was "[i]t is my understanding that this was Albert's first and only controlled purchase. You will be supplied with his criminal history and will have the opportunity to cross-examine the witness about his motives for cooperation, should he testify at trial."

The State represented to the defendant that it was its understanding that the alleged September 8, 2010 controlled purchase from the defendant was Terrance Albert's only controlled purchase. The defendant is not required to read between the lines to somehow realize that this does not mean that Terrance Albert never *attempted* to make another controlled purchase. The Court should not permit these types of deflections by the State in an attempt to evade its duties under Brady and Rule 5.

The Assistant Attorney General "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935); see also State v. Liberte, 336 S.C. 648, 657, 521 S.E.2d 744, 749 (Ct. App. 1999). Attorney General's duty to the State of South Carolina "coexist[s] with his duty to see that the accused is given a fair trial." State v. McGill, 191 S.C. 1, 3 S.E.2d 257, 261 (1939). In fact, the Assistant Attorney General "has the duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995). The United States Supreme Court has repeatedly emphasized the prosecutor's responsibility for fair play, and the South Carolina Rules of Professional Conduct demand it. Kyles, 514 U.S. at 438-40; S.C. Rules Prof. Conduct, Rule 3.4.

The State had the duty to produce all Rule 5 and Brady discovery to the defendant. It cannot evade its duty just because Terrance Albert's attempted a controlled purchase from Nick Dendy, but was apparently unsuccessful. This is especially true because the State is using this alleged attempted control purchase to argue that the State Grand Jury had subject matter jurisdiction. Moreover, it is exculpatory because it directly contradicts Terrance Albert's written statement, and shows that there was no conspiracy. This Court should dismiss this case due to the State's repeated Brady and Rule 5 violations.

If the State has lost, destroyed, or failed to preserve this evidence, this Court should also dismiss this case. When a party loses or destroys evidence, an inference may be drawn that the lost or destroyed evidence would have been adverse to that party. Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990); Gathers By and Through Hutchinson v. S.C. Elec. and Gas. Co., 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993). The defendant's due process rights are violated when (1) the State destroyed the evidence in bad faith or (2) the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001); *see also* State v. Moses, 390 S.C. 502, 518, 702 S.E.2d 395, 403 (Ct. App. 2010). Although the defendant can establish a due process violation by meeting either prong, here, both prongs are met.

If the State destroyed, or failed to preserve, the evidence, it was done in bad faith. With respect to other alleged undercover purchases, law enforcement wrote a "Report of Investigation" regarding the confidential informant's ("CI's") phone calls to whom the CI was going to purchase drugs, the date of these phone calls, the date of the alleged undercover purchase, law enforcement's instructions to the CI regarding his/her undercover purchase, surveillance notes of the CI during the undercover purchase, the amount of documented funds given to the CI, and the search of the CI before and after the alleged purchase. Additionally, with respect to other undercover purchases, law enforcement wrote a "Report of Surveillance" detailing the alleged surveillance of the CI during the CI's undercover purchase. Further, law enforcement had the CI write a statement regarding his/her undercover purchase and officers wrote an "Incident Report" regarding the undercover purchase. Further, law enforcement photocopied the documented funds given to the CI for the undercover purchase and sometimes

wrote how much the CI was paid for his/her effort. The State's failure to preserve this evidence in the alleged Terrance Albert/Nick Dendy transaction was clearly in bad faith and contrary to law enforcement's standard procedure and practice to preserve this type of evidence.

Further, this evidence possessed an exculpatory value apparent before the State destroyed the evidence, or failed to preserve the same. It shows that Nick Dendy and the defendant had a buyer/seller relationship, rather than being involved in a conspiracy. Rather than have Terrance Albert wait so that Nick Dendy could get the drugs from the defendant, Nick Dendy allegedly sent Terrance Albert directly to the defendant. This goes directly against the State's assertion that an individual would call Nick Dendy for drugs, and Nick Dendy would have to wait to get the drugs from the defendant before he could deliver them to that individual. It also directly contradicts Terrance Albert's statement that he was approached by the defendant about buying some methamphetamine, rather than being sent to the defendant by Nick Dendy. Further, the defendant cannot obtain other evidence of comparable value by other means. He does not know when the alleged transaction occurred, what officers were involved, where it happened, what was said, what statement Terrance Albert gave to law enforcement, what documented funds were used, whether Terrance Albert was searched before and after the alleged transaction, and whether (and how much) Terrance Albert was paid for his efforts. The defendant has no way to go back and re-create the alleged Terrance Albert/Nick Dendy transaction. The value of law enforcement surveillance at the time of the alleged incident cannot be replaced. State v. Jackson, 302 S.C. 313, 316, 396 S.E.2d 101, 102 (1990).

The Assistant Attorney General has the duty to personally learn of any favorable evidence known to others acting on the government's behalf, including the police. Kyles, 514 U.S. at 438. He is responsible for fair play, as emphasized by the United States Supreme Court

and demanded by the Rules of Professional Conduct. Kyles, 514 U.S. at 438-40; S.C. Rules Prof. conduct, Rule 3.4. He has the duty to produce Brady and Rule 5 discovery in the State's possession, and those acting on the State's behalf. The Court should not permit the State to continuously evade its duties by refusing to produce discovery, and then rely on that same discovery to oppose the defendant's Motion to Dismiss. For these reasons, the Court should dismiss both Counts I and Counts II.

II. THE COURT SHOULD ALSO DISMISS COUNT II BECAUSE THE STATE ABUSED THE GRAND JURY PROCESS BY NOT PRESENTING EVIDENCE THAT WOULD AMOUNT TO PROBABLE CAUSE.

As stated by the defendant in its initial brief, the evidence presented to the Grand Jury with respect to Count II was the following:

We did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion.

(Grand Jury Testimony, 11/8/11, pp. 16-17). The State does not dispute that this evidence alone does not establish probable cause. Rather, the State argues that it produced "evidence" establishing probable cause when it presented the Indictment and Superseding Indictment to the Grand Jury. (Response pp. 10-11). However, the presentment of the Indictment to the Grand Jury is not evidence. If it were, the State would be permitted to merely present the Indictment to the Grand Jury, with doing nothing more. This contradicts the statutory duties of the Attorney General and the role of the Grand Jury. See S.C. Code Ann. § 14-7-1650(A) ("The Attorney General or his designee shall examine witnesses, present evidence, and draft indictments and reports upon the direction of a state grand jury").

Nevertheless, even if the State's presentment of the Indictment to the Grand Jury was evidence, it still did not establish probable cause. To establish probable cause, the State must present evidence showing the confidential informant's reliability or veracity. State v. Adolphe,

314 S.C. 89, 93, 441 S.E.2d 832, 834 (Ct. App. 1994); *see also* State v. Johnson, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990) (an affidavit was defective because "it [did] not set forth any information as to the reliability of the informant nor was the information corroborated"). The State presented no evidence to the Grand Jury showing Terrance Albert's reliability or veracity. For example, it did not present evidence of how and when Terrance Albert was searched for money and drugs, whether an officer watched Albert make the control buy, whether Albert immediately turned drugs over to police, when Albert turned drugs over to police, and whether Albert was searched after the alleged control buy.

Despite the State's contention, the evidence it presented regarding the procedure for controlled purchases was for those made by confidential informant Tanya Smith. (Grand Jury Testimony 1/13/11, p. 9) ("She is searched by an Officer. Her vehicle - - in these particular cases, she was driven by another Officer because she didn't have a Driver's License. So she was searched; the vehicle was searched; she's issued money, documented State funds that we issue her; and in these particular cases, she was also equipped with an electronic recording device that recorded the conversations. We also recorded telephone conversations that she made to the individuals setting up the purchases"). There is no similar testimony for the alleged purchase made by Terrance Albert to establish his reliability or veracity as required establishing probable cause.

Even given the claimed "evidence" in the State's presentment of the Indictment and Superseding Indictment, it would still be insufficient to support probable cause for the Court to issue an arrest warrant or to bind the defendant over for trial after a preliminary hearing. This Court should not permit the State to use the Grand Jury as "a mere instrument of the

prosecution.” State v. Thrift, 312 S.C. 282, 304, fn. 15, 440 S.E.2d 341 (1994). This Court should therefore dismiss Count II.

III. THE COURT SHOULD ALSO DISMISS COUNT I BECAUSE THE GRAND JURY LACKED SUBJECT MATTER JURISDICTION TO CHARGE THE CRIME ALLEGED THEREIN.

The defendant does not take Agent Asbill’s testimony out of context as claimed by the State. (Response p. 4). An alleged co-conspirator’s simple buyer-seller transaction with a person outside the conspiracy does not vest subject matter jurisdiction in the State Grand Jury over the alleged conspiracy. See State v. Home, 324 S.C. 372, 381, 478 S.E.2d 289, 294 (Ct. App. 1996) (“Proof of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy”). Again, “[t]he essence of a conspiracy is the agreement.” Wilson, 315 at 292; see also Iannelli, 420 U.S. at 777. Even assuming that an alleged co-conspirator purchased drugs from a person outside the conspiracy, it is not evidence of an alleged agreement between the defendant, Nicholous Dendy, Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers that had a multi-county impact. There is no evidence that any of the alleged co-conspirators agreed that they would redistribute or resell the drugs that were purchased outside the conspiracy. There is no evidence that the drugs purchased outside the conspiracy were, in fact, distributed to another co-conspirator for them to be resold.

The State asserts that the Grand Jury had subject matter jurisdiction over Count I because Counts XV and XVI allege that Brian Sekerchak distributed methamphetamine on March 15, 2011 and June 1, 2011 in Pickens County. (Response p. 4). On March 15 and June 1, 2011, Confidential Informant Miranda Woods made controlled buys from Sekerchak. Miranda Woods is not an alleged co-conspirator, and Sekerchak’s distribution to her does not establish the alleged multi-county scope of the conspiracy alleged between the defendant, Nicholous Dendy,

Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers. See Wilson, 315 S.C. at 294. Despite the State's contention, Sekerchak's alleged distribution of methamphetamine to Miranda Woods is not a substantive offense of the conspiracy between the defendant, Nicholous Dendy, Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers. (Response p. 3). See Holmes, 277 S.C. at 233 ("one cannot enter into a conspiracy with another who only feigns acquiescence in a crime").

The State asserts that the Grand Jury also had subject matter jurisdiction over Count I because Count XVIII alleges that Sekerchak possessed with intent to distribute methamphetamine in violation of S.C. Code Ann. § 44-53-375(B). (See Response p. 3). The factual basis for Count XVIII is 0.02 grams of methamphetamine allegedly found in Sekerchak's home pursuant to a search warrant. There is no evidence that Sekerchak possessed the 0.02 grams of methamphetamine with intent to distribute it in violation of Subsection (B). Tellingly, this is the only charge against Sekerchak that the State has decided to *nol-pros* pursuant to Sekerchak's plea agreement. Nevertheless, even assuming that Sekerchak possessed with intent to distribute 0.02 grams of methamphetamine, discovery has revealed that Sekerchak had purchased the methamphetamine from "Big Pam" Bryant, not an alleged co-conspirator here. On August 30, 2011, Sekerchak provided a statement to law enforcement stating that "for about 2 months or 3 months" he had been buying methamphetamine from "Big Pam." Conversely, he dealt with Amy Brock, the alleged co-conspirator here, back in 2010.

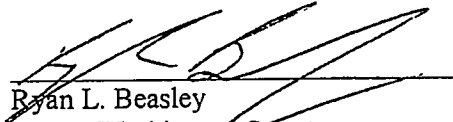
The 0.02 grams of methamphetamine that Sekerchak allegedly possessed with the intent to distribute, purchased from "Big Pam," and *nol-pros* by the State, is insufficient to confer subject matter jurisdiction in the Grand Jury over the alleged conspiracy. That is, it does not establish that the alleged agreement between the defendant, Nicholous Dendy, Amy Brock,

Michael Robinson, Brian Sekerchak, and Joshua Byers, occurred, transpired, or had significance in more than one county. *See* S.C. Code Ann. § 14-7-1630. This Court should therefore dismiss Count I.

IV. CONCLUSION

This Court should dismiss Counts I and II of the Superseding Indictment because the State Grand Jury lacked subject matter jurisdiction to indict the defendant for the crimes alleged therein. The Superseding Indictment is insufficient, and the State abused the Grand Jury proceedings by its presentation of these charges. The Superseding Indictment is further insufficient with respect to Count II because the State presented no evidence that would amount to probable cause, and the State further abused the Grand Jury proceedings by its presentation of this charge. Moreover, the Court should dismiss this case due to the State's repeated discovery violations as articulated herein and in the defendant's Reply to his Supplemental Discovery Motion.

Dated this 28th day of September, 2012
Greenville, South Carolina


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STATE GRAND JURY OF SOUTH CAROLINA

JAMES R. PARKS
CLERK, STATE GRAND JURY

State of South Carolina,	)	Case No.: 2011-GS-47-06
	)	
v.	)	
	)	DEFENDANT'S SUPPLEMENTAL
Clyde Bowen Davis,	)	DISCOVERY MOTION
	)	
Defendant.	)	

NOW COMES the defendant, Clyde Bowen Davis, by and through his attorney, Ryan L. Beasley, and moves the Court to Order the Attorney's General's Office produce any and all surveillance footage, photographs, GPS or other tracking data and/or records, video recordings, and/or audio recordings, and all documents relating thereto, of the defendant, Terrance Albert, Brian Dale Pace, Amy Brock, Nick Dendy, Michael Robinson, Brian Keith Sekerchak, Joshua Ellis Byers, Jason Griffin, and/or any other persons in connection with this case, including the "confidential informant" referenced in Investigator Ayers' February 15, 2011 Grand Jury testimony. The defendant also moves the Court to Order the Attorney's General's Office to produce the items requested by defense counsel on-the-record during the Court's September 4, 2012 proceedings, as further discussed below.

On December 12, 2011, the defendant served Rule 5 and Brady Motions on the Attorney General's Office requesting discovery. The discovery requested herein should have been produced by the Attorney General's Office pursuant to these Motions. Last night defense counsel learned that in another "Ice House" case involving defendant Tate, the Attorney General's Office did not produce discovery in direct violation of Rule 5 and Brady. Upon information and belief, Tate was being investigated by law enforcement in Gwinnett County, Georgia. Georgia law enforcement provided to the South Carolina Attorney General's Office

discovery regarding its Gwinnett County investigation. However, the Attorney General's Office never produced this discovery to the defense. In light of the State's violations, the defendant brings this specific discovery motion.

Similar to the Gwinnet County law enforcement investigation regarding defendant Tate, Investigator Ayers testified that law enforcement in Greenville and SLED are "separately" investigating the defendant. (Grand Jury, November 8, 2011, p. 17). The defendant has not received any discovery from the Attorney General's Office regarding these investigations. The defendant therefore hereby specifically requests *all* material and information relating to these investigations, and all other investigations, which has been provided to the Attorney General's Office, or has been provided to any law enforcement officers or agencies who are investigating the "Ice House" cases. This request includes, but it not limited to, all surveillance footage, photographs, GPS or other tracking data and/or records, video recordings, and/or audio recordings, and all documents relating thereto, law enforcement records, reports, notes, memorandum, statements, indictments, tickets, warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions, of the defendant, Terrance Albert, Brian Dale Pace, Amy Brock, Nick Dendy, Michael Robinson, Brian Keith Sekerchak, Joshua Ellis Byers, Jason Griffin, and/or any other persons in connection with this case, including the "confidential informant" referenced in Investigator Ayers' February 15, 2011 Grand Jury testimony.

Count II charges that on September 8, 2010, the defendant distributed, dispensed, or delivered methamphetamine to an undercover informant. (Superseding Indictment, Count II). It is the State's position that Terrance Albert is this undercover informant. However, Terrance Albert is not a member of the alleged conspiracy. While the alleged undercover buys regarding

conspiracy of Count I were all made between alleged co-conspirators, there is no evidence that Albert ever purchased methamphetamine from, or sold methamphetamine, to any of the alleged co-conspirators. Further, there is no evidence that Count II is a substantive offense of Count I. As stated on-the-record on September 4, 2012, the defendant requests all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions regarding Terrance Albert, including, but not limited to, all such discovery relating to Terrance Albert's current incarceration.

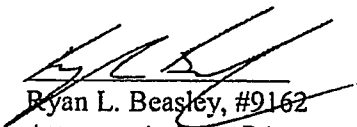
As also stated on-the-record, the defendant further requests all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, arrest warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions regarding the "confidential informant," including such person's identity, referenced in Investigator Ayers' Grand Jury testimony on February 15, 2011:

On a totally separate case, we had a gentleman that stated he - - that he could deal with Nick Dendy. We sent him to Dendy. Dendy says I get my methamphetamine from Clyde Davis, who is my cousin. So, Dendy sends another one of our Informants directly to Clyde Davis. We purchased methamphetamine from Clyde Davis.

The discovery requested herein is extremely important, exculpatory, and relevant to the defense. Withholding from the defendant this requested discovery deprives him of his Due Process rights under the 5th and 14th Amendments to the Constitution of the United States and Article I, §3 of the Constitution of South Carolina. It also violates the defendant's "right to present a defense," a right enumerated via the 6th Amendment to the Constitution of the United States and recognized by the Supreme Court of the United States through Washington v. Texas, 388 U.S. 14 (1967). The State's withholding of this discovery is in further direct violation of Brady, Giglio

v. U.S., 405 U.S. 150 (1972), and Rule 5. The defendant therefore respectfully moves this Court to Order the State to produce the discovery requested herein.

Respectfully submitted,



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Date: September 5th, 2012
Greenville, South Carolina

FILED

SEP 13 2012

STATE GRAND JURY OF SOUTH CAROLINA

JAMES R. PARKS
CLERK, STATE GRAND JURY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
State of South Carolina	)	
	)	Case No.: 2011-GS-47-06
vs.	)	
	)	STATE'S RESPONSE TO DEFENDANT'S
Clyde Bowen Davis,	)	SUPPLEMENTAL DISCOVERY MOTION
	)	
Defendant.	)	

The Defendant, by and through his attorney, Ryan L. Beasley, moved this Court to Order the Attorney General's Office to produce additional items of discovery. To date, the State has completely complied with Defendant's original discovery request made in December 2011. The State will continue to disclose any new information or documentation as it is uncovered. The new items specifically requested in the Defendant's latest motion are discussed below.

- I. Defendant references that "Investigator Ayers testified that law enforcement in Greenville and SLED are 'separately' investigating the defendant. (Grand Jury, November 8, 2011, p. 17)" and "requests *all* material and information relating to these investigations, and all other investigations, which has been provided to the Attorney General's Office, or has been provided to any law enforcement officers or agencies who are investigating the 'Ice House' cases."**

The remaining portion of the quoted testimony clearly indicates that the investigation referred to by Investigator Ayers dealt with cocaine, not methamphetamine which was the drug targeted in Operation Ice House. Defense Counsel is aware that this separate investigation resulted in a county arrest warrant against Defendant for trafficking cocaine because Defense Counsel represents Defendant on that charge. Further, on May

22, 2012 Defense Counsel represented Defendant in a bond hearing before this Court on the cocaine trafficking charge. Assistant Attorney General Joshua R. Underwood was present for that hearing but did not participate because, as explained to Defense Counsel and the Court at that time, the cocaine charge is not connected to Operation Ice House and is not being prosecuted by the Attorney General's Office. Furthermore, on September 4, 2012 Defense Counsel, Assistant Attorney General Underwood, and Assistant Solicitor Allen Fretwell discussed the cocaine charge in the courtroom prior to that day's proceedings. That conversation clearly established that the Thirteenth Circuit Solicitor's Office maintains responsibility for that charge, not the Attorney General's Office. Therefore, Defense Counsel should seek this discovery material from the solicitor's office handling the cocaine trafficking charge.

II. The Defendant requests, *inter alia*, the indictments, tickets, warrants, plea bargains, and Proffer Agreements pertaining to the Defendant, Terrance Albert, Brian Dale Pace, Amy Brock, Nick Dendy, Michael Robinson, Brian Keith Sekerchak, Joshua Ellis Byers, Jason Griffin, and/or any other persons in connection with this case.

On August 31, 2012, the State hand delivered copies of the criminal histories and, where applicable, Plea Agreements related to each of the individuals named above. The State asserts that this fulfills its obligation to disclose this type of material. If the Defendant still desires additional material, the State respectfully requests that a hearing be scheduled and that at such a hearing the Defendant be required to establish why such material is relevant and necessary to the case and why he is entitled to any such additional material from the State.

- III. The Defendant requests all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions regarding Terrance Albert, including, but not limited to, all such discovery relating to Terrance Albert's current incarceration.**

The State has already provided a copy of Terrance Albert's criminal history. The Attorney General's Office has not entered into any plea or proffer agreements with Terrance Albert in relation to this case, nor is this office currently prosecuting Mr. Albert for any criminal offenses. The State contends that it has fulfilled its duty to disclose. If the Defendant desires any additional information in this regard, the State respectfully requests that a hearing be scheduled and that the Defendant be required to establish why he is entitled to and why the State should provide such information.

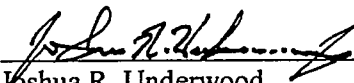
- IV. The Defendant further requests all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, arrest warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions regarding the "confidential informant," including such person's identity, referenced in Investigator Ayers' Grand Jury testimony on February 15, 2011.**

The State has already identified the confidential informant referred to by Investigator Ayers as Terrance Albert. The State has already turned over Mr. Albert's criminal history and again contends that the State has fulfilled its duty to disclose. If the Defendant desires any additional information in this regard, the State respectfully requests that a hearing be scheduled and that the Defendant be required to establish why he is entitled to and why the State should provide such information.

V. CONCLUSION

The State submits that it has fully complied with its duties to disclose and will continue to do so. Should it become necessary for the Court to address the need for specific further disclosures, the State respectfully requests a hearing at which the Defendant will be required to establish the need and obligation for further disclosures and the State will be able to rebut the same. In addition, the State respectfully requests that the Court disregard Defense Counsel's inappropriate allegation of discovery violations by the State involving the case of another defendant, Antonio Emerson Tate. This allegation is completely false and based on misinformation.

Respectfully submitted,


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Columbia, South Carolina

ORIGINAL FILED

OCT 23 2012

JAMES R. PARKS
CLERK, STATE GRAND JURY

STATE GRAND JURY OF SOUTH CAROLINA

State of South Carolina,)
)
 v.)
)
 Clyde Bowen Davis,)
)
 Defendant.)

Case No.: 2011-GS-47-06

**DEFENDANT'S REPLY
TO SUPPLEMENTAL
DISCOVERY MOTION**

Throughout its Response, the State impermissibly places the burden on the defendant to "establish why he is entitled to and why the State should provide" discovery. (State's Response to Defendant's Supplemental Discovery Motion, p. 3). This is not the defendant's duty. "The *Brady* disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998). "The prosecution has the duty to disclose regardless of whether the defendant makes a specific request." Kennerly, 331 S.C. at 452. "This rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police." Kennerly, 331 S.C. at 452. In fact, "the individual prosecutor has the duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995). Even if each piece of withheld discovery may not alone constitute a *Brady* violation, a violation may still exist when the withheld discovery is considered collectively. Kyles, 514 U.S. at 436.

Like *Brady*, Rule 5 has "the same goal of ensuring the criminal defendant's right to a fair trial." Kennerly, 331 S.C. at 454. Rule 5 also guarantees the defendant's access to pre-trial discovery by requiring the prosecution to "respond to the defendant's request for disclosure no

later than thirty (30) days after the request is made.” S.C. Rule Crim. Pro., Rule 5(a)(3). Rule 5 not only “applies to evidence within the actual possession of the prosecution” but also to “evidence within the possession of other government agencies.” Kennerly, 331 S.C. at 453, 503 S.E.2d at 220 (citing State v. Gullledge, 326 S.C. 220, 487 S.E.2d 590 (1997)).

The Assistant Attorney General “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935); *see also* State v. Liberte, 336 S.C. 648, 657, 521 S.E.2d 744, 749 (Ct. App. 1999). Attorney General’s duty to the State of South Carolina “coexist[s] with his duty to see that the accused is given a fair trial.” State v. McGill, 191 S.C. 1, 3 S.E.2d 257, 261 (1939).

Because the “significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.” Kennerly, 331 S.C. at 454 (quoting U.S. v. Agurs, 427 U.S. 97 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). Likewise here, the Court should resolve the matter in favor of disclosure. Brady requires that the defendant receive discovery in time for him to adequately use it at trial. Kennerly, 331 S.C. at 453. Withholding law enforcement records, after defendant’s counsel has made a general request that included them, deprives the defendant of due process. *See* Anderson v. South Carolina, 709 F.2d 887, 888 (4th Cir. 1983). Rule 5 requires that the State produce such discovery within 30 days of the defendant’s request. It has been over nine months since the defendant made his Rule 5 request, long after this 30-day deadline.

- I. The defendant is entitled to *all* material and information relating to criminal investigations of the defendant *and* any alleged co-conspirators and confidential informants, including the claimed "separate" investigation by law enforcement in Greenville and SLED, which has been provided to the Attorney General's Office, or has been provided to any law enforcement officers or agencies who are investigating the "Ice House" cases.

Again, pursuant to Brady and Rule 5, the defendant is entitled to discovery that is in the actual possession of the Attorney General's Office and discovery that known to others acting on the State's behalf, including the officers investigating the Ice House cases. Kennerly, 331 S.C. at 452. This information includes, but is not limited to, all surveillance footage, photographs, GPS or other tracking data and/or records, video recordings, and/or audio recordings, and all documents relating thereto, law enforcement records, reports, notes, memorandum, statements, indictments, tickets, warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions, of the defendant, Terrance Albert, Brian Dale Pace, Amy Brock, Nick Dendy, Michael Robinson, Brian Keith Sekerchak, Joshua Ellis Byers, Jason Griffin, and/or any other persons in connection with this case, including confidential informants.

The State does not deny that the requested discovery is in its possession, or in the possession of law enforcement officers or agencies investigating the "Ice House" cases. It instead claims that the investigation of the defendant by Greenville Law Enforcement and SLED is the responsibility of the Thirteenth Solicitor's Office. It therefore concludes, without any supporting authority, that the Attorney General's Office has no duty to produce this discovery. (Response pp. 1-2, Section I). This is not the law. Investigator Ayers testified to the Grand Jury *in this case*:

We did use a Confidential Informant that knew Davis and made a purchase of methamphetamine from Clyde Davis on one occasion. And I know the State Law Enforcement Division is still running a separate investigation on Mr. Davis where

he's also selling cocaine. So he's not - - he's kind of a high-ranking guy in Greenville. He sells methamphetamine; he sells cocaine. So he's kind of - - he's brought a lot of problems to Law Enforcement in Greenville.

(Grand Jury, November 8, 2011, p. 17). It is illogical for the State to present such information in an attempt to establish probable cause to Indict the defendant in this case, and then when asked to produce the discovery, refuses on the basis of it being a separate case. Because it the claimed separate investigation was used by the State to support probable cause in this case, it is material to the defendant's preparation of his defense of this case. It is irrelevant whether the State obtained this information *via* the Attorney General's Office or the State obtained this information *via* the Thirteenth Circuit Solicitor's Office. It is the *State* that used this information to support probable cause *in this case*, thus this discovery must be produced pursuant to Brady and Rule 5.

The State does not make any argument with respect to the requested information regarding alleged co-conspirators and confidential informants, except that it has already provided the defendant with criminal histories and, where applicable, Plea Agreements. (Response p. 2, Section II). Again, without any supporting case law, it claims that the defendant is "required to establish why such material is relevant and necessary to the case and why he is entitled to any such additional material from the State." (Response, p. 2, Section II).

It is not the defendant's burden to somehow guess what discovery the State has, and show the Court why it is relevant and necessary to the case. Under both Brady and Rule 5, the Attorney General's Office has the duty to produce discovery which is in its possession or the possession of law enforcement officers acting on its behalf. Kennerly, 331 S.C. at 452. Brady requires that the State produce discovery that is favorable to the defendant and material to guilt or punishment. Kennerly, 331 S.C. at 452. Impeachment evidence as well as exculpatory evidence falls within Brady. U.S. v. Bagley, 473 U.S. 667, 666, 105 S.Ct. 3375, 3380, 87

L.Ed.2d 481 (citing Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104)). Rule 5 requires that the State produce, among other things, discovery that is material to the defendant's preparation of his defense, intended for use by the prosecution as evidence in chief at trial, or was obtained from or belong to the defendant. S.C. Rule Crim. Pro., Rule 5(a)(1)(C).

Defense counsel anticipates that the alleged co-conspirators of the defendant and confidential informants will be testifying against him at trial, and/or law enforcement officers will be testifying regarding these alleged transactions with the defendant. Information relating to all criminal investigations of these alleged co-conspirators and confidential informants is favorable to the defendant and material to his alleged guilt. Therefore, it must be produced under Brady. It is also material to the defendant's preparation of his defense, therefore must be produced under Rule 5. This information will show the alleged co-conspirators' and confidential informants' credibility, bias, motive and modus operandi. It will show whether the alleged co-conspirators and confidential informants have been untruthful (or truthful) to law enforcement in the past, and whether it is reasonable for law enforcement to rely on their alleged truthfulness in this case. Further, it is submitted that the alleged co-conspirators and confidential informants may have committed perjury in failing to report income from criminal activity in their income tax returns. Such perjury is relevant to consideration of any evidence presented by the alleged co-conspirators and confidential informants. U.S. v. Shearer, 794 F.2d 1545, 1551 (11th Cir. 1986).

Even further, it would appear that such requested discovery is relevant and material to this case because it was provided to the Attorney General's Office and/or law enforcement officers investigating this case. Again, it is the duty of the Attorney General's Office to use "every legitimate means" to bring about a just result. Berger, 295 U.S. at 88. Because the

“significance of an item of evidence can seldom be predicted accurately until the entire record is complete” this Court should resolve the issue in favor of disclosure. Kennerly, 331 S.C. at 454 (quoting Agurs, 427 U.S. at 108).

II. The defendant is entitled to all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant’s Rule 5 and Brady Motions regarding Terrance Albert, including, but not limited to, all such discovery relating to Terrance Albert’s incarceration.

The State does not deny that the requested discovery is in its possession, or in the possession of law enforcement officers or agencies investigating the “Ice House” cases. (Response p. 3). It instead asserts that (1) the defendant has the duty to establish why the State should provide this discovery, and (2) it does not have the duty to produce discovery because the Attorney General is not prosecuting Terrance Albert and the Attorney General’s Office did not enter into plea or Proffer agreements with Terrance Albert. (Response p. 3).

The defendant does not have the duty to establish why the State should provide discovery, and the State cites no cases to support its novel proposition. As demonstrated above, Brady and Rule 5 place this burden on the State. As previously explained to the Assistant Attorney General, the requested information falls within both Brady and Rule 5:

It is the State’s position that Terrance Albert was a confidential informant and made a controlled purchase from my client. This discovery is extremely important, exculpatory, and relevant to the defense. For example, it will show whether (and in what capacity) Terrance Albert made controlled purchases from other individuals, and when (and in what manner) he began cooperating with the State. This information goes directly to the veracity and reliability of Terrance Albert as a confidential informant. It is further exculpatory as to why (and when) Terrance Albert began cooperating with the State (for example, was he a concerned citizen or was he caught committing a crime, and if so, what crime and in what capacity). The discovery will also show whether Terrance Albert has been untruthful (or truthful) to law enforcement in the past, and whether it is reasonable for law enforcement to rely on his alleged truthfulness in my client’s case. The State’s withholding of this discovery is in direct violation of Rule 5 and Brady.

The Assistant Attorney General's response to defense counsel's explanation was "[i]t is my understanding that this was Albert's first and only controlled purchase. You will be supplied with his criminal history and will have the opportunity to cross-examine the witness about his motives for cooperation, should he testify at trial."

The State cannot evade its duty to produce discovery under Brady and Rule 5 by claiming that defense counsel will have the opportunity to cross-examine Terrance Albert at trial. Prior to trial, defense counsel has the duty to investigate the case, not merely rely on cross-examination. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cri. 1986)); see also Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Moreover, defense counsel's apparent opportunity to cross examine Terrance Albert at trial does not negate the State's duty to produce discovery.

It is irrelevant whether the State is prosecuting Terrance Albert *via* the Attorney General's Office or the State is prosecuting Terrance Albert *via* some other agency. Either way, the State of South Carolina is prosecuting Terrance Albert for at least one crime. The *State* cannot evade its duty to produce discovery just because the Attorney General's Office is not investigating this crime or the Attorney General's Office did not enter into a plea or proffer agreement.¹ Whether the Attorney General's Office is representing the State, or some other prosecutorial agency is representing the State, the relevant party is still the State of South Carolina. The State cannot evade its duties under Brady and Rule 5 by telling the defendant he has to get discovery from another State agency. The State is withholding the requested discovery in violation of both Brady and Rule 5.

¹ Plea and proffer agreements are entered into between the *State* and the defendant, not the prosecuting agency and the defendant.

III. The defendant is entitled to all law enforcement records, reports, notes, memorandum, statements, indictments, tickets, arrest warrants, plea bargains, Proffer Agreements, and all other discovery requested in defendant's Rule 5 and Brady Motions regarding the "confidential informant," referenced in Investigator Ayers' Grand Jury testimony on February 15, 2011.

Investigator Ayers testified to the following:

On a totally separate case, we had a gentleman that stated he - - that he could deal with Nick Dendy. We sent him to Dendy. Dendy says I get my methamphetamine from Clyde Davis, who is my cousin. So, Dendy sends another one of our Informants directly to Clyde Davis. We purchased methamphetamine from Clyde Davis.

(Grand Jury Transcript, 2/15/11). The State revealed that this Confidential Informant was Terrance Albert *for the first time* in its Response to the Defendant's Motion to Dismiss the Indictment, which was filed on the same date as its Response to the Defendant's Supplemental Discovery Motion. The State's assertion that it "has already identified the confidential informant referred to by Investigator Ayers as Terrance Albert" is misleading. (Response p. 3).

The State has produced no discovery regarding the alleged Terrance Albert/Nick Dendy transaction. As stated in Section II above, the defendant has repeatedly requested all police reports, notes, and memos regarding Terrance Albert. The State only produced discovery regarding the alleged September 8, 2010 controlled purchase from the defendant. The Assistant Attorney General's response to the defendant's request for *all* police reports, notes, and memos regarding Terrance Albert was that "[i]t is my understanding that this was Albert's first and only controlled purchase. You will be supplied with his criminal history and will have the opportunity to cross-examine the witness about his motives for cooperation, should he testify at trial."

The State represented to the defendant that it was its understanding that the alleged September 8, 2010 controlled purchase from the defendant was Terrance Albert's only controlled

purchase. The defendant is not required to read between the lines to somehow realize that this does not mean that Terrance Albert never *attempted* to make another controlled purchase. The Court should not permit these types of deflections by the State in an attempt to evade its duties under Brady and Rule 5.

This is especially true because the State is using this alleged attempted control purchase to argue that the State Grand Jury had subject matter jurisdiction in this case. It is impermissible for the State to rely on this discovery to argue that the State Grand Jury had subject matter jurisdiction, but continuously refuse to produce this discovery to the defense. It is material for the defendant's preparation of his defense, including writing and replying to motions. Even further, this discovery is exculpatory because directly contradicts Terrance Albert's written statement that he was approached by the defendant about purchasing methamphetamine, rather than Nick Dendy sending him to the defendant to purchase methamphetamine. It also exculpatory because it shows that there was no conspiracy agreement between the alleged co-conspirators. That is, Nick Dendy did not wait for the defendant to deliver the drugs to him, so that he could then deliver the drugs to Terrance Albert. He instead allegedly sent Terrance Albert directly to the defendant. The requested discovery falls under both Brady and Rule 5.

IV. Conclusion

The Assistant Attorney General has the duty to use "every legitimate means" to bring about a just result. The United States Supreme Court has repeatedly emphasized the Assistant Attorney General's responsibility for fair play, and the South Carolina Rules of Professional Conduct demand it. Kyles, 514 U.S. at 438-40; S.C. Rules Prof. Conduct, Rule 3.4. The State has repeatedly evaded its duties under Brady and Rule 5 to produce discovery to the defendant.

Due to these discovery violations, for the reasons articulated herein and in the Defendant's Reply to his Motion to Dismiss the Indictment, this Court should dismiss this case.

Dated this 28th day of September, 2012
Greenville, South Carolina


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STATE GRAND JURY OF SOUTH CAROLINA

SEP 18 2012

JAMES R. PARKS
CLERK, STATE GRAND JURY

State of South Carolina,

v.

Clyde Bowen Davis,

Defendant

Case No.: 2011-GS-47-06

**DEFENDANT'S MOTION FOR
DISCLOSURE OF EVIDENCE
CONCERNING CONFIDENTIAL
INFORMANTS**

NOW COMES the defendant, Clyde Bowen Davis, by and through his attorney, Ryan L. Beasley, and pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fifth Amendment to the United States Constitution, and Rule 5, moves for an Order directing the State to disclose the following documents and information regarding the confidential informants in this case.¹ Pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure, this information should have been disclosed within 30 days of the defendant's Rule 5 motion.

1. The name and address of each confidential informant used in this case;
2. Defendant requests that the State produce the confidential informants for interviews by Defendant's counsel;
3. The case number and name of the prosecutions in which the confidential informants utilized in this case have previously been utilized as a confidential informant;
4. The case names and numbers of any trials or evidentiary hearings at which the confidential informants have testified concerning: their own prior criminal activity; payments or

¹ The term "confidential informant" used herein includes, but is not limited to, Terrance Albert, Tanya Smith, the "confidential informant" referenced in Investigator Ayers' February 15, 2011 Grand Jury testimony, and any other persons who made undercover drug purchases from the defendant or any of his alleged co-conspirators, including the alleged co-conspirators themselves who made such undercover purchases.

rewards provided by the State; efforts made to induce others to participate in criminal activity; or other purported law enforcement-related matters;

5. Any ledger, sheet or other document which details the sums paid the confidential informants or their families in this and other cases in which said informants assisted the government, and the purpose of each such payment;

6. Any information, whether or not memorialized in a memorandum, agent's report or other writing, regarding promises of immunity or leniency, preferential treatment or other inducements made to the confidential informants, or to any family member, friend or associate of the informants, in exchange for the informants' cooperation, including the dismissal or reduction of charges, assisting in matters of sentencing or deportation, or promises or expectancies regarding payments of expenses of testimony or eligibility for any award or reward;

7. Information or records concerning notification of potential prosecution, investigation or deportation made by the government to the informants or any member of their families;

8. Any report, document or information which details the criminal activities of the confidential informants which were undertaken without the authority or approval of the State, but for which the State has elected formally, or informally, not to prosecute;

9. FBI rap sheet, NCIC printout and any other records available to the State reflecting the arrest and conviction history of the informants;

10. Information concerning prior misconduct by the confidential informants in the performance of their role as an informant, including: any prior refusal of the informants to testify for or assist the State; any prior allegation that the informants entrapped another person to commit an offense or made false statements in connection with a criminal investigation;

11. Information concerning further misconduct by the informants, other than in their role as informant, including misconduct that reflects on the lack of candor, credibility, truthfulness or law-abiding character of the informants, including uncharged criminal conduct or fraud;

12. Information reflecting the nature and extent of assets obtained by the informants in connection with their illegal activities over the past ten years;

13. Any "personnel files" maintained by the State and/or any law enforcement agency relating to the confidential informants utilized in this case, reflecting on their character for truthfulness and lawfulness;

14. Any State agency and/or law enforcement files or other information revealing matters relevant to the confidential informants' credibility, mental or physical health, or narcotic or alcohol use or other dependency;

15. All of the above-referenced requests are evidence useful for impeachment and as such are required to be disclosed under Giglio v. United States, 405 U.S. 150 (1972).

ARGUMENT

I. THE GOVERNMENT MUST DISCLOSE THE IDENTIFY OF ALL CONFIDENTIAL INFORMANTS UTILIZED BY THE STATE.

In Roviaro v. United States, 353 U.S. 53, 65 (1957), the Supreme Court held that where disclosure of an informant's identity or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair trial, the government's privileges to withhold the informant's identity must yield. Roviaro, 353 U.S. at 61. The Roviaro Court reasoned that the "desirability of calling [the informant] as a witness, or at least interviewing him in advance of

trial,² was a matter for the accused rather than the government to decide.” Roviaro, 353 U.S. at 64.

The Tenth Circuit has followed Roviaro and held that if an informant’s testimony “might be relevant to the defendant’s case, the informant’s identity must be disclosed.” United States v. Reardon, 787 F.2d 512, 517 (10th Cir. 1988). The public’s interest in furthering effective law enforcement must give way to fairness when disclosure of the informant’s identify is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause. United States v. Brantley, 986 F.2d 379 (10th Cir. 1993) (quoting Roviaro, 353 U.S. at 60-61). If an informant was a participant or witness to a crime, his or her identify must be disclosed. Brantley, 986 F.2d at 383.

In the present case, each of the confidential informants was allegedly either a witness or participant to the crimes for which defendant stands charged. Each informant claims to have participated in or witnessed a drug transaction involving defendant, or his alleged co-conspirators. This level of participation requires the government to disclose the identity of its informants and all impeachment evidence. State v. Diamond, 280 S.C. 296, 298, 312 S.E.2d 550 (1984) (prosecution must reveal informant’s identity when informant is a participant in the transaction or a material witness and not “mere tipster”); *see also* United States v. Scafe, 822 F.2d 928, 933 (10th Cir. 1987) (government not required to reveal identity of “tipster”); State v. Blyther, 287 S.C. 31, 336 S.E.2d 151 (Ct. App. 1985) (prosecution must reveal identity of informant when informant introduces undercover officer to defendant and was present and witnessed the transaction); State v. Burns, 294 S.C. 338, 340-41, 364 S.E.2d 465 (1988)

² The purpose of pretrial disclosure of the informant’s identity and current whereabouts is to allow the defendant “an opportunity to interview [the informant] prior to trial.” United States v. Opager, 589 F.2d 79, 804 (5th Cir. 1979). As the Court stated in Opager, the “importance to a litigant of interviewing potential witnesses is undeniable.” Id.

(defendant must be afforded reasonable opportunity to locate informant after identity is revealed); State v. Hinson, 293 S.C. 406, 361 S.E.2d 120 (1987) (prosecution must “reveal the deal” between the state and a witness before trial).

A review of decisions from other circuits reveals the danger of allowing the government to hide the identity of its informants. The Eleventh Circuit has held that a defendant is entitled to disclosure and access to a confidential informant where “the informant’s probable testimony would bear a direct relationship on the defendant’s asserted defense.” United States v. McDonald, 935 F.2d 1212, 1217 (11th Cir. 1991). In United States v. Espinosa-Hernandez, 918 F.2d 911, 913-914 (11th Cir. 1990), the court held that preventing defense access to an informant who was the central figure of the undercover operation would justify the granting of a new trial.

In United States v. Ayala, 643 F.2d 244, 247 (5th Cir. 1981), the Fifth Circuit reversed the defendant’s conviction based on the district court’s failure to grant a motion to compel disclosure of the identity of an informant. The Ayala court analyzed the Roviaro standard for disclosure: “The informer’s level of involvement with the criminal activity is an important consideration.... The more active the participation, the greater the need for identification.” Id. 643 F.2d at 246. In Ayala, the defendant contended that the informant, if called as a witness, might “cast doubt on the agent’s identification” of the defendant. Id. at 247. The Court agreed and held that where the asserted need for identification of an active participant or eyewitness informant “rises above pure conjecture,” and the potential helpfulness of the informer’s testimony is apparent, disclosure is required. Id. at 247.

Not only must the government disclose the identity of its informants, it must also “use reasonable efforts” to produce the informants so that counsel may interview the informants or use them as witnesses at trial. United States v. Muse, 708 F.2d 513, 514 (10th Cir. 1983). The

government's failure to produce informants for interview would violate defendant's due process rights. Id.

The informants used in this case were an integral component of law enforcement's investigation. They were active participants in the events of this case. They are witnesses to the alleged conspiracy and alleged distribution of methamphetamine and they possess information that bears directly on defendant's defense of the charges against him. Under Roviaro as its progeny, their identity must be disclosed in order to preserve defendant's due process right to a fair trial.

II. THE GOVERNMENT MUST DISCLOSE PRIOR UTILIZATION OF, AND TESTIMONY BY, INFORMANTS

Information regarding the government's prior utilization of informants is material and favorable within the terms of Brady v. Maryland, 373 U.S. 83 (1963), where it reveals the informant's modus operandi in setting up criminal transactions and in inducing other persons to participate in criminal activity. Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975). Experience has shown that where an informant utilizes undue persuasion in one case to induce an individual to participate in a criminal offense, he is likely to use the same tactic in other cases. United States v. McClure, 546 F.2d 670, 673 (5th Cir. 1977). In McClure, a conviction was reversed due to the trial court's exclusion of "Fed. R.Evid. 404(b) evidence of a systematic campaign' by the informant to induce other persons to engage in illegal activity. Id., 546 F.2d at 672.

Such evidence is also discoverable, pursuant to Giglio v. United States, 406 U.S. 150 (1972), to aid in the impeachment of informant witnesses. Similarly, the prior testimony of an informant on themes material to his service as an informant, including prior misconduct as an informant, should be disclosed where the defense proposes to examine the informant as to those themes at trial. Johnson v. Brewer, 521 F.2d at 563. In United States v. Cohen, 888 F.2d 770,

776-777 (11th Cir. 1989), the Eleventh Circuit recognized the importance of such evidence, reversing a conviction where the trial court had excluded evidence offered under Fed. R. Evid. 404(b) that the primary informant had previously concocted and managed a fraudulent scheme.

Along the same line, courts have held discoverable and highly relevant information regarding prior or contemporaneous perjury or bizarre testimony of an informant. United States v. Mesarosh, 352 U.S. 1 (1956). Where an informant witness' prior presentence investigation report is in the possession of the government, disclosure should be ordered. United States v. Trevino, 556 F.2d 1256, 1271 n.7 (5th Cir. 1977).

Defendant intends to examine the government's informants at trial concerning their prior service as informants. Defendant's due process and confrontation rights demand that the informants' prior government service be disclosed.

III. THE GOVERNMENT MUST PRODUCE EVIDENCE OF PREFERENTIAL TREATMENT INDUCEMENTS OR AGREEMENTS MADE WITH INFORMANTS, INCLUDING MONIES PAID AND PROMISES OF FINANCIAL REWARD

Defendant seeks a full record of the monies paid to all informants and their families as a result of their cooperation in this case as well as any other case in which the informant has provided services. Such detailed information and records are needed to avoid disputes regarding the nature and extent of payments made to the informant, and are discoverable pursuant to Giglio, 405 U.S. at 155.

Defendant also seeks information as to any threats, promises or inducements made to the informants or their families to motivate their cooperation. Such Giglio material is discoverable to allow defense counsel to establish the bias or hostility of the informant in creating the circumstances of the instant case. It is proper impeachment to question a cooperating witness about preferential treatment given to his or her family. United States v. Nickerson, 669 F.2 1016

(5th Cir. 1982). The threats/benefits evaluation is not limited to the informant alone. United States v. Partin, 493 F.2d 750, 757 (5th Cir. 1974).

The Tenth Circuit has held that a specific pretrial request for any benefit, inducement or consideration bestowed on a government witness in exchange for their testimony is discoverable under United States v. Bacley and United States v. Agurs, United States v. Abello-Silva, 948 F.2d 1168, 480 (10th Cir. 1991). This Court should apply a “relatively low” materiality standard to specific requests for disclosure of inducements or agreements made with government witnesses. Id. This low materiality standard is justified by the relative position of the parties. “The government’s hand is stacked with cards the defense lacks. It can immunize witnesses and gather information beyond the reach of the defendant.” Id. See also United States v. Reid, 92 F.2d 1456, 1460 (10th Cir. 1990) (government must disclose existence of agreement with witness in exchange for testimony).

Similarly, unconsummated promises of financial or other awards or benefits are discoverable as to the informant. Thus, where the informant harbors an expectation of a future financial award for his services in obtaining a conviction, such evidence is important to the defense. Williamson v. United States, 311 F.2d 411 (5th Cir. 1962) (conviction reversed where informant-witness’ recovery of an award was contingent on defendant’s conviction). Furthermore, the full details of any government inducements offered to a witness including his/her entire history of compensation are discoverable and admissible at trial. United States v. Williams, 954 F.2d 668, 672 (11th Cir. 1992) (“jury has a right to know what may be motivating a witness” even if the amount of money given to an informant “is felt by the government to be too prejudicial.”)

Defendant has a due process and Sixth Amendment right to know what inducements or agreements the government has provided to its confidential informants.

IV. THE GOVERNMENT MUST DISCLOSE THE INFORMANTS' ARREST AND CONVICTION RECORD, UNAUTHORIZED CRIMINAL ACTIVITY AND OTHER MISCONDUCT

The government must disclose "evidence useful to the defendant simply for impeachment purposes." Muse, 708 F.2d at 516. This information includes the informant's history of criminal activity and other misconduct relevant to consideration of his credibility, bias, motive and modus operandi. See United States v. Austen, 632 F.2d 478, 482 (5th Cir. 1980) (criminal record of confidential informant is reliable impeachment material).

An informant's history and pattern of criminal activity and misconduct serve to illustrate the methods normally employed by the informant to achieve his goals. Such evidence "might easily extend beyond that of mere impeachment." United States v. Espinosa-Hernandez, 918 F.2d 911, 194 (11th Cir. 1990). In Espinosa-Hernandez, the Eleventh Circuit reversed the district court's failure to grant full discovery as to an undercover agent's misconduct relating to the handling of informants. Cf. Haber v. Wainwright, 756 F.2d 1520 (11th Cir. 1985) (prior criminal conduct relevant where witness may have been promised immunity).

Defendant requests disclosure of 404(b)-type evidence pertaining to the informants, as well as their arrest and conviction records.

V. THE GOVERNMENT MUST DISCLOSE THE ASSETS OBTAINED BY INFORMANTS THROUGH CRIMINAL ACTIVITY

The discovery of assets obtained by the informant through criminal activity is sought as verification of the extent of the informant's prior criminal activity and his motive to protect such assets from forfeiture. Further, it is submitted that the informants may have committed perjury in failing to report income from criminal activity in their prior income tax returns. Such perjury is

relevant to consideration of any evidence presented by the informant. United States v. Shearer, 794 F.2d 1545, 1551 (11th Cir. 1986).

VI. THE GOVERNMENT MUST DISCLOSE PERSONNEL FILES REFLECTING INFORMANT'S BAD CHARACTER

In United States v. Deutsch, 475 F.2d 55, 58 (5th Cir. 1973), the court compelled disclosure of a postal employee's personnel file where evidence failed to negate indications that the employee, who had acted in the role of an informant, may have had disciplinary problems. Similarly, in United States v. Garrett, 542 F.2d 23, 26 (6th Cir. 1976), the court reversed the defendant's conviction where the district court foreclosed discovery and cross-examination as to an undercover agent's disciplinary records relating to his use of narcotics and failure to submit to urinalysis. The court noted that such evidence was relevant because the undercover agent "might well have looked upon a successful prosecution of [the defendant] as a means of having his [own] suspension [from duty] lifted." Id.

The Tenth Circuit has adopted Deutsch's holding in Muse, 708 F.2d at 516. Thus, defendant requests the government disclose any personnel files pertaining to the confidential informants used in this case pursuant to United States v. Muse. See also, United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) (government has duty to examine personal files for potential impeachment material).

Because the government's witness files contain discoverable impeachment material, defendant requests disclosure of those files.

VII. THE GOVERNMENT MUST DISCLOSE INFORMATION REFLECTING INFORMANTS' CREDIBILITY, MENTAL HEALTH, DRUG USE AND OTHER DEPENDENCY

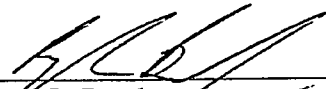
Information relating to a potential witness's credibility is discoverable and material to the defense. Giglio, 405 U.S. at 154. Particularly relevant is evidence that such an individual is

undergoing psychiatric treatment, United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983), is otherwise physically or emotionally impaired, United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974), or is addicted to or abuses drugs or alcohol. United States v. Collins, 472 F.2d 1017 (5th Cir. 1972); United States v. Fowler 465 F.2d 664 (D.C. Cir. 1972); United States v. Romano, 482 F.2d 1183 (5th Cir. 1973). Defendant requests this vital impeachment information.

CONCLUSION

Confidential informants played an active and central role in the investigation into the alleged activities of the defendant. The government must reveal the identity of the confidential informants and disclose impeachment evidence in order to protect defendant's right to a fair trial as guaranteed by the Sixth and Fifth Amendments to the United States Constitution. For the foregoing reasons, defendant requests disclosure of the above-referenced materials and information related to the confidential informants utilized by the government in the present case.

Respectfully submitted,



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September 10th, 2012

STATE GRAND JURY OF SOUTH CAROLINA

State of South Carolina,

v.

Clyde Bowen Davis,

Defendant.

FILED

SEP 18 2012

JAMES R. PARKS
CLERK, STATE GRAND JURY

Case No.: 2011-GS-47-06

**DEFENDANT'S MOTION TO
EXCLUDE THE PHOTO
LINEUP AND ALL IN-COURT
IDENTIFICATIONS MADE
SUBSEQUENT THERETO**

NOW COMES the defendant, Clyde Bowen Davis, by and through his attorney, Ryan L. Beasley, and hereby moves to exclude all evidence of the "photo lineup" in which Amy Brock and Brian Pace allegedly identified the defendant. The defendant also moves to prohibit Amy Brock's and Brian Pace's in-court identification of the defendant at trial. Brock and Pace allegedly identified the defendant from a single-photograph lineup, which is attached hereto as Exhibit 1.

THE UNDULY SUGGESTIVE PHOTO LINEUP

Count I of the superseding indictment charges the defendant, Nicholous Dendy, Amy Brock, Michael Robinson, Brian Sekerchak, and Joshua Byers with conspiracy to distribute methamphetamine. Amy Brock testified before the Grand Jury that she purchased methamphetamine from Nicholous Dendy. (Grand Jury, 9/14/11, p. 17). Brock's initial drug purchases from Dendy would take place inside her house. (Grand Jury, 9/14/11, p. 17). Dendy would arrive at her house and go inside to meet Brock. (Grand Jury, 9/14/11, p. 17). Shortly after Dendy's arrival, his "cousin" would pull into Brock's driveway. (Grand Jury, 9/14/11, p. 17). Dendy would then walk outside and obtain the drugs from his cousin, while Brock would wait inside her house. (See Grand Jury, 9/14/11, p. 17). Dendy would deliver the drugs to Brock inside the house. Brock never dealt directly with Dendy's cousin, nor did she ever meet Dendy's

cousin. (Grand Jury, 9/14/11, pp. 17, 21). She testified that she later identified Dendy's cousin as the defendant in a "lineup."¹ (Grand Jury, 9/14/11, p. 17).

Investigator Ayers also testified before the Grand Jury that Brock "picked" the defendant out of a photo lineup:

When we approached Amy Brock, she states that Dendy shows up to her house and then calls his cousin to show up. His cousin shows up in a car, Dendy walks out to his cousin, gives the money, he gets the methamphetamine. We showed Brock a photo lineup and she picked Clyde Davis out as being the one who delivers the methamphetamine to Dendy.

(Grand Jury, 2/15/11, p. 31).

On December 12, 2011, the defendant served Rule 5 and Brady motions on the Attorney General's Office. The "photo lineup" in which Brock allegedly identified the defendant was not produced. Through subsequent conversations with the Attorney General's Office and review of discovery, counsel learned that the "photo lineup" was actually a "lineup" with a single photograph - - the photograph of the defendant. (Exhibit 1, photo lineup).

Through discovery, the State also produced a typewritten alleged summary of an interview with Brain Pace. This summary is not dated, nor is it signed by the officer who wrote the summary. Nevertheless, this discovery reveals that the State used a single-photograph lineup in which Pace allegedly identified the defendant as a person from whom he purchased methamphetamine.

In June 20, 2012, counsel specifically asked the Assistant Attorney General to produce the single-photograph lineup wherein Brock allegedly identified the defendant. Counsel received no response. On August 27, 2012, counsel asked the Assistant Attorney General for the single-photograph lineups wherein Brock and Pace allegedly identified the defendant. On August 29,

¹ The defendant is not Dendy's cousin, and in fact, they are not related by blood or marriage.

2012, the State produced the attached document, asserting this is the photo lineup wherein Brock and Pace identified the defendant. (Exh. 1, photo lineup).

As stated by the United States Supreme Court, "[t]he 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). In fact, "[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." Id. "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. 188, 198, 93 S.Ct. 375, 4 L.Ed.2d 401 (1972).

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. 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). 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, 432 U.S. at 112).

Here, the single-photograph lineup containing only the photograph of the defendant was unduly suggestive. Manson, 432 U.S. at 109 (parties agreed that 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); Simmons v. U.S., 390 U.S. 377, 383-84, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (discouraging use of a "picture of a single individual who generally resembles the person" the witness observed); U.S. v. Hines, 387 F.3d 690, 693-94 (8th Cir. 2004) (a single-person photo lineup is unduly suggestive). Here, the single photograph lineup shown to Brock and Pace was likewise unduly suggestive.

Further, no emergency or exigent circumstances existed for the State's use of a single photograph. Brock's alleged identification occurred on October 26, 2010 during her second interview regarding her involvement in past drug transactions. Similarly, Pace's alleged identification occurred at the end of October or early November 2010, while he was being interviewed regarding his involvement in past drug transactions. These were not situations where the defendant was fleeing from the scene of a crime. The police had more than enough time to present Brock and Pace with a lawful photo lineup.

The unduly suggestive lineup was arranged by law enforcement. If necessary, the defendant is entitled to a full *in camera* hearing. State v. Liverman, 398 S.C. 130, 134, 727 S.E.2d 422, 423 (2012) (citing Perry v. New Hampshire, 565 U.S. - -, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012)). As demonstrated below, there is a very substantial likelihood that Brock and Pace misidentified the defendant, therefore all identification evidence must be excluded.

SUBSTANTIAL LIKELIHOOD OF BROCK'S MISIDENTIFICATION

To determine whether there is a substantial likelihood of misidentification of the defendant, the Court should examine the following factors: (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. "Of course, the State has the burden to establish by clear and convincing evidence that the in-court identification was based upon observations of the appellant other than the show-up or line-up identification." State v. Rogers, 263 S.C. 373, 377, 210 S.E.2d 604, 608 (1974). Here, all five factors indicate there was very substantial likelihood of misidentification, and the State cannot meet its burden. The Court must therefore exclude Brock's out-of-court identification and prohibit her in-court identification of the defendant. Traylor, 360 S.C. at 81, 84.

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 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. (Grand Jury, 9/14/11, pp. 17, 21). She waited inside her house while Dendy went outside and got the methamphetamine from his cousin. (Grand Jury, 9/14/11, p. 18). 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. See Moore, 343 S.C. at 289. This factor indicates a very substantial likelihood of 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). This factor indicates a very substantial likelihood of misidentification.

Third, discovery reveals that Brock gave *no* prior description of Dendy's cousin, much less an accurate description of the defendant. ("Historical on Amy Elizabeth Brock 10-26-10"; Grand Jury, 2/15/11, p. 31). Thus, this factor indicates a very substantial likelihood of misidentification. *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); Rogers, 263 S.C. at 378 (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").

Fourth, Brock's level of certainty was insufficient. After her identification, she made no mention of her certainty. (See "Historical on Amy Elizabeth Brock 10-26-10" and Grand Jury, 2/15/11, p. 31). This is not a case like Manson where the witness said that "there is no question whatsoever" that the photograph was of the perpetrator. Manson, 432 U.S. at 115. Nor is this a case like Neil where the witness had "no doubt" that she correctly identified the person who raped her. Neil, 409 U.S. at 200. This factor indicates a very substantial likelihood of misidentification.

Fifth, the length of time between the alleged crime and the identification was substantial. On October 12, 2010, Brock was approached by law enforcement about her trafficking of methamphetamine. Three days later, on October 15, 2010, Brock identified Dendy out of a six-person photograph lineup as the person from whom she had previously purchased methamphetamine. During this interview, she did not even mention Dendy's cousin. It was not until October 26, 2010, when she allegedly mentioned the involvement of Dendy's cousin and identified the defendant out of the single-photograph lineup. 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 defendant as Dendy's cousin after she was provided the single-photograph lineup. This factor indicates a very substantial likelihood of misidentification.

All five factors indicate a very substantial likelihood of Brock's misidentification. Due process requires that Brock's out-of-court identification of the defendant be excluded, and any in-court identification be prohibited.

SUBSTANTIAL LIKELIHOOD OF PACE'S MISIDENTIFICATION

Like Brock, Pace was also shown a single-photograph lineup containing the defendant's photo. (Exhibit 1, photo lineup). The factors here also weigh in favor of inadmissibility. Unlike the witness in Neil, Pace was not "the victim of one of the most personally humiliating of all crimes." Neil, 409 U.S. at 200. He was not a "specially trained, assigned, and experienced officer [who] could be expected to pay scrupulous attention to detail" so that he could "find and arrest" the perpetrator. Manson, 432 U.S. 98. Pace did not state any level of certainty in his identification of the defendant. Further, Pace gave no prior description of the perpetrator, much less an accurate description of the defendant. Compare Manson, 432 U.S. at 115 (this factor met when description included "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature" in addition to what the perpetrator wore) with Moore, 343 S.C. at 289 (this factor not met when description was based "primarily on the suspects' clothing and race, and that one was taller than the other"). Here, the factors indicate there was a very substantial likelihood of misidentification.

CONCLUSION

The State created the unduly suggestive single-photograph lineup where no exigent circumstances existed. There is a very substantial likelihood that both Brock and Pace

misidentified the defendant. Therefore, due process requires that both Brock's and Pace's out-of-court identifications, and any in-court identifications, be excluded at trial.

Dated this 11th day of September, 2012
Greenville, South Carolina



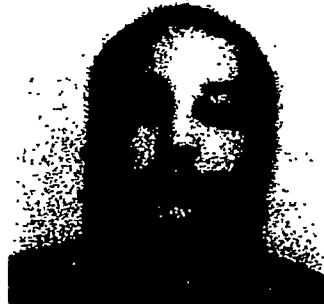
Ryan L. Beasley
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Greenville, SC 29601
(864) 679-7777 (phone)
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Attorney for the defendant

EXHIBIT 1

PHOTO LINEUP



3 YEAR DRIVER RECORD



Customer No: 22963204		Driver License No: 7608132	
Name: DAVIS, CLYDE BOWEN			
Address: 110 DOBBS ST			
City: GREENVILLE		State: SC	Zip: 296053928
County: GREENVILLE		Sex: M	Driver Training: N
DOB: 08/24/1977			
Status - DL: NO SUSPENSION		CDL: NO DISQUALIFICATION	

License Information

Type	Class	Function	Issued	Expires	First Issued	Restrictions	Endorsements
Current							
DL	D	Reissue	07/13/2004	08/24/2014	10/19/1995	N	N
BP	M	Renewal	01/21/1999	01/21/2000	01/21/1999	N	N
Prior							
DL	D	Renewal	07/13/2004	08/24/2014	10/19/1995	N	N
DL	D	Reissue	07/13/2004	08/24/2014	10/19/1995	N	N
DL	D	Renewal	09/04/2003	08/24/2008	10/19/1995	N	N
DL	D	Renewal	03/04/1998	08/24/2003	10/19/1995	N	N
DL	D	Duplicate	01/21/1999	08/24/2003	10/19/1995	N	N
DL	D	Modify	02/12/2003	08/24/2003	10/19/1995	N	N

Point Summary

Total Current Points:	5
Driver Credit:	<u>4</u>
Adjusted Current Points:	1

VIOL: 421 - Speeding 10-mph or less
Violation: 08/13/2009 **Conviction:** 01/06/2010
ACD: S51 **Conviction Loc Ref:**
Conviction State: GA

Ticket#: 78737
Recd: 01/17/2010 **Post:** 01/27/2010
Conviction Reference:
Court Type: COC
Violation Points: 2 **Current Points:** 1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
State Grand Jury

Letitia H. Verdin, Circuit Court Judge

State of South Carolina, ... Respondents

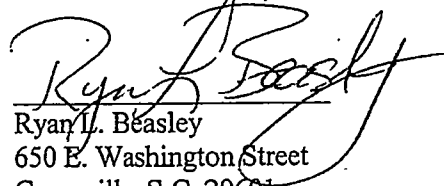
vs.

Clyde Bowen Davis, ... Appellant.

NOTICE OF INTENT TO APPEAL

Clyde Bowen Davis appeals the Order of the Honorable Letitia H. Verdin dated October 3, 2013 and attached hereto. The Appellant was sentenced on or about September 18, 2013 and a Motion for Verdict in Arrest of Judgment and Motion for New Trial, pursuant to Rule 29, was timely filed. Appellant received written notice of entry of the Order denying its Motion on or about October 4, 2013.

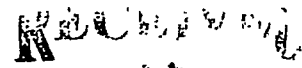
RYAN L. BEASLEY, PA


Ryan L. Beasley
650 E. Washington Street
Greenville, S.C. 29601
(864) 679-7777
Attorney for Appellant

October 10, 2013

Other counsel of record:

Joshua R. Underwood, Assistant Attorney General
Office of the Attorney General
Rembert C. Dennis Building
P.O. Box 11549
Columbia, SC 29211


OCT 16 2013
SC Court of Appeals

STATE GRAND JURY OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

State of South Carolina,

v.

Clyde Bowen Davis,

Defendant.

COURT OF GENERAL SESSIONS

CASE NO. 2011-GS-47-06

**ORDER DENYING DEFENDANT'S
MOTION FOR VERDICT IN ARREST
OF THE JUDGMENT AND MOTION
FOR A NEW TRIAL**

RECEIVED

OCT 17 2013

SC Court of Appeals

FILED

OCT 04 2013

JAMES L. RKS
CLERK, STATE GRAND JURY

THIS MATTER is before the Court on Defendant's motion for a verdict in arrest of the judgment and an entry of acquittal, or, in the alternative, for a new trial, pursuant to Rules 4 and 29 of the South Carolina Rules of Criminal Procedure. On September 18, 2013, a jury found Defendant guilty of conspiracy to traffick methamphetamine, 100 to 200 grams, and this Court sentenced him to 25 years in the South Carolina Department of Corrections. In his motion, Defendant argues (1) the State Grand Jury lacked the requisite subject matter jurisdiction to indict Defendant for conspiracy to traffick methamphetamine; (2) the Court erred in admitting testimony in violation of Defendant's constitutional right to confront witnesses and of the South Carolina Rules of Evidence; and (3) the Court erred in admitting out-of-court and subsequent in-court identifications of Defendant. Defendant's motions are denied.

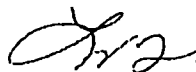
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Subject Matter Jurisdiction of the State Grand Jury

Defendant argues the State Grand Jury lacked subject matter jurisdiction to indict Defendant for conspiracy to traffick methamphetamine, in violation of South Carolina Code subsection 14-7-1630 (A)(1) (Supp. 2012). Defendant's challenge on this issue is timely, as "issues related to subject matter jurisdiction may be raised at any time." *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). Subsection 14-7-1630(A)(1) "requir[es] an allegation of multi-county significance in an indictment to establish subject matter jurisdiction in the State Grand Jury." *State v. Evans*, 322 S.C. 78, 81, 470 S.E. 2d 97, 98 (1996). Defendant argues count 1 of the superseding indictment in this case only alleges a conspiracy to traffick methamphetamine occurred in Greenville County. The indictment alleges the Defendant "did, in Greenville County and Pickens County of South Carolina . . . conspire to sell, manufacture, deliver, purchase, or bring into this State" between one hundred and two hundred grams of methamphetamine. This Court finds the indictment sufficient to vest subject matter jurisdiction over this case in the State Grand Jury pursuant to the requirements of South Carolina Code subsection 14-7-1630(A)(1).

Admissibility of Testimony of SLED Agent Ashley Asbill

Defendant argues this Court erred in admitting the testimony of South Carolina Law Enforcement Division (SLED) Agent Ashley Asbill, as his testimony was irrelevant, unduly prejudicial, and violated the Confrontation Clause and the South Carolina Rules of Evidence. Agent Asbill testified about his involvement in and observation of a controlled buy between the Defendant and Terrance Albert, who was working undercover for SLED. Defendant argues Agent Asbill's testimony regarding Defendant's purchase from Albert, who did not testify, was



irrelevant to the conspiracy charge. Defendant also argues that because Albert was working undercover and thus did not acquiesce to the conspiracy, the fact that Defendant sold drugs to Albert could not be proof of a substantive crime committed under the alleged conspiracy. Defendant relies on *State v. Wilson*, 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993), for the proposition that "only the *substantive crimes* committed in furtherance of the conspiracy are admissible as circumstantial evidence of the conspiracy" (Defendant's motion, pg. 3) (emphasis added by Defendant), and argues Agent Asbill's testimony is therefore irrelevant and inadmissible under Rule 402 of the South Carolina Rules of Evidence.

Defendant's interpretation and quotation of *Wilson* are inaccurate. The underlying crime in a conspiracy is the mutual agreement or understanding. *Wilson* states "the substantive crimes committed in furtherance of the conspiracy constitute circumstantial evidence of the existence of the conspiracy, its object, and scope," but not to the exclusion of other evidence, as the Defendant asserts through the misquoted language. 315 S.C. at 294, 433 S.E.2d at 867-68. In fact, "the State is entitled to prove 'the whole history of the conspiracy, from its commencement to its conclusion,' as well as overt acts done in furtherance of the conspiracy since from those overt acts, 'an inference may be drawn as to the existence and object of the conspiracy.'" *Id.* (citing *State v. Hightower*, 221 S.C. 91, 69 S.E.2d 363 (1952)).

The State did not introduce evidence of the controlled buy between Defendant and Albert to prove a conspiracy existed between them. Defendant is correct that someone working for law enforcement cannot be a co-conspirator. See *State v. Holmes*, 277 S.C. 232, 233, 285 S.E.2d 353, 354 (1981) (citing *U.S. v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967)). A person cannot escape



prosecution for participation in a conspiracy, however, simply because one other actor with whom they interact is a government agent and does not have the requisite criminal intent to form a conspiracy. *See United States v. Jimenez Recio*, 537 U.S. 270, 275, 123 S. Ct. 819, 822, 154 L. Ed. 2d 744 (2003) ("the fact that a conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant"). The fact that Albert was working undercover and therefore lacked the intent to enter into a conspiracy with Defendant does not erase Defendant's actions in furtherance of the greater conspiracy, nor does it discount Agent Asbill's testimony. Defendant's argument, that his alleged sale of drugs to Albert could not be a substantive crime used to prove the existence of the conspiracy because Albert was not a co-conspirator, fails.

Additionally, Defendant's assertion that Agent Asbill's testimony was irrelevant and was inadmissible hearsay is incorrect. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402, SCRE. Agent Asbill testified to his personal observations of the Defendant during the controlled buy, which was an overt act committed by Defendant in furtherance of the conspiracy alleged in the indictment in this case. "The State is permitted great latitude in the introduction of circumstantial evidence to establish the existence of a conspiratorial agreement." *Wilson*, 315 S.C. at 294, 433 S.E.2d at 867-68. Agent Asbill did not testify to anything Albert said to him regarding the controlled buy, which would be inadmissible hearsay, but rather testified only to what he observed while monitoring the buy. Agent Asbill's testimony was relevant, was not hearsay, and was properly admitted.

24

Finally, Defendant argues that the State's failure to call Terrance Albert to testify regarding the controlled buy violated Defendant's Sixth Amendment right to confront adverse witnesses. "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (citing *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). One can prove a violation of these rights "by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination" *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986)) (emphasis in original). The Sixth Amendment provides a defendant the right to call witnesses who are favorable to him, but does not provide the right to compel the State to call the witnesses of the defendant's choosing. It is not the right to confront all witnesses who may be adverse to the defendant, but instead is the right to meaningfully cross-examine those witnesses whom the State calls. *See Graham*, 314 S.C. 385, 444 S.E.2d 527 ("Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses"). Defendant had and took the opportunity to meaningfully cross-examine Agent Albert regarding the controlled buy. The fact that Defendant could not cross-examine Terrance Albert, whom Defendant believes was a more appropriate witness to testify about the controlled buy, did not in fact violate Defendant's Sixth Amendment rights.



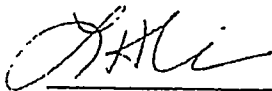
Admissibility of Identifications

Defendant repeats the arguments from his pre-trial motion to exclude the photo lineup and any subsequent in-court identifications, arguing the lineup was unduly suggestive and subject to misidentification. This Court held a pre-trial hearing in accordance with *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), where SLED Agent Chad Ayers testified to the circumstances surrounding the photo lineup and the witnesses' identification of Defendant. This Court found the identification process was not unduly suggestive, nor was there a substantial likelihood of misidentification. *See State v. T aylor*, 360 S.C. 74, 600 S.E. 2d 523 (2004). Subsequent to that finding, this Court allowed Amy Brock, the witness who identified Defendant in the photo lineup, and other witnesses to identify Defendant in court. Defendant does not raise any new points of law as to this issue.

Conclusion

Defendant's motion for verdict in arrest of judgment and motion for a new trial are denied.

IT IS SO ORDERED.



LETTIA H. VERDIN
CIRCUIT COURT JUDGE
THIRTEENTH JUDICIAL CIRCUIT

Greenville, South Carolina

October 3, 2013



STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 2011GS4700006
	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
Clyde Davis,	)	
	)	
Defendant.	)	

September 16-18, 2013
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

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

JOSHUA UNDERWOOD, Esquire
CURTIS PAULING, Esquire
Assistant Attorney Generals

RYAN BEASLEY, Esquire
Attorney for the Defendant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



CAT 7

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 16th day of September, 2013 at approximately 11:21 a.m.)

MR. UNDERWOOD: Your Honor, if I may.

THE COURT: Yes, sir.

MR. UNDERWOOD: I haven't had a chance to read the entire of Mr. Beasley's severance motion. I do notice that Roman numeral two of that motion is requesting to sever Count 1 of the indictment from Count 2. Just to make things simpler in our argument, I will go ahead and just move forward for the purpose of this trial solely on Count 1 and consenting to that portion of the motion.

THE COURT: Okay. Count 1 is -

MR. UNDERWOOD: That is the trafficking by conspiracy count, Your Honor.

MR. BEASLEY: So you are consenting to sever Count 1 of Count 2?

MR. UNDERWOOD: Yes.

MR. BEASLEY: Okay. Does that mean you are also consenting to my motion to dismiss Count 2?

MR. UNDERWOOD: Not a chance.

THE COURT: Good try.

MR. UNDERWOOD: I will let you try them separately. That is as far as I will go.

1 **THE COURT:** Is it methamphetamine that we are
2 talking about here?

3 **MR. UNDERWOOD:** Yes, Your Honor.

4 **THE COURT:** Okay. Trafficking
5 methamphetamine. I'm sorry. I'm just not looking
6 right at the indictment. In the moments before we
7 bring the jury up, do y'all want to come up with a
8 short non-argumentative statement of the facts for
9 me to give to the jury just to make sure they don't
10 know anything about the alleged facts in this case?

11 **MR. BEASLEY:** I don't think it is necessary.

12 **MR. UNDERWOOD:** The indictment is pretty
13 clear.

14 **MR. BEASLEY:** Yeah.

15 **THE COURT:** Do you have the indictment?

16 (Pause.)

17 All right. That is easy enough. All right.

18 (Pause.)

19 They are standard voir dire. I probably won't
20 ask number six. I will ask some variation of all
21 the others. It is five and five. You want to do
22 how many alternates?

23 **MR. UNDERWOOD:** Two.

24 **THE COURT:** It is going to be several days,
25 you think?

1 **THE COURT:** You might have wondered why
2 excused them for the rest of the afternoon. I'm
3 just want to tell you -- y'all, I'm going to be
4 honest with you. I am starving. Let's take up all
5 the motions this afternoon. Okay. Let's come back
6 at 2:00 and take up all the motions. Okay.

7 **MR. BEASLEY:** Thank you.

8 (WHEREUPON, a lunch recess is taken.)

9 **THE COURT:** Mr. Beasley, it looks like one
10 has been consented to already. So the motion to
11 sever the indictments have been consented to. There
12 are two pending motions. That would be the motion
13 to dismiss the motion with regard to the photo
14 identification.

15 **MR. UNDERWOOD:** Your Honor, if I may. just to
16 clarify. On severance motion that Mr. Beasley
17 provided, it has two parts. The State has consented
18 to severing the distribution count and the
19 conspiracy count. But there was another part to
20 that motion that I think is still contested. It can
21 kind of be wrapped into the motion to dismiss.

22 **THE COURT:** Okay.

23 **MR. UNDERWOOD:** Just to be clear.

24 **THE COURT:** All right. Yes, sir.

25 **MR. BEASLEY:** Your Honor, the first motion, I

1 filed a motion to dismiss. There were basically
2 several parts to that. There was a motion to
3 dismiss Count 2 based on no subject matter
4 jurisdiction for the Attorney General's office.
5 Also, to dismiss Count 1 for no subject matter
6 jurisdiction also -- to dismiss. There was no
7 probable cause presented to the Grand Jury as to
8 Count 2. Also, within that motion, we argued Rule 5
9 Brady violations which I would like to start with
10 those first.

11 THE COURT: All right.

12 MR. BEASLEY: Those are probably the more
13 relevant at this point.

14 THE COURT: All right.

15 MR. BEASLEY: In response to my initial
16 motion that I filed, the State asserted that Agent
17 Ayers -- and they put this in the brief that he tied
18 the alleged distribution charge of Count 2 applied
19 to the alleged conspiracy Count 1 by the following
20 Grand Jury testimony. This is in his testimony. He
21 said, on a totally separate case, we had a gentleman
22 stating that he knew Nick Dendy. Nick Dendy is a
23 co-conspirator in this case.

24 THE COURT: Okay.

25 MR. BEASLEY: Dendy says, I get my meth from

1 Clyde Davis, my cousin. Dendy says another one of
2 our informants dealt directly with Clyde Davis. We
3 purchased meth from Clyde Davis. This was the first
4 time that we figured out the confidential informant
5 at that time was Terrance Albert. So, we
6 immediately filed some supplemental motions asking
7 for any evidence regarding those transactions with
8 Terrance Albert.

9 The State has not produced any discovery
10 regarding the alleged transaction between Terrance
11 Albert and Nick Dendy. Either the State is
12 withholding this discovery from the defendant or the
13 State has failed to preserve it. Furthermore, the
14 defendant has been prejudiced by the State
15 withholding this discovery.

16 As testified by Investigator Ayers, the State
17 sent Terrance Albert to Nick Dendy to purchase meth.
18 Nick Dendy then allegedly told Terrance Albert that
19 he, Nick Dendy, gets his meth from the defendant.
20 Nick Dendy then allegedly sent Terrance Albert to
21 the defendant. Again, no discovery regarding these
22 transactions has been produced. There is no police
23 reports regarding sending Terrance Albert to Nick
24 Dendy to purchase meth. The State produced no
25 discovery at all regarding the date they sent

1 Terrance Albert to Nick Dendy or the location of the
2 Terrance Albert/Nick Dendy transaction. There is no
3 surveillance footage, notes produced or anything.
4 The State is using this information which they used
5 the State Grand Jury testimony to support its
6 position at State Grand Jury for subject matter
7 jurisdiction.

8 This evidence is also exculpatory because it
9 indicates there is no conspiracy agreement between
10 the alleged co-conspirators. That is, it shows that
11 Nick Dendy did not wait for Mr. Davis to deliver the
12 drugs to him so that he could deliver the drugs
13 which is what is alleged. It is also exculpatory
14 because it contradicts Terrance Albert's statement,
15 which is the CI. He gives a statement and he
16 actually claims that he was approached by Clyde
17 Davis.

18 The course of discovery goes directly to the
19 veracity and liability of Terrance Albert, the
20 confidential informant, on when and what manner
21 Terrance Albert began cooperating as a confidential
22 informant and whether Terrance Albert has been
23 truthful or untruthful to law enforcement in the
24 past. The State has continuously failed to produce
25 this discovery in violation of Rule 5 Brady.

1 In fact, last year before trial, I actually
2 sent an e-mail to Mr. Underwood reiterating reports
3 and memos regarding Terrance Albert. I explained in
4 details the State's position that Terrance Albert is
5 a confidential informant that made a controlled
6 purchase from my client. This discovery is
7 extremely important, exculpatory and relative to
8 defense. It will show whether in what capacity
9 Terrance Albert made controlled purchases from other
10 individuals and when or in what manner he began
11 cooperating with the State. This information goes
12 directly to the veracity and liability of Terrance
13 Albert as a confidential informant.

14 It is exculpatory as to why and when Terrance
15 Albert begin cooperating with the State. For
16 example, was he a concerned citizen, was he caught
17 in a crime, in what capacity. I said the discovery
18 will also show whether Terrance Albert has been
19 untruthful or truthful to law enforcement in the
20 past.

21 Mr. Underwood responded and said my
22 understanding this is Terrance Albert's first and
23 only controlled purchase. You will be supplied with
24 his criminal history and you will have the
25 opportunity to cross-examine the witness about his

1 motives for cooperation should he testify at trial.

2 An attempted control purchased does not qualify
3 for, you know -- the Attorney General has the duty
4 to provide any favorable evidence known to the
5 government whether it includes what the police know.
6 It is his duty to get that information from the
7 police. Just because Terrance Albert attempted a
8 control purchase from Nick Dendy but apparently was
9 unsuccessful -- this is especially true because the
10 State is using this alleged attempt to controlled
11 purchase to argue that the State Grand Jury has
12 subject matter jurisdiction. It is exculpatory
13 because it directly contradicts Terrance Albert's
14 written statement that shows there was no
15 conspiracy. Your Honor, we would ask that the
16 statement be dismissed based on granting Rule 5.

17 Further, Your Honor, if the State did destroy
18 or fail to preserve the evidence, it was done in bad
19 faith. With respect to all the other alleged
20 undercover buys or attempted buys that are produced
21 in this, they have a drug report regarding the CI's
22 phone calls to who the CI was going to purchase
23 drugs, the date of these phone calls, the date of
24 the alleged undercover purchase, law enforcement's
25 instructions to the CI regarding his or her

1 undercover purchases, surveillance notes of the CI
2 during the under cover purchase, the amount of
3 documented funds given to the CI and the search of
4 the CI before and after the alleged purchase.
5 Additionally, with respect to other undercover
6 purchases, law enforcement wrote a report of
7 surveillance detailing the alleged surveillance of
8 the CI during these CI undercover purchases.
9 Further, law enforcement had the CI write a
10 statement regarding his or her undercover purchase
11 and the officers wrote an incident report regarding
12 the undercover purchase. Further, law enforcement
13 photocopied the documents and funds given to the CI
14 for the undercover purchase and sometimes wrote down
15 how much the CI was paid for his or her effort.

16 The State's failure to preserve this evidence
17 in the alleged Terrance Albert/Nick Dendy
18 transactions clearly are contrary to law
19 enforcement's standard procedures and practice.
20 Further, Your Honor, this evidence possess an
21 exculpatory value when they failed to preserve it.
22 I say that because it shows Nick Dendy, who is the
23 co-conspirator in this case, only had a buyer/seller
24 relationship with my client rather than being
25 involved in this conspiracy.

1 Furthermore, it shows that Terrance Albert did
2 have to wait for Nick Dendy to call up my client to
3 come to him and get the drugs. Instead, Nick sent
4 this CI directly to my client. This goes directly
5 against the State's assertion that an individual
6 would call Nick Dendy for drugs and Nick would have
7 to wait to get the drugs from the defendant before
8 he could deliver them to the individual.

9 It also directly contradicts Terrance Albert's
10 statement where he gave a written statement, Judge,
11 showing that he was approached by my client. The
12 testimony before the Grand Jury by Agent Ayers
13 directly contradicts that. We don't have anything
14 to go on. We don't know when this alleged
15 transaction occurred, what officers were involved,
16 when it happened, where, what statement did Terrance
17 Albert give to law-enforcement, were documented
18 funds were used, whether Terrance Albert was
19 searched before and after the transaction, how much
20 Terrance Albert was paid for his efforts. We have
21 no way of going back and re-creating this alleged
22 Terrance Albert/Nick Dendy transaction. The law
23 enforcement surveillance of the time of this alleged
24 incident cannot be replaced. Your Honor, based on
25 all of that, I think that is clearly a Rule 5 Brady

1 violation. I think the case should be dismissed.

2 THE COURT: All right, Mr. Underwood.

3 MR. UNDERWOOD: First, Your Honor, the reason
4 that the State has not provided any documentation
5 about control purchase on Nick Dendy involving
6 Terrance Albert is because there was no control
7 purchase attempt. That was aborted before it ever
8 got at that far. There was conversation of Terrance
9 Albert -- just my understanding from law enforcement
10 that Terrance Albert was involved in a conversation
11 with Nick Dendy and was told to make a purchase with
12 Davis. There was no actual attempt to make a
13 control purchase. It was a matter of Terrance
14 Albert had arrangements with Nick Dendy to buy a
15 certain amount of dope on a certain day. They had a
16 wire. None of that ever happened, Your Honor. That
17 is why there was no report of that because it didn't
18 get that far.

19 To my knowledge, Your Honor, I have provided
20 Mr. Beasley with SLED confidential informant packet
21 when they signed up Mr. Albert as a confidential
22 informant. I gave him the entire packet. He was
23 not working off any charges. He wasn't made any
24 promises. He wasn't making any money. I think he
25 may have referred to SLED by officers who have

1 talked to this individual in the past.

2 But in this particular case, there were no
3 promises made to the defendant -- to the
4 confidential informant, he wasn't paid any money,
5 which is why there was nothing to hand over to Mr.
6 Beasley about that. There were no consideration is
7 given to him. This was a single use confidential
8 informant. SLED didn't use him to make any other
9 buys or attempted buys. He was elicited to make one
10 attempted undercover purchase against Clyde Davis,
11 which he did.

12 And all that information has been provided to
13 Mr. Beasley. There's no -- there's no information
14 that the State is withholding. I inquired from law
15 enforcement if there'd been any times in the past
16 where Terrance Albert has worked as a confidential
17 informant for other agencies where he wasn't
18 truthful or there were any problems with any buys
19 that he tried to do. And I was advised that there
20 was no such situation.

21 I don't think that it's proper for the State to
22 have to find every single time that he's worked as a
23 confidential informant if there were no problems
24 with those cases. I don't think it's proper to burn
25 a confidential informant in other cases when there

1 was nothing, no propriety involved. Uh, Your Honor,
2 therefore, everything I think that's proper and
3 could reasonably be construed as proper concerning
4 Terrance Albert has been turned over to the defense.

5 Also, Your Honor, just to clarify, as far as
6 whether or not this undercover purchase constitutes
7 a charge related to subject matter jurisdiction of
8 the State Grand Jury, whether Nick Dendy bought dope
9 from Clyde Davis and resold it, whether he was
10 involved in arranging and brokering a deal with
11 Clyde Davis, that shows evidence of a conspiracy
12 arrangement.

13 This is just a substantive count of
14 Distribution of Methamphetamine. Mr. Davis is
15 charged with a Conspiracy to Traffic Methamphetamine
16 in this area. Therefore, it's connected, this
17 distribution is connected to that charge of
18 conspiring to traffic methamphetamine, particularly
19 the fact that another individual, Nick Dendy, is
20 potentially involved at least at some small level in
21 arranging the deal, Your Honor.

22 Not to mention that, you know, the indictment
23 shows that or accuses Mr. Davis of several named
24 individuals and unnamed individuals of conspiring to
25 traffic. Now, if Mr. Davis wants to stipulate that

1 he was manufacturing methamphetamine, that he didn't
2 get it from somewhere else, we might have a
3 different story, Your Honor. But obviously, he did
4 have methamphetamine from someone to sell it to
5 someone else.

6 The case will show, again in the State's case-
7 in-chief that more than a buyer/seller relationship
8 with some of these individuals took place. It was
9 repeat business. It was a situation of I'm selling
10 you methamphetamine so you can sell it to someone
11 else so you can come back and buy more and repeat,
12 repeat, repeat at a continuous cycle. That's
13 conspiracy, Your Honor. There were no Brady
14 violations.

15 All the information that's in any way, shape or
16 form relevant to this case has been turned over to
17 the defense. The State hasn't withheld anything.
18 The State has made inquiries as to whether there was
19 any other information that needed to be handed over
20 and was informed there is no other information that
21 is out there. If there was, we would give it over.
22 But it's just not there.

23 **THE COURT:** All right. Thank you.

24 Mr. Beasley?

25 **MR. BEASLEY:** Your Honor, this is how they

1 got the indictment. He sits there and testifies
2 that he has a CI that could deal with Nick Dendy.
3 He sends him to Dendy. Dendy says I get my meth
4 from Clyde, who is my cousin. So Dendy sends
5 another one of our informants directly to Clyde
6 Davis. You know, he says he doesn't want to burn
7 the CI. But he said that was his only purchase.
8 There is a problem here. I mean, they are using
9 that --

10 **THE COURT:** He says they didn't -- they
11 stopped the buy. There was no controlled buy. They
12 stopped it before it happened.

13 **MR. BEASLEY:** But how did they -- alright,
14 the State says that's the case when they ought to
15 produce Terrance Albert. I want to question him on
16 the stand, proffer him. No offense, but I'm not
17 just going to take the State's word for it. I'd
18 rather talk to the CI. I think that's very, you
19 know, --

20 **THE COURT:** Uh, well, uh, --

21 **MR. BEASLEY:** I mean, that's very important
22 information because it's going to the -- how did the
23 CI even come into contact with Dendy? I mean, he
24 just volunteered to go start cooperating with the
25 State? There's nothing about that. They just said

1 we have this CI. There's no information about that.
2 All they did is send him -- they said send him to
3 Dendy, which they used in their State Grand Jury as
4 reliable information. They have nothing on him.
5 Then they send him to Clyde. That's very important
6 information of how all this transpired. Otherwise,
7 this is the only buy. This is the only buy in the
8 entire case on my guy. That's it.

9 THE COURT: Mr. Underwood, anything in
10 response? I mean, is that going to be the only
11 evidence of any buy?

12 MR. UNDERWOOD: This is the only controlled
13 purchase on Clyde Davis. Yes, ma'am.

14 THE COURT: All right. All right.

15 MR. UNDERWOOD: It's not the only evidence
16 involving him in the conspiracy, but it's the only
17 controlled purchase. All right. Well, based on
18 what I'm hearing, I'm going to deny your motion at
19 this time. Not to say that it can't be renewed at a
20 later time during trial.

21 MR. BEASLEY: Your Honor, you know, they
22 actually consented to severing. But obviously, they
23 are sort of intertwined because they are using that
24 information and went in before the Grand Jury to get
25 an indictment. I think they should be required to

1 produce this CI. They are supposed to produce him
2 anyway. They were supposed to be trying Count 2
3 anyway. But I should be allowed to ask the CI
4 questions about how this came about. The CI
5 statement says that Clyde approached him. Yet, they
6 are saying that they sent, uh, the CI to Davis from
7 -- according to Dendy. It's very important as to
8 how all this transpired. I really think I should go
9 and proffer this witness.

10 THE COURT: Mr. Underwood?

11 MR. UNDERWOOD: Your Honor, when the case is
12 -- when that particular case is called to trial, I
13 think that's more than fair game for cross-
14 examination. I don't see a need to bring a witness
15 in to proffer the testimony. That is just cross-
16 examination. All of that material Mr. Beasley has
17 discussed this proper for cross-examination.

18 MR. BEASLEY: No doubt. But they used the
19 information to get an indictment on conspiracy.

20 THE COURT: All right. Well, we will cross
21 that bridge when that case is tried. But if you
22 don't intend on calling that witness in this case, I
23 am not going to require you to proffer it at this
24 time.

25 MR. BEASLEY: Your Honor, my other motion

1 within that one motion has about several in it. As
2 I said, the State Grand Jury wide subject matter
3 jurisdiction on Count 2, which is this transaction
4 with Dendy. The State argued in their reply that
5 South Carolina Code 14-7-1630(a)(1), any offense
6 that arises out of or is connected to multi-county
7 drug offense. This is not the law. The statute
8 addresses subject matter jurisdiction for a crime
9 that arises out of or in connection with the multi-
10 county drug offense only such crimes of multi-county
11 nature or is transpired, transpiring as
12 significantly more than one county. That is for
13 subject matter jurisdiction in the State Grand Jury
14 for crimes that arise out of or in connection to the
15 multi-county drug plan must have also transpired in
16 more than one county in the state. Subject matter
17 jurisdiction as to State Grand Jury Count 2, the
18 crime alleged must be of a multi-county nature or
19 transpired or has significance in more than one
20 County of this state.

21 The State presented no evidence to the Grand
22 Jury to support this multi-county nature nor was any
23 evidence produced in discovery even if this multi-
24 county significance was not required. There is no
25 evidence that the accounts arose out of or was

1 connected with Count 1. Through various arguments,
2 the State asserts that Count 2 is a substantive
3 crime of Count 1. They conclude that Count 2 arose
4 out of or is connected with Count 1. Because Count
5 1 is a multi-county nature, Count 2 must be a multi-
6 county nature.

7 Your Honor, those arguments are not supported
8 by any law. Count 2 is not a substantive count of
9 Count 1. Count 2 does not have any multi-county
10 significance. The substantive crimes of this
11 conspiracy would be specific met transactions
12 between the co-conspirators themselves. This is why
13 the substantive crimes committed in furtherance of a
14 conspiracy constitutes circumstantial evidence of
15 the existence of the conspiracy.

16 Despite the State's contention that -- they
17 quoted the Wilson case, does not -- that does not
18 stand for the proposition that any drug transaction
19 by an alleged co-conspirator may be used to prove
20 the scope and elements of conspiracy. Furthermore,
21 in their response, they failed to distinguish the
22 alleged drug transaction between the alleged drug
23 conspirators and the defendant alleged drug sales.

24 As a matter of law and as acknowledged by the
25 State in their brief, Terrance Alberts alleged

1 purchase of methamphetamine from the defendant on
2 September 2010 cannot be made out a co-conspirator.
3 One cannot enter into a conspiracy with things out
4 there. Since Terrance Albert is not a co-
5 conspirator, the defendants of alleged sale of drugs
6 to him cannot be a substantive time of the alleged
7 conspiracy.

8 The State said they have clear, established
9 case law. Yet, they cited none. They did quote
10 Wilson. Wilson holds the opposite of what they
11 contend, which is only substantive crimes committed
12 in furtherance of a conspiracy is admissible as
13 circumstantial evidence of a conspiracy.

14 THE COURT: Yes, sir.

15 MR. UNDERWOOD: First, Your Honor, just to
16 clarify as to the law of jurisdiction, the State
17 Grand Jury -- I have a copy of the statute for you.

18 THE COURT: Do you have a copy for Mr.
19 Beasley?

20 MR. BEASLEY: I've got a copy.

21 THE COURT: Okay.

22 MR. UNDERWOOD: Section 14-7-1630(a)(1).
23 Your Honor, a correct statement of the law as to the
24 subject matter jurisdiction of the Grand Jury is
25 that subject matter jurisdiction over multi-county

1 drug offenses and any crimes that arise out of or in
2 connection to those offenses, the substantive
3 charges that are coming out of those offenses also
4 have to have a multi-county -- they don't have to be
5 of a multi-county nature.

6 THE COURT: Okay.

7 MR. UNDERWOOD: If they are connected to a
8 crime that is listed in that statute, a multi-county
9 drug offense, a crime connected to that multi-county
10 drug offenses within subject matter jurisdiction of
11 the State Grand Jury. In this particular situation,
12 we have a distribution of methamphetamine by Clyde
13 Davis who has also been alleged to be in a multi-
14 county drug conspirator selling that same drug,
15 methamphetamine, within the same geographical area.
16 That distribution of that methamphetamine arises out
17 of or is connected to that conspiracy in and of
18 itself. That right there is enough to vest subject
19 matter jurisdiction in State Grand Jury. It came
20 out of the same investigation both by law
21 enforcement and the State Grand Jury. That evidence
22 was presented together. Again, Mr. Davis is accused
23 of conspiring with other individuals to sell
24 methamphetamine. Unless Mr. Davis is going to
25 stipulate that he made all of that methamphetamine,

1 then he must have got it from someone to resell,
2 which shows that it is of a conspiracy.

3 The conspiracy on its face in the indictment
4 and as presented to the State Grand Jury shows at
5 least two counties, Greenville and Pickens County,
6 as evidenced by the fact that one of the alleged co-
7 conspirators were selling drugs, substantive counts,
8 in Pickens county. There were drug buys made in
9 Greenville county and in Pickens county in
10 connection with this conspiracy. That is a multi-
11 county drug conspiracy. Any charges connected to
12 that conspiracy are therefore subject matter
13 jurisdiction of the State Grand Jury. Count 1 and
14 Count 2 are both properly vested for subject matter
15 jurisdiction in the statewide Grand Jury. Proper
16 information was presented in the statewide Grand
17 Jury with more than sufficient information to
18 establish probable cause.

19 Therefore, there is no reason to dismiss those
20 indictments because they were about on their face.
21 They properly alleged that there is a multi-county
22 impact. And that information was presented to the
23 statewide Grand Jury.

24 **MR. BEASLEY:** All right. Mr. Beasley, any
25 response to that?

1 **MR. BEASLEY:** The only thing that was
2 presented to the State Grand Jury was this alleged
3 sending the CI to Dendy and sending him to Clyde.
4 Then there is Amy Brock who never dealt with Clyde
5 Davis. She just said that Dendy would come to her
6 house and his cousin would show up. She said she
7 never met him, never talked to him. She sat inside
8 while the deal was being done and that is all that
9 happened that was testified before the Grand Jury.
10 Then they threw in something up there about
11 some other investigation that is going on with Clyde
12 and some other drugs. Yet, that is all they have.
13 You know, that's why I get back to this how
14 important the information to come from the CI is.
15 I can go ahead and go to my next point about
16 what they presented as Count 2. There is no
17 probable cause. The only thing they say it was is
18 we did use a confidential informant that made a
19 purchase of meth from Clyde Davis on one occasion.
20 I mean, they didn't dispute, they did not say
21 anything else about the veracity of the CI, whether
22 they checked him, whether he was wired up, whether
23 they gave him funds, marking. They did this with
24 everybody else.
25 **THE COURT:** All right. Let me just respond

1 on the multi-county crime and jurisdiction vested
2 with the statewide Grand Jury. I find at least from
3 what I am hearing an argument that the State Grand
4 Jury had jurisdiction and that if the State is able
5 to prove multi-county conspiracy involving, you
6 know, transactions in several counties that this one
7 buy could have been furtherance of it and it need
8 not be -- uh, it need not be something that is a
9 multi-county crime just so the State Grand Jury have
10 jurisdiction. I did not say that very artfully.

11 Let's move to your next line. Mr. Underwood,
12 you want to respond with regard to probable cause?

13 **MR. UNDERWOOD:** Briefly, Your Honor. You
14 know, both sides agreed to this case sufficiently so
15 I'm going to be very brief and just point out, Your
16 Honor, during reservation of the original
17 indictment, Agent Ayers testified to more than what
18 Mr. Beasley referred to. When the indictment was
19 actually presented, Investigator Ayers testified
20 that on September 8, 2010, confidential informants
21 working under direct control of Greenville County
22 Sheriff's office did purchase an amount of what he
23 has listed as 3.7 grams of crystallized substance
24 from Mr. Clyde Davis at 112 Dobb St., Greenville,
25 SC, 29611. This methamphetamine was placed in the

1 lab for analysis. He did not have the lab sheet
2 with him at the time. He was asked whether it was
3 field tested for methamphetamine. He stated that it
4 was. It came back positive for methamphetamine with
5 a field weight of 3.7 grams.

6 When the superseding indictment was presented,
7 Agent Barwick testified that on September 8, 2010,
8 law enforcement agents associated with the case
9 supervised a controlled purchase of methamphetamine
10 from Clyde Bowen Davis. This was a confidential
11 informant purchase that took place at 112 Dobb
12 Street in Greenville, South Carolina. The substance
13 purchased by agents tested positive for
14 methamphetamine in the amount of 3.51 grams.

15 Numerous other occasions throughout this
16 investigation, the Grand Jury was briefed on and
17 explained what a controlled purchase was. It wasn't
18 like they just got this in a vacuum. The Grand Jury
19 was very familiar with what controlled purchases
20 were, how they work, how confidential informants are
21 searched both before and after. It would have been
22 redundant. They heard it numerous times throughout
23 the investigation. That could be seen by just
24 reading through all the different transcripts. More
25 than sufficient information was established to show

1 probable cause or Count 2 of the distribution count
2 of methamphetamine.

3 Your Honor, loads of information was presented
4 on the conspiracy counts with regards to different
5 individuals that were involved, the testimony given
6 by Amy Brock and identified with Clyde Davis through
7 a picture of him being the source to Nick Dendy who
8 was her source. This information was all presented
9 to the Grand Jury and had more than enough probable
10 cause to move forward. The indictment was presented
11 to the Grand Jury. They voted. They deliberated
12 and voted any found in the probable cause that a
13 conspiracy existed.

14 If you look at the transcripts, there is more
15 than enough information for both Count 1 and Count 2
16 to show that there was probable cause in Count 1 for
17 a multi-county Drug Conspiracy and Count 2 of
18 Distribution of Methamphetamine. When viewed as a
19 whole all the information presented to the Grand
20 Jury, Count 2 was connected to Count 1. Therefore,
21 there was probable cause and subject matter
22 jurisdiction again for both counts.

23 **THE COURT:** I find that there was at least
24 probable cause in this case for an indictment -- for
25 the indictment in this case. Although I appreciate

1 your argument and thorough argument on behalf of
2 your client, I'm going to deny your motion.

3 MR. BEASLEY: Okay. The last one, Judge, was
4 I asked you to dismiss Count 1 because Grand Jury
5 lacked subject matter jurisdiction to charge the
6 crime alleged therein. But based on your previous
7 rulings on substantive counts, I think I will lose
8 that motion. But I will have it as a matter of
9 record.

10 THE COURT: Well, it is noted for the record.

11 MR. BEASLEY: Okay.

12 THE COURT: In fact, your motion, all of your
13 motions will be preserved. You need not going to
14 full argument on that one.

15 MR. BEASLEY: Okay. Okay. I guess the next
16 one, I guess we can go to the motion seven. Uh, all
17 right, Your Honor, I filed a motion to sever. The
18 State has consented to severing Count 2 from Count
19 1. I also ask the court, uh, to sever the defendant
20 Robertson, Sekerchak and Byers, uh, from Count 1.

21 In a conspiracy, the evidence is an agreement
22 between alleged co-conspirators, not alleged common
23 knowledge, that is, the importation and distribution
24 of drugs in a defined geographical area. It is not
25 enough for six alleged co-conspirators to intend to

1 sell meth even if they were acting in the same
2 geographical location. It's not enough for the
3 alleged co-conspirators to associate with each other
4 during the unlawful drug activity. It is not even
5 enough for the co-conspirators to have buyer/seller
6 relationships with each other. The State must show
7 evidence of an agreement between the defendant,
8 which is my client, Mr. Davis, Nick Dendy, Amy Brock
9 and Michael Robinson, Brian Sekerchak and Joshua
10 Byers to sell, manufacture, deliver, purchase or
11 bring into this state mess. There is no evidence of
12 that agreement.

13 In the summer of 2009, Brock was selling meth
14 for Westbrook and Bud Sekerchak. Westbrook would
15 front Brock the meth. She would sell it and take
16 the money she made from her sales back to him.
17 Westbrook purchased the meth from Juan Castilo. In
18 February of 2010, Brock begin purchasing directly
19 from Castilo bypassing Westbrook. Castilo purchased
20 meth from Sandoval Flores. Sandoval Flores purchased
21 meth from a Hispanic in North Carolina. Between
22 February of 2010 and May of 2010, Brock also
23 purchased meth from Nick Dendy. Dendy was
24 purchasing meth from the same Hispanic in North
25 Carolina as was Sandoval Flores.

1 There is no evidence the defendant, Mr. Davis,
2 was involved or present at any of these
3 transactions. Nor is there any evidence that Mr.
4 Davis supplied drugs for any of these transactions.
5 From 2009 to the first half of 2010, Amy Brock sold
6 meth to Michael Robinson, Brian Sekerchak, David
7 Satterfield, Leanne Ramsey, Jonathan Waltz. She
8 also sold meth to Warren Chastain. There is no
9 evidence that the defendant, Mr. Davis, was involved
10 in or present at any of these transactions nor is
11 there any other evidence that the defendant supplied
12 drugs for any of these transactions.

13 In May of 2009, Joshua Byers began selling meth
14 to Amy Smith. In October of 2009, Byers sold meth
15 to Jeffrey Scott. I am getting all of this from the
16 State's recorded documentation of their statements
17 and their Grand Jury testimony. 2009, November 2009
18 to June 2010, Byers sold meth to Leanne Ramsay.
19 Leanne Ramsay sold -- purchased meth from Sandovo
20 Flores. And on two occasions, Byers sold meth to
21 Brock. On one occasion, Byers sold meth to
22 Robinson. There is no evidence that Byers
23 purchased meth from the defendant. Dendy, Brock,
24 Robinson and Sekerchak. There is no evidence that
25 Byers sold meth to the defendant, Dendy or

1 Sekerchak. There is no evidence that Davis was
2 involved in or present at any of these transactions.
3 Nor was there any evidence that Clyde supplied the
4 drugs for any of these transactions.

5 **THE COURT:** I'm reading along with you. I
6 have read it, but I am reading along with you.

7 **MR. BEASLEY:** Okay. Judge, based on all of
8 that -- and I will skip going through this -- it is
9 the same thing where Mr. Davis is not mentioned, he
10 is not even around on that timeline. There is
11 testimony basically that Dendy was getting it from
12 other people. There is no agreement -- they never
13 act together for a shared mutual benefit. The State
14 is just incorrect in focusing this whole conspiracy
15 on just common knowledge of buying and selling.
16 There is no agreement among these individuals to do
17 all of this. That is a big problem.

18 It is all buyers/seller relationships. Even
19 Dendy, after he finally started cooperating, he even
20 finally said he also gets it from this guy named
21 Bokie. He'd get some from Bokie and some from
22 Clyde. Then he gives it to Amy. I think the State
23 has moved a little loose and fast and used the Grand
24 Jury as an arm of the State to get these
25 indictments. You know, I think at least these other

1 co-defendants, Robinson and Sekerchak and, uh, Byers
2 and Robinson should be severed. Because the only
3 evidence was of Dendy going to Amy Brock's house.
4 And she said he would call Clyde. He would show up
5 and drop off some drugs to Dendy.

6 THE COURT: What about it, Mr. Underwood? He
7 says that there is no -- that they ought to be
8 severed from all of these different defendants
9 because there is no evidence that there was any
10 agreement between them, no conspiracy whatsoever.

11 MR. UNDERWOOD: A couple of points, Your
12 Honor. First, the idea that criminal defendants can
13 ask that the charges against them can be amended is
14 a bit in the extreme. If that were the case, every
15 defendant would ask that the charges against them be
16 changed.

17 Your Honor, this is the indictment the Grand
18 Jury found probable cause that a conspiracy did
19 exist between these individuals. Probable cause had
20 already been established which is why they have a
21 trial. Which is why, in reality, this entire motion
22 is really a premature directed verdict motion. It
23 is based on what Mr. Beasley and the defense thinks
24 the evidence at trial is going to show. Until the
25 State has actually had the opportunity to present

1 their full case-in-chief, the court can't make a
2 determination on whether or not this case has
3 sufficient evidence to go to a jury.

4 **MR. BEASLEY:** Actually, I didn't interpret
5 this. I actually recorded what they presented to
6 the Grand Jury and the police reports that they
7 quoted. That's the only thing I have to use.

8 **MR. UNDERWOOD:** Some of the assertions that
9 are in this motion are incorrect. There are certain
10 places where there are assertions that there are no
11 evidence of, there is evidence of it. Certain
12 places where -- for example, at some point, Mr.
13 Beasley referred to there being no evidence that
14 Joshua Byers was buying and selling methamphetamine
15 from Nick Dendy or Amy Brock. Well, there was. Amy
16 Brock testified she had dealings with Joshua Byers.
17 Dendy, in his post cooperation statement, also
18 acknowledged that he had information. Joshua Byers,
19 since he has fully cooperated, has acknowledged
20 buying from Nick Dendy on occasion. So there is
21 evidence of these things contrary to the assertion
22 in this motion.

23 Most importantly, Your Honor, this is a
24 premature directed verdict motion. The State has to
25 have a chance to present its case in full before a

1 subject determination could be made.

2 Also, Your Honor, just to point out what a
3 conspiracy is, the State does not have to show that
4 Clyde Davis individually met with every single
5 person in a conspiracy. Not every person needs to
6 know what every other person in a conspiracy is
7 doing. A continuous course of action can be
8 evidence of a conspiracy. A simple buyer seller
9 relationship of one transaction does not meet
10 conspiracy. But if you have the same person coming
11 back time and time again buying methamphetamine to
12 resell it and the only way they are going to come
13 back is to sell what they bought, that shows a
14 conspiracy, Your Honor. Those two people are
15 working together in concert to furtherance
16 distributing methamphetamine to continue making
17 money.

18 **THE COURT:** All right. Uh, Yeah. I do
19 believe Mr. Underwood is correct and that this is
20 more properly taken up at the directed verdict
21 stage. I want to deny your motion at this time but
22 certainly to revisit after we have heard the State's
23 case.

24 **MR. BEASLEY:** Eyewitness identification. The
25 State has the burden of proof.

1 **THE COURT:** All right. Mr. Underwood, do
2 you have the witness available and ready to go with
3 this?

4 **MR. UNDERWOOD:** Your Honor, in the motion,
5 Mr. Beasley refers to the identification both of Amy
6 Brock and of Mr. Pace. We didn't know about this
7 motion this morning. We haven't had a chance to get
8 in touch with Mr. Pace. Ms. Brock is here.
9 Investigator Ayers is here. They are ready to
10 testify.

11 **THE COURT:** All right. And, this Pace
12 fellow, will he be available tomorrow?

13 **MR. UNDERWOOD:** If the State decides to call
14 him, Your Honor. I am not sure that he will be
15 called in the case.

16 **THE COURT:** Okay. .

17 **MR. UNDERWOOD:** If he is, Your Honor, I would
18 request that we put off hearing his portion of the
19 testimony until he is going to testify.

20 **THE COURT:** But you've definitely intend to
21 call Amy Brock?

22 **MR. UNDERWOOD:** Yes, Your Honor. She is
23 available now.

24 **THE COURT:** All right. In whatever order you
25 want to call your witnesses.

1 **MR. UNDERWOOD:** Your Honor, actually Mr.
2 Pauling, Your Honor.

3 **THE COURT:** Okay.

4 **MR. PAULING:** Your Honor, at this time, the
5 State would call Investigator Chad Ayers.

6 **THE COURT:** All right. Sir, if you will,
7 come forward and be sworn.

8 **CHAD AYERS**
9 having first been duly sworn, testifies as follows:

10 **DIRECT EXAMINATION**

11 **BY MR. PAULING:**

12 **Q** Investigator, how are you doing, sir?

13 **A** Good.

14 **Q** Back in 2002, were you part of an Investigation
15 Operation Icehouse?

16 **A** I was.

17 **Q** How did you become involved in that particular
18 investigation?

19 **A** Started off late in 2009 with a female that
20 approached law enforcement and wanted to cooperate in
21 reference to distribution and trafficking of
22 methamphetamine across the upstate of South Carolina. At
23 that time, I was working with, uh, Investigator Brian
24 Cooley who reached out to Agent Asbill of the State Law
25 Enforcement Division and requested his assistance.

1 Q And you were working with the narcotics unit in
2 Greenville county at that time?

3 A I was.

4 Q And what were your duties at that particular
5 time?

6 A Uh, investigating street level and long-term
7 complex narcotics investigations.

8 Q This case came before the Grand Jury, is that
9 correct?

10 A Yes, sir.

11 Q Okay. Greenville county was part of this case.
12 Did this investigation also involve Pickens County?

13 A It did. Purchases were made in Pickens county
14 and also, I believe, purchases in Anderson county.

15 Q Okay. As part of this investigation, were
16 there several targets that were identified?

17 A There were.

18 Q Were one of those targets Nick Dendy?

19 A Yes, sir.

20 Q Were one of those targets also Amy Brock?

21 A Yes, sir.

22 Q As it relates to Amy Brock at that particular
23 time, did you come into contact with her or approach her
24 as part of this investigation?

25 A I did, on several occasions.

1 Q You can tell the Court how did that come about.

2 A Earlier on in the investigation, we received
3 information that Amy was selling methamphetamine out of
4 her residence. The first time myself and Investigator
5 Brandon Brown made contact with her at her residence, we
6 then went to another location to speak with her in
7 further detail where she stated she was, in fact, selling
8 methamphetamine. At a later date, I approached her at
9 her residence with Lieutenant Hall of the Sheriff's
10 office. I provided her -- as the investigation
11 progressed, we gain more information as to who was
12 supplying who with the methamphetamine. Who was
13 supplying her and who was supplying her supplier.

14 Q Before we get to that, you said, initially, you
15 spoke with her. Did she indicate to you at that time who
16 her source for methamphetamine was?

17 A At that time, I believe she stated on the
18 initial meeting, she stated she was getting it from Nick
19 Dendy.

20 Q And then some time later, you and -- who?
21 Lieutenant Hall?

22 A Lieutenant Hall.

23 Q Okay -- approached Ms. Brock -- was this at her
24 residence?

25 A Correct.

1 Q -- and further discussed the information that
2 she provided you?

3 A Yes, sir. We received information that Mr.
4 Davis was actually supplying Nick Dendy with the
5 methamphetamine. We were still in the early stages in
6 the investigation on Mr. Davis. I obtained South
7 Carolina DMV photo of Mr. Davis. It was in color. I
8 folded it down to where just his face was showing. I
9 walked up with Lieutenant Hall to Ms. Brock's residence
10 and asked her who this was. She stated that was who she
11 knew as Nick's cousin that had come to her house to bring
12 Nick methamphetamine.

13 Q How did she describe these meetings at her
14 house with Nick Dendy and this individual that she was
15 discussing?

16 A From what I could recall, she said they varied.
17 Sometimes, Nick would show up at her residence. She
18 would give Nick the money. Sometimes Nick would go
19 outside to a vehicle. I believe she also stated that Mr.
20 Davis had come in. There was no communication between
21 those two. She just observed them. They weren't
22 carrying on a conversation with each other, Amy and Mr.
23 Davis.

24 (WHEREUPON, Court's Exhibit 1 is marked for
25 identification purposes.)

1 **MR. PAULING:** May I approach the witness, Your
2 Honor?

3 **THE COURT:** Let me give blanket permission
4 for all attorneys throughout the trial to approach
5 the witness.

6 **MR. PAULING:** Thank you, Your Honor.

7 **BY MR. PAULING:**

8 **Q** Agent Ayers, I'm going to show you what has
9 been marked as Court's Exhibit 1. I am going to ask you
10 if you recognize that particular item.

11 **A** It is the photo that I showed Amy Brock that
12 day.

13 **Q** And now in particular, what is that?

14 **A** It is a three-year driving record of Clyde
15 Bowen Davis.

16 **Q** Okay. You indicated earlier that you folded
17 that down. Show the court how you presented that to
18 Ms. Brock.

19 **A** (Indicating.)

20 **Q** Is that how you did it? Now is there any
21 identifying information that was visible to Ms. Brock
22 when you showed her that DMV photo?

23 **A** No, sir.

24 **Q** After you showed her that photo, -- let me ask
25 you this. If you would, explain the process again. What

1 is the question that you asked her about before you
2 presented the photo to her?

3 A I already had it folded up. She came to the
4 door and stepped right outside her front door. I held it
5 up with Lieutenant Hall present and just said who is
6 this. At which time, she said, that is Nick's cousin.

7 Q Was Ms. Brock expecting you that day? Did she
8 know that you were on the way over?

9 A I don't recall.

10 Q Let me make sure I understand what you said.
11 She came to the door. You asked her who is this?

12 A Yes, sir.

13 Q Did you suggest to her that it was an
14 individual that you knew as --

15 A I said it just like that. Who is this?

16 Q Let me ask you this, Investigator Ayers, was
17 that the only photo that you show her?

18 A Of Mr. -- of Mr. Davis, yes. She was provided
19 at a later date a six-person photo lineup of Mr. Dendy.

20 Q Okay.

21 A Mr. Dendy was included in the six-person photo
22 lineup.

23 Q That was at another time?

24 A Correct. That day, this was the only one shown
25 to her.

1 Q Let me ask you this, you did a photo lineup, a
2 six pack -- a six pack of Nick Dendy. What would that
3 have been?

4 A Would have been a piece of paper. Would have
5 had six individuals on the -- like head profiles of six
6 separate individuals one of which was Mr. Dendy. I would
7 have asked her to pick out someone that she recognizes.
8 I would have informed her that someone in the photo
9 lineup that she may or may not recognize and then to
10 explain to me once she picks out the individual how she
11 knows the individual.

12 Q I guess the question is why in this particular
13 case you only used one photo or asked about this one
14 particular photo.

15 A I wasn't trying -- I already had information
16 that Mr. Davis was the supplier. She knew who he was. I
17 am not trying to pick him out as of a suspect like an
18 assault. This is why she would have already know who he
19 was.

20 Q Now, after she identified that individual in
21 the photo lineup as being, uh, Nick Dendy's cousin, is
22 that what she said?

23 A That's what she stated.

24 Q Okay. She indicated that was the individual
25 who would come and bring the drugs to Nick Dendy?

1 A Correct.

2 Q They would come to her house?

3 A Correct.

4 Q And she -- did she tell you or give you a

5 summary of how this meeting took place?

6 A Yes, sir. During one of our interviews, I

7 believe she stated that Nick would show up at her

8 residence. She would give the money from the

9 methamphetamines that she had already sold to Nick. Nick

10 would sometimes walk out to the vehicle where Mr. Davis

11 was or she stated that Mr. Davis had come into her

12 residence but she had not communicated with Davis. Nick

13 had done the communication. She cooperated what I

14 already know. Narcotics dealers don't like to associate

15 with people they don't know and communicate with.

16 Q Did Ms. Brock ever indicate that she knew the

17 individuals named in the picture when she showed it to

18 her?

19 A No, sir.

20 Q Did she ever indicate that she had been

21 introduced to him?

22 A No, sir.

23 Q But she indicated that she had actually seen

24 him face-to-face?

25 A Yes, sir.

1 **MR. PAULING:** I have no further questions at
2 this time, Your Honor.

3 **THE COURT:** All right, Mr. Beasley.

4 **MR. BEASLEY:** Thank you, Your Honor.

5 **CROSS-EXAMINATION**

6 **BY MR. BEASLEY:**

7 **Q** Chad, what was the, uh, -- you said you
8 obtained the information that Davis was supplying Dendy.
9 What information did you obtain?

10 **A** Can you repeat the question?

11 **Q** When you started off about your investigation,
12 you said we obtained information that Davis was supplying
13 Dendy. Where did you get that information?

14 **A** I believe that came from Mr. Dendy. I would
15 have to look back and find out exactly where that came
16 from.

17 **Q** Mr. Dendy is a defendant. He did not start
18 cooperating until not too long ago. There is no way that
19 he gave you this that you found out Davis was supplying
20 Dendy. Who would you have found out that information
21 from?

22 **A** I'd have to look back. I am not sure exactly
23 who that came from. We are looking at a couple of years
24 since that happened.

25 **Q** Well, the reason I am asking that and I think

1 it is very important is because when you went to approach
2 Amy Brock and say, hey, I know you are dealing. And she
3 starts saying and I get it from Dendy and she would have
4 already known who he was so I just showed her this one
5 picture. Just to add another little question on there.
6 You can correct me if I am wrong. I have gone through
7 all the discovery in this case, notebooks three or four
8 deep. Everywhere, y'all do a six-person lineup.
9 Everywhere, except this one.

10 MR. PAULING: Is that a question, Your Honor?

11 BY MR. BEASLEY:

12 Q Yeah. Can you explain to me why you would do
13 that, number one? Why would you say she would have
14 already know who he was?

15 THE COURT: Let's deal with that question
16 first.

17 THE WITNESS: What is your first question,
18 Sir?

19 BY MR. BEASLEY:

20 Q Chad, I know you know what the first question
21 was. You said she would have already known who he was so
22 I just showed her this one little picture of him of his
23 drivers license.

24 A At this time, the information I received is
25 that she already know who the individual that she was

1 getting it from, she stated she had seen. We printed off
2 that photo. I asked her did she know who this individual
3 was. She said that she did. That is what we put into
4 our case file.

5 Q How did you have this photo already present?
6 Who gave the information that Davis was supplying Dendy?

7 A I would have to look back. We took a lot of
8 statements in this case. I would have to look back.

9 Q It would seem like it is an important thing
10 since this is the so-called top man on the totem pole
11 sort of thing and you just go with one photo lineup and
12 say, hey, is this the guy that Dendy is buying from his
13 cousin? This his cousin?

14 A No, I didn't ask for that. I just asked her
15 who that individual was.

16 Q But you said you already knew who he was which
17 is why you did not give a six-person lineup.

18 A Correct. I just asked her who that person was,
19 who she identified as your client.

20 Q And would you agree with me doesn't a one-
21 person photo lineup violate your policy?

22 A No, sir.

23 Q You don't think that -- they didn't tell you in
24 the Academy when you try to identify a perpetrator or a
25 defendant or a drug dealer or whoever, they don't say,

1 hey, isn't this the guy right here? Is this the guy?

2 A That is not what took place that day.

3 Q You weren't taught to give a six-person lineup?

4 A I was taught many investigative techniques.

5 MR. BEASLEY: Okay. No further questions.

6 THE COURT: Mr. Pauling, any other questions
7 for this witness?

8 MR. PAULING: Yes, just briefly.

9 REDIRECT EXAMINATION

10 BY MR. PAULING:

11 Q At any time, Investigator Ayers, did you
12 suggest at all to Amy Brock that the individual was Clyde
13 Davis?

14 A No, sir.

15 Q You simply asked her who it was?

16 A My exact words, I believe, were who is this.

17 Q Did she indicate to you that it was --

18 A That's Nick's cousin.

19 Q This same individual who brought the drugs to
20 Nick Dendy before?

21 A That is what Ms. Brock stated, correct.

22 MR. PAULING: No further questions, Your
23 Honor.

24 RECROSS EXAMINATION

25 BY MR. BEASLEY:

1 **Q** For the record, you don't know how you came by
2 this picture before you got there?

3 **A** I would have to look back through some old
4 interviews.

5 **THE COURT:** Investigator, uh, you said you
6 would have to look back through some old interviews
7 to figure out how you got this picture and also how
8 you got the information that Davis was supplying
9 Dendy. Those interviews, can you look at them this
10 afternoon?

11 **THE WITNESS:** Yes, ma'am.

12 **THE COURT:** Okay. All right. I'd ask you to
13 do that if you don't mind. I want to ask you to
14 retake the stand because I would like that
15 information. I would like to consider that.

16 **THE WITNESS:** Yes, ma'am.

17 **THE COURT:** Okay. Thank you.

18 All right. I will let him stand down subject to
19 the fact that he is going to review some interviews.

20 **MR. PAULING:** The State will call Amy Brock.

21 **THE COURT:** Okay. Ma'am, if you will, come
22 forward and be sworn please.

23 **AMY BROCK**

24 having first been duly sworn, testifies as follows:

25 **THE COURT:** Thank you. You can have a seat.

DIRECT EXAMINATION

BY MR. PAULING:

Q How are you doing, Ms. Brock?

A Good.

Q Ms. Brock, where are you from originally?

A Greenville, South Carolina.

Q You lived in Greenville all of your life?

A Yes, sir.

Q Ms. Brock, at some point, you were indicted by the State Grand Jury for Trafficking Methamphetamine by Conspiracy, is that correct?

A Yes, sir.

Q Have you already pled guilty to your charges?

A Uh-huh.

Q You are cooperating with law enforcement at this particular time?

A Yes.

Q During the investigation at some point, were you approached by Investigator Chad Ayers at the Greenville County Sheriff's office?

A Uh-huh.

Q Was that in relation to his investigation into your drug activity?

A Right.

Q And at that particular time, where were you

1 living?

2 A 216 New Dunham Bridge Road.

3 Q And when you were approached by law
4 enforcement, was it just one time in particular?

5 A It was several.

6 Q Okay. The first time they contacted you, did
7 you speak with them about your drug activity?

8 A Yes, sir.

9 Q At that particular time did you indicate who
10 you were obtaining drugs from?

11 A Yes, sir.

12 Q When I say drugs, with that methamphetamine?

13 A Yes, sir.

14 Q Okay. Who was it that you were getting your
15 drugs supplied by?

16 A Nick Dendy.

17 Q Okay. At that particular time, do you recall
18 about when this was when law enforcement approached you?

19 A October 2010.

20 Q At that time, how long had you been dealing
21 with Nick Dendy, dealing methamphetamine?

22 A Probably six months to a year maybe.

23 Q If you could, just explain to the court as far
24 as your dealings with Nick Dendy, how did those dealings
25 occur?

1 A He would pull up in my driveway. He would
2 either come inside or I would go out to his car. The
3 supplier will come behind him. I would give him the
4 money. He would take it to him and get the
5 methamphetamine.

6 Q Let me slow you down.

7 A Okay.

8 Q Before Nick Dendy would even get to your house,
9 how would he know to come to your house? Would he call?

10 A I would call him. I would call him.

11 Q Okay. So you would call him. Just typically,
12 how much methamphetamine would you order?

13 A Around a quarter ounce.

14 Q Around a quarter ounce?

15 A Uh-huh.

16 Q If you called Nick Dendy on a particular
17 occasion, about how long would it take them to get to
18 your house?

19 A Usually anywhere from 30 minutes to an hour.

20 Q As far as where you were living at that time,
21 did you know where Nick Dendy was living?

22 A I knew roundabouts where he lived. I didn't
23 know exactly where he lived at.

24 Q Had you been to his house?

25 A No, sir.

1 Q You said you know roundabout where he lived.

2 In relation to your residence, how far away was that?

3 A A mile and a half.

4 Q Okay. But sometimes it would take him about 30
5 minutes to an hour to get to your house?

6 A Right.

7 Q He would come to your house and pull into the
8 driveway?

9 A Uh-huh.

10 Q Would Mr. Dendy be by himself?

11 A Yes, sir.

12 Q Okay. At that point, would he come into your
13 house or would he wait outside?

14 A Both. Both.

15 Q It would just depend?

16 A It just depends, right. Right. Or either I
17 would come out outside. It just depended on how long it
18 was going to take him to get there.

19 Q Now, when you would call Mr. Dendy, did you
20 know that you were going to have to wait on his supplier
21 to come?

22 A Right. Right.

23 Q So, Mr. Dendy would get to your house.
24 Sometimes he would come in. Sometimes you actually had
25 to go outside?

1 A Right.

2 Q Now, you said another individual would come to
3 your house?

4 A Right.

5 Q Did Mr. Dendy ever tell you who that person
6 was? I guess before he got there, would he say such and
7 such is coming over? What would he say?

8 A He didn't actually say any names. He would
9 just say -- I just knew that was who he was getting it
10 from. At one point in time, I thought it was his cousin.
11 I'm not sure if it is. I don't know if it is. There was
12 one point in time it was referred to as his cousin. I am
13 not sure.

14 Q When you said referred to as his cousin, did
15 Nick Dendy refer to him as his cousin?

16 A Yeah.

17 Q He said my cousin was coming over?

18 A Yeah. Yes, sir.

19 Q Was this on the first occasion or was this some
20 time after you had been dealing with Nick for some time
21 that he mentioned this was my cousin?

22 A It was some time after.

23 Q Okay. Now, on the occasions when Nick would
24 come inside how with the transactions occur? Would the
25 other individual, Nick's cousin, also come in?

1 A No. He would never come in.

2 Q Okay. What would happen?

3 A He would just come in. I would give him the
4 money when he did come inside.

5 Q Nick Dendy would come in?

6 A Nick Dendy. Yeah, only him come inside. He
7 would just come in. I would give him the money. Then he
8 would run outside and bring back the methamphetamine.

9 Q Okay. Now, when he would run outside --

10 ~~A To the~~ other person that was in the driveway.

11 Q Did you see the other person that was in the
12 driveway?

13 A Uh, not when I was in the house. The times
14 that I ran outside to get them from him, to hand him the
15 money, when the person was already outside and the other
16 car, I could see him. He never come inside the house. I
17 did not see him that way.

18 Q On the occasions when Nick Dendy came into your
19 house, how did you know that someone else arrived at your
20 house?

21 A Because he would be on the phone talking to him
22 and saying the other person would say I'm about to pull
23 up so he would know he was out there.

24 Q But how would you know? Did you hear any car
25 pull up? Did you see a car pull up?

1 A Right. I seen a car pull up.

2 Q So you are looking through your window?

3 A Right.

4 Q Do you remember what type of car it was?

5 A Silver.

6 Q Okay. Now, on occasions where you would go
7 outside ---

8 A Right.

9 Q --- would Nick come into your house and both of
10 you go outside or would Nick just simply stay outside,
11 Nick Dendy?

12 A He would just be outside.

13 Q Okay. He would call you to come out?

14 A Right.

15 Q Now, when you would go outside, was the other
16 individual already pulled up?

17 A Yes, sir.

18 Q In those occasions, if you would, describe to
19 the court how would those transactions occur? I mean,
20 would you just go to Nick and give him the money or would
21 you also go over to where his cousin was?

22 A I never went over to where his cousin was. I
23 just always gave him the money. He would go to his
24 cousin and then he would come back and hand it to me.

25 Q Okay. Could you describe how close the cars

1 were to each other?

2 A Right behind one another. The driveway is not
3 that long. It was right behind one another.

4 Q So you would physically see when Nick would go
5 and get the drugs from his cousin?

6 A Right.

7 Q How were you able to see the individual in the
8 car? Was the window down?

9 A The window was down.

10 Q Okay.

11 A And it was daylight.

12 Q It was daylight?

13 A Uh-huh.

14 Q Did he ever -- did you ever speak to Nick
15 Dendy's cousin?

16 A No, sir.

17 Q Or the individual he described as his cousin.

18 A Right.

19 Q Did you ever meet him?

20 A No, sir. I never spoke to him.

21 Q But you saw him?

22 A But I saw him.

23 Q Okay. You just never was formally introduced?

24 A Right.

25 Q Okay. Now, how many occasions would you say

1 there were that when you actually went outside, Nick
2 Dendy is outside. You gave Nick the money and he goes
3 over to who he calls his cousin and makes the drug
4 transaction. Approximately how many times would that
5 have occurred?

6 A I would say half the time that I was getting it
7 from him, that is the way that it would go down.

8 Q Overall, how many times would Nick come to your
9 house and make a phone call and get the meth from his
10 cousin?

11 A 3 to 4 times a week. That went on for a couple
12 of months.

13 Q Half of those occasions you would have gone
14 outside and been present when the actual transaction
15 occurred between Nick Dendy and who you said was his
16 cousin?

17 A Right.

18 Q Approximately how long would those transactions
19 take place?

20 A How long would they take?

21 Q Right.

22 A 5 to 10 minutes.

23 Q You said you would get a quarter ounce -- a
24 quarter ounce?

25 A Uh-huh.

1 Q Was there ever any occasion that you got more
2 than a quarter ounce?

3 A No, sir.

4 Q Again we're talking about 2010?

5 A 2010.

6 Q How much were you paying Nick Dendy for the
7 quarter ounce that he got from his cousin?

8 A I believe it was 400.

9 Q You said the transaction might take 5 or 10
10 minutes. You gave Nick the money. Nick goes over to the
11 car. Does he just hand him the money?

12 A I'm saying 5 to 10 minutes. By the time he
13 would come, pull in my driveway and wait on his cousin to
14 get there, that is what would take 5 to 10 minutes. Just
15 when I handed Nick the money, no, it took no longer for
16 him to just walk or walk over to the car, give him the
17 money, get the stuff and then I get it.

18 Q So if you have to guesstimate just the actual
19 hand-to-hand, would that take more than a minute?

20 A No.

21 Q Okay. But again, this happened several times,
22 at least half the times when you were dealing with Nick
23 Dendy about three or four times a week?

24 A Right.

25 Q Okay. Was there ever any individual with Nick

1 Dendy's cousin?

2 A No, sir.

3 Q That you recall.

4 A Not that I recall.

5 Q All right. Now, when law enforcement

6 approached you in October of 2010, you discussed with

7 them who your drug source was?

8 A Yes, sir.

9 Q That Nick Dendy was a drug source of yours?

10 A Uh-huh.

11 Q And did you explain to them how this particular

12 drug transaction occurred?

13 A Yes, sir.

14 Q And at some point, were you asked to identify

15 Nick Dendy?

16 A Yes, sir.

17 Q And did you do that?

18 A Yes, sir.

19 Q On another occasion, did Agent Ayers approach

20 you with a particular photo and ask you to recognize

21 another individual?

22 A Yes, sir.

23 Q And did you recognize that individual?

24 A Uh-huh. I recognized him as that being who

25 Nick's supplier was.

1 **MR. PAULING:** May I approach the witness,
2 Your Honor?

3 **THE COURT:** Yes.

4 **BY MR. PAULING:**

5 **Q** I am going to show you what was marked Court's
6 Exhibit 1. I am going to ask you if you recognize that.

7 **A** Yes.

8 **Q** Okay. How do you recognize that?

9 **A** That was the same picture that I was shown and
10 asked if I knew who that was. I said yes.

11 **Q** It was shown to you like this?

12 **A** Yes, sir.

13 **Q** Did you see any identifying information
14 relating to that photo?

15 **A** No, sir.

16 **Q** Did you see a name as to who the individual
17 was?

18 **A** No, sir.

19 **Q** Date of birth?

20 **A** No.

21 **Q** Social Security number?

22 **A** Huh-uh.

23 **Q** Address?

24 **A** (Shakes head.)

25 **Q** Now, prior to Investigator Ayers showing you

1 that picture, did he, in any manner, suggest to you that
2 that was the person that you would know as Nick's cousin?

3 A No, sir.

4 Q If you recall that particular day, did you know
5 that Investigator Ayers was coming over that day? Do you
6 recall?

7 A No, sir.

8 Q Do you remember what he asked you as far as
9 that picture is concerned?

10 A He just asked me, he said if I show you a
11 picture of somebody you know, would you be able to tell
12 me if you recognize them or not or do you recognize this
13 person. I said -- I looked at the picture and I said
14 yes, that is Nick's supplier.

15 Q You said that is Nick's supplier?

16 A Right.

17 Q And that is the same individual you knew as
18 Nick's cousin?

19 A Yeah. I never knew his name.

20 Q You never knew his name?

21 A Huh-uh.

22 MR. PAULING: Beg the Court's indulgence.

23 THE COURT: Sure.

24 MR. PAULING: No further questions at this
25 time, Your Honor.

1 THE COURT: All right. Mr. Beasley.

2 MR. BEASLEY: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. BEASLEY:

5 Q Ms. Brock, you actually never gave any
6 description of Dendy's cousin to Agent Ayers prior to
7 being shown that photo, correct?

8 A No, sir.

9 Q Okay. How long -- the first time I guess Agent
10 Ayers approached you about you dealing drugs out of your
11 house, how much time had passed before he bought a photo
12 to show you?

13 A I would say a month or two.

14 Q So he waited a month or two before he bought
15 you the photos?

16 A I believe so, yes.

17 Q And so you were usually in the house when these
18 deals would transpire? Is that correct?

19 A I was in the house sometimes, right.

20 Q Okay. You said Dendy's supplier, his cousin,
21 drove a silver Charger? Is that what you said?

22 A Charger. 300. Something like that. I am not
23 sure.

24 Q And how far, you actually never met his
25 supplier, correct?

1 A No, we were never formally introduced.

2 Q So you never walked up to him and said hello,
3 correct?

4 A No, sir.

5 Q Okay. You didn't tell Chad when you identified
6 that photo, I have no doubt that is the individual?

7 A What now?

8 Q You didn't give -- you didn't make a statement
9 to Chad saying I absolutely know that is the individual
10 in the picture, that is the cousin?

11 A Yeah. He asked me is this person -- do you
12 recognize this person. I said yes. That is who Nick
13 gets his -- that is his supplier.

14 Q And that was a month after he initially
15 approached you, correct?

16 A Right.

17 Q Okay. No further questions.

18 THE COURT: Okay. Mr. Pauling?

19 MR. PAULING: Just a couple.

20 REDIRECT EXAMINATION

21 BY MR. PAULING:

22 Q Ms. Brock, did you had any doubt in your mind
23 that the individual that you saw, the individual was Nick
24 Dendy's cousin?

25 MR. BEASLEY: Objection, Your Honor. That is

1 not what was -- that is an improper question. Chad
2 had already testified to what he asked her. He is
3 creating a question of how she identified this
4 individual where it has already been asked and
5 answered by Chad and when she has already testified
6 to. I think he is being actually sort of
7 suggestive.

8 THE COURT: I will allow the question.

9 BY MR. PAULING:

10 Q Did you have any trouble identifying him?

11 A No, sir.

12 MR. PAULING: Nothing further, Your Honor.

13 MR. BEASLEY: Just brief.

14 THE COURT: Sure.

15 RECROSS EXAMINATION

16 BY MR. BEASLEY:

17 Q What time would Dendy usually come by and drop
18 off the drugs?

19 A It was normally during the day.

20 Q It was normally during the day?

21 A Uh-huh.

22 Q What time?

23 A Uh, anywhere from afternoon to evening. There
24 was never really a certain exact time. Just whenever I
25 called.

1 Q When Dendy would pull up and wait for his
2 supplier to show up, how far back would the supplier be
3 from his car?

4 A They were parked right behind each other.
5 There was just enough space for a car to -- without
6 actually touching the car.

7 Q How many times would you say that you would go
8 out there and get the drugs from Dendy?

9 A I said more than about half the time.

10 Q So half the time, you would go out there and
11 get the drugs from Dendy and his supplier was sitting
12 right behind you?

13 A Right.

14 Q So half the time, that would be how many times?

15 A If I do the math, he would come over to my
16 house three or four times a week. This went on for a
17 couple of months.

18 Q You never talked to his supplier?

19 A No. I never asked to, never wanted to.

20 THE COURT: Mr. Pauling, anything else?

21 MR. PAULING: Nothing further from the State,
22 Your Honor.

23 THE COURT: All right, ma'am. You can step
24 down.

25 THE WITNESS: Thank you.

1 **THE COURT:** Thank you.

2 **MR. PAULING:** Your Honor, we don't have any
3 other witnesses.

4 **THE COURT:** All right. Investigator Ayers,
5 have you had enough time to review those statements
6 or is this just far too short a period for you to
7 have reviewed them?

8 **THE WITNESS:** There is another notebook at
9 my office that I'm going to try to get a hold to.

10 **THE COURT:** Okay. All right. I don't mind
11 -- I will tell you what. I don't mind reconvening
12 at nine o'clock tomorrow morning to take this matter
13 up. I want to think about this issue overnight
14 anyway. I will be happy to hear arguments from
15 either of the attorneys. I'm going to think about
16 this issue, take it under advisement. Unless there
17 is anything else that we need to take up this
18 afternoon, we can reconvene at 9:00. The jury won't
19 be done until about 9:30 picking a foreperson. My
20 goal is if we are to start the trial tomorrow
21 morning, we would start at about 9:30 hopefully.

22 All right. Any estimates -- I just haven't
23 asked this question yet, any estimates on how long
24 this trial will take?

25 **MR. UNDERWOOD:** Not really, Your Honor. I am

1 hopeful that it will be two full days. There is a
2 possibility we could finish up by Mr. Beasley's
3 deadline Wednesday afternoon. If not, we will
4 definitely finish up Thursday.

5 **THE COURT:** I think we can work around
6 whatever we need to do.

7 Mr. Davis, you are still out on bond. We have
8 not sworn the jury. You are still out on bond. You
9 are going to leave here tonight and go to your house
10 or wherever it is that you go. If you do not show
11 up tomorrow, I do need to tell you that I will try
12 you in your absence. I don't have any hesitation
13 about doing that in any way. I think I want to give
14 you a fair warning about that. You do understand
15 that?

16 **MR. DAVIS:** Yes, ma'am. I will be here.

17 **THE COURT:** Okay. Second, there is going to,
18 a point in this trial -- you have got an outstanding
19 attorney. I have no doubt y'all have gone over this
20 at length. But you're going to get to a point in
21 this trial where you will to have to decide whether
22 or not you want to testify in the trial of this
23 case. We are breaking a little early today. We
24 will have lunch breaks all throughout and things
25 like that. You need to be talking to your attorney

1 all along. If you have any questions, hesitations,
2 reservations about whether or not you plan to
3 testify in the trial of this case, you need to be
4 bringing those up all along. I am going to bet that
5 we will get to that decision by you of whether or
6 not you want to testify in the trial of this case,
7 it may be tomorrow afternoon. It could happen.
8 Probably would not. Probably would be Wednesday.
9 But we could. I want you to be thinking about it.
10 I also want you to bear in mind that while you
11 certainly will listen to your attorney and take his
12 advice in this regard, it must be your decision
13 whether or not you will testify. You understand
14 that?

15 MR. DAVIS: Yes, ma'am.

16 THE COURT: Finally, and I say this to
17 everybody. I don't just say this to you. I say
18 this to everybody. When this jury is in here, they
19 deserve our utmost respect. As such, I do not allow
20 people to make faces or react to testimony. I say
21 that not only to you. I say that to everybody.
22 Don't react to testimony. I don't allow people to
23 do that. That is the same thing as giving your
24 opinion to the jury about what is happening. If you
25 want to give your opinion, you have an absolute

1 right to do it but you must do it by sworn testimony
2 on this witness stand. All right?

3 MR. DAVIS: Yes, ma'am.

4 THE COURT: As long as we are clear about
5 that, we will be in recess until 9 a.m., at which
6 time, we will come back and hear from Investigator
7 Ayers and then possibly if we need to hear any
8 testimony from Pace. If you are going to use Pace
9 -- am I saying that right, Pace?

10 MR. UNDERWOOD: Yes, Your Honor.

11 THE COURT: If you are going to use Pace in
12 the trial of this particular case, do you anticipate
13 you will use him before lunchtime tomorrow?

14 MR. UNDERWOOD: No, Your Honor.

15 THE COURT: Or any talk of Pace before
16 lunchtime tomorrow?

17 MR. UNDERWOOD: Highly unlikely, judge.

18 THE COURT: All right. It sounds like we
19 might could revisit that and take a longer lunch
20 break. Anything else before tomorrow?

21 MR. BEASLEY: No, Your Honor.

22 THE COURT: All right. Thank y'all so much.

23 MR. BEASLEY: Thank you.

24 (WHEREUPON, the proceedings conclude at
25 approximately 3:45 p.m.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 17th day of September, 2013 at approximately 9:21 a.m.)

THE COURT: We're back on the record. I got a note from the jury that the foreperson will be Randall Bentley. It looks like they made a good choice based on the jury information that we got. So Randall Bentley is the foreperson.

I notified Mr. Davis -- I understand he's on his way, but I notified him that court would start today at 9 a.m. and that we would try him in his absence if necessary. I don't want to keep the jury waiting any longer.

Investigator Ayers, would you retake the stand?

THE WITNESS: Yes, ma'am.

THE COURT: And I will remind you that you are still under oath from yesterday.

CHAD AYERS

having previously been sworn, testifies as follows:

THE COURT: Investigator Ayers, yesterday, there were a couple of questions that you were unable to answer of Mr. Beasley's. And I'm going to -- you said you need to review some reports in order to answer those questions.

1 **THE WITNESS:** Yes, ma'am.

2 **THE COURT:** Mr. Beasley, do you care to ask
3 those questions again today or you want the court
4 to ask him?

5 **MR. BEASLEY:** The Court could ask him.

6 **THE COURT:** All right. What I have written
7 down is, first of all, how did you already have
8 information that Davis was -- Davis, the defendant
9 in this case, was supplying Dendy?

10 **THE WITNESS:** After reviewing the buy from
11 Mr. Davis, I looked at the bottom of the DMV photo
12 and determined that date is the same date as the
13 buy. To my best recollection, Mr. Albert was the
14 one that provided Clyde Davis' name. That was on
15 the same day I was able to get his DL photo and
16 identify who he was.

17 **THE COURT:** Okay. So that's why you had
18 that photo?

19 **THE WITNESS:** Yes, ma'am.

20 **THE COURT:** All right. You have any
21 questions based on that?

22 **MR. BEASLEY:** I think we'll get back to the
23 Terrance Albert stuff, but I don't think I have
24 anything else.

25 **THE COURT:** All right. Anything from the

1 State?

2 MR. UNDERWOOD: Nothing from the State, Your
3 Honor.

4 THE COURT: All right, sir. You can step
5 down.

6 THE WITNESS: Thank you, ma'am.

7 THE COURT: Thank you. I appreciate you
8 looking into that.

9 THE WITNESS: Yes, ma'am.

10 THE COURT: All right. Anything else that
11 we need to take up with regard to the photo
12 identification of the defendant, uh, by Amy Brock?

13 MR. BEASLEY: I don't think so, Your Honor.

14 THE COURT: All right. All right. Well, I
15 find from the totality of circumstances, uh, that
16 although it is concerning certainly -- and I'm sure
17 will be the subject of much cross-examination, it's
18 concerning that Ms. Brock was only shown one photo
19 that she had identified not by face, but by
20 relationship to the person that she dealt with on a
21 regular basis, she had already identified the
22 defendant. She -- that defendant was already known
23 to law enforcement. This was not, uh, -- this was
24 not someone unknown to law enforcement at the time.
25 She had, at least from her testimony, numerous

1 opportunities to see Mr. Davis and albeit through a
2 windshield at least part of the time at very close
3 range. She's, uh, -- and the level of certainty
4 that she identified Mr. Davis was at a high level
5 of certainty and that there had not been a great
6 deal of time. And as I said, it had been ongoing
7 buys but had not been a great deal of time between
8 her identification and the last time that she had
9 seen Mr. Davis. Based on the totality of the
10 circumstances, I'm going to find that at least the
11 jury can consider this fair identification. Is
12 there anything else we need to take up before we
13 bring the jury back in?

14 MR. BEASLEY: I just think --

15 THE COURT: I'll give Mr. Davis a couple
16 more minutes.

17 MR. BEASLEY: Okay. I mean, I just want to
18 be on the record or I want the Court to reconsider.
19 It's my understanding that nothing can be brought
20 up about Terrance Albert unless Terrance Albert is
21 produced as a witness.

22 MR. UNDERWOOD: And I strongly disagree with
23 that, Your Honor. The fact that an operation took
24 place to attempt an undercover buy was part of the
25 investigation in a conspiracy, officers should be

1 able to testify about their participation in that
2 operation in an attempt to do an undercover
3 purchase. Obviously, the State would not be able
4 to put the actual substance into evidence because
5 without the confidential informant, there's no
6 chance. But the law enforcement's involvement and
7 their observations is still fair game as part of
8 their investigation in this conspiracy.

9 (WHEREUPON, Mr. Davis enters the courtroom.)

10 **THE COURT:** I will allow the officers to
11 testify as to their participation of this. I have
12 no doubts whatsoever, Mr. Beasley, that you will at
13 length bring up to the jury the fact that the
14 confidential informant is not present. And your
15 objection to that is certainly noted. I know that
16 you'll object to it.

17 **MR. BEASLEY:** Your Honor, I just think it's
18 a material piece of evidence. It's exculpatory the
19 fact that Terrance -- the only reason they even
20 went to Amy Brock is because of this CI. It starts
21 from the beginning. I don't see how we can move
22 forward unless I have this witness here. He's
23 given a statement. Law enforcement is basing
24 everything on this witness. He's got to be
25 present. I think it's very prejudicial to my

1 client for them to rely on this and then not
2 produce it. It's very prejudicial.

3 THE COURT: I understand your vigorous
4 objection to it. However, I have ruled. As I
5 said, that's certainly an area for cross-
6 examination.

7 Mr. Davis, I understand that you work third
8 shift and I'm understanding of that. But you need
9 to understand that starting tomorrow -- you were
10 lucky that this morning we had motions to take up
11 which we did without you. But I was about to bring
12 the jury back in here. They would have seen an
13 empty seat. That's not good. You need to
14 understand that and you need to be, uh, -- but you
15 need to be present. All right. Ready to bring the
16 jury back in.

17 (WHEREUPON, the bailiff approaches the bench and a
18 conference is held off the record.)

19 THE COURT: The jury is asking to take
20 notes. I'll give them instructions on how to use
21 the notes. Neither side has any objection?

22 MR. BEASLEY: No objection from the
23 defendant.

24 MR. UNDERWOOD: No, Your Honor.

25 THE COURT: All right.

1 **(WHEREUPON, the jury enters at approximately**
2 9:30 a.m.)

3 **THE COURT:** Good morning, Ladies and
4 Gentlemen. Thank you so much for being so prompt
5 this morning and taking care of the foreperson
6 situation.

7 Sir, you are our foreperson and you are
8 sitting in the exact chair for that. If you will,
9 continue to stay there throughout the balance of
10 the trial.

11 Do you mind swearing the jury please?

12 **THE CLERK:** Yes.

13 Mr. Foreperson, Ladies and Gentlemen of the
14 jury, please stand and raise your right hand to be
15 sworn. You shall well and truly try and true
16 deliverance make between the State of South
17 Carolina and the defendant at bar whom you shall
18 have and charge and a true verdict give according
19 to the law and the evidence so help you God?

20 **(WHEREUPON, each juror responds.)**

21 **THE COURT:** Ladies and Gentlemen, what I'm
22 going to say to you now is not intended to serve as
23 a charge on the law in this case. It's just
24 introduction to the case so that you will know the
25 procedures that we'll follow throughout this trial.

1 I will instruct you, as I told you earlier, on the
2 law in this case at the end after you've heard
3 arguments from the attorneys in this case.

4 The defendant is charged by an indictment
5 filed in this court with a crime of Trafficking
6 Methamphetamine by Conspiracy, the elements of
7 which will be explained to you later. The
8 indictment is simply the document -- as I told you
9 during jury selection, it is simply the document by
10 which someone is charged with a crime. It is not
11 in any sense evidence of anyone's guilt whatsoever.

12 The defendant has pled not guilty to this
13 allegation. Therefore, the State has the burden of
14 proving each and every one of the elements of this
15 crime in the indictment beyond a reasonable doubt.
16 It will be your duty, Ladies and Gentlemen, to
17 determine whether or not the State has met that
18 burden.

19 Your purpose as jurors is to find the facts.
20 You are the sole judge of the facts, in this case.
21 At any time I make any comment on any facts in this
22 case, you are to disregard it. The law does not
23 allow me to have an opinion on the facts in this
24 case and I do not.

25 You are to determine the facts from the

1 testimony you hear and other evidence introduced in
2 court. It is up to you to determine the inferences
3 which you feel may be properly drawn from that
4 evidence. It's especially important that you
5 determine -- excuse me -- that you perform your
6 duty of determining the facts diligently and
7 conscientiously because ordinarily there is no way
8 to correct an erroneous determination of the facts
9 by a jury.

10 On the other hand, the same law that makes you
11 the judges of the facts makes me the judge of the
12 law. You must accept it and follow it even though
13 you may disagree with it. Your job is to take the
14 law as I give it to you, apply it to the facts as
15 you find them from the testimony of the witnesses
16 and other evidence introduced at this trial. And
17 from that, you will render your verdict.

18 Until I advise you to begin your
19 deliberations, you must not discuss this case with
20 anyone. I talked to you a little bit about this
21 yesterday. Let's talk about it again. Please do
22 not discuss this with anyone including your fellow
23 jurors, your friends or family or anyone involved
24 in this case certainly. After the case is
25 submitted to you, you can discuss it only in the

1 jury room with your fellow jurors.

2 There are outstanding attorneys involved in
3 this case. They have been instructed and they
4 would never try to talk to you about this case in
5 any way. If you were to ever come across someone
6 while you are leaving the courthouse or something
7 like that that tried to talk to you about this
8 case, you are to identify yourself as a juror. If
9 that person does that immediately stop talking to
10 you, you must notify the bailiffs about it. The
11 bailiffs will notify me. I assure you I will take
12 care of that situation immediately.

13 During this trial, do not read, listen to or
14 watch any news reports about this case if there are
15 any. That includes anything on the internet, uh,
16 radio or television. You can not consider anything
17 that you've heard about this case in any way except
18 what you hear in the courtroom during the trial of
19 this case. It is important that you keep an open
20 mind and not decide any issue in this case until
21 all of the evidence has been presented, the parties
22 have made their closing arguments and I've
23 instructed you on the law that's applicable in this
24 case. It is your solemn responsibility to
25 determine the guilt or innocence of the defendant

1 and your verdict must be based solely on the
2 evidence as its presented in this trial and the law
3 as I instruct you on it.

4 In just a moment, the Attorney General will
5 make what is called an opening statement in which
6 he will tell you what he believes the issues in
7 this case to be. The attorney for the defendant
8 may also make an opening statement although he is
9 not required to do so. What the attorneys tell you
10 during their opening statements is not evidence in
11 this case. It is only their contention as to what
12 the issues are. The evidence in this case will be
13 presented to you by sworn testimony from this
14 witness stand and exhibits that may be introduced
15 into evidence.

16 From time to time, you may hear one of the
17 attorneys say that they need to take up a matter of
18 law regarding something -- that they need to take
19 up a matter of law with me. I may ask them to
20 approach the bench if it's something that we can
21 take up quickly. If it's something that might take
22 a minute more of our time, I'll ask you to step to
23 your jury deliberation room so we can discuss it
24 outside your presence. I do not want you to
25 believe that we are hiding the ball from you in any

1 way.

2 Let me explain to you why there are certain
3 matters that we need to take up outside your
4 presence some times. I told you a moment ago that
5 I can not have an opinion on the facts in this case
6 and that I do not have an opinion on the facts in
7 this case. However, occasionally, I might have to
8 comment on the facts in this case when I am making
9 a ruling of law. So that I do not influence you in
10 any way or make any indication about the facts in
11 this case to you in any way, we'll either take up a
12 matter privately at the bench or take it up outside
13 your presence. I want to assure you that if we do
14 ask you to step to your jury deliberation room,
15 while you are there, we will be working and we will
16 trespass on your time as little as possible.

17 All right. As I told you, one way that you
18 will hear evidence in this case will be from sworn
19 testimony of witnesses. That means, you'll have to
20 determine the credibility of witnesses.
21 Credibility simply means believability. It will be
22 my responsibility to rule whether certain testimony
23 is admissible or not. Once the testimony is
24 admitted, it is up to you whether or not to believe
25 it. That is solely for you to decide.

1 In deciding whether to believe a witness, you
2 have the right to consider any interest, bias,
3 prejudice of the witness, the opportunity that the
4 witness had to actually see or hear the things
5 about which he or she is testifying. You have the
6 right to consider anything in the record that will
7 help you evaluate the testimony of the witnesses.

8 I ask you to pay very close attention to the
9 witnesses and observe, uh, their mannerisms. You
10 can consider that -- their demeanor while they are
11 on the witness stand. You will, uh -- you have the
12 right to believe one witness over several witnesses
13 or several witnesses over one witness. You can
14 believe part of a witness' testimony and reject
15 part of a witness' testimony, that same witness.
16 You can believe all or not of a witness' testimony.
17 You can use anything in the record to determine
18 whether or not you believe that witness is telling
19 the truth. In other words, you will determine a
20 witness' credibility just like you do in your daily
21 lives. You will look at their demeanor and
22 consider any bias or interest they may have in the
23 outcome of the case.

24 Ms. Foreperson, it will be your added duty, as
25 I told you, to lead the discussions in the jury

1 deliberation room once this case is finally in your
2 hands to decide. It will also be your added duty
3 to, uh, -- to sign the verdict form in this case
4 with the jury's unanimous verdict.

5 Our alternates, uh, and I thank you so much,
6 sir, for your service as I thank all of the jurors
7 for your service. Our alternates, as I told you
8 yesterday, you will be with us through the balance
9 of the trial just as if you were one of the 12
10 jurors. You can step into their shoes at any
11 moment if I had to remove a juror for any reason,
12 for an emergency or for any other reason.

13 I know that you all have requested if some of
14 you can take notes. I appreciate your asking that
15 and appreciate your checking with me about that.
16 Let's talk about how we're going to deal with those
17 notes. Not -- let's remember that not everyone is
18 as good of a notetaker as the next one. I don't
19 know how good each of you are at notetaking. I'm
20 not real great. But some people are good
21 notetakers and that can be helpful to them.

22 Just because someone has something written
23 down, I want you to remember that doesn't -- if
24 what you heard and what you remember is different
25 than what somebody's got written down, that does

1 not mean that what you heard is wrong. Remember
2 that please. Also, uh, because I don't want you
3 to, say, study over your notes or do something like
4 that in the evenings, you'll leave your note --
5 your note pads will be numbered and be left here
6 overnight. At the end of the trial, those notes
7 will be taken up and they will be given to me -- I
8 will not read them but my office will shred those
9 notes so that they could never fall into anyone's
10 hands or anything like that. But please do not
11 take any notes with you in the evenings or when we
12 leave the trial.

13 All right. Is there any objection to my
14 initial charge from the State?

15 MR. UNDERWOOD: No, Your Honor.

16 THE COURT: Any from the defense?

17 MR. BEASLEY: No, Your Honor.

18 THE COURT: All right then. Ladies and
19 Gentlemen, we are ready to begin with opening
20 statements. Yes, sir.

21 MR. UNDERWOOD: May it please the Court,
22 Your Honor?

23 THE COURT: Yes, sir.

24 MR. UNDERWOOD: Counsel?

25 Good morning. This trial is going to give you

1 a glimpse into the world of drug trafficking. This
2 case is about trafficking methamphetamine in
3 Greenville county. Now, methamphetamine has got
4 lots of different names. Some people call it
5 crank. Some people call it crystal, crystal meth.
6 Other people call it ice because of what it looks
7 like in certain forms. It looks kind of like
8 shaved ice.

9 Drug trafficking operates a lot like
10 legitimate sales businesses. You've got
11 wholesalers. You've got brokers. You've got
12 retailers at various different levels. The
13 difference is we're not talking about something
14 legit. We're talking about selling an illegal
15 substance, methamphetamine, a controlled substance
16 and an illegal drug.

17 Now, as this case goes on, we're going to
18 prove to you that a conspiracy existed between a
19 number of individuals. We're going to prove to you
20 that one of the heads of this conspiracy, at least
21 at the local level is this defendant, Clyde Davis.
22 You're going to hear from coconspirators. You're
23 going to hear from drug dealers, drug users. I
24 wish that we could present preachers and teachers
25 and doctors, but those aren't the people who are

1 involved in drug trafficking. Drug dealers are
2 involved in drug trafficking. Those are the people
3 that you're going to hear from. They are the ones
4 in the business who have the information that you
5 need to determine if Clyde Davis is guilty.

6 You'll hear from one investigator who will
7 explain to you the various different drug
8 traffickers that were identified. This trial is
9 going to focus on one that happened here in
10 Greenville with Clyde Davis as the head.

11 Now, the judge has told you this is a
12 conspiracy case and she is the judge of the law.
13 At the end of the case, she's going to charge you
14 on the law. But suffice to say for right now,
15 conspiracy is when two or more people get together
16 to accomplish some illegal gain. In this case,
17 people assembled together with a common goal and
18 scheme of selling methamphetamine, ice.

19 Now, in this trial, Clyde Davis sits here
20 presumed innocent. It is my burden, Mr. Pauling's
21 burden, the State's burden to prove to you beyond a
22 reasonable doubt that Clyde Davis is guilty. And
23 that's why we are having this trial is to prove to
24 you this man is guilty, that he was involved in the
25 illegal sale of ice methamphetamine. That is a

1 strong burden, but a burden that we gladly bear
2 because that's what our system needs to function,
3 to protect everyone's rights so that the right
4 people are found guilty. I submit to you that we
5 are going to present the evidence to you that you
6 need to find beyond any reasonable doubt that Clyde
7 Davis is guilty of this drug trafficking.

8 You are the judges of the facts. You will get
9 to see these people on the witness stand and assess
10 how credible they are, what biases they have, what
11 their involvement is, how truthful they are being
12 to you. That is for your determination. You will
13 see a number of people on that witness stand who
14 will eventually lead you to only one conclusion.
15 At the end of this trial, we're going to ask you to
16 assess all that evidence and find that Clyde Davis
17 is guilty of trafficking methamphetamine.

18 THE COURT: Mr. Beasley, do you care to make
19 an opening statement?

20 MR. BEASLEY: Yes, Your Honor.

21 THE COURT: All right. Thank you.

22 MR. BEASLEY: May it please the Court?

23 THE COURT: Yes, sir.

24 MR. BEASLEY: Good morning, everybody. I'm
25 Ryan Beasley. I'm a lawyer here in Greenville.

1 I'm originally from the Pee Dee area of South
2 Carolina. I've been up here for over 10 years. I
3 went to Wofford College. I went to USC Law School.
4 I've been practicing up here for over 10 years now
5 in several capacities. I've been a prosecutor,
6 like Mr. Pauling and Mr. Underwood over here. I
7 been a law clerk for a judge like Elizabeth sitting
8 up there next to Judge Verdin. Now, I'm a defense
9 attorney.

10 The issue here and the reason I'm telling you
11 this is not whether you like or dislike me, Mr.
12 Pauling, Mr. Underwood or even my man, Mr. Ford,
13 over here, the bailiff. The reason you are here
14 today at this juncture is to determine what the
15 facts are in this case. I'm telling you that
16 because you may come in here with some
17 preconception or notion that, uh, what your role is
18 or what you are supposed to do about certain
19 things. But I want you to know you are supposed to
20 decide what the facts are.

21 You know, like me, probably like most people
22 in the courtroom this morning, I'm sure you were
23 sitting this morning having a cup of coffee,
24 reading the newspaper, watching TV or, you know,
25 these days probably on the computer reading about

1 news. You probably saw some article where somebody
2 was arrested by the State. Somebody was charged.
3 You, like me, will believe it. That's a natural
4 thing to do. You're probably, just like me, going,
5 "I'm glad they got this guy. I'm glad he's off the
6 street. I'm glad he's not going to be out there to
7 hurt anybody else." That's a natural human thing
8 to do. I do the same thing.

9 But you know, you assume that the police made
10 the correct charge, they got the right guy. What
11 you did is you prejudice that person that they
12 charge. You have a predisposed decision on him, so
13 to speak. And it's based on what you read in the
14 newspaper, watched on TV or read on the computer.
15 You know what? That is perfectly acceptable to do.
16 That is the natural human thing to do. That's what
17 I do.

18 However, what I'm going to tell you, Ladies
19 and Gentlemen, your role in the world has changed
20 today. It has changed. When you took that oath,
21 you took a solemn promise. You swore that you
22 would follow the law on this case. You see, it
23 sounds very simple. It seems like, you know,
24 probably something pretty easy to do. I can
25 promise you that is going to be the most difficult

1 thing you've ever done. You'll have a tough time
2 keeping that promise. I guarantee it.

3 After this indictment is read by the judge,
4 after you hear the opening statement from Mr.
5 Underwood, you are like this guy had to do
6 something wrong. He has to be at least a little
7 guilty. Has to be. Why would the judge be here?
8 Why would I be here? Why would the State be here?
9 Why would we be wasting all the State's money and
10 time if he wasn't guilty? He's got to be.
11 Something. Has to be.

12 Well, I can tell you one thing. If you sit
13 here with any inkling whatsoever in your soul, in
14 your heart, in your conscience that Clyde did
15 anything wrong, then you are violating that oath
16 that you took. You have to presume Clyde is
17 innocent. You have to.

18 You know, as far as I know, they didn't post
19 the list up six weeks ago and say, hey, who wants
20 to sign up for jury duty and be here for a week? I
21 know you didn't. I know you got the summons that
22 said you have to be here or else. And, you know
23 what, Clyde got the same summons. He don't want to
24 be here either. He worked a third shift at BMW.
25 He hasn't slept for two days. He's coming here

1 right after work. He doesn't want to be here.

2 Oliver Wyndall Holmes said jury duty is one of
3 the highest duties one could perform for one's
4 country during peacetime. It is the jurors who
5 stand between the power of the state to deprive the
6 individual of his life and liberty. So you all are
7 here with an awesome duty, an almost impossible
8 task. That's to presume someone is innocent.

9 This isn't a contest between me and Mr.
10 Pauling and Mr. Underwood. It's not us against
11 them. I don't say that, you know, to be arrogant
12 about whether they -- they -- I don't have to prove
13 anything. Clyde doesn't have to prove anything.
14 We don't have to disprove anything. I don't say
15 that to be arrogant about how this is going to
16 work. I say that because the State has to present
17 evidence that proves to you beyond a reasonable
18 doubt that Clyde conspired with these five other
19 individuals, Amy Brock, Nicolous Dendy, uh, a guy
20 named Sekerchak and a guy named Joshua Byers. And
21 what they have to prove is they agreed to sell,
22 manufacture, deliver, purchase or bring into this
23 state meth. And let me tell you, that's going to
24 be a very extraordinary, difficult burden for the
25 State. The State must show evidence of an

1 agreement and it has to be between all those
2 individuals. That's going to be the issue. There
3 is no agreement. There is no agreement.

4 The judge is going to, you know, obviously
5 tell you the law at the end of the case. I'm going
6 to give you some brief things to think about. To
7 constitute a conspiracy is not enough for these six
8 alleged co-conspirators in this indictment to
9 intend to sell, manufacture, deliver, purchase or
10 bring into the state meth, even if they are acting
11 within agreement. It's not enough for the alleged
12 co-conspirators to associate with each other while
13 they are doing this unlawful activity. Further, it
14 is not even enough for these alleged coconspirators
15 to have some kind of buyer/seller relationship.
16 Not enough. You will hear through the testimony
17 that there is no evidence of any sort of agreement.

18 You know, unfortunately, some of the testimony
19 you will hear is from drug users, addicts, what you
20 heard the State say. But I'm surprised the State
21 didn't elaborate a little more and give you heads
22 up that just about all these people had been caught
23 lying at one time or another. They had given
24 different statements, several different statements.
25 It's not until the State has to show them something

1 else or say, hey, I'm going to take your kids out
2 of your house if you don't tell me what I need to
3 know. Those are things you really have to think
4 about. These are very unreliable witnesses. I
5 want you to listen to their testimony carefully or
6 listen to their inconsistent statements. As
7 jurors, you are asked to determine more than just
8 inconsistent statements.

9 Most of these probably come down to two
10 different witnesses. There's Nicholous Dendy and
11 Amy Brock. Nicholous Dendy gave, I think, four
12 different statements. Amy Brock gave a statement,
13 did some undercover buys and then she was still
14 dealing when this happened. When they busted her,
15 she had her kids in the house.

16 So your job is to assess their credibility. I
17 want you to look in their eyes. See if they look
18 you in the eye when they testify. Ask yourselves
19 is this somebody I could trust. Do they look
20 comfortable sitting up there? Are they talking and
21 then looking over here at the State for reassurance
22 that they are saying the right thing?

23 The State has to prove to you beyond a
24 reasonable doubt in the case that those witnesses
25 were -- the case depends primarily on the testimony

1 of Dendy and Brock. I'm going to tell you that's
2 what it comes down to. Nobody else dealt with Mr.
3 Davis or even knows Mr. Davis. Just ask yourself,
4 "Am I sure? Am I convinced beyond a reasonable
5 doubt that this person is telling me the truth, not
6 just the half-truth, the full truth?

7 You are here to determine whether the State
8 has proved to you beyond a reasonable doubt that
9 Clyde conspired with these individuals to sell
10 meth. I promise you that Clyde did not conspire
11 with these individuals. You not only come out of
12 here -- of this courtroom writing a verdict of not
13 guilty, but you're going to be upset with the State
14 for not doing a better job. I mean, they did not
15 do a good job of making a case.

16 Your focus should be on the evidence of an
17 agreement between all these alleged coconspirators
18 and not as the State would have you think of this
19 common object, which is just selling meth. That is
20 not what this is about. I promise you that.

21 The system that we are all here participating
22 in today is a system that's created hundreds of
23 years ago. And it's basically the same thing.
24 Judge here wears the black robe. Judge in England
25 wears a black robe. They wear wigs over there in

1 England. We don't wear wigs. The courtrooms are
2 kind of the same. One thing is sort of different
3 where they do in England. When the judge charges
4 the jury, the judge says you have three verdicts
5 you can give. You have a verdict of not guilty, a
6 verdict of guilty or a third verdict of not proven.
7 Over here, we don't get three verdicts. We only
8 get two. What we did is we merged the not proven
9 and not guilty together. That's what the judge is
10 going to charge you with.

11 The reason I mention that is I want to
12 reemphasize that Clyde Davis doesn't have to prove
13 anything to you guys. The issue is whether the
14 State has proven beyond a reasonable doubt. I
15 submit to you that they will not. On behalf of
16 Clyde and myself, I want to thank you for being
17 here. I know you're going to pay attention in
18 great detail to all the testimony. At the end,
19 I'll come back and summarize everything for you.
20 Thank you for your time.

21 **THE COURT:** Mr. Underwood, you ready to call
22 your first witness?

23 **MR. UNDERWOOD:** Thank you, Your Honor. The
24 State calls Tonya Smith.

25 **THE COURT:** Come forward and be sworn

1 please. Place your left hand on the Bible and
2 raise your right hand please. Ma'am, right here.

3 THE WITNESS: Right here?

4 THE COURT: Yes, ma'am.

5 TONYA SMITH

6 having first been duly sworn, testifies as follows:

7 THE COURT: Thank you. You can have a seat.

8 DIRECT EXAMINATION

9 BY MR. UNDERWOOD:

10 Q Good morning, Ms. Smith.

11 A Good morning.

12 Q If you have any trouble hearing me, let me
13 know.

14 A Okay.

15 Q If you can't hear my questions, just let me
16 know. Ms. Smith, did you become a confidential informant
17 in this investigation?

18 A Yes, I was one.

19 Q Okay. Ms. Smith, kind of introduce yourself to
20 the jury please. How old are you?

21 A I'm 40 years old.

22 Q Where are you from?

23 A Greenville.

24 Q How far did you go in school?

25 A Graduated high school.

1 Q Are you married? Have a family?

2 A I have three boys. They are 22, 20 and 14. I
3 currently have a boyfriend, yes.

4 Q You still living in Greenville?

5 A I live in, uh, Piedmont now.

6 Q Ms. Smith, how did you get involved with
7 illegal drugs?

8 A I was 32 years old. I started off selling
9 drugs for the money. First time I got arrested, lost my
10 kids, I started using.

11 Q When was that?

12 A Uh, '08.

13 Q What kind drugs were you using?

14 A Methamphetamine.

15 Q How much methamphetamine were you using?

16 A I had a three-and-a-half gram habit a day.

17 Q As a result of your drug use, did you find
18 yourself in trouble with the police?

19 A Yes.

20 Q How did that come about?

21 A Explain the question.

22 Q How did you get in trouble with the police?

23 A I mean, I was arrested for doing illegal
24 activities for selling drugs. I had two charges for
25 possession with intent to distribute and also some

1 charges for, uh, third degree burglary -- I mean, first
2 degree burglary, strong armed robbery, an assault and
3 battery of a high and aggravated nature charge and
4 conspiracy charge.

5 Q Were those charges related to your drug use?

6 A Yes, they were.

7 Q How were those charges disposed of?

8 A Some of them were dismissed because I took a
9 plea. I had three years probation. I went to a rehab
10 facility for nine months.

11 Q Did you complete rehabilitation?

12 A Yes, I did. I've got six more months left on
13 my probation.

14 Q What kind of rehabilitation facility was it?

15 A I went to Heart of Hannah in Travelers Rest.
16 It's a faith-based program. You go to drug classes for
17 six weeks. They help you find a job and they teach you a
18 new way of life. They teach you to live without drugs.

19 Q Since you've gone into that rehab, you stayed
20 clean?

21 A Yes.

22 Q You have a job?

23 A Yes, I do.

24 Q Where are you working at?

25 A Master Mark Dry Cleaners in Cherrydale. I been

1 there two and a half years.

2 Q Now, Ms. Smith, if you could, please explain to
3 the jury how you became a confidential informant.

4 A After my second possession with intent to
5 distribute charge, you pretty much become broken inside.
6 I wanted to stop. I spoke with Officer Ayers. He showed
7 me -- told me what all evidence they had against me. I
8 have children. I wanted my life to change. To me, being
9 an informant was helping them get drugs off the street.

10 Q Is that an effort because of what drugs had
11 done to your life?

12 A Yes. Yes, it was. If it took one drug dealer
13 off the streets, it would matter.

14 Q How -- how did the process work to become a
15 confidential informant? What did you have to do?

16 A I done some controlled buys. Just told on
17 people that -- I helped them with whatever they needed me
18 to do.

19 Q When you say you did some controlled buys, what
20 does that mean?

21 A You wear a wire and go in and purchase drugs
22 from another party. Whenever it was over, you just give
23 what you had purchased to the police.

24 Q Just start at the beginning of how an
25 undercover operation would start -- from start to finish,

1 how that process would work.

2 A We would meet out at -- Officer Chad Ayers
3 would come and pick me up from my mothers'. We would go
4 out to either -- out at the Donaldson Center or we would
5 meet in another location. One officer would go with me
6 or drive me there. Once I got to where we were meeting
7 them at, they would put a wire on me so that they could
8 hear what was going on and report it. Then we would go
9 to the location. The officer would drive me there. I
10 would go in, make the buy, come back out and then we'd go
11 back to where we met at originally.

12 Q Were you ever searched by law enforcement?

13 A Oh, yeah. Yeah.

14 Q How did that happen?

15 A They would search you when you get there. They
16 would search my car. I guess to make sure I didn't have
17 nothing I shouldn't have on me.

18 Q That's the beginning?

19 A At the beginning, yes.

20 Q Were you searched again at the end?

21 A Yes.

22 Q Same kind of search?

23 A Yes.

24 Q How many undercover purchases did you make in
25 this investigation?

1 A I believe it was nine.

2 Q Who were some of the individuals that you made
3 purchases from?

4 A Uh, Mikey Mike, Felipe -- it's been a long
5 time. Sorry. Uh, Mikey Mike, Felipe, Tasha. There was
6 one -- Chad Moore in Pickens.

7 Q One person you identified as Mikey Mike, what's
8 his real name?

9 A Mike Robinson, I believe.

10 Q Were you able to buy from him a controlled
11 purchase from a prior relationship with him?

12 A Yes.

13 Q How do you know Mikey Mike?

14 A I would either go down there and sell him drugs
15 or I would buy drugs when I couldn't get it from my
16 regular supplier.

17 Q So you and Michael Robinson would buy and sell
18 drugs back and forth?

19 A Yes.

20 Q Were they always the same drugs?

21 A Yes, it was always methamphetamine.

22 Q How long have you known Mikey Mike?

23 A A couple of years. Met him in '08.

24 Q How did you actually meet him?

25 A I went down there with another girl that went

1 down there selling drugs. I just kind of sat in the
2 living room and talked, you know, to everybody while she
3 was doing her business.

4 Q So when you first met Michael Robinson, it was
5 about drugs ---

6 A Yes.

7 Q --- from the beginning?

8 A Yes.

9 Q How often would you buy drugs from Michael
10 Robinson?

11 A Just about every day.

12 Q How much would you buy?

13 A It would range anywhere from \$20 to a half an
14 ounce.

15 Q When you say \$20, how much meth is that?

16 A Uh, .2.

17 Q .2 grams?

18 A Uh-huh.

19 Q So you would buy .2 grams to how much?

20 A Half an ounce which is 14.0 grams.

21 Q What time frame are you talking about? What
22 year?

23 A '08, '09 and 2010.

24 Q How often would you buy from him?

25 A I mean, I seen him every day. Sometimes I

1 would go down there and just sit because I would sit out
2 of his house and sell drugs. I usually bought from him a
3 good bit. At least five times a week.

4 Q At least five times a week between 2008 and
5 2010?

6 A Yes.

7 Q All right. And how much would an average
8 purchase be?

9 A An average a day would probably be \$300.

10 Q How much meth is \$300?

11 A An eight ball. It's 3.5 grams of
12 methamphetamine.

13 Q So one eight ball how many times a week on
14 average?

15 A Five times.

16 Q So five eight balls a week from 2008 to 2010?

17 A Probably. It's been a while.

18 Q Sometimes did you buy less?

19 A Yeah, sometimes I bought less. On average, it
20 was usually -- I would buy it to make money. I would at
21 least buy an eight ball that way I could supply my habit
22 and make some money.

23 Q Again, how much -- how many grams is an eight
24 ball?

25 A 3.5.

1 Q At times you said you would buy more, more than
2 an eight ball?

3 A Yes. Yes, if I had more money on me, I would
4 buy the amount of money I had.

5 Q How often would you buy more than an eight
6 ball?

7 A Once a week. Sometimes twice a week.

8 Q You mention up to --

9 A 14 grams. A half an ounce.

10 Q How often would you buy half an ounce?

11 A Twice a week.

12 Q You say half an ounce, is that the total week
13 or at one time?

14 A At one time.

15 Q When did you stop dealing with Michael
16 Robinson?

17 A 2010.

18 Q You remember what part of 2010?

19 A Probably about the summer of 2010. I went to
20 jail. I got out. A lot of my stuff that was locked up
21 in storage was in his house. I was really kind of mad
22 and just cut off ties.

23 Q And all of that is before you became a
24 confidential informant?

25 A No, I was an informant before then.

1 Q Now, the relationship we talked about from 2008
2 to 2010, were those purchases that you were making as a
3 drug dealer with him?

4 A Yes.

5 Q That's not counting the purchases you made for
6 law enforcement?

7 A No. No, that does not even include that.
8 That's why I was able to go and make the purchases I made
9 for law enforcement through him. I didn't question it
10 because I bought large amounts.

11 Q And how many times did you do, to the best of
12 your memory, did you make controlled purchases from
13 Michael Robinson for law enforcement?

14 A Two.

15 Q I'm sorry.

16 A Two of them.

17 Q How much did you buy each time?

18 A I believe they were half ounce or maybe a
19 quarter ounce.

20 Q Remember roughly when that was?

21 A Honestly, I can't remember that. That was a
22 while back.

23 Q It was a while ago?

24 A Yeah. I can't remember that.

25 Q Okay. Do you know an individual named Joshua

1 Byers?

2 A Yes, I do.

3 Q How do you know him?

4 A He was my drug supplier.

5 Q At what time was he your supplier?

6 A From, let's see, 2007, 2008 until I got
7 arrested the first time. Then we cut ties.

8 Q How much methamphetamine were you buying from
9 Joshua Byers in that time frame?

10 A On a daily -- day-to-day basis, anywhere from
11 an ounce, half an ounce to an ounce a day I would get
12 from him.

13 Q You said you stopped dealing with him in 2008?

14 A Yes. The first time I got arrested.

15 Q How about an individual, Brian Keith Sekerchak,
16 do you know him?

17 A Yes, I do.

18 Q How do you know him?

19 A Uh, he lived on the other side of my
20 neighborhood. He was just another known drug dealer. I
21 would just go and get some drugs from him. I really
22 didn't purchase large amounts from him. Did you have
23 much of a business relationship with him?

24 A No, not much. But I knew who he was.

25 Q Do you recall any particular times buying drugs

1 from him?

2 A Yeah. That's how it is in the meth world. You
3 know, you go to one place and it's not there, you can
4 always find some right down the street.

5 Q How about an individual named Amy Brock. Do
6 you know her?

7 A Yes, I know who she is.

8 Q How do you know Amy Brock?

9 A She lived up the street from Mikey Mike.

10 Q Did you ever have any involvement with her?

11 A No.

12 Q Why not?

13 A Just didn't get along.

14 Q Do you know what her relationship was with
15 Michael Robinson?

16 A I believe she either sold it to him or got it
17 from him. He could call her to get drugs. I do know
18 that.

19 Q So Michael Robinson would call Amy Brock for
20 drugs?

21 A Yeah.

22 Q Would that include the drugs he sold to you?

23 A Oh, yeah.

24 Q You know if Michael Robinson had any other
25 suppliers?

1 A Uh, Nick.

2 Q Nick who?

3 A I don't know Nick's last name.

4 Q What does Nick look like?

5 A He's a black man.

6 Q How do you know Nick?

7 A I seen him at Mikey Mike's.

8 Q What did he do at Mikey Mike's?

9 A Just came and brought him drugs that I
10 purchased.

11 Q Methamphetamine?

12 A Yes.

13 Q How often would you see Nick at Mikey Mike's?

14 A I only seen him a couple of times. He didn't
15 come and stay much. He would just drop it off and leave.

16 Q How much would he drop off at a time?

17 A I mean, I know I bought the seven grams from
18 him twice.

19 Q From Nick?

20 A No, from Mikey Mike that Nick had gave to him.
21 Uh, a couple other times I seen him over there, but not
22 much.

23 Q So on at least two occasions, you brought
24 methamphetamine that came from Nick?

25 A Came from Nick, yes.

- 1 Q And that was seven grams each time?
- 2 A Yes.
- 3 Q Did you ever buy directly from Nick?
- 4 A No.
- 5 Q You ever had any discussions with Nick?
- 6 A No. No, I didn't need to. I was there to see
- 7 Mikey Mike, not Nick.
- 8 Q Did you ever have any dealings with Clyde
- 9 Davis?
- 10 A No.
- 11 Q Do you know Clyde Davis?
- 12 A No.
- 13 Q During that time frame, who were your
- 14 suppliers? You can list your different suppliers from,
- 15 say, mid-2008 until you stopped being involved with
- 16 drugs.
- 17 A Felipe and Luke Blankenship and Mikey Mike.
- 18 Those were the main ones that I would go and get drugs
- 19 from.
- 20 Q So Mikey Mike was one of your main suppliers?
- 21 A Yes.
- 22 Q When Nick brought drugs to Mikey Mike for you
- 23 to purchase, was Nick by himself?
- 24 A As far as I could tell.
- 25 Q So you don't know for sure where he got it

1 from?

2 A No.

3 Q Ms. Smith, have you and I ever met to discuss
4 your testimony?

5 A Not today, no.

6 Q Have we ever met in the past to talk about your
7 testimony?

8 A I mean, it's been a while since I've seen you,
9 but yeah. We have talked but not about testimony today,
10 no.

11 Q Have I ever -- what have I ever told you about
12 how to testify?

13 A You haven't.

14 Q Just so that I could understand your
15 relationship with Mikey Mike, can you just summarize the
16 time frame and the amount of drugs that you bought from
17 him?

18 A 2008, '9 and '10, I would go to Mikey Mike's
19 house and buy anywhere from .2 to 14 grams in a week
20 time. I mean, that's just how it was. It was nothing
21 else but about drugs.

22 Q You were using drugs as well?

23 A Yes, I was.

24 Q And you are clean now?

25 A Yes. January 5th will be three years.

1 Q Congratulations.

2 Court's indulgence.

3 THE COURT: Certainly.

4 BY MR. UNDERWOOD:

5 Q Ms. Smith, the meth that you were buying from
6 Mikey Mike, what were you doing with it?

7 A Selling it.

8 Q Did Mikey Mike know that?

9 A I'm sure he did. I would leave with drugs and
10 come back with money to buy more drugs. So yeah, I'm
11 sure he knew what I was doing with it.

12 Q Since you were a user, the amounts of drugs
13 that you were buying, was that more than one person could
14 possibly use?

15 A It's usually what I used in a day by myself.

16 Q How often would you come back to Mikey Mike?

17 A Sometimes two and three times a day.

18 Q Did he ever sell you meth on front?

19 A No.

20 Q Could you explain to the jury what fronting
21 means?

22 A It means if you don't have any money, you go to
23 your drug supplier and tell them that you want to make
24 some money and you'll bring the money back once you sell
25 the drugs.

1 Q You always paid cash for your drugs?

2 A To Mikey Mike, I did. Yes. He would have to
3 pay cash for it. If it was that amount, normally, I
4 would have to wait on that amount to come be delivered.

5 Q If the drugs you bought for -- if you didn't
6 resell the drugs you brought from Mikey Mike, would you
7 have been able to go back to Mikey Mike and buy more?

8 A Not on front, no. I'd have to purchase it.

9 Q Last question.

10 A Okay.

11 Q Would you be able to keep going back to Mikey
12 Mike to buy drugs if you hadn't sold the drugs you had
13 already bought?

14 A No. I didn't have a job. I had no way else to
15 supply my habit except to sell it.

16 Q Was Mikey Mike aware of your situation?

17 A Yes. We were all addicts.

18 Q Thank you, Ms. Smith. Please answer any
19 questions that Mr. Beasley might have.

20 A Okay.

21 THE COURT: Mr. Beasley, before you begin,
22 let's take a short break.

23 Ladies and Gentlemen, I'm going to ask you to
24 step to your jury deliberation room for a moment.
25 I'll sound like a broken record during this trial,

1 but please don't discuss this case with anyone.

2 Thank you.

3 (WHEREUPON, the jury exits at approximately
4 10:18 a.m.)

5 THE COURT: I'm sorry to take a break so
6 early, but let's take about a 10-minute break.
7 We'll come back at 10:30.

8 (WHEREUPON, a short recess is taken.)

9 THE COURT: You want to retake the stand?

10 (WHEREUPON, the witness complies.)

11 THE COURT: All right. Let's bring our jury
12 in.

13 (WHEREUPON, the jury enters at approximately
14 10:33 a.m.)

15 THE COURT: Mr. Beasley?

16 MR. BEASLEY: Thank you, Your Honor.

17 THE COURT: Yes, sir.

18 CROSS-EXAMINATION

19 BY MR. BEASLEY:

20 Q I'm Ryan Beasley. How are you?

21 A Just fine.

22 Q Uh, so you've been off meth, you said, for
23 three years?

24 A Almost, yes.

25 Q Congratulations. That is very impressive.

1 A Thank you.

2 Q I know it's a hard habit to kick.

3 A It really is.

4 Q Real quick, you're biggest suppliers, you said,
5 were Felipe and Blankenship?

6 A Luke Blankenship, yes.

7 Q And, uh, was Felipe probably the biggest
8 supplier to you and Mike Mike, Mr. Robinson?

9 A ~~Well,~~ yes, to me.

10 Q Okay. And who was Mike's biggest supplier?

11 A The only one I knew besides me going over there
12 or a couple of other people going over there was Nick.

13 Q So Nick was hanging out over there all the
14 time?

15 A He didn't hang out over there. He would come
16 over there and he was drop off drugs and leave. If
17 you're not a meth user, the last thing you want to do is
18 sit up in that house with a bunch of drug addicts.

19 Q Okay. So all right. No more questions. Thank
20 you.

21 THE COURT: Anything else for this witness?

22 MR. UNDERWOOD: Nothing, Your Honor. We ask
23 that she be excused.

24 THE COURT: All right.

25 THE WITNESS: Thank you.

1 **THE COURT:** Ma'am, you can step down.

2 Mr. Beasley, do you have any objection to her
3 being excused?

4 **MR. BEASLEY:** No, Your Honor.

5 **THE COURT:** All right. Thank you, ma'am, for
6 being here.

7 **THE WITNESS:** Thank you so much.

8 **MR. UNDERWOOD:** Your Honor, the State calls
9 David Norris.

10 **THE COURT:** Come forward and be sworn please,
11 sir. Place your left hand on the Bible and raise
12 your right hand please.

13 **DAVID NORRIS**

14 having first been duly sworn, testifies as follows:

15 **THE COURT:** All right. You may have a seat.

16 **DIRECT EXAMINATION**

17 **BY MR. UNDERWOOD:**

18 **Q** Good morning, Mr. Norris.

19 **A** Morning.

20 **Q** Have you worked as a confidential informant in
21 this case known as Operation Icehouse?

22 **A** Uh, yes.

23 **Q** Mr. Norris, would you please introduce yourself
24 to the jury. Tell them where you are from.

25 **A** I'm David Norris. I'm from the west side of

1 Greenville, born and raised.

2 Q How old are you, Mr. Norris?

3 A 32.

4 Q How far did you go in school?

5 A Graduated.

6 Q You have any family around here?

7 A Yes, sir.

8 Q Married? Kids?

9 A Yes. Wife, four kids.

10 Q Mr. Norris, how did you first get involved in
11 illegal drugs?

12 A As a user, I guess.

13 Q And what kind of drugs did you use?

14 A Methamphetamine, marijuana.

15 Q How did you get introduced to methamphetamine?

16 A By a friend of mine, a girl.

17 Q And when you had used methamphetamine, how much
18 would you smoke or -- how did you use methamphetamine
19 first of all?

20 A Smoke.

21 Q You smoked it?

22 A Yes, sir.

23 Q How much would you smoke at a time?

24 A Uh, I don't know like quantity-wise. Just till
25 I was high, I guess.

1 Q Was it multiple grams?

2 A No, no, no, no. Nothing like that. Just
3 quarter grams, I guess.

4 Q So a quarter of a gram would get you high?

5 A Yeah.

6 Q At some point, did you become an addict?

7 A Sure.

8 Q What were you addicted to?

9 A Meth.

10 Q How long were you an addict?

11 A Probably, I don't know, a year or two years.

12 Q When did you first become addicted to
13 methamphetamine?

14 A I'll say in late 2009, early 2010. Something.

15 Q As a result of your drug use, did you ever have
16 any problems with police?

17 A Yes.

18 Q Did you ever get arrested for any drug crimes?

19 A Yes.

20 Q Were you convicted of those?

21 A Yes, sir.

22 Q What were they?

23 A Possession of meth.

24 Q Is that before you became a confidential
25 informant?

1 A Yes.

2 Q At what time did you become a confidential
3 informant?

4 A I was -- I can't really remember the year. I
5 believe it was 2010 or '9. I was approached by an
6 investigator. I was held on other charges. I had a
7 pending investigation and they approached me, you know,
8 basically.

9 Q At that time, were you offered a chance to be a
10 confidential informant?

11 A Yes, sir.

12 Q Did you agree to become a confidential
13 informant at that time?

14 A Yes, sir.

15 Q As a confidential informant, what was expected
16 of you with law enforcement?

17 A To purchase methamphetamines, controlled buys
18 and give knowledge of, you know, those having it thereof.

19 Q When you say give knowledge, can you explain
20 what you mean by that?

21 A Uh, you know, the awareness of people who had
22 it, knowing people who had it or was dealing it, dealing
23 with it.

24 Q So law enforcement interviewed you?

25 A Yes, sir.

1 Q You told them what you knew about the drug
2 trade?

3 A Yes, sir.

4 Q Let's talk about controlled buys. How did
5 those work?

6 A I would make a call and then, if the call was
7 made, I would get wired or whatever with a device and
8 then go meet them with the money. You know, nothing but
9 the money for the drug purchase.

10 Q Were you searched?

11 A Yes, sir.

12 Q How were you searched?

13 A Before and after. Physical searched. You
14 know, patted down, searched my vehicle.

15 Q Why were you searched?

16 A To make sure I didn't have it on me, I guess.

17 Q Were you searched again after the deal?

18 A Yes, sir.

19 Q How many controlled purchases did you make for
20 law enforcement?

21 A Three to five.

22 Q Do you remember who you bought from?

23 A Yes, sir.

24 Q Who did you buy from?

25 A I bought from Michael Robinson. I know him as

1 Mikey Mike and Brian Keith Sekerchak.

2 Q And did you know Brian Keith Sekerchak before
3 he made this controlled purchase?

4 A No, sir.

5 Q And that's -- the only way you knew him was
6 from that controlled purchase?

7 A Yes, sir.

8 Q You remember how much you bought from him?

9 A I believe it was a half eight, 1.7 grams.

10 Q How long ago was that?

11 A Probably been two, if not three, years ago.

12 Q I know earlier you testified about you taking
13 methamphetamine. Are you clean now?

14 A Yes, sir.

15 Q How long have you been clean?

16 A Uh, going on four years, three years.

17 Q How did you get clean?

18 A Uh, prison.

19 Q So while you were in prison, you got clean?

20 A Yeah.

21 Q Did you do any kind of rehab while you were
22 there?

23 A Yes, sir.

24 Q Is that how you kicked the habit?

25 A Yeah. Then I came out with stipulations on my

1 paperwork for outpatient drug rehab through the Phoenix
2 Center.

3 Q Have you completed that?

4 A Yes, sir.

5 Q And you been clean up to this point?

6 A Yes, sir.

7 Q You mentioned that Michael Robinson, you knew
8 him as Mikey Mike?

9 A Yes, sir.

10 Q Did you have a relationship with him before you
11 became a confidential informant?

12 A Uh, no, sir.

13 Q Did you ever buy meth from him?

14 A Yes, sir.

15 Q When did you first start buying meth from him?

16 A Again, it was probably around 2009 or '10. It
17 was in the fall. I met him through a friend.

18 Q And this was before you became a CI?

19 A Uh, yes.

20 Q Who was it that introduced you to him?

21 A Kim Rushton.

22 Q Did she have any involvement with
23 methamphetamine?

24 A Yes, sir.

25 Q What was her involvement?

- 1 A Same purpose. Selling it and using it.
- 2 Q How did she introduce you to Michael Robinson?
- 3 A She brought me to his house, took me to his
- 4 house.
- 5 Q Why did she take you to him?
- 6 A To purchase meth?
- 7 Q From Michael Robinson?
- 8 A Yes, sir.
- 9 Q Did you buy meth from Michael Robinson that
- 10 day?
- 11 A Yes, sir.
- 12 Q You know how much it was?
- 13 A I believe it was an eight ball that day.
- 14 Q And just for the jury's edification, how many
- 15 grams are in an eight-ball?
- 16 A 3.5.
- 17 Q So the first time you met Michael Robinson, you
- 18 bought 3.5 grams of meth from him?
- 19 A Yes, sir.
- 20 Q After that, did you continue to buy meth from
- 21 Michael Robinson?
- 22 A Yes, sir.
- 23 Q From that time in 2009, when did you stop
- 24 buying meth from Michael Robinson?
- 25 A Probably June 2010.

1 Q And how often did you buy meth from Michael
2 Robinson?

3 A Once a week if not, you know, every other week
4 or so.

5 Q I'm sorry. Once a week or once every other
6 week?

7 A Uh, let's say once a week, yeah.

8 Q Once a week. Okay. And how much would you
9 usually buy at a time?

10 A Between a half eight or eight ball.

11 Q All right. So from -- do you remember when in
12 2009 you met Michael Robinson?

13 A Not exactly.

14 Q So from some time in 2009 until June of 2010,
15 once a week, you would buy a half eight or eight ball of
16 meth?

17 A Yes, sir.

18 Q From Michael Robinson?

19 A Yes, sir.

20 Q Where did these meth buys happen?

21 A Uh, at Mikey's house.

22 Q And where is that?

23 A It's over in Tanglewood.

24 Q And where is Tanglewood?

25 A On the west side of Greenville, I guess.

1 Q In Greenville?

2 A Yes, sir.

3 Q Do you know where Michael Robinson was getting
4 the meth he was selling to you?

5 A Not officially, no, sir.

6 Q You say not officially, what does that mean?

7 A I never seen him, you know, I never seen him
8 get it from anybody. I'd see people pull up and leave or
9 sometimes he wouldn't have it there and he would be
10 waiting on somebody and people would pull up and leave.

11 Q Do you know who he was waiting on?

12 A Not exactly.

13 Q Did you ever see him not have meth, meet with
14 someone and then have meth?

15 A Yes.

16 Q Explain that please.

17 A I'd come over to purchase the meth and he
18 wouldn't have it. He'd be like you have to wait a
19 minute. We'd see it. He had cameras and everything.
20 All his TVs had video cameras on them. A truck would
21 pull up, an old white truck would pull up sometimes. He
22 would go out there. When he'd come back in, he'd have
23 it.

24 Q Do you know who he was getting it from?

25 A No, sir.

1 Q You know somebody named Nick Dendy?

2 A I've heard of him. I don't exactly know him.

3 Q Do you know if he had any relationship with
4 Michael Robinson?

5 A No, sir.

6 Q Have you ever -- do you know Amy Brock?

7 A Yes, sir.

8 Q How do you know Amy Brock?

9 A I used to go to school with her, middle school.
10 I just know her from the street.

11 Q When you say know her from the street, was she
12 selling meth too?

13 A Yes, sir.

14 Q Did you ever have a buyer or seller
15 relationship with her?

16 A No, sir. I went to her house one day. Mikey,
17 uh, he didn't have it and he had sent me to her house.
18 So I left his house and went up to her. Some reason or
19 another, she didn't answer the door. She never came to
20 the door.

21 Q Have you ever seen either Nick Dendy or Amy
22 Brock at Michael Robinson's house?

23 A I seen Mikey at Amy's house.

24 Q Do you know if that was meth related?

25 A No, sir. I can't officially say. But I mean,

1 if I had to guess, yeah.

2 MR. UNDERWOOD: Court's indulgence.

3 THE COURT: Yes, sir.

4 (WHEREUPON, there is a pause.)

5 BY MR. UNDERWOOD:

6 Q You mentioned that when you were at Michael
7 Robinson's house that he wouldn't have dope and people
8 would be coming and going?

9 A Yes, sir.

10 Q Who was coming and going?

11 A Users, uh -- friends of his. Some people would
12 come and stay. There's always a house full of people
13 there. Four or five people always.

14 Q You say users. Why were users hanging around?

15 A Cause that was the spot to get it.

16 Q Mikey Mike's was the place to get it?

17 A Uh-huh.

18 Q Did you ever see anybody that came to drop off
19 there for him?

20 A Never -- I was never outside. I'd just see him
21 on camera.

22 Q You said you'd see him on camera. What does
23 that mean?

24 A That he had a video camera on the front of his
25 house. The monitor was inside the house.

1 Q Did you see the monitor when people were coming
2 and bringing stuff?

3 A Yes, sir.

4 Q Who did you see on the monitor?

5 A Uh, they never got out. I just seen the
6 vehicle pull up.

7 Q You don't know who the people were?

8 A No, sir.

9 Q I was kind of confused. I just wanted to
10 straighten that out.

11 A Okay.

12 Q Other than Mikey Mike, did you have any other
13 suppliers?

14 A Just Brian Sekerchak. I made a couple of buys
15 from him but never no other main suppliers or nothing.

16 Q It's fair to say that Michael Robinson was your
17 main supplier?

18 A Yes, sir.

19 Q Now, the meth that you bought from him, what
20 did you do with it?

21 A Turned it in.

22 Q Not talking about controlled purchases. When
23 you were buying for your own self. What were you doing
24 with the meth that you bought?

25 A I was using it.

1 Q Did you sell it?
2 A Some, yes.
3 Q You sold some and used some?
4 A Yes, sir.
5 Q Is that how you supported your habit?
6 A Basically.
7 Q Did Michael Robinson know that you were selling
8 some of it?
9 A We never discussed it.
10 Q Did he ever give it to you on front?
11 A No, sir.
12 Q Did he ever give it to other people on front?
13 A I don't know.
14 Q Did you always pay cash for yours?
15 A Yes, sir.
16 Q You bought meth from him from 2009 to 2010,
17 right?
18 A Uh-huh.
19 Q Once a week, right?
20 A Yes, sir.
21 Q And you used some of it and you sold some of
22 it?
23 A Yes, sir. Mostly used it.
24 Q Thank you, Mr. Norris. Please answer any
25 questions Mr. Beasley has for you.

1 **THE COURT:** Mr. Beasley?

2 **MR. BEASLEY:** No questions, Your Honor.

3 **THE COURT:** All right. Sir, you can step
4 down.

5 **MR. UNDERWOOD:** Your Honor, the State's next
6 witness would be Warren Chastain.

7 **THE COURT:** All right. Ladies and Gentlemen,
8 while they are bringing our next witness in, I want
9 to tell you, at any point while we're changing up
10 witnesses or something like that, if you want to
11 stand and stretch, feel free to. You are not
12 chained to those chairs. All right. In fact, next
13 break, I'll stand if it makes you more comfortable.

14 Sir, if you'll come forward and best as you
15 can, raise your right hand please.

16 **WARREN CHASTAIN**

17 having first been duly sworn, testifies as follows:

18 **THE COURT:** All right. You can have a seat.

19 **DIRECT EXAMINATION**

20 **BY MR. UNDERWOOD:**

21 **Q** Good morning, Mr. Chastain. Judging by your
22 attire, obviously, you are in custody right now?

23 **A** Yes, sir.

24 **Q** Are you a defendant in the case known as
25 Operation Icehouse?

1 A Yes, sir.

2 Q And you already pled guilty?

3 A Yes, sir.

4 Q Have you been sentenced yet?

5 A No, sir.

6 Q When you pled guilty, did you enter into a plea
7 agreement with the State?

8 A Yes, sir.

9 Q What's your understanding of that plea
10 agreement?

11 A I don't understand what you mean.

12 Q What did you plead to?

13 A Second offense Trafficking Methamphetamine 28
14 to 100 grams.

15 Q Okay. Was the State going to make any special
16 recommendation for your sentence?

17 A Yes, sir.

18 Q What was that?

19 A 12 to 15.

20 Q And if you hadn't pled guilty, you would have
21 been facing up to 30 years, is that right?

22 A Yes, sir.

23 Q Did you have any other pending charges?

24 A Now?

25 Q Well, at that time.

1 A Yes, sir.

2 Q And did the State agree to dismiss those
3 charges?

4 A Yes, sir.

5 Q Part of your plea agreement, did you agree to
6 testify truthfully in any trials?

7 A Yes, sir.

8 Q Is that why you are here today?

9 A Yes, sir.

10 Q Other than the sentence recommendation of 12 to
11 15 years, has the State promised you anything else in
12 exchange for your testimony?

13 A No, sir.

14 Q At the end of the day, who's going to determine
15 your final sentence?

16 A The judge.

17 Q Mr. Chastain, you were indicted for Conspiracy
18 to Traffic Methamphetamine, is that right?

19 A Yes, sir.

20 Q Who are the individuals in your conspiracy?

21 A Adrian Hernandez, Felipe Flores, Eduardo
22 Preciado, Malva Martinez, Jason Griffin and Kimberly
23 Ruston.

24 Q Now, those individuals are not indicted with
25 Clyde Davis, is that right? Is that a different case?

1 A Yes, sir.

2 Q So you pled guilty to a separate case, correct,
3 from the one that we're dealing with here today?

4 A To my knowledge.

5 Q It all stemmed from the same investigation?

6 A Yeah.

7 Q Mr. Chastain, explain to the jury how did you
8 get involved with methamphetamine.

9 A When I was younger, my older brother and I
10 started using it.

11 Q How old were you?

12 A 17.

13 Q And when was that?

14 A Uh, 10 years ago. 12 years ago.

15 Q How old are you now?

16 A 29.

17 Q Mr. Chastain, how far did you go in school?

18 A GED. 11th grade.

19 Q When you were still around high school age, is
20 that when you started using meth?

21 A Yes, sir.

22 Q Did you become an addict?

23 A Yes, sir.

24 Q Are you still an addict?

25 A No, sir.

1 Q How did you get involved with selling
2 methamphetamine?

3 A I hung around everybody that was selling it and
4 just kind of fell into that group.

5 Q So you fell into that group. Who are you
6 talking about?

7 A Uh, people on my indictment. People on
8 previous indictments. Long time rolling into a big ball,
9 I guess.

10 Q Are you saying -- was there overlap with these
11 different people?

12 A Yeah. Like Operation Vanilla Ice and Ice Cream
13 and all of that, I was friends with them, a lot of them
14 guys.

15 Q Vanilla Ice, were those separate
16 investigations?

17 A (Nods head.)

18 Q So you had involvement across several
19 investigations?

20 A Yes, sir.

21 Q But you pled guilty to charges involving
22 Operation Icehouse, this case?

23 A Yes, sir.

24 Q Mr. Chastain, I'm just going to ask you a few
25 brief questions. You know of an individual named Nick

1 Dendy?

2 A I know of him. I don't know him that good. I
3 talked to him mostly here when I was out on bond for this
4 charge.

5 Q Have you ever bought meth from him?

6 A No, sir.

7 Q How about an individual named Michael Robinson
8 or Mikey Mike, do you know him?

9 A No, sir.

10 Q Do you know Brian Sekerchak?

11 A I know Keith and Bud Sekerchak.

12 Q Do you know someone named Batman?

13 A Yes, sir.

14 Q Who is Batman?

15 A Keith.

16 Q Is that Keith Sekerchak?

17 A (Nods head.)

18 Q You ever buy or sell meth from him?

19 A Uh, I believe I sold him meth a few times.

20 Q You ever buy anything from him?

21 A Yes.

22 Q What did you buy from him?

23 A Small amounts. Maybe an eight ball, quarter
24 ounce.

25 Q Of methamphetamine?

- 1 A Yes, sir.
- 2 Q When was that?
- 3 A Years ago. Five or six years ago, I guess.
- 4 Q What about Joshua Byers? Do you know him?
- 5 A Yes, sir.
- 6 Q How do you know him?
- 7 A Uh, somebody -- Nate lived at his house with
- 8 him.
- 9 Q When you say Nate, who is Nate?
- 10 A Bradshaw is her last name, I think.
- 11 Q Okay. How do you know her?
- 12 A She was friends with my wife.
- 13 Q Is she another meth user, meth dealer?
- 14 A Yes, sir.
- 15 Q So how did you meet Joshua Byers?
- 16 A She was living with him.
- 17 Q Did you ever buy any methamphetamine from him?
- 18 A No, sir.
- 19 Q You ever sell any to him?
- 20 A No, sir.
- 21 Q What about Amy Brock? You know her?
- 22 A Yes, sir.
- 23 Q How do you know her?
- 24 A Through another friend of mine.
- 25 Q How did you meet her?

1 A I bought something from her one day.

2 Q How much did you buy from her?

3 A A quarter ounce.

4 Q A quarter ounce. Is that the only time you
5 ever bought from her?

6 A Yes, sir. Just one time. I was out. I was
7 waiting to get more.

8 Q So you bought a quarter ounce from Amy Brock?

9 A Yes, sir.

10 Q When was that?

11 A I don't know the exact date. Some time during
12 the phase of this investigation.

13 Q Prior to this investigation, were you in
14 prison?

15 A Yes, sir.

16 Q So is this after you got out of prison?

17 A Yes, sir.

18 Q When were you in prison?

19 A Until November of 2009.

20 Q Some time after November of 2009, you bought a
21 quarter ounce from Amy Brock?

22 A Yeah.

23 Q You know where she was getting her meth from?

24 A Uh, no.

25 Q You know where you got that quarter ounce?

- 1 Like, where did you buy it?
- 2 A At her house.
- 3 Q And where is her house?
- 4 A In Tanglewood.
- 5 Q Is that in Greenville?
- 6 A Yes, sir.
- 7 Q Greenville county?
- 8 A Yes, sir.
- 9 Q When you bought that quarter ounce from Amy,
- 10 did she already have it on hand or did somebody bring it
- 11 to her?
- 12 A Uh, I'm not sure. I don't remember.
- 13 Q You don't remember. But you bought a quarter
- 14 ounce from her?
- 15 A Yes, sir.
- 16 Q And that was at her house?
- 17 A Yes, sir.
- 18 Q Did you pay cash for it or did you get it on
- 19 front?
- 20 A I paid cash for it.
- 21 Q What did you do with that quarter ounce?
- 22 A Uh, probably sold half of it and kept the other
- 23 half.
- 24 Q Is that because you were a dealer?
- 25 A Yes, sir.

1 Q That's how you made your money?

2 A Yes, sir.

3 Q Thank you, Mr. Chastain. Please answer any
4 questions Mr. Beasley has for you.

5 THE COURT: Mr. Beasley?

6 MR. BEASLEY: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. BEASLEY:

9 Q Mr. Chastain, who was your biggest supplier?

10 A Malva Martinez.

11 Q What about Felipe? Did you know him too?

12 A Yeah, but I never really dealt with Felipe.

13 Q When you were using meth, buying meth, was this
14 in Greenville?

15 A Yes, sir.

16 Q Okay. No more questions.

17 THE COURT: Anything else for this witness?

18 MR. UNDERWOOD: Nothing, Your Honor.

19 THE COURT: Sir, you can step down.

20 MR. UNDERWOOD: Your Honor, the State's next
21 witness would be Joshua Byers.

22 THE COURT: All right.

23 Thank you for reminding me. I said I would
24 stand.

25 Sir, if you will, come forward and be sworn.

1

JOSHUA BYERS

2

having first been duly sworn, testifies as follows:

3

THE COURT: All right. Thank you. You can
4 have a seat.

5

DIRECT EXAMINATION

6

BY MR. UNDERWOOD:

7

Q Good morning, Mr. Byers.

8

A Good morning.

9

Q Are you a defendant in this case?

10

A Yes, sir.

11

Q Have you already pled guilty?

12

A Yes, sir.

13

Q What did you pled guilty to?

14

A Trafficking 28 to 100 grams, Conspiracy, 28

15

grams to 100 Trafficking, 10 to 28 Trafficking and

16

Distribution.

17

Q So you pled guilty to conspiracy and actual

18

trafficking, is that right?

19

A Yes, sir.

20

Q And did you enter into a plea deal with the

21

State?

22

A Yes, sir.

23

Q What was the nature of that plea deal?

24

A 7 to 30, open plea.

25

Q What does an open plea mean?

1 A I can get anywhere between 7 and 30 years.

2 Q And who is going to determine your sentence,
3 the State?

4 A Yes, sir.

5 Q Does the state sentence you or does the judge
6 sentence you?

7 A The judge.

8 Q The deal that you made with the State, did you
9 agree to cooperate and testify truthfully?

10 A Yes, sir.

11 Q At the end of the case, the judge is going to
12 determine your sentence?

13 A Yes, sir.

14 Q That can be anywhere within the range of the
15 charge, right?

16 A Yes, sir.

17 Q The State's not making any recommendations?

18 A No, sir.

19 Q Mr. Byers, did you pled guilty because you were
20 are guilty?

21 A Yes, sir.

22 Q Mr. Byers, who are the people that are in the
23 conspiracy charge you pled to? Who else is charged with
24 you?

25 A Myself, Amy Brock, Brian Sekerchak, Mikey

1 Robinson, Clyde Davis and Nick Dendy.

2 Q Now, if you could, please explain a little bit
3 about yourself, who you are and where you are from.

4 A I'm originally from the Judson community. I'm
5 31 years old.

6 Q How far did you go in school?

7 A 9th grade.

8 Q Did you get your GED?

9 A No, sir.

10 Q You have a wife or kids?

11 A I have a son.

12 Q How old is he?

13 A 13.

14 Q How did you get involved with methamphetamine?

15 A Started off as a user.

16 Q How old were you then?

17 A Late 20s.

18 Q Who introduced you to it?

19 A Mutual friends, partying.

20 Q When you started using methamphetamine, how did
21 you use it?

22 A I would snort it.

23 Q How much would you snort at a time and get
24 high?

25 A Two or three lines at a time.

1 Q You know how much a line weighs?

2 A Nah. No, sir. Not exactly.

3 Q You know if it's more than a gram or less than
4 a gram?

5 A Less than a gram.

6 Q How did you get involved with selling
7 methamphetamine?

8 A Somebody introduced it to me and told me you
9 could make money off of it.

10 Q And who did you first start working with to
11 sell it?

12 A A guy named Joey.

13 Q What time frame was this?

14 A 2008.

15 Q 2008?

16 A Yes, sir.

17 Q You started selling meth with some guy named
18 Joey?

19 A Yes, sir.

20 Q Okay. At any point, did you ever meet an
21 individual named Brian Keith Sekerchak?

22 A No, sir.

23 Q How about Michael Robinson?

24 A No, sir.

25 Q You know anybody named Mikey Mike?

1 A I've heard of him.

2 Q You ever have any dealings with him?

3 A No, sir.

4 Q What about a woman named Amy Brock. You know

5 her?

6 A Yes, sir.

7 Q How do you know her?

8 A Through dealings.

9 Q What kind of dealings?

10 A I sold her product.

11 Q When you say product, you talking about

12 methamphetamine?

13 A Yes, sir. Methamphetamine.

14 Q How much did you sell to Amy Brock?

15 A I sold her quarter ounces, eight balls on a few

16 occasions.

17 Q How many occasions?

18 A I can't be exact.

19 Q Rough guess.

20 A Probably three to five times.

21 Q Three to five times, you sold meth to Amy

22 Brock?

23 A Yes, sir.

24 Q How much did you sell those three to five

25 times?

1 A Any where between an eight ball to a quarter
2 ounce.
3 Q Each time?
4 A Yes, sir.
5 Q Did you ever buy any meth from Amy Brock?
6 A No, sir.
7 Q How about Nick Dendy? Do you know him?
8 A No, sir.
9 Q You ever have any dealings with him?
10 A Yes, sir. I know Nick Dendy.
11 Q How do you know him?
12 A Through buying methamphetamines.
13 Q How did you get introduced to him?
14 A Through Amy Brock.
15 Q Through Amy Brock?
16 A Yes, sir.
17 Q How did that introduction take place?
18 A At her house.
19 Q Why did she introduce you to him?
20 A She had someone looking to buy methamphetamine.
21 That's how I got introduced to him. I sold
22 methamphetamines.
23 Q So at that time in your life, what year are we
24 talking about right now?
25 A 2010, early 2010.

1 Q Early 2010, you are selling methamphetamine?

2 A Uh-huh.

3 Q One of the people that you sold methamphetamine
4 to is Amy Brock?

5 A Yes, sir.

6 Q Did you ever buy from Amy Brock or you just
7 sold?

8 A I sold to her.

9 Q Just sold to her. How did it come about that
10 you got connected to Nick Dendy?

11 A Through Amy Brock.

12 Q Why did she introduce you to him?

13 A She was --

14 Q Was there a reason?

15 A No. She was looking to buy methamphetamines.
16 I delivered her methamphetamines. As I was there, Nick
17 Dendy came in. The methamphetamines I gave her, she
18 handed to Nick Dendy.

19 Q So she gave Nick Dendy the methamphetamine?

20 A Yes, sir.

21 Q She ever buy methamphetamine from Nick?

22 A Not that I -- I mean, I can't -- I don't know.

23 Q Is that the only time you ever met Nick Dendy?

24 A No, sir.

25 Q What other times have you met with Nick Dendy?

1 A I met him on one other occasion when I
2 purchased methamphetamines from him.

3 Q How much did you purchase from him?

4 A An ounce.

5 Q How many grams are in an ounce?

6 A 28 grams.

7 Q You brought 28 grams from Nick Dendy?

8 A Yes, sir.

9 Q And when was that?

10 A Some time in 2010.

11 Q Amy Brock introduced you to Nick Dendy as a
12 dealer?

13 A Yes, sir.

14 Q You know where Amy Brock got her
15 methamphetamine other than you?

16 A No, sir.

17 Q You know where Nick Dendy got his
18 methamphetamine?

19 A No, sir.

20 Q You ever met an individual named Clyde Davis?

21 A On one occasion.

22 Q When was that?

23 A I was at a West End Car Detailing Service
24 through my cousin Josie Hudson's boyfriend, Charles
25 Brown. Charles had been telling me that one of his

1 friends had methamphetamines. On this day at the --

2 MR. BEASLEY: Objection, Your Honor. He's
3 testifying to hearsay.

4 THE COURT: Sustained.

5 BY MR. UNDERWOOD:

6 Q How did you meet Clyde Davis?

7 A Through Charles Brown.

8 Q Okay. And what was the purpose of meeting
9 Clyde Davis?

10 A Methamphetamines.

11 Q How did the actual meeting take place?

12 A At the car wash inside Charles Brown's vehicle.

13 Q What happened inside Charles Brown's vehicle?

14 A Clyde Davis handed Charles Brown a bag of
15 methamphetamine which Charles Brown handed to me.

16 Q What was your understanding of why that
17 methamphetamine was given to you?

18 A To try to get me to buy methamphetamines from
19 them.

20 Q Together?

21 A Yes, sir.

22 Q At that time, did they know you were dealing
23 methamphetamine?

24 A Charles Brown did.

25 Q The methamphetamine that he gave you, he got

1 from Clyde Davis?

2 A Yes, sir.

3 Q Where was Clyde Davis physically at that time?

4 A Front passenger seat of Charles Brown's
5 vehicle.

6 Q Where were you?

7 A In the back seat.

8 Q Charles Brown was driving?

9 A Yes, sir. I'm sitting behind Charles Brown.

10 Q And this is at a car wash where?

11 A West End Detailing Service.

12 Q Where is that?

13 A Woodside Avenue.

14 Q You remember when that was? That meeting?

15 A I'd like to say 2010 some time.

16 Q And you remember how much methamphetamine it
17 was?

18 A I don't know exact. It looked to be a gram.

19 Q What did you do with that methamphetamine?

20 A I sold it.

21 Q Did you ever have any other dealings with Clyde
22 Davis?

23 A No, sir.

24 Q Why not?

25 A I just -- I never -- I mean I never got his

1 information or nothing like that, never knew how to
2 contact him.

3 Q Did you ever have any other dealings with
4 either Nick Dendy or Amy Brock?

5 A No, sir.

6 Q Thank you, Mr. Byers. Please answer any
7 questions that Mr. Beasley has for you.

8 A Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. BEASLEY:

11 Q Mr. Byers, how are you doing this morning?

12 A How are you doing, sir?

13 Q Good. Uh, you were getting most of your, uh,
14 meth from, was it a Hispanic?

15 A No, a white male.

16 Q Who was that?

17 A Joey.

18 Q Okay. Did you ever get any meth from Nico?

19 A No, sir.

20 Q Okay. Who is Joey?

21 A Joey, if I'm mistaken, his last name is McCall.

22 Q Okay. Uh, when did, uh, -- when did you tell
23 the State about this purchase with Clyde Davis and
24 Charles Brown?

25 A At the point of my interview.

1 Q Which is right before you were supposed to go
2 to court?

3 A I didn't have a court date scheduled when I
4 spoke to him.

5 Q Do you remember the date?

6 A I don't remember the exact date, no, sir.

7 Q So when did you plead guilty?

8 A I don't remember. It's been recently since I
9 signed my plea but I don't know an exact date.

10 Q Did you give the statement after you pled
11 guilty or before you pled guilty?

12 A Before I pled guilty.

13 Q Did you actually give a written statement?

14 A No, sir.

15 Q So the law enforcement didn't take a written
16 statement from you?

17 A No, sir.

18 Q Okay. No further questions, Your Honor.

19 THE COURT: Anything else from this witness?

20 MR. UNDERWOOD: Very briefly, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. UNDERWOOD:

23 Q Mr. Byers, just to clarify, the incident
24 involving Charles Brown and Clyde Davis, did you tell law
25 enforcement that?

1 A Yes, sir.

2 Q When did you tell them that?

3 A At the point of my interview.

4 Q Since then, you met with your attorney?

5 A Yes, sir.

6 Q Did you discuss that incident with your

7 attorney?

8 A Yes, sir.

9 Q Is that the first time that you told that story

10 about Clyde Davis?

11 A Yes, sir.

12 Q So when you got to your attorney is the first

13 time?

14 A No, no. At the interview.

15 Q Were there any things that during your

16 interview you didn't remember? Anything that you needed

17 to tell them later?

18 A Not that I'm aware of.

19 Q Mr. Byers, have you been completely truthful?

20 A To my knowledge, I been completely truthful.

21 Q Thank you.

22 MR. UNDERWOOD: Nothing further, Your Honor.

23 THE COURT: Mr. Beasley?

24 RECROSS EXAMINATION

25 BY MR. BEASLEY:

1 Q Mr. Byers, do you believe it was in your best
2 interest to give that statement on Mr. Davis and Mr.
3 Brown to the State?

4 A I'm not understanding what you're asking.

5 Q Did you think it would benefit you by coming in
6 here and testifying that you did a buy from Clyde Davis
7 and Mr. Brown?

8 A I don't know if it was going to benefit me. I
9 was just being honest.

10 Q Okay. No further questions.

11 THE COURT: Mr. Underwood, anything else from
12 this witness?

13 MR. UNDERWOOD: Nothing further, Your Honor.

14 THE COURT: Sir, you can step down.

15 THE WITNESS: Thank you.

16 THE COURT: If you will, come forward and be
17 sworn please.

18 BRIAN SEKERCHAK

19 having first been duly sworn, testifies as follows:

20 DIRECT EXAMINATION

21 BY MR. PAULING:

22 Q Mr. Sekerchak, how are you doing, sir?

23 A Fine, sir.

24 Q Would you tell this jury where you are from?

25 A Greenville, South Carolina.

1 Q Okay. How old are you?
2 A 44.
3 Q 44 years old. Have you lived in Greenville all
4 your life?
5 A Yes, sir.
6 Q You have family here?
7 A Yes, sir.
8 Q Children?
9 A No, sir. I ain't got no kids.
10 Q As far as your educational background, you
11 finished high school?
12 A No, sir. I went to the 11th grade. I got my
13 GED though.
14 Q You got your GED?
15 A Yes, sir.
16 Q Why did you drop out in the 11th grade?
17 A I went to jail.
18 Q Okay. And what did you go to jail for back
19 then?
20 A Distribution of LSD.
21 Q Distribution of LSD?
22 A Yes, sir.
23 Q Now, at that time, was that your first
24 involvement with any type of drugs, illegal drugs?
25 A Yes, sir.

1 Q Obviously, you are in a jumpsuit at this point.
2 Were you charged, arrested and indicted in this
3 particular investigation?

4 A For what I got for the first time?

5 Q No, right now.

6 A Right now?

7 Q Yes, sir.

8 A Yes, sir.

9 Q And, uh, what was that for? Was that for LSD
10 or was that for something else?

11 A This time?

12 Q Yes, sir.

13 A It's methamphetamines.

14 Q Methamphetamines?

15 A Yes, sir.

16 Q And have you already pled guilty? .

17 A Yes, sir.

18 Q Were you represented by an attorney?

19 A Yes, sir.

20 Q Okay. And did you enter into a plea agreement
21 with the State regarding your charges?

22 A Yes, sir.

23 Q Okay. And in fact, you were charged with
24 Trafficking by Conspiracy over 400 grams, is that
25 correct?

1 A Yes, sir.

2 Q As part of your plea agreement, you plead to a
3 reduced charge. Is that correct?

4 A No, sir. Just 15 to 18.

5 Q Okay. 15 to 18. Okay. Let me back up.
6 Trafficking 400 grams or more by conspiracy carries more
7 than that, right?

8 A Yes, sir.

9 Q As part of your plea agreement, you plead to a
10 lesser included offense, is that correct?

11 A Yes, sir.

12 Q Trafficking 28 to 100 grams?

13 A I'm not sure.

14 Q Second offense?

15 A Yes, sir.

16 Q You were looking at 5 to 30 on that particular
17 charge. Is that correct?

18 A Yes, sir.

19 Q And you also plead to five counts of
20 Distribution of Methamphetamine?

21 A I think so.

22 Q Second offense?

23 A Yes, sir.

24 Q You're looking at 5 to 30 on each of those
25 charges as well. But as part of your plea agreement, you

1 mentioned 15 to 18. Is that the recommendation of the
2 State, 15 to 18 years?

3 A Yes, sir.

4 Q That range. Is that your understanding?

5 A (No response.)

6 Q Is that your understanding?

7 A Yes, sir.

8 Q As part of your plea agreement, did it also
9 include to testify in trials?

10 A Yes, sir.

11 Q Involving this particular investigation, is
12 that correct?

13 A Yes, sir.

14 Q And when I say to testify in trial it's to
15 testify truthfully?

16 A Yes, sir.

17 Q Now, you mentioned that you dropped out of high
18 school in 11th grade because you were involved with LSD
19 and you mentioned these more recent charges involving
20 methamphetamine, is that correct?

21 A Yes, sir.

22 Q Tell this jury when did you first become
23 involved with methamphetamine.

24 A It's been years ago.

25 Q You say years ago, five years ago, ten years

- 1 ago?
- 2 A Probably 15, 20 years ago, I started snorting
- 3 it.
- 4 Q Okay. Started snorting it. And how did that
- 5 come about? I know that was a long time ago but who
- 6 supplied you with it?
- 7 A Just different people.
- 8 Q Just different people?
- 9 A Yes, sir.
- 10 Q I guess at some point you continued to use it?
- 11 A Yes, sir.
- 12 Q Okay. Would you say you were addicted to it?
- 13 A Yes, sir.
- 14 Q And when you began using, you said you were
- 15 snorting methamphetamine. How much were you using
- 16 initially?
- 17 A Sometime we just do \$20 worth every couple of
- 18 days back then.
- 19 Q You say "we", who were you hanging out with?
- 20 A Me and my brother, you know, different friends.
- 21 Q Okay. Who is your brother?
- 22 A Edward Sekerchak.
- 23 Q Does he go by a nickname?
- 24 A Yes, sir. Bud.
- 25 Q Bud?

1 A Yes, sir.

2 Q Okay. And just people you'd hang out with?

3 A Yes, sir..

4 Q Okay. And then more recently, uh, you
5 continued to use meth, is that correct?

6 A Yes, sir.

7 Q Was it more than, say, like a \$20 amount that
8 you are sharing?

9 A Yes, sir.

10 Q And how much would it have been?

11 A At least \$100 worth a day.

12 Q What's \$100 worth? How much methamphetamine is
13 that?

14 A At least a gram a day.

15 Q At least a gram a day?

16 A Yes, sir.

17 Q And for this that you're involved in now, were
18 you simply just using methamphetamine or what -- you pled
19 to some distribution charges, so...

20 A I was selling to support my habit.

21 Q Selling to support your habit?

22 A Yes, sir.

23 Q When did you begin to sell methamphetamine?

24 A Uh, about maybe 2003, '4. Yeah, 2005 when I
25 got back out the last time.

1 Q Okay. You said you got back out the last time.
2 A Yeah.
3 Q What happened in 2003, 2004?
4 A I was in on some burglaries.
5 Q On some what?
6 A Some burglaries.
7 Q Some burglaries?
8 A Yes, sir.
9 Q Was that drug related?
10 A No, sir.
11 Q And, uh, how much time did you do for those
12 burglaries?
13 A Just two years.
14 Q Two years?
15 A Yes, sir.
16 Q Okay. When you were in on those burglaries,
17 did you go through any type of drug treatment?
18 A No, sir.
19 Q Okay. When you came out of prison from that
20 burglary conviction, you were still addicted?
21 A Yes, sir.
22 Q And so did you then sell to feed your habit?
23 A Yes, sir.
24 Q And more recently, what you're involved in now,
25 you were selling meth? Who was your source?

- 1 A I would go to Amy Brock's house and get it.
- 2 Q Okay. How did you meet Amy Brock?
- 3 A Through my brother.
- 4 Q Through your brother? Through Bud?
- 5 A Yes, sir.
- 6 Q Okay. And was Bud already being supplied by
- 7 Amy?
- 8 A Yes, ma'am.
- 9 Q Okay. Where was Amy living at that particular
- 10 time?
- 11 A Dunham Bridge Road.
- 12 Q Dunham Bridge Road.
- 13 A I think that's the name of it.
- 14 Q About when was this?
- 15 A 2000 -- all of 2010.
- 16 Q All of 2010.. So beginning in 2010?
- 17 A Yes, sir.
- 18 Q Okay. Before you began getting meth from Amy
- 19 Brock, who was supplying you?
- 20 A My brother.
- 21 Q Your brother was?
- 22 A Yes, sir.
- 23 Q And Amy was his supplier?
- 24 A Yes, sir.
- 25 Q Do you know if Bud was getting meth from anyone

1 else at that particular time?

2 A I'm not sure.

3 Q Okay. Now, did Bud take you down to Amy's
4 house?

5 A Yes, sir.

6 Q Okay. And, uh, if you could just describe to
7 the jury the first time you met with Amy. You and Bud go
8 over there. What takes place? What happens? What
9 normally happens?

10 A I would always give him my money and he would
11 go in to get it to start with.

12 Q Okay. So you just stayed out in the car?

13 A Yes, sir.

14 Q Okay. Now, how much money would you give him?
15 How much meth were y'all purchasing?

16 A You want the amount of weight? Eight ball. I
17 might just get an eight ball like when I was first
18 starting.

19 Q What's an eight ball?

20 A \$300.

21 Q It cost \$300?

22 A Yes, sir.

23 Q What is the weight of methamphetamine?

24 A I think it's three and a half grams.

25 Q Three and a half grams. Do you know why they

1 call it an eight ball? Why do you call it an eight ball?

2 A I don't really know.

3 Q You don't know. All right. Let me ask you
4 this, how many eight balls would it take to make an
5 ounce?

6 A Eight.

7 Q Eight of them. Okay. So then an eight ball is
8 an eighth of an ounce?

9 A Yeah.

10 Q Would it be \$300 worth?

11 A Yes, sir.

12 Q Now, would you pull your money with Bud or was
13 that your own money?

14 A Yeah, we'd go in on it.

15 Q Okay. So when you would get to Amy Brock's
16 house, Bud would go in and then come out with the meth?

17 A Yes, sir.

18 Q At some point, did you become familiar enough
19 with Amy that you would go in the house?

20 A Yes, sir.

21 Q About how many times had -- did it take for you
22 to go over there with Bud before you became familiar
23 enough with Amy to just go in on your own?

24 A Just a couple.

25 Q Just a couple of times?

1 A Yes, sir.

2 Q And I guess did there come an occasion then
3 when you would just go on your own?

4 A Yes, sir.

5 Q At this time, did we start talking about early
6 2010, spring time, summer time?

7 A Maybe March or April 2010.

8 Q Okay. When you and Bud were going over to
9 Amy's, how often would you go over there?

10 A Every other day maybe.

11 Q Every other day?

12 A Yes, sir.

13 Q And in relation to where you all were living,
14 did you live with Bud?

15 A No, sir.

16 Q In relation to where you were living, how far
17 was it to Amy's house?

18 A Maybe two miles.

19 Q Okay. Maybe two miles? And now, you said
20 probably about March or April you became familiar enough
21 with Amy to go over there by yourself?

22 A Yes, sir.

23 Q And on those occasions when you would go over,
24 how would the transactions take place?

25 A I would just go in and give her my money.

1 Q Okay. And I guess that's the short and dirty
2 of it. Let me back up. Would you call her beforehand?
3 A Yes, sir.
4 Q Okay. So you would call Amy?
5 A Uh-huh.
6 Q Now, what would you request? What would you
7 say?
8 A I asked her if she had anything.
9 Q Okay. And when you say anything, whether it
10 was a gram or an eight ball --
11 A Yes, sir.
12 Q Now, would you ever get more than an eight
13 ball? A Yes, sir.
14 Q Okay. What's the most you would get from Amy?
15 A A half ounce.
16 Q A half ounce?
17 A That would be the most I ever got from her.
18 Q The most would be a half ounce?
19 A Yes, sir.
20 Q Now, uh, if you called up for a half ounce,
21 would it be ready when you got there? What would happen?
22 A Sometimes she would already have it. And then
23 sometimes she might have to wait on them to bring it.
24 Q Okay. You said wait on them to bring it. Who
25 would she be waiting on?

1 A She'd wait on Nick Dendy. Then she would give
2 him the money and then Clyde would pull up on the side of
3 the road.

4 Q Slow down. In the instances where you went
5 with Bud the first few times, you went with Bud. You're
6 sitting in the car, is that correct? Bud goes in the
7 house. Now, during those occasions, did anyone pull up
8 to Amy's house?

9 A Yes, sir.

10 Q And explain that to the jury. What would
11 happen?

12 A They would do like the same deal. They would
13 pull up. Somebody, Clyde would come outside or Amy would
14 come outside to the car and buy the drugs.

15 Q Okay.

16 A And come back in.

17 Q Just so I understand, this is the -- are we
18 talking about even the first time when you go over there
19 with Bud?

20 A Yeah, but not every time. She might have it.
21 Most of the time she would already have it, you know. I
22 only seen them pull up maybe 10 times out of 50, you
23 know.

24 Q Okay. So out of 50 times that you went over to
25 Amy Brock's house to purchase meth, whether that was with

1 your brother or by yourself, out of the approximately 50
2 times you went over there -- and you say they?

3 A Uh-huh.

4 Q Now, again, who would that have been?

5 A Nick Dendy.

6 Q Okay. Nick Dendy.

7 A He would come out and go to the car and give
8 him our money, to Clyde Davis.

9 Q So Nick Dendy would be there first?

10 A Yes, sir.

11 Q Y'all would give the money to Nick and then
12 Clyde would pull up?

13 A (Nods head.)

14 Q When you would go and talk to -- would you go
15 in the house and talk to Amy first?

16 A Yes, sir.

17 Q And Nick's already there. Okay. How did you
18 know that Clyde was going to be coming?

19 A That's what they'd say. They was waiting on
20 him.

21 Q Okay.

22 A They said that's who he was. I didn't know
23 him.

24 Q Okay. And when you see the vehicle pull up,
25 you remember what kind of vehicle it was?

1 A Sometimes he'd be in a black, like, Honda and
2 sometimes I seen him in a silver Dodge Charger.

3 Q Okay. Now, did you have any discussion with,
4 uh, -- well, with either Nick Dendy or Clyde Davis?

5 A No, sir.

6 Q Okay. Why was that?

7 A Cause I dealt with her.

8 Q You dealt with Amy?

9 A Yes, sir.

10 Q She brokered the deal for you?

11 A Yes, sir.

12 Q Okay. Let me ask you this, Mr. Sekerchak, if
13 you knew that Nick Dendy and Clyde Davis was supplying
14 Amy Brock, why didn't you just go directly to them?

15 A Cause we would have called that cutting each
16 other's throat. I always deal with who I deal with to
17 start with straight up.

18 Q You said -- I'm sorry. I didn't mean to stop
19 you.

20 A That's okay.

21 Q When you say we would call that cutting each
22 other's throat, who are you talking about?

23 A Everybody that deals in it.

24 Q Everybody who deals in meth?

25 A Yes, sir.

1 Q So it's just a certain protocol you follow?

2 A Yes, sir. I do.

3 Q Let me ask you this. If you're going over
4 there to get an eight ball and I believe the most you
5 ever got was a half ounce, how much was Amy Brock
6 charging you for an eight ball?

7 A Sometimes I'd get it from her for like \$250.

8 Q Okay. What about a half ounce?

9 A Sometimes \$8-850. Never no more. Never too
10 high.

11 Q 800 or \$850?

12 A Yes, sir.

13 Q Okay. And when you would get the eight ball or
14 half ounce, what would you do?

15 A Go back to my house. I'd have people, you
16 know, already waiting for it.

17 Q You'd already have people waiting for it?

18 A Yes, sir.

19 Q Okay. Now, when you would go there, you kept
20 saying you would give them the money. Did Amy Brock ever
21 front you?

22 A Yes, sir.

23 Q What is that? Why would she front you?

24 A I might not have all the money. So she would
25 give me -- if I needed more to keep me from coming back

1 to her house that night, she would give me more.

2 Q Okay. On those particular occasions, just so I
3 understand, if you went over to Amy Brock's house and you
4 don't have all the money -- you want to get a half ounce
5 but you don't have all the money, is this a situation
6 where she already has it there for you and she will just
7 give it to you?

8 A Most of the time. She'd give me everything she
9 had if she had to. I never ripped her off.

10 Q And so you would go back home because you had
11 people you were selling it to?

12 A Yes, sir.

13 Q Now, would you stop by those individual's homes
14 on the way back home or would you just go to your house
15 and they'd come to you?

16 A They'd come to my house.

17 Q And some of those individuals, could you tell
18 the jury who were those people that you were selling meth
19 to?

20 A Just different people that I had met.

21 Q Okay. I mean, were these regular customers?

22 A Yes, sir.

23 Q Okay. Well, did you come to know their names?

24 A Yes, sir.

25 Q Okay. Who are some of these people?

1 A Ray Russell, Miranda Woods, uh, a bunch of
2 different people.

3 Q And if you got a half ounce for ~~800~~ \$850, what
4 amounts were you selling?

5 A I'd sell whatever they wanted. ~~You know~~, I had
6 people waiting on a half a ball.

7 Q Half of an eight ball?

8 A Yes, sir. That way, it get gone ~~faster~~ and I
9 could go back and get some more.

10 Q How were you able to -- I understand you said
11 you were selling to support your habit, is that correct?
12 All right. So how are you making enough money to support
13 your habit.

14 A Well, if I get some people what they want, you
15 know, they'll give me something out of it ~~as long as~~ they
16 know I don't rip them off. People always ~~give~~ me stuff.

17 Q That's essentially how it would ~~work~~. You
18 would go to Amy. She would supply you and ~~you~~ would sell
19 the meth to various individuals. At least ~~on 10~~
20 occasions, Nick Dendy would come and then ~~Clyde~~ Davis.

21 A Yes, sir.

22 Q Okay. When Nick Dendy arrived, ~~were~~ you
23 introduced the Nick Dendy -- the first time ~~you~~ saw Nick
24 Dendy, were you introduced to him?

25 A No, sir. No. I sat in the living room. They

1 did the dealing in the bedroom.

2 Q Okay. As far as Clyde Davis, you said he
3 either came in a black Honda or a -- I believe you said a
4 silver Charger. Is that correct?

5 A Yes, sir.

6 Q When Clyde Davis would come to the house, would
7 he stay in the car, would he come in the house? Tell the
8 jury what would happen.

9 A He stayed in the car. He never pulled in the
10 driveway. He sat on the side of the road.

11 Q All right. How did you know it was him? Could
12 you see him?

13 A No, sir. Not really. That's who they said it
14 was.

15 Q Amy said that's Clyde?

16 A Yes, sir.

17 Q And what about Nick? Did he say who it was?

18 A Yes, sir.

19 Q Did you know if there was any relationship or
20 any family relation between Nick Dendy and Clyde Davis?

21 A No, sir.

22 Q No, there wasn't or no, you don't know?

23 A I don't know.

24 Q Now, other than Amy Brock, did you have any
25 other particular sources for methamphetamine?

1 A Yes, sir.

2 Q Who are they?

3 A I would get it from Pam Bryant.

4 Q Okay. Now, is this also in the Greenville
5 area?

6 A Yes, sir.

7 Q As far as when you were selling
8 methamphetamine, were you selling only in the Greenville
9 area?

10 A Mostly. They got me in Pickens too.

11 Q Okay. I'm talking about -- I'm asking -- I'm
12 asking you as to the methamphetamine that you got from
13 Amy Brock that she got from Nick Dendy and Clyde Davis,
14 that meth, did you only sell it in the Greenville area?

15 A Yes, sir.

16 Q Okay. Did you have customers in other areas
17 though?

18 A Yes, sir.

19 Q Okay. You said mostly. What other areas would
20 you --

21 A I had friends in Pickens.

22 Q Okay. So you sold meth in Pickens county as
23 well?

24 A Yes, sir.

25 Q Beg the Court's indulgences. (Pause.)

1 Now, Mr. Sekerchak, you said your brother's
2 name is -- what's your brother's name?
3 A Edward Sekerchak.
4 Q You called him what?
5 A I called him Bud.
6 Q Okay. Do you have a nickname?
7 A Yes, sir.
8 Q What's your nickname?
9 A Batman.
10 Q Batman. So is that what most people -- I guess
11 most of your friends and other people call you Batman?
12 A Yes, sir.
13 Q Why they call you Batman?
14 A I don't know.
15 Q Did you come up with that nickname?
16 A The younger people did.
17 Q The younger people did?
18 A Yes, sir.
19 Q Are some of your customers or were some of your
20 customers, I guess, the younger crowd?
21 A Yes, sir.
22 Q Beg the Court's indulgence.
23 THE COURT: Sure.
24 (WHEREUPON, there is a pause.)
25 MR. PAULING: Thank you, Mr. Sekerchak. I have

1 no further questions. Please answer any questions
2 Mr. Beasley may have for you.

3 THE COURT: Mr. Beasley.

4 MR. BEASLEY: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. BEASLEY:

7 Q Mr. Sekerchak, uh, did you ever do any
8 undercover buys?

9 ~~A Yes, sir.~~

10 Q How many did you do?

11 A Two.

12 Q Two?

13 A Yes, sir.

14 Q And who were those undercover buys with?

15 A Amy.

16 Q And did the State wire you up?

17 A Yes, sir.

18 Q They check your pockets and everything before
19 you went and did the buy?

20 A Yes, sir.

21 Q They give you some marked money?

22 A I guess.

23 Q Well --

24 A I guess the money was marked. I don't know if
25 they marked it or not.

1 Q They gave you money?

2 A Yes, sir.

3 Q And you went and made a purchase from Amy

4 Brock?

5 A Yes, sir.

6 Q And then after you made the purchase, they

7 would check your pockets and everything again. Did you

8 give a statement to the police?

9 A Yes, sir.

10 Q Okay. How many buys did you do with Amy Brock?

11 A Just two.

12 Q Okay. And those two times you bought from Amy

13 Brock, those undercover buys, Nick Dendy didn't show up

14 and hand off the drugs, correct?

15 A No, sir.

16 Q Okay.

17 A She already had it.

18 Q And you never met Clyde Davis, correct?

19 A No, sir.

20 Q And when the times that you said you were in

21 the house and Amy and -- would tell you who was out

22 there, she say it was Nick's cousin?

23 A I've heard her say that before.

24 Q Okay. But you saw the cars. It was a silver

25 Charger and a black Honda?

1 A Yes, sir.

2 Q Okay. You only did two total buys for the
3 State?

4 A Yes, sir.

5 Q Okay. No further questions.

6 THE COURT: Mr. Pauling, anything else for
7 this witness?

8 MR. PAULING: Beg the Court's indulgence.

9 (Pause.)

10 Just briefly, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. PAULING:

13 Q Mr. Sekerchak, you said when you observed Clyde
14 Davis, Amy Brock and Nick Dendy said was Clyde Davis
15 coming to the house, you said he didn't pull up into the
16 driveway, is that correct?

17 A No, sir.

18 Q So you are looking from the house?

19 A One time I was in my brother's car.

20 Q Okay. You are sitting in the car. Bud is
21 going into the house and dealing with Amy.

22 A We sat there waiting and waiting and waiting
23 and waiting. Then they finally pulled up.

24 Q You keep saying they finally pulled up. Did
25 Nick and Clyde pull up together?

- 1 A No, he was already in the house too.
- 2 Q He was already there.
- 3 A We had cars parked lined all the way out the
- 4 driveway. We was parked all the way at the road. Nobody
- 5 else could pull in the driveway.
- 6 Q Okay.
- 7 A They pulled up on the side of the road.
- 8 Q The driveway. Can you -- cars side by side or
- 9 is it one behind the other?
- 10 A One behind the other.
- 11 Q So when this car pulls up, this silver car, you
- 12 are looking at the rear view or you turn around?
- 13 A I looked.
- 14 Q And you say it was a silver car?
- 15 A Yes, sir.
- 16 Q So, uh, -- you described it as a --
- 17 A I thought it was a Dodge Charger.
- 18 Q Okay.
- 19 A A 2000-something. I don't know what year.
- 20 Q Okay. Okay. Are you sure it was a Charger?
- 21 A I ain't sure.
- 22 Q Okay.
- 23 A Not positive.
- 24 Q But it was a silver car?
- 25 A Yes, sir.

1 Q Shaped like a Charger. No further questions,
2 Your Honor.

3 THE COURT: Anything else, Mr. Beasley?

4 MR. BEASLEY: No, Your Honor.

5 THE COURT: Sir, you can step down.

6 THE WITNESS: Thank you.

7 MR. UNDERWOOD: Your Honor, the State's next
8 witness is Michael Robinson.

9 THE COURT: Everybody doing okay? Y'all
10 doing okay? You do know -- I hope Judge Welmaker
11 told you and I will remind you -- if you need a
12 break at any time, you let -- either you motion me
13 or you let the -- let Mr. Ford over here in the red
14 jacket know that you need a break and we will break
15 immediately. I will not call out somebody and say
16 the woman on the second row needs a break. I won't
17 say that. I'll just say we'll take a break.

18 (Pause.)

19 Okay. I'll tell you what, while our next
20 witness is coming out, let's take a short break.
21 Ladies and Gentlemen, please don't discuss the case.

22 Let's let the jury leave before we start, uh,
23 breaking in here.

24 (WHEREUPON, the jury exits at approximately
25 11:39 a.m.)

1 **THE COURT:** Just a short break. Five
2 minutes. All right.

3 **(WHEREUPON, a short recess is taken.)**

4 **THE COURT:** All right. We ready to bring the
5 jury back in?

6 **MR. UNDERWOOD:** Uh, yes, Your Honor. Just as
7 a scheduling matter, I think after this next witness
8 probably would be a good time for a lunch break.

9 **THE COURT:** All right. You alright with
10 that?

11 **MR. BEASLEY:** I'm fine with that.

12 **THE COURT:** Great. Then that's how we'll do
13 it. Do we need to take up anything with regard to
14 bond or anything like that before we break?

15 **MR. BEASLEY:** It depends on the situation.

16 **THE COURT:** It's clear that he doesn't have a
17 bond. But we'll talk about it, you know.

18 **(WHEREUPON, the jury enters at approximately**
19 12:01 p.m.)

20 **THE COURT:** Ladies and Gentlemen, I'm sorry
21 for the delay. That was in no way either of these
22 attorneys' faults. That was entirely my fault. I
23 am so sorry about that in keeping you waiting. I
24 apologize.

25 Yes, sir.

1 **MR. UNDERWOOD:** Thank you, Your Honor. The
2 State's next witness is Michael Robinson.

3 **THE COURT:** Sir, if you will, come forward
4 and raise your right hand please.

5 **MICHAEL ROBINSON**
6 having first been duly sworn, testifies as follows:

7 **THE COURT:** All right. You can have a seat.
8 Thank you.

9 **DIRECT EXAMINATION**

10 **BY MR. UNDERWOOD:**

11 **Q** Good afternoon, Mr. Robinson.

12 **A** Good afternoon.

13 **Q** Are you a defendant in this case for
14 trafficking methamphetamine?

15 **A** Yes, sir.

16 **THE COURT:** Sir, I think you've got a soft
17 voice.

18 **THE WITNESS:** Yes, sir.

19 **BY MR. UNDERWOOD:**

20 **Q** And Mr. Robinson, have you already pled guilty?

21 **A** Yes, sir.

22 **Q** What did you plead guilty to?

23 **A** 12 to 15.

24 **Q** 12 to 15 years recommendation?

25 **A** Yes, sir.

- 1 Q And what were the charges that you pled to?
- 2 A Trafficking, I guess.
- 3 Q Lesser included trafficking and conspiracy?
- 4 A Yes, sir.
- 5 Q And did you also plead guilty to four
- 6 distributions?
- 7 A Yes, sir.
- 8 Q And those were all methamphetamine?
- 9 A Yes, sir.
- 10 Q And your understanding is the State's going to
- 11 recommend 12 to 15 years?
- 12 A Yes, sir.
- 13 Q As part of your plea agreement, did you agree
- 14 to come to court and testify truthfully?
- 15 A Yes, sir.
- 16 Q Aside from court hearings, have you and I ever
- 17 spoken?
- 18 A No, sir.
- 19 Q Have you been interviewed by law enforcement
- 20 about this incident?
- 21 A No, sir.
- 22 Q You haven't talked to either myself or law
- 23 enforcement about your testimony today?
- 24 A Yes, sir.
- 25 Q Mr. Robinson, have you been to prison before?

1 A I just come from prison.

2 Q And what are you in prison for?

3 A Violation of probation.

4 Q And what were you on probation for?

5 A Methamphetamines.

6 Q You been to prison for methamphetamine once
7 already?

8 A Yes, sir.

9 Q And Mr. Robinson, you understand that the
10 charges you pled to -- since they were subsequent
11 offenses -- you've already been to prison once -- that
12 they had higher penalties, up to 30 years each?

13 A Yes, sir.

14 Q But the State is going to recommend 12 to 15
15 years since you pled guilty?

16 A Yes, sir.

17 Q Mr. Robinson, if you could, kind of introduce
18 yourself to the jury a little bit. How old are you?

19 A 45.

20 Q Where are you from?

21 A Greenville.

22 Q How far did you go in school?

23 A 9th grade.

24 Q Get your GED?

25 A No, sir.

- 1 Q Why did you drop out of school?
- 2 A Went to work.
- 3 Q Where did you work?
- 4 A My father had our own company.
- 5 Q What kind of work was it?
- 6 A Carpenter. Build houses.
- 7 Q So you built houses?
- 8 A Yes, sir.
- 9 Q How did you get involved with methamphetamines?
- 10 A Just one of the guys on the job had some one
- 11 day and got me hooked on it.
- 12 Q When was that?
- 13 A Ten years ago, I guess.
- 14 Q So you were using methamphetamine 10 years ago?
- 15 A Yes.
- 16 Q How did you use it? What method did you use?
- 17 A Smoke it.
- 18 Q Smoked it?
- 19 A Yes, sir.
- 20 Q How much would you smoke at a time to get high?
- 21 A Uh, \$50 worth.
- 22 Q And by weight, how much meth is that?
- 23 A Half a gram.
- 24 Q Half a gram?
- 25 A Yes, sir.

1 Q When did you get involved with selling
2 methamphetamine?

3 A I really didn't get involved with it. I just
4 had people call and ask me if I could get them some and I
5 would get them some. That's pretty much the way it went.

6 Q So it just kind of happened?

7 A Yeah. Yeah.

8 Q Prior to being incarcerated, where did you
9 live?

10 A Greenville.

11 Q Where in Greenville?

12 A Behind Tabernacle Church.

13 Q Is that area Tanglewood?

14 A Yeah, Tanglewood. Yes, sir.

15 Q Over the last couple of years, who were your
16 sources of supply for methamphetamine?

17 A Uh, Nick Dendy and Amy Brock.

18 Q Nick Dendy and Amy Brock?

19 A Yes, sir.

20 Q Starting with Amy Brock, how did you meet her?

21 A Uh, I knew her boyfriend ten years ago, the one
22 that got killed. I knew her through him cause she was
23 his girlfriend. I built buildings up there for him and
24 all kinds of stuff like that.

25 Q So you knew her for a long time?

1 A Yeah. I worked on her house and all that kind
2 of stuff.

3 Q That's outside of meth?

4 A Yeah.

5 Q Did you ever have any dealings with her and
6 methamphetamine?

7 A Yes. I'll get my methamphetamine from her.

8 Q When did you start getting methamphetamine from
9 Amy?

10 A Five, ten years ago. Ten.

11 Q When did you stop getting meth from Amy Brock?

12 A Uh, when I got locked up, I guess.

13 Q When did you get locked up?

14 A 2010 or '11. 2011.

15 Q And the meth that you had that you went to
16 prison for, did you get that from Amy Brock?

17 A Uh, no.

18 Q That came from someone else?

19 A Yes.

20 Q And then you were on probation after that,
21 right?

22 A Yeah.

23 Q You started getting meth from Amy Brock up
24 until you got locked up?

25 A Yes.

1 Q How often would you buy meth from Amy Brock?

2 A Once a week.

3 Q Once a week?

4 A Yeah.

5 Q How much would you buy from her at a time?

6 A Half a ball.

7 Q Half a?

8 A Half a ball.

9 Q Half a ball. How much is that?

10 A Gram and a half.

11 Q So you would buy a gram and a half from her
12 every week?

13 A About once a week.

14 Q Once a week?

15 A Yeah.

16 Q So all the meth you got from Amy Brock, you
17 used it?

18 A I might sell half and keep half. Something
19 like that.

20 Q But you only bought from her once a week?

21 A Pretty much.

22 Q What's the largest amount you ever bought from
23 Amy Brock at one time?

24 A An eight ball.

25 Q How many grams are in an eight ball?

1 A Three and a half.

2 Q How many times did you buy an eight ball from
3 Amy Brock?

4 A Once a month maybe. Whenever I had that kind
5 of money.

6 Q Once a month up until you got locked up. When
7 did you get locked up?

8 A 2011.

9 Q So one eight ball a month plus other weeks you
10 buy --

11 A Half a ball. Half a ball.

12 Q Half a ball? Now, where would you buy your
13 meth from Amy? Did you go to her? Did she come to you?

14 A I'd go to her house.

15 Q Sorry?

16 A I'd go to her house.

17 Q You'd go to her house?

18 A Yes.

19 Q Is that how it always worked?

20 A Yes, pretty much.

21 Q When you would go to her house to buy the
22 methamphetamine, she'd already have it on hand?

23 A Pretty much, yes, sir.

24 Q Did anyone ever bring her meth while you were
25 there?

1 A No, sir.

2 Q You'd go there, what, about once a week?

3 A Uh-huh.

4 Q How much would you pay her for an eight ball?

5 A \$120. Somewhere like that. \$120, 130.

6 Q How much for a half?

7 A \$50.

8 Q You know an individual named Nick Dendy?

9 A Yes, sir.

10 Q How do you know him?

11 A I met him through a friend of mine. He brought
12 him over to the house one day. I met him that way.

13 Q Why was he brought over to your house?

14 A I don't really know. I mean, he was just
15 riding with the guys that come by.

16 Q Once you were introduced to him, did you
17 develop a business relationship with him?

18 A As time went on, yes.

19 Q What was the nature of that business
20 relationship?

21 A He brought me some meth by one day and sit
22 there and wanted me to check it out. I checked it out.
23 He said would you like to get rid of some for me. I said
24 yes. So I did.

25 Q How much meth was it?

- 1 A Like an eight ball.
- 2 Q Okay. So he brought you an eight ball and
- 3 asked you to get rid of it for him?
- 4 A Yes.
- 5 Q And what did he mean by get rid of it?
- 6 A Sell it.
- 7 Q So Nick Dendy asked you to sell an eight ball
- 8 for him?
- 9 A Yes.
- 10 Q Did you do it?
- 11 A Yes, sir.
- 12 Q How much -- did you sell it all to one person
- 13 or did you break it up?
- 14 A I sold it all to one person.
- 15 Q Who did you sell it to?
- 16 A I can't remember.
- 17 Q Let me ask you this. How many different
- 18 customers did you sell to in general?
- 19 A It's whoever come by. Two or three customers.
- 20 Q You know an individual named David Norris?
- 21 A David Norris? No.
- 22 Q You know a woman named Kim Rushton?
- 23 A No, sir.
- 24 Q You know a stripper, Kim?
- 25 A Yes.

1 Q You know a stripper, Kim?

2 A Yes, sir. I knew of her. I didn't really know
3 her that well.

4 Q Was she involved in selling methamphetamine?

5 A I have no idea. I just knew her name. I
6 didn't know her.

7 Q After that first time that Nick Dendy brought
8 you that eight ball that you sold for him, did you have
9 any more meth dealings with Nick Dendy?

10 A Like I said, someone come by and want some.
11 I'd call him and he'd come by and drop -- give it to me
12 and I would give it to them. I would give him the money.
13 That was pretty much the way it went.

14 Q When was the first time that he brought you
15 that first eight ball?

16 A I don't remember. Two years ago, I guess.
17 2010.

18 Q When did you stop dealing with Nick Dendy?

19 A Uh, I guess when I went to jail.

20 Q So you were dealing with him also up until you
21 went to jail?

22 A Yes, sir.

23 Q That was 2011?

24 A Yes, sir.

25 Q What was the usual amount that you would buy

- 1 from Nick Dendy when he brought you meth?
- 2 A Eight ball.
- 3 Q Was it almost always eight ball?
- 4 A Yes, sir.
- 5 Q Did you ever buy more?
- 6 A One time, I did.
- 7 Q How much did you buy that time?
- 8 A Two eight balls.
- 9 Q You bought two eight balls?
- 10 A Uh-huh.
- 11 Q How often would you buy from him?
- 12 A Maybe once a week or something like that.
- 13 Q So you would buy an eight ball a week?
- 14 A Yes, sir.
- 15 Q How long of a period of time that we're talking
- 16 about? About a month?
- 17 A About a year.
- 18 Q So an eight ball a week for a year?
- 19 A Yes, sir.
- 20 Q On one occasion, you bought two eight balls?
- 21 A Yes, sir.
- 22 Q How much did Nick charge you for an eight ball?
- 23
- 24 A \$300.
- 25 Q The price ever change or was that constant?

1 A No, it never change.

2 Q And the meth that you bought from Nick, were
3 you selling that meth?

4 A Some of it. Most of -- I was just doing my
5 habit. I was supporting my habit.

6 Q All right. So you sold meth to support your
7 habit?

8 A Yes, sir.

9 Q You'd buy meth. Smoke it yourself and sell the
10 rest?

11 A Yes, sir.

12 Q Did you ever see where Nick Dendy got his meth
13 from?

14 A No, sir.

15 Q Did you ever go to him to buy any meth?

16 A No, sir. I always called him and he'd come to
17 me.

18 Q And that went on for about a year?

19 A Yes, sir.

20 Q Did anyone ever come with him?

21 A Not that I know of.

22 Q Did you ever have any kind of surveillance
23 equipment at your house?

24 A Yes, sir.

25 Q What kind of equipment?

1 A Just a camera showing the driveway.

2 Q Did you have any other suppliers other than Amy
3 Brock and Nick Dendy?

4 A No, sir.

5 Q You ever met Clyde Davis?

6 A No, sir.

7 Q All the meth that you got during this time
8 period all came from Amy Brock and Nick Dendy?

9 A Yes, sir.

10 Q When you bought from Nick Dendy or Amy Brock,
11 did you ever buy it on front?

12 A Uh, every now and then. Maybe once in a blue
13 moon. I pretty much paid for everything I got.

14 Q Okay. The one or two times that you fronted,
15 was it with Nick or was it with Amy?

16 A Uh, Amy.

17 Q You also always paid cash up front?

18 A Yes.

19 Q Mr. Robinson, the customer base that you had,
20 where were these people coming from?

21 A Just friends I knew.

22 Q They all lived in Greenville?

23 A Yeah. Pretty much Greenville. Yeah.

24 Q They didn't live anywhere else?

25 A Not that I know of.

1 Q The meth that you sold, they always smoked all
2 of it at your house?

3 A Sometimes.

4 Q Any of them resell it?

5 A No.

6 Q So the people you were selling to were users?

7 A Yeah, pretty much. We all were users.

8 Q They weren't dealers. They were just users?

9 A Yeah. I was pretty much a user too. I was
10 just going along with them to get ours. You know what
11 I'm saying?

12 Q To support your habit?

13 A Yeah, to support a habit. Yes, sir.

14 Q And since you been incarcerated, are you now
15 clean of methamphetamine?

16 A Yes, sir.

17 Q At the time, would you consider yourself an
18 addict?

19 A Back then?

20 Q Back then.

21 A Yes, sir.

22 Q Your main source for the last couple of years,
23 year or two before you were incarcerated, your two
24 sources were Amy Brock and Nick Dendy?

25 A Yes.

1 Q Thank you. Please answer any questions Mr.
2 Beasley has for you.

3 THE COURT: Mr. Beasley?

4 MR. BEASLEY: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. BEASLEY:

7 Q Mr. Robinson, how are you doing?

8 A Pretty good, sir.

9 Q I'm Ryan Beasley. Uh, how many, uh, purchases
10 did the State make off you, undercover buys?

11 A Four.

12 Q Just four?

13 A Uh-huh.

14 Q So that was, uh, -- so they had four purchases,
15 uh, as far as the evidence against you?

16 A Yes, sir.

17 Q Did they execute a search warrant at your
18 house?

19 A Yes, sir.

20 Q Okay. They found meth there?

21 A No, sir.

22 Q They didn't?

23 A No, just Loratabs.

24 Q In these undercover purchases, uh, I guess you
25 received the information regarding these purchases,

1 correct?

2 A Yes, sir.

3 Q Can you describe to the jury how those under --
4 can you -- just explain to the jury what took place on
5 those undercover purchases?

6 A A buddy of mine told me this girl was going to
7 come by and buy some stuff that I ain't never met before.
8 He set me up is what he did. Then she come by. She
9 wanted an eight ball. She said -- I got her an eight
10 ball. She liked it. She said she wanted another one so I
11 got her two. A week went by. She come back and got two
12 more. Then I never see her again.

13 Then Amy Brock -- I went and pick up a ball
14 that night. Amy Brock calls back and says I'm fixing to
15 go to Wal-Mart, will you take care of this customer for
16 me and I will reimburse you when I get back. That's when
17 David whoever his name is, I ain't never met the boy
18 before in my life. That's how that went.

19 Q So you think Amy was setting you up?

20 A Yeah, Amy was setting me up too.

21 Q When did you go to jail the first time for
22 meth?

23 A Uh, 2010.

24 Q That was the first time?

25 A Yes, sir.

1 Q So you been in jail since 2010?

2 A 2011. Yeah.

3 Q 2011. Uh, but you been getting -- you said you

4 been getting meth from Amy Brock for like, you said 10

5 years, is that right?

6 A Yeah.

7 Q Tell me this. Y'all sat around and smoke and

8 everything?

9 A Yeah.

10 Q Did, uh, -- is there a guy name Felipe? He

11 would come over there and drop off meth too sometimes?

12 A No.

13 Q He wouldn't?

14 A I ran into him kind of there at the end. I

15 only met him about once or twice.

16 Q Okay. Who is your friend that introduced you

17 to Dendy?

18 A I can't remember the boy's name. It was one of

19 the guys that work with us. One of the guys that work

20 with us. I can't keep up with all of them.

21 Q With this surveillance equipment that you had

22 at your house, did you have like a video recorder or tape

23 or anything?

24 A No.

25 Q Just cameras?

1 A Just a camera. Just to see who come up in the
2 driveway.

3 Q Uh, when you got the evidence against you in
4 this case, did, uh, they have like marked money that they
5 had given you or anything like that?

6 A They showed me some pictures of marked money.

7 Q Okay. All right.

8 A I never did see it.

9 Q Do you remember a guy named Asa Thomason
10 hanging out at your house?

11 A Who?

12 Q Asa Thomason.

13 A Asa Thomason.

14 Q You never hearing of him?

15 A (Shakes head.)

16 Q Okay. Okay. No more questions.

17 THE COURT: All right. You have any more
18 questions for this witness?

19 REDIRECT EXAMINATION

20 BY MR. UNDERWOOD:

21 Q Just to clarify, Mr. Robinson. You talked
22 about where people that you had sold to in undercover
23 buys that you sold an eight ball and then she wanted two
24 more and then two more?

25 A Yes, sir.

1 Q Did you actually have those eight balls?

2 A No, I had called -- Nick Dendy brought them to
3 me.

4 Q Did you actually get and sell a total of five
5 eight balls to that person? One, two and two?

6 A It was four.

7 Q So you sold a total of four eight balls?

8 A Yes, sir.

9 Q And so if you were selling two at a time, does
10 that mean you were getting more than one eight ball from
11 the defendant?

12 A Two times I did.

13 Q So earlier, you testified you were getting one
14 eight ball a week. That was the usual. But there were
15 times that you'd buy more?

16 A Yeah. Yeah. Yes.

17 MR. UNDERWOOD: Thank you, Your Honor. No
18 further questions.

19 THE COURT: All right. Anything else?

20 Sir, you can step down.

21 Ladies and Gentlemen, we've probably come to a
22 good point for a lunch break. We'll break until
23 1:45. I ask you to be back in your jury
24 deliberation room at 1:45. We'll resume the trial
25 then. Again, please don't discuss this case with

1 anyone.

2 (WHEREUPON, the jury exits at approximately
3 12:22 p.m.)

4 THE COURT: All right. Thank you. Any
5 matters we need to take up before we break for
6 lunch?

7 MR. BEASLEY: Maybe bond.

8 THE COURT: Okay. Well, uh, Mr. Davis, you
9 understand that your bond is now, uh, -- is now gone
10 because the jury has been sworn. What was his
11 original bond?

12 MR. BEASLEY: It was 100,000 house arrest.
13 Then he was on GPS for over a year. He made a
14 motion to get that terminated. He's had no problems
15 and been to every court date.

16 THE COURT: Yes, sir.

17 MR. BEASLEY: Like I said, he does have a
18 full-time job now. He works third shift.

19 THE COURT: Mr. Pauling looks like he's got
20 something on his mind.

21 MR. PAULING: No, Your Honor. The bond is
22 up. Typically, we may not have an issue. But in
23 light of what happened this morning as far as I
24 understand he said he was working and third shift.
25 I guess my point is if we carry on to tomorrow, if

1 he's taken into custody, we're not having that
2 issue.

3 THE COURT: Right.

4 MR. PAULING: Tomorrow morning.

5 THE COURT: Uh-huh.

6 MR. PAULING: That's what the State's
7 position is on it.

8 THE COURT: All right. Here's what I'm going
9 to do, Mr. Dendy. If you can find a bondsman to go
10 on a trial bond for you -- I know that's an old-
11 fashioned type thing. But if you can get somebody
12 to go on a trial bond for you, I'll set a \$40,000
13 trial bond for you. And we'll -- you might be able
14 to find somebody to go on some sort of bond for you
15 at a real reasonable rate. All right.

16 MR. PAULING: Thank you, Your Honor.

17 THE COURT: Thank you. All right. Let's
18 start back at 1:45.

19 (WHEREUPON, a lunch recess is taken.)

20 (WHEREUPON, the jury enters at approximately
21 1:56 p.m.)

22 THE COURT: Ma'am, if you would, come forward
23 and be sworn please.

24 AMY BROCK

25 having first been duly sworn, testifies as follows:

1 **THE COURT:** All right. Thank you.

2 **DIRECT EXAMINATION**

3 **BY MR. PAULING:**

4 **Q** How are you doing, Ms. Brock?

5 **A** Doing good.

6 **Q** Please tell the jury where you are originally
7 from?

8 **A** Greenville, South Carolina.

9 **Q** You grew up in Greenville?

10 **A** Yes, sir.

11 **Q** And did you go to school here in Greenville
12 county?

13 **A** Yes, sir.

14 **Q** Did you go to high school?

15 **A** Yes, sir.

16 **Q** Did you finish high school?

17 **A** No, sir.

18 **Q** How far did you go in high school?

19 **A** Until the 12th grade.

20 **Q** Until the 12th grade?

21 **A** Yes, sir.

22 **Q** And what high school did you attend?

23 **A** Carolina High School.

24 **Q** You dropped out in the 12th grade?

25 **A** Yes, sir.

- 1 Q Why was that?
- 2 A Being stupid.
- 3 Q Being stupid? And did you ever get your GED?
- 4 A I went and got my high school diploma through
- 5 Cornerstone Christian Academy.
- 6 Q Cornerstone Christian Academy?
- 7 A Yes, sir.
- 8 Q And when was that?
- 9 A 2000.
- 10 Q 2000?
- 11 A 2000/2001.
- 12 Q Ms. Brock, how old are you now?
- 13 A I'm 32.
- 14 Q 32?
- 15 A Yes, ma'am. Yes, sir.
- 16 Q And, uh, after you got your high school
- 17 diploma, what did you do? You have a job or what did you
- 18 do?
- 19 A I worked at the YMCA.
- 20 Q What did you do at the YMCA?
- 21 A Childcare.
- 22 Q When was that?
- 23 A 2000/2001 through 2005.
- 24 Q And at that time when you were working at the
- 25 YMCA, were you living at home with family?

1 A I was living at my house. I had my own house.

2 Q At that time, were you married? You have any
3 children at that point?

4 A I have one child. Then I was pregnant while I
5 was still working at the YMCA. I gave birth to them.
6 That's when I went on maternity leave and just stayed at
7 home with him.

8 Q So your second child was born in 2005?

9 A 2005.

10 Q 2005? Now, Ms. Brock, as far as this case is
11 concerned, were you involved in this particular
12 investigation?

13 A What? I'm sorry.

14 Q In this particular case, were you involved --
15 when I say were you involved, did you become involved in
16 this particular investigation?

17 A Yes, sir.

18 Q Before we get there, at some point, were you
19 involved in using illegal drugs?

20 A Yes, sir.

21 Q And what illegal drugs were those?

22 A Methamphetamines.

23 Q Before using methamphetamine, did you use any
24 other type of drug?

25 A No, sir.

1 Q As far as methamphetamine is concerned, when
2 did you become involved with using meth?

3 A I would say probably around 2008.

4 Q How did that come about?

5 A I was introduced to it by a boyfriend of mine.

6 Q Who was that?

7 A Kyle Germaine.

8 Q Kyle Germaine?

9 A Uh-huh.

10 Q Now, is Kyle the father of your two children?

11 A Yes, sir.

12 Q Okay. And he introduced you to it back in
13 2008?

14 A Back in 2007.

15 Q 2007, around that time? Okay.

16 A No, no, no. I'm sorry. Not 2007. It was
17 around 2004.

18 Q Around --

19 A 2004, 2005.

20 Q 2004/2005. Around that time, you began using
21 methamphetamine?

22 A Yes, sir.

23 Q And how often were you -- how much meth were
24 you using?

25 A Uh, just weekends.

1 Q Just on the weekends?

2 A Yes, sir.

3 Q Would Kyle go get them from somebody and bring
4 it home or what would happen?

5 A He'd just had it. I would just use it with
6 him. Just recreational using it.

7 Q Okay. You said on the weekends. How much were
8 y'all using?

9 A Probably like a quarter -- if I got anything,
10 it would be like a quarter gram.

11 Q A quarter gram?

12 A Uh-huh.

13 Q Now, at some point after that, uh, at that
14 time, let me ask you, are you still with Kyle Germaine or
15 what happened?

16 A He actually passed away on a motorcycle
17 accident.

18 Q When about was that?

19 A That was 2007.

20 Q 2007. At that time, were you still using meth?

21 A I quit. After he passed away, I quit for a
22 while.

23 Q And at some point, did you begin using meth
24 again?

25 A Yes, sir.

- 1 Q When was that?
- 2 A I would say 2008.
- 3 Q Why was that?
- 4 A Because I pretty much instead of trying to deal
5 with his death on my own, I just used it -- a substance
6 drug to try to cope with what I was going through.
- 7 Q Okay. You said that Kyle was supplying you
8 with meth before when you were using. He passed away.
9 You're trying to cope while using meth. Who was
10 providing you with this meth at this time?
- 11 A Just several different people.
- 12 Q Such as?
- 13 A Uh, -- I would just get it from random people.
14 I got it from Steve Westbrook. Just people like that.
- 15 Q Who is Steve Westbrook?
- 16 A It's the guy that I had -- when I first started
17 selling drugs, it's who I got it from.
- 18 Q When would that had occurred? You said you
19 went from using to selling?
- 20 A Yes, sir.
- 21 Q Why was that?
- 22 A Just to kind of support my habit.
- 23 Q What was your habit at that particular time?
- 24 A Maybe a quarter gram to a half a gram a day.
- 25 Q A quarter gram to a half a gram a day, how much

1 would that cost you?

2 A A quarter gram would be \$25. A half a gram was
3 \$50.

4 Q Okay. And at that time, when you were using
5 meth at that particular time, were you still working at
6 YMCA? What was your situation at that point?

7 A No, I was no longer working.

8 Q Okay. You weren't working at all?

9 A No, sir.

10 Q You began selling meth?

11 A Yes, sir.

12 Q You said Steve Westbrook?

13 A Yes, sir.

14 Q So did he approach you about it or you went to
15 him?

16 A He approached me about it.

17 Q What was the deal?

18 A He just said that he had some that, you know,
19 he needed to get rid of. And if I was willing to help
20 him, you know, he would help me with, you know, just by
21 making a little bit extra money or some to be able to
22 smoke free without having to pay for it.

23 Q So when you started dealing with Steve
24 Westbrook, how much was he giving to you to sell?

25 A An eight ball.

- 1 Q An eight ball?
- 2 A Uh-huh.
- 3 Q How much is an eight ball? What's the weight?
- 4 A It's 3.5 grams.
- 5 Q 3.5 grams. And you had other individuals you
- 6 would sell that to?
- 7 A Yes, sir.
- 8 Q Who were some of the people you were selling
- 9 eight ball amounts of meth to?
- 10 A I sold to Monica Williams. I believe I sold to
- 11 Mikey Mike.
- 12 Q Who is Mikey Mike?
- 13 A Mikey Mike -- Michael Robinson.
- 14 Q Michael Robinson?
- 15 A Uh-huh.
- 16 Q Okay. And how did you know Michael Robinson?
- 17 A Uh, he lived right up the street from me and I
- 18 just knew him from, you know, the drug little clique.
- 19 You know, you kind of meet everybody.
- 20 Q Okay. You said up the road from you, where
- 21 were you living at that time?
- 22 A I was living at 216 New Dunham Bridge Road.
- 23 Q Okay. And now as far as when you were dealing
- 24 with Steve Westbrook, he provided you meth and he
- 25 provided some of these other individuals. What time

1 frame was this? Was 2008, 2009? When was this?

2 A I'd say it was 2009.

3 Q And how long did you deal with Steve Westbrook?

4 A Uh, for a short period of time.

5 Q Why was it a short period of time?

6 A Because it -- he -- I don't -- I'm not su -- I
7 think he was no longer able to get it anymore.

8 Q Okay. Did you know who his source was at the
9 time?

10 A No, sir.

11 Q Okay. Now, Steve Westbrook, he's not able to
12 get meth anymore. Did you ever find a new source?

13 A That's actually when I was approached by Bud
14 Sekerchak.

15 Q Okay.

16 A And, uh, he actually just gave me some and told
17 me I didn't have to pay for it. He just told me I could
18 sell it and give him whatever -- the money later.

19 Q How did that happen? Were you calling around
20 looking for meth or he just happened to come over to your
21 house and say, hey, --

22 A No, actually I had never met him before. He,
23 uh, rode by my house and had thrown some out in my yard
24 and then had his son come up to my house and tell me that
25 he had thrown some out in my yard in a cigarette pack

1 container.

2 Q And do you recall how much meth it was at that
3 time?

4 A I don't recall because at the time, I'm not the
5 one who found it. It was a guy -- some guy that was at
6 my house at the time had actually found it and actually
7 gotten rid of it. I was unaware of this. I was actually
8 asleep. I was unaware of this until I woke up and was
9 told about it. .

10 Q You -- Bud Sekerchak came to you saying I've
11 got some if you can move it?

12 A Right.

13 Q Okay.

14 A This was after his brother had already came and
15 said, you know what he did with throwing the dope in my
16 front yard.

17 Q Who is his brother?

18 A Austin Sekerchak.

19 Q Okay. Uh, does he have any other brothers?

20 A Bud or Austin?

21 Q Bud.

22 A Yes, sir. He has a brother named Mike, uh, we
23 called him Batman.

24 Q Okay.

25 A Keith Sekerchak.

1 Q Okay.

2 A Yeah.

3 Q Did you ever deal with Batman, Keith Sekerchak?

4 A No.

5 Q Okay. When I said did you deal with him, did
6 he sell you meth or did you sell him meth?

7 A Uh, I sold him meth. I bought from him, uh,
8 two or three times. Not many.

9 Q Okay. Did that all occur at your house?

10 A Yes.

11 Q Okay. And now, I heard you say Bud Sekerchak
12 came or someone threw some meth in your yard and you
13 found that out from his brother Austin. Did you develop
14 another source, another main source for methamphetamine?

15 A From Bud?

16 Q Other than Bud.

17 A Uh, from Nick Dendy.

18 Q How did that come about?

19 A Uh, I met Nick up at Mikey Mike's house.

20 Q At Mikey Mike's house?

21 A Yes. Yes, sir.

22 Q Okay. And when about would that had been?

23 A 2009.

24 Q Okay. 2009?

25 A Uh-huh.

- 1 Q The early part or summertime?
- 2 A It was the late part of 2009.
- 3 Q I'm sorry?
- 4 A It was the late part of 2009.
- 5 Q Late part of 2009. Thanksgiving,
- 6 Christmastime?
- 7 A Right.
- 8 Q Okay. Now, uh, why were you over at Mikey
- 9 Mike's at that particular time?
- 10 A Uh, I was buying dope from Mikey Mike.
- 11 Q At that particular time, how much dope were you
- 12 -- how much meth were you buying from Mikey Mike?
- 13 A Uh, probably around a half eight ball.
- 14 Q A half eight ball?
- 15 A Uh-huh.
- 16 Q And what was he charging for it?
- 17 A 150.
- 18 Q Okay. \$150? When you would go over to Mikey
- 19 Mike's house to purchase meth, would you call ahead of
- 20 time or would you just go over there since he was right
- 21 up the road?
- 22 A I would call ahead of time.
- 23 Q Okay. And you would order it up at that time?
- 24 A I would just say I need to come see you.
- 25 Q And he knew what that meant?

1 A Huh?

2 Q He knew what that meant?

3 A Yes, sir. He knew what that meant.

4 Q And so then you would go to his house?

5 A Uh-huh.

6 Q Okay. Now, you said you met with Nick Dendy
7 there. On this particular occasion, when you meet Nick
8 Dendy, was he already there at the house?

9 A He wasn't there when I first got there. After
10 I was there, that's when Nick had to come over to the
11 house, over to Mikey Mike's house.

12 Q And did he arrive there by himself?

13 A Yes, sir.

14 Q Okay. And what happened -- let me back up.
15 Before Nick Dendy got there, had you ever heard of Nick
16 or did Mike Robinson tell you about Nick? How did Nick
17 Dendy even come up?

18 A I knew of Nick because Mikey Mike was telling
19 me that's who he was getting his stuff from.

20 Q Okay. Now, when Nick Dendy comes over, this
21 would be your first time meeting him. What happens when
22 he gets there?

23 A Uh, he -- that's pretty much when Mikey Mike
24 just kind of introduced me and Nick together, uh, me and
25 Nick. We, you know, spoke to each other. I just

1 purchased something. Mikey Mike was there but I just
2 purchased something from Nick that day -- that night.

3 Q Okay.

4 A Instead of actually having to go through Mikey
5 Mike.

6 Q You recall how much it was?

7 A It was probably a half an eight ball or an
8 eight ball.

9 Q Okay. And now uh, you purchased directly from
10 Nick Dendy on that occasion?

11 A Yes, sir.

12 Q Now after that -- that was over at Michael
13 Robinson's house, is that correct?

14 A Yes, sir.

15 Q Okay. Were there other occasions when you went
16 to Mike -- after that, when you went to Mike Robinson's
17 house to purchase meth and Nick Dendy came over?

18 A No, that was the only -- that was the only
19 occasion that I met Nick at Mike's house.

20 Q Okay. Was that your last dealing with Nick
21 Dendy?

22 A No, sir.

23 Q Okay. And if you can tell, uh, the jury what
24 were your dealings with Nick Dendy. That one occasion at
25 Mike's house, what happens next as far as your dealings

1 with Nick Dendy?

2 A That's when, uh, me and Nick exchanged numbers.
3 That's when we started dealing with each other one on one
4 and not having to go through, you know, somebody else.

5 Q Was there an advantage to you for that, not
6 having to go through Mike Robinson?

7 A Uh, yeah. I wouldn't have to just -- the
8 trouble of going down to Mikey Mike's house. It was, you
9 know -- it was just, you know, a lot easier for me to do
10 that that way.

11 Q So where would the deals take place that you
12 did with Nick Dendy?

13 A They would take place at my house.

14 Q Now, was there a price difference between going
15 through Mike Robinson and then to Nick as opposed to
16 going through Nick directly or was it the same?

17 A Uh, it was probably the same. It might have
18 been a little bit more if I went through Mikey Mike, but
19 not much. I didn't do it -- I mean, there wasn't very
20 many times that I bought stuff from Mikey Mike.

21 Q Okay. Now, when you begin dealing with Nick
22 Dendy, what time frame is this? Are we still on 2009 or
23 is this 2010?

24 A I'm thinking it was -- 2010 is when I started
25 dealing with Nick.

1 Q Okay. Now, uh, what part of 2010
2 approximately? Was it springtime? Was it warm? Was it
3 summertime at this point?

4 A Uh, it's springtime.

5 Q In these instances when you're dealing with
6 Nick Dendy, y'all exchanged phone numbers. So when you
7 would do a deal with Nick Dendy, what would you do?

8 A Uh, I would call Nick. He would come over to
9 my house. I would, you know, hand Nick some money. And
10 then Nick would wait on -- he would have to call another
11 individual to come over. That individual would -- they
12 would both be out in my driveway in separate cars. I
13 would give Nick the money. Then Nick would then give the
14 money to the other person who had pulled up, the
15 supplier. Then he would come and bring me the
16 methamphetamines.

17 Q I'm going to run back through that with you.

18 A Okay.

19 Q You would call Nick up?

20 A Right.

21 Q Correct? Nick would come to your house?

22 A Yes, sir.

23 Q Would he drive up alone?

24 A Yes, sir.

25 Q Would he then come into your house?

1 A Uh, sometimes he would come into my house.

2 Sometimes I would just run out to his car.

3 Q Okay. You would run out to his car. Is that
4 the point when you'd give Nick Dendy money?

5 A Right.

6 Q Okay. Now, uh, that would happen on some
7 occasions. On other occasions, would Nick Dendy come
8 into your house?

9 A Yes, sir.

10 Q Okay. On those occasions, would he wait in
11 your house until the other individual came?

12 A Right, because he never had it on him.

13 Q Okay. Now, at that point, would you give Nick
14 Dendy the money while he was still inside or would you go
15 outside with him?

16 A I would go outside with him and sometimes I
17 would just go ahead and give him the money inside.

18 Q Okay. And now before the individual, the other
19 individual would come over to your house, did Nick tell
20 you who it was? Did he give you a name?

21 A Nick never gave me a name. I always, uh,
22 assume that that was his cousin.

23 Q Okay. And you said you assumed that it was his
24 cousin. Why would you make that assumption that it was
25 his cousin?

1 A Because he would always say his cousin.

2 Q Nick would tell you that?

3 A Nick would tell me that that was his cousin.

4 Right.

5 Q Okay. Now, during the times when these deals
6 were taking place, what amounts were you getting? Were
7 you still getting a half eight or an eight ball or?

8 A Yes, sir. Sometimes I would get a half eight
9 to an eight ball. The most I've ever got was a quarter
10 ounce.

11 Q Okay. And how much Nick charge you for a
12 quarter ounce?

13 A \$400.

14 Q \$400?

15 A Uh-huh.

16 Q And if you got that quarter ounce, what would
17 you do with a quarter ounce? Would you use all that?
18 Would you sell some of it? What would you do?

19 A Uh, I would use -- I used a good bit of it
20 because, you know, I was heavy, you know, on drugs. But
21 I would sell some of it.

22 Q All right. What amounts would you sell of it?
23 If you got a quarter ounce, how many grams is a quarter
24 of an ounce? Do you know?

25 A A quarter ounce is seven.

1 Q Okay. So this seven grams, how much would you
2 sell? Would you sell half of it? Or would you --

3 A I would probably sell -- I would probably sell
4 an eight ball to one individual. That way, -- just an
5 individual or somebody.

6 Q All right. Now, uh, back to those transactions
7 with Nick Dendy and who you knew as Nick's cousin.

8 A Uh-huh.

9 Q On the occasions that you would go outside,
10 that you would actually go outside and wait outside with
11 Nick, is that what happened?

12 A Right. Sometimes I would wait outside and just
13 talk to him, you know.

14 Q All right.

15 A And sometimes I wouldn't. It just depend on
16 what was going on, who was in my house and what was going
17 on.

18 Q Okay. Now, on the occasions when you would
19 wait outside for Nick's cousin to arrive, uh, describe
20 what would happen. Nick's cousin pulled up, what would
21 happen?

22 A Nick would probably already have the money
23 waiting on his cousin to get there. As soon as Nick
24 would pull up, I would go out there, give Nick the money
25 and talk to him for just a little bit and then his cousin

1 would pull up. Or he would call his cousin while he was
2 waiting at my house, then his cousin would pull up. Then
3 Nick would get out of the car -- go to the car, get the
4 methamphetamines and then give them to me.

5 Q And at, uh, -- while you were out there, were
6 you able to see this other individual? Would you ever
7 see the car they were driving?

8 A Yes, sir.

9 Q Okay. What type of car were they --

10 A It was a silver car. I don't know if it was a
11 300. It was some new car like that.

12 Q And would you be able to see the person driving
13 the car?

14 A Yes, sir.

15 Q And how were you able to see the person? Was
16 there --

17 A The windows were down and it was daylight. My
18 driveway's not that long. There, it's -- you know, he's
19 right here. The car's right here.

20 Q You say he's right here. Nick's car?

21 A Nick's car.

22 Q Okay. And then the other person?

23 A The other person's car is parked right directly
24 behind it.

25 Q And the times when that other person would pull

1 up, how long would it take? How long would the
2 transaction take?

3 A Just not even a minute.

4 Q Not even a minute?

5 A Uh-huh.

6 Q Okay. But it's during that time that you would
7 be able to observe this other individual that you knew as
8 Nick's cousin?

9 A Yes, sir.

10 Q And on how many occasions would you say that
11 that happened?

12 A I would say it just depended how much I was
13 using, how much I was selling. Sometimes it would be
14 once a week. Sometimes it would be three to four times a
15 week. But it wasn't never consistently, you know, that
16 many times.

17 Q At least once a week?

18 A At least once a week, yes, sir.

19 Q But sometimes -- but as much as four times a
20 week?

21 A It has been up to four times a week.

22 Q Okay. If you can, Ms. Brock, give me the time
23 frame that you would have been dealing with Nick Dendy.
24 Springtime 2010 until when? When I say dealing with Nick
25 Dendy in what you just described, dealing with Nick

- 1 Dendy --
- 2 A I would say it was until that October/November.
- 3 Q Okay. Of 2010?
- 4 A Uh-huh.
- 5 Q Okay. At least once a week.
- 6 A Right.
- 7 Q And possibly up to four times a --
- 8 A Right.
- 9 Q -- three or four times a week.
- 10 A Right.
- 11 Q Essentially the same scenario. You called
- 12 Nick. He comes. He waits on his source which he
- 13 described as his cousin?
- 14 A Right.
- 15 Q Then he comes and provides the meth to Nick.
- 16 You give Nick the money. He gives it to his cousin and
- 17 you get the meth, is that correct?
- 18 A That's correct.
- 19 Q Okay. You say until about October or November
- 20 of 2010, this was the way the arrangement went?
- 21 A Yes, sir.
- 22 Q Now, you said sometimes you stayed in the
- 23 house. Sometimes you went outside?
- 24 A Uh-huh.
- 25 Q How many occasions do you think you were

1 outside with Nick and Nick's cousin when the transaction
2 took place?

3 A It was half the time.

4 Q About half the time?

5 A Uh-huh.

6 Q Okay. Now, why did the, uh, -- why did the
7 arrangement stop, you said in October or November of
8 2010. What happened?

9 A I'm not sure if it was he got -- I don't know
10 what happened between them two or whatever. I know that
11 he was no longer getting it from him.

12 Q Who was no longer getting it from him?

13 A I'm assuming Nick was no longer getting it from
14 him. It just, you know, that's how it just stopped.

15 Q Okay.

16 A And there was periods of time when I was
17 selling drugs that I would quit and lay low for a little
18 bit and not do anything. And so therefore, I just wasn't
19 messing with it at all.

20 Q Let me ask you this, Ms. Brock. At some point,
21 were you approached by law enforcement?

22 A Yes, sir.

23 Q Okay. And, uh, if you could, tell the jury how
24 did that come about? What happened when you were
25 approached by law enforcement?

1 A Uh, which time?

2 Q The first time.

3 A The first time. The first time I was outside
4 in my driveway washing my car. I was approached by Chad
5 Ayers and it was one other guy. I'm not sure who it was.
6 We went to, uh, a middle school. They just pretty much
7 talked to me and told me that they knew what I was doing
8 and asked me what my involvement was in everything.

9 Q When they said they knew what you were doing,
10 what were they referring to?

11 A They were referring to selling
12 methamphetamines.

13 Q Okay. And, uh, at that particular time, did
14 you have any discussion or tell them what you had been
15 doing?

16 A Yes, sir.

17 Q Now about when was that?

18 A That was, I want to say, in October maybe?

19 Q 2010?

20 A September or October of 2010.

21 Q And you indicated that you were approached a --
22 you said that was -- which time. So you were approached
23 a second time, is that correct?

24 A Yes, I was also approached a second time by
25 them.

1 Q Okay. And what happened?

2 A The second time I was approached by them, they
3 come by my house and I was asked -- I was shown a picture
4 and asked if I knew this person. I identified him as
5 being Nick's supplier.

6 Q Okay. And when you say Nick's supplier, was it
7 the same that you knew as Nick's cousin?

8 A Yes, Nick's cousin. He was the only person
9 that I knew as being Nick's supplier.

10 Q And is that because of what Nick Dendy actually
11 told you? Is that what Nick Dendy told you?

12 A Right.

13 MR. PAULING: Beg the Court's indulgence.

14 THE COURT: Sure.

15 (WHEREUPON, State's Exhibit 1 is marked for
16 identification purposes.)

17 BY MR. PAULING:

18 Q Now, Ms. Brock, that second time, if you
19 describe again for the jury the process or how that
20 happened as far as you identifying Nick's cousin, who you
21 knew as Nick's cousin.

22 A I was approached by Chad Ayers and it was two
23 other officers. And he pulled out a picture. He asked
24 me, he said do you know this person. I said yes, sir, I
25 do. I said I know this as Nick's cousin, his supplier,

1 the guy that always pulls up in my driveway after Nick
2 does and who Nick receives his methamphetamines from.

3 Q How long after -- approximately how long after
4 the first time you were approached by law enforcement.
5 You mentioned the discussion at the middle school. How
6 long after that was this conversation that you had with
7 Investigator Ayers?

8 A Uh, it was approximately a month.

9 Q And the picture that he showed you, did it have
10 any identifying information on it?

11 A No, sir.

12 Q The picture that he showed you?

13 A No, sir. It was just a picture.

14 Q And did you have any trouble identifying the
15 individual?

16 A No, sir. No, sir.

17 Q I'm going to show you now -- may I approach the
18 witness, Your Honor?

19 THE COURT: Yes, sir.

20 BY MR. PAULING:

21 Q I'm going to show you what's been marked for ID
22 purposes only as State's 1. I'm going to ask you if you
23 recognize that.

24 A Yes, sir. That's the picture that I
25 identified.

1 Q Okay. And this is the picture that
2 Investigator Ayers showed you?

3 A Ayers showed me. Yes, sir.

4 Q And now, Ms. Brock, at some point after that,
5 uh, did law enforcement come to your house again?

6 A Yes, sir.

7 Q If you can, tell the jury what happened on that
8 particular occasion.

9 A Uh, that is when they had served a warrant and,
10 uh, I got arrested that night.

11 Q You say served a warrant, was it a search
12 warrant?

13 A Yes, sir.

14 Q For your home?

15 A Yes, sir.

16 Q You were actually indicted in this particular
17 case, is that correct?

18 A Yes, sir.

19 Q Okay. And now, uh, have you pled guilty to
20 your charges?

21 A Yes, sir.

22 Q In fact, you were indicted for Trafficking
23 Methamphetamine by Conspiracy, is that correct, 400 grams
24 or more?

25 A Yes, sir.

1 Q That's what you were indicted for as well as
2 two counts of Distribution of Methamphetamine?

3 A Yes, sir.

4 Q As well as two counts of exposing a child, is
5 that correct?

6 A Yes, sir.

7 Q Okay. But you have pled guilty to a lesser
8 included of Trafficking Methamphetamine by Conspiracy 10
9 to 28 grams, is that correct?

10 A Yes, sir.

11 Q Okay. As well as exposing a child to meth, two
12 counts, is that correct?

13 A Yes, sir.

14 Q And the distribution charge, is that correct?

15 A Yes, sir.

16 Q And it's your understanding that there is a
17 recommendation by the State of a sentence range of five
18 to eight years?

19 A Yes, sir.

20 Q And part of your plea agreement is for you to
21 testify truthfully at trial, is that correct?

22 A Yes, sir.

23 Q And as far as cooperating with law enforcement,
24 did you participate in any controlled buys?

25 A Yes, sir.

1 Q And if you could, describe for the jury how did
2 those occur.

3 A Uh, I was just asked to, uh, make a controlled
4 buy to Nick Dendy twice.

5 Q And prior to the actual deals taking place,
6 what did they do as far as -- when I say what did they
7 do, as far as law enforcement is concerned -- in
8 preparing you for the controlled buy, what did they do?
9 Did they check you beforehand?

10 A Searched me?

11 Q Yes, did they --

12 A Uh, yes, sir, they did.

13 Q Did they fit you with any audio equipment or
14 anything?

15 A Yes, sir.

16 Q Now, did they take you to a location or did you
17 drive yourself or what happened?

18 A I drove myself to a location where they met me
19 at.

20 Q Okay. Let me ask you this. Was there -- did
21 you use your vehicle?

22 A Yes, sir.

23 Q Did they check your vehicle beforehand?

24 A Yes, sir.

25 Q Okay. And after the deal took place, did they

1 search both you and your vehicle afterwards as well?

2 A Yes, sir.

3 Q As far as the controlled buy was concerned, did
4 you pay for it out of your own money?

5 A No, sir. They supplied me the money.

6 Q Okay. They supplied you state-documented
7 funds?

8 A Yes, sir.

9 Q Okay. Was -- was that part of your cooperation
10 with law enforcement?

11 A Yes, sir.

12 Q Now, Ms. Brock, I want to go back to the
13 charges I talked about, what you were charged with and
14 the search warrant on your house that particular day.
15 You were also charged with exposing a child to meth two
16 counts.

17 A Yes, sir.

18 Q Now, when law enforcement was executing the
19 search warrant at your house, who all was at your house
20 that day?

21 A Who all was at my house at that time?

22 Q Yes.

23 A Uh, it was me, my two children, they were
24 asleep in the bed, another guy named Michael Reddick,
25 Vickie Buchanan, David Cook, Sara McGee and, uh, one

1 other guy. What's his name?

2 Q If you can't remember --

3 A I can't remember what his name was. It was one
4 other guy.

5 Q Okay. I guess my point is you said your two
6 children were there ~~that were sleeping in the room?~~

7 A Yes, sir.

8 Q Now, at that time -- this was 2010?

9 A Yes, sir.

10 Q Okay. Now, at that time, were your children
11 living with you? What was going on at that time?

12 A No, sir. My kids were not living with me. I
13 didn't have -- I don't -- I didn't have custody of my
14 children so they were living next door to my parent's
15 house. My parents were actually gone out of town on
16 vacation that week. ~~They just happened to be at my house~~
17 ~~that night that the police had a search warrant.~~

18 Q Okay. ~~But there was methamphetamine at your~~
19 ~~house, is that correct?~~

20 A Yes, sir. ~~There was~~

21 Q And your children were there, is that correct?

22 A Yes, sir. ~~They were~~

23 Q And you owned up to that, is that right?

24 A Yes, sir.

25 Q You pled guilty to that particular charge?

- 1 A Yes, sir. I did.
- 2 Q To those charges?
- 3 A Right.
- 4 Q Let me ask you this, Mr. Brock. You testified
5 before the State Grand Jury regarding your involvement in
6 this drug trafficking ring?
- 7 A Yes, sir. I did.
- 8 Q Was that in September of 2011?
- 9 A Yes, sir. It was.
- 10 Q Now, you may have mentioned this earlier, but
11 who were some of all the individuals that you sold
12 methamphetamine to? Meth that you got from Nick Dendy
13 that was supplied by who you knew as Nick's cousin, who
14 did you sell that meth to?
- 15 A Uh, I sold that meth to, uh, Mikey Mike. I
16 sold it to Batman. Uh, --
- 17 Q Batman is Keith Sekerchak, is that correct?
- 18 A That's correct.
- 19 Q Okay.
- 20 A I also sold some to his brother.
- 21 Q Bud Sekerchak?
- 22 A Bud Sekerchak.
- 23 Q Okay.
- 24 A Uh, that was the main people that I sold to.
- 25 Q Okay. Did you know an individual by the name

1 of Joshua Byers?

2 A Yes, sir.

3 Q Did you sell to him?

4 A I sold to Josh, uh, maybe once or twice, but
5 that was it.

6 Q What about Warren Chastain?

7 A No, sir.

8 Q Okay.

9 ~~A I think~~ I did one time.

10 Q Okay.

11 A Yeah.

12 Q You sold to Warren Chastain. Would that had
13 been at your house?

14 A Yes, sir.

15 Q Okay. Now, as far as, I guess, the customer
16 base you had, were they all in Greenville county or did
17 you have individuals coming from outside of Greenville
18 county?

19 A As far as my -- as far as I, uh, understand
20 they were all from Greenville county.

21 Q Okay. Beg the Court's indulgence. (Pause.)

22 Now, Ms. Brock, as far as you cooperating with
23 law enforcement, let me ask you, at what point did you
24 decide to cooperate with law enforcement? Was it after
25 the, uh, search warrant occurred?

1 A No, sir. I cooperated with law enforcement
2 before the search warrant was occurred.

3 Q Okay. Okay. Let me ask you this, as far as
4 your cooperation with law enforcement, as far as you
5 providing law enforcement information, did anyone ever
6 threaten you or threaten you as far as your children were
7 concerned?

8 A No, sir. They did not.

9 Q And as I understand it, you talked to law
10 enforcement. You explained to them that your
11 methamphetamine source was Nick Dendy?

12 A Yes, sir.

13 Q That Nick Dendy would actually get the meth
14 from who he described as his cousin?

15 A Yes, sir.

16 Q And that individual, you pointed out, in a
17 photo ID, photo identification of that person?

18 A Yes, sir.

19 Q That individual?

20 A Yes, Nick never had the drugs on him when he
21 come to my house. It was always him having to get it
22 from his cousin.

23 Q Okay. And that individual that you knew as
24 Nick's cousin, that Nick said was his cousin, do you see
25 that individual in the courtroom today?

1 A Yes, sir.

2 Q And if you could, where is he?

3 A Right there.

4 Q You say right there, what is he wearing?

5 A The white shirt.

6 Q The white shirt?

7 A Uh-huh.

8 Q Can you just describe him?

9 A Uh, brown skin, white shirt, heavy set.

10 MR. PAULING: Your Honor, I just ask that the
11 record reflect that Ms. Brock has indicated the
12 defendant, Clyde Davis.

13 THE COURT: It so reflects.

14 MR. PAULING: No further questions of Ms.
15 Brock.

16 THE COURT: Mr. Beasley.

17 MR. BEASLEY: Thank you.

18 CROSS-EXAMINATION

19 BY MR. BEASLEY:

20 Q Good afternoon.

21 A Good afternoon.

22 Q Just for the record again, that's the first
23 time you ever had to describe Mr. Davis, correct?

24 A Yes, sir.

25 Q Thank you. Uh, All right. Let's go back.

1 You've been dealing since 2004 basically buying and
2 selling? Does that sound about right?

3 A No, sir.

4 Q Okay. I misunderstood then. I thought you
5 said you started using in 2004.

6 A I was buying or selling? I never sold in 2004.

7 Q Okay. When did you start? From your
8 testimony, I gathered that it was always sort of you buy,
9 but you'd also use it, and then you'd sell some of it.

10 A I never done that until I started messing with
11 Steve Westbrook.

12 Q Okay. And that was back in what, '08? '09.
13 Sorry. '09.

14 A It was '09? Okay. '09.

15 Q That's what it says in some of your statements.

16 A Right. It's just been three years.

17 Q I know. And I know you and I talked actually
18 before you came in here. You actually told me you been
19 clean and sober for two years now.

20 A Yes, sir.

21 Q Congratulations.

22 A Thank you.

23 Q You look a lot better since the last time I saw
24 you.

25 A Thank you.

1 Q Let's go back to those bad times. So when
2 Dendy would come and drop off drugs to you, is it safe to
3 say you were probably high, under the influence of meth?

4 A Yes, sir.

5 Q And, uh, when law enforcement got you started
6 doing undercover buys, you were doing those -- you would
7 get wired up. You would get buy money and you would go
8 meet Mr. Dendy somewhere, correct?

9 A Yes, sir.

10 Q And I think one time it occurred at O'Reilly's
11 Auto Parts? Does that sound right?

12 A Uh, no, sir. It was actually at Wendy's. It
13 was at a Wendy's and then it was at a McDonald's on White
14 Horse Road.

15 Q So you would drive up and Dendy would get out
16 and hand you the meth?

17 A Right.

18 Q And you would give him the money. And you were
19 all wired up and that was it?

20 A Yes, sir.

21 Q How many times did you buy from Dendy? Did you
22 do those undercover buys with Dendy?

23 A Uh, I done two of them.

24 Q After those buys, did you start using and
25 dealing again?

1 A Uh, I started -- not for a while. I did still
2 use -- I still used again, yes, sir.

3 Q Okay. Okay. Uh, earlier -- you weren't in
4 here -- Batman testified.

5 A Right.

6 Q And you told -- you stated earlier that you
7 never knew what --

8 MR. PAULING: Objection, Your Honor. May we
9 approach just for a second?

10 THE COURT: Certainly.

11 (WHEREUPON, a bench conference is held off the
12 record.)

13 BY MR. BEASLEY:

14 Q And you never knew Nick's cousin's name when
15 you were getting drugs from Nick, correct?

16 A No, sir. I didn't.

17 Q Okay. If Mr. Sekerchak testified earlier that
18 you told him it was Clyde Davis, that would not be true,
19 correct?

20 A I never knew --

21 MR. PAULING: Objection, Your Honor.

22 THE COURT: Hold on just one second.

23 Uh, rephrase that question please.

24 BY MR. BEASLEY:

25 Q You never told anyone, uh, what Dendy's

1 cousin's name was?

2 A No, sir, because I never even knew. I only
3 knew him as being his cousin.

4 Q Okay. Thank you. When law enforcement asked
5 you to identify Mr. Dendy, they gave you a six-person
6 lineup, didn't they?

7 A Mr. --

8 Q With Nick Dendy. I can show you. But did they
9 show you a six-person lineup to identify Nick Dendy?

10 A I can't remember if it was a six-person or if
11 it was just individual.

12 Q Okay. You want me to show you? Would that
13 refresh your memory?

14 A That's fine.

15 Q This is when you did your undercover purchase
16 of Mr. Dendy. Do you recognize filling out this
17 information?

18 A Yes, I do.

19 Q Do you recognize this photo lineup?

20 A Uh-huh.

21 Q Do you remember circling that individual?

22 A Yes.

23 Q And who was that individual?

24 A Nick Dendy.

25 Q Okay. So you were given a six-person lineup,

1 correct?

2 A If it's circled, yes.

3 Q Okay.

4 A It's just been three years ago.

5 Q I know. It's hard to keep up with. Uh, Nick,
6 uh, -- did you -- I know this is painful even to go back
7 to some of this stuff. But were you having a sexual
8 relationship with Mr. Dendy?

9 MR. PAULING: Objection, Your Honor. I don't
10 understand the relevance.

11 THE COURT: I'm going to allow it.

12 THE WITNESS: That's fine.

13 THE COURT: I'm going to allow it at this
14 point.

15 THE WITNESS: That's fine. No, sir. I did
16 not.

17 BY MR. BEASLEY:

18 Q So if he said you had a -- if you were selling
19 yourself to sex and he had sex with you a couple of
20 times, that's not true?

21 A No, sir. It's not.

22 MR. PAULING: Objection. Asked and answered.

23 MR. BEASLEY: Okay.

24 THE COURT: I'm going to allow that question.
25 I'm sure -- I mean, she's answered it for you.

1 BY MR. BEASLEY:

2 Q Okay. In one of the undercover buys, Dendy
3 indicated to you that he recognized one of the undercover
4 cars. Isn't that right?

5 A Yes, sir. Yes, sir, he did.

6 Q Can you explain that to me? What happened?
7 Did he know that -- was it Chad in one of the cars or who
8 was it?

9 A No, sir. It wasn't Chad. We were originally
10 supposed to meet at, I believe it was a QT's on White
11 Horse Road. He told me he recognized one of the -- it
12 was not Chad. It was another officer that, I guess, was
13 on Chad's team that was going to be in the same gas
14 station area. Nick told me that he recognized one of the
15 individuals in the truck. He told me to follow him
16 somewhere else and meet.

17 MR. BEASLEY: Just a second, Judge.

18 THE COURT: That's fine.

19 BY MR. BEASLEY:

20 Q And when you said that, uh, Nick Dendy's
21 supplier would drive up, he was in a silver Charger?

22 A Charger, 300, I'm not sure exactly what car.
23 It was a silver flashy car.

24 Q Did you ever see a black Honda Accord?

25 A No, sir.

1 Q Okay. Okay. Uh, no more questions.

2 MR. PAULING: Beg the Court's indulgence?

3 THE COURT: Yes, sir.

4 (WHEREUPON, there is a pause.)

5 REDIRECT EXAMINATION

6 BY MR. PAULING:

7 Q Just briefly, Ms. Brock. Mr. Beasley asked you
8 about the occasion of the deals at either the Wendy's,
9 you said it was a deal at the Wendy's and the McDonald's?

10 A Yes, sir.

11 Q Now, at that time, you were cooperating with
12 law enforcement. Was that a controlled buy?

13 A Yes, sir.

14 Q At that particular time, was that after, uh,
15 law enforcement approached you a couple of times?

16 A Yes, sir.

17 Q Was that -- let me ask you this, was that after
18 the search warrant was conducted on your house?

19 A No, sir.

20 Q Okay. So it was before that.

21 A It was before the search warrant was conducted.

22 Q You indicated to the jury earlier that there
23 was a period of time where Nick's cousin kind of sketched
24 out on you, I guess?

25 A Yes, sir.

1 Q You said --

2 A I don't know if it -- I don't think it was
3 Nick's cousin. I believe it might have been Nick. I
4 never dealt with his cousin.

5 Q No, I guess what I'm saying is you said there
6 was a time when the process was Nick Dendy would come to
7 your house.

8 A Right.

9 Q The person he described as his cousin would
10 come?

11 A Yes, sir.

12 Q There was a period of time after that --

13 A Where his cousin didn't come to my house.

14 Q He didn't come?

15 A Right.

16 Q When this undercover deal was going on, was
17 that during that same time frame, I guess is what I'm
18 saying? That's what I'm asking rather.

19 A Uh, --

20 Q And if you remember --

21 A I don't remember.

22 Q Okay.

23 A I don't.

24 Q But typically, let me ask you this. Would you
25 typically -- when you were dealing with Nick before,

1 would you typically have a deal at the McDonald's or at
2 the Wendy's?

3 A No, sir. Just some times when I wasn't at
4 home. But most of the time, it was always at my house.
5 He had to get it from his cousin.

6 Q So most of the time, the deals took place at
7 your house?

8 A Pretty much always they did.

9 Q Okay. Not at a Wendy's?

10 A Right.

11 Q Not at a McDonald's?

12 A Right.

13 MR. PAULING: No further questions, Your
14 Honor.

15 THE COURT: Mr. Beasley?

16 MR. BEASLEY: Your Honor, just real briefly.

17 THE COURT: Sure.

18 RECROSS EXAMINATION

19 BY MR. BEASLEY:

20 Q Amy, uh, Nick says he actually gets half of his
21 drugs from Mr. Davis and half from a guy named Bookie.
22 Did you ever meet Mr. Bookie?

23 MR. PAULING: Objection. Your Honor, I don't
24 know if that was -- is that a question? May we
25 approach?

1 **THE COURT:** Sure.

2 **MR. BEASLEY:** I just asked her if she ever
3 met Mr. Bookie.

4 **MR. PAULING:** No, the one before that.

5 **THE COURT:** All right.

6 (WHEREUPON, a bench conference is held off the
7 record.)

8 **BY MR. BEASLEY:**

9 **Q** And Nick gave a statement. He said he got --
10 he actually said he only got -- only bought from you --
11 sold to you four times. Is that true?

12 **A** No, sir.

13 **Q** All right. Then he said he bought -- he may
14 have sold to you 50 or 70 times. Is that probably close
15 to being true maybe?

16 **A** I'm sorry. Repeat the question.

17 **Q** He said that he sold to maybe 50 to 70 times.
18 Does that sound about right?

19 **A** Yes, sir.

20 **Q** Okay. And he actually said that half of those
21 times would be, uh, Mr. Davis and half of the times,
22 those were Bookie.

23 **A** I don't know who Bookie is.

24 **Q** Cause you really never met whoever was pulling
25 up and dropping off the drugs, correct?

1 A Uh, I never met -- the only person that I ever
2 seen pull up in my house and deliver the drugs that Nick
3 got from was Clyde Davis.

4 Q Okay. Thank you.

5 THE COURT: Anything else?

6 MR. PAULING: Nothing further, Your Honor.

7 Thank you.

8 THE COURT: Ma'am, you can step down.

9 THE WITNESS: Thank you.

10 THE COURT: Thank you.

11 Yes, sir.

12 MR. UNDERWOOD: Your Honor, the State's next
13 witness is Nicholous Dendy.

14 THE COURT: Do you have any objection to her
15 being excused?

16 MR. UNDERWOOD: None, Your Honor.

17 THE COURT: Mr. Beasley, do you have any
18 objection?

19 MR. BEASLEY: No objection.

20 THE COURT: All right then. Yes, sir. Thank
21 you so much for pointing that out.

22 Sir, if you would, come forward and be sworn.

23 NICHOLOUS DENDY

24 having first been duly sworn, testifies as follows:

25 THE COURT: All right. Thank you, sir. If

1 you will, have a seat please.

2 **DIRECT EXAMINATION**

3 **BY MR. UNDERWOOD:**

4 **Q** Good afternoon, Mr. Dendy. Are you a co-
5 defendant in this case?

6 **A** Yes, sir.

7 **Q** Were you charged with Trafficking
8 Methamphetamine by Conspiracy and two counts of
9 Distribution of Methamphetamine?

10 **A** Yes, sir.

11 **Q** Have you already pled guilty?

12 **A** Yes, sir.

13 **Q** By pleading guilty, did you enter in -- enter
14 into a plea agreement with the State?

15 **A** A plea agreement on how much time I'm going to
16 get?

17 **THE COURT:** So sorry. That was my fault. I
18 turned your mic off.

19 **THE WITNESS:** Okay.

20 **BY MR. UNDERWOOD:**

21 **Q** Did you enter into a plea agreement with the
22 State?

23 **A** Yeah. Are you saying did I agree to how much
24 time I'm going to get?

25 **Q** Yes, sir. Did you enter an agreement with the

1 State?

2 A Yes, sir.

3 Q Is it your understanding that as part of that

4 agreement, you agreed to testify truthfully in court?

5 A Yes, sir.

6 Q Is it also your understanding that by the State

7 reducing the charges and the State was going to make a

8 recommendation of 15 to 18 years for you?

9 A Yes, sir.

10 Q That's your understanding?

11 A Yes, sir.

12 Q And you are here to testify truthfully?

13 A Yes, sir.

14 Q Has any other promises been made to you or

15 threats about your testimony here today?

16 A No, sir.

17 Q Mr. Dendy, tell the jury a little bit about

18 yourself. Where are you from?

19 A I'm from Greenville, South Carolina.

20 Q Born and raised?

21 A Yes, sir.

22 Q Where did you go to high school?

23 A J.L. Mann.

24 Q Did you graduate?

25 A No, sir.

1 Q How far did you go?

2 A 9th grade.

3 Q Did you get your GED?

4 A No, sir.

5 Q Why did you drop out in 9th grade?

6 A With the wrong crowd, you know. Then I had
7 stayed back so many times to where I was real older than
8 everybody else that was in class with me. I ended up
9 quitting.

10 Q Have you ever used methamphetamine?

11 A No, sir.

12 Q Have you ever used any other drugs?

13 A Yes, sir.

14 Q What kind of drugs did you use?

15 A Marijuana and crack cocaine.

16 Q You ever been involved with selling marijuana
17 or crack cocaine?

18 A In my earlier years, no. When I was growing
19 up, I done sold.

20 Q When you were younger?

21 A Yes, sir.

22 Q How far back are we talking?

23 A Maybe when I was like 17.

24 Q And how old are you now?

25 A I'm 30-- fixing to be 39 next month.

1 Q You never used methamphetamine?

2 A No, sir.

3 Q You know the defendant in this case, Clyde
4 Davis?

5 A Yes, sir.

6 Q How do you know him?

7 A My daddy always work on cars, you know. He run
8 a mechanics shop. He had a shop closer to their
9 neighborhood. Everyday I used to go over to my daddy's.
10 He was right there in their neighborhood. That's how I
11 got to meet him.

12 Q And was this when you were a child?

13 A Yeah. A long time ago. Probably like 14, 15
14 years old.

15 Q And you and Clyde Davis become friends?

16 A Yes, sir.

17 Q Close friends?

18 A Pretty close.

19 Q Now, how did you get involved with selling
20 methamphetamine?

21 A Uh, I had a friend named Michael Robinson. I
22 used to go over to Michael Robinson house and I would sit
23 around with him and stuff. Me and him would, you know,
24 get high. You know, smoke blunts and stuff together.
25 You know, he was -- you know, over to his house, you

1 know, that's where they was doing -- you know, that's
2 what they was doing. You know what I mean? So he
3 basically turned me on to it.

4 Q You said he was doing. What were they doing?
5 I'm sorry. What was his name?

6 A Michael Robinson.

7 Q Michael Robinson. What were they doing at
8 Michael Robinson's house?

9 A Getting high and selling methamphetamines.

10 Q Okay. And you were hanging out with Michael
11 Robinson?

12 A Yes, sir.

13 Q What's your connection to him?

14 A Sir?

15 Q How do you know him?

16 A I met him through a friend of mine named Shane.

17 Q And you are at Michael Robinson's house getting
18 high with them. How does that lead you to
19 methamphetamine?

20 A By sitting there getting high with them, you
21 know what I'm saying, Michael Robinson had people, you
22 know, coming in and out, knocking on the door, you know,
23 dealing methamphetamines.

24 Q Okay. And how did you personally start selling
25 meth?

1 A Uh, one day, you know what I'm saying, I was
2 over to Michael Robinson house. I had seen him, you
3 know, serve some. I was asking him what it was or
4 whatever. He told me what it was, you know. And once he
5 told me what it was, you know, I ended up saying one day
6 -- I can't quite remember the exact date. But one day, I
7 was somewhere. It was like on the fourth of July. But I
8 don't remember what year it was. I went to go get my
9 kids some firecrackers from, uh, Mr. Firecracker. When I
10 pulled up at Mr. Firecracker, you know what I'm saying, I
11 ended up bumping into Davis.

12 Q Clyde Davis?

13 A Clyde Davis.

14 Q All right. What happened when you bumped into
15 Clyde Davis?

16 A We laughed. We tripped around. We talked. He
17 was like, uh, if I wanted some extra money, you know what
18 I'm saying or whatever, I could give him a call. He was
19 the one that, you know, had the methamphetamine and
20 stuff. I ended up giving him a call and got some of it
21 from him. Then, I ended up, you know, after I had seen
22 Mikey Mike, you know, him dealing with it at his house, I
23 took it back up there.

24 Q Okay. How much methamphetamine was it?

25 A The first time, it was like 3 -- 3.5 grams.

1 Q I just want to wrap my head around this. How
2 did that conversation just come up to someone that wasn't
3 involved with selling drugs, didn't even use
4 methamphetamine, how did you come to start selling drugs
5 with Clyde Davis?

6 A When I met up with him at, uh, Mr. Firecracker
7 on the fourth of July, he was letting me know what he
8 had, you know what I'm saying, that I could make money
9 off of if I choose to, you know. That's how it came
10 about. Boom. He mentioned the methamphetamine. I know
11 Mikey Mike do -- Michael Robinson and them, they deal
12 with the meth. So I grabbed the meth from him. I goes
13 to Mikey Mike house.

14 Q So is it accurate to say that he approached you
15 as a business opportunity to make money selling meth?

16 A Yes, sir.

17 Q Did you ever use meth?

18 A No, sir.

19 Q So whenever you sold meth, it was just to make
20 money?

21 A Yes, sir.

22 Q After that first time of selling that meth, you
23 sold to Michael Robinson?

24 A Yes, sir.

25 Q It was 3.5 grams?

- 1 A Yes, sir.
- 2 Q Did you continue to sell methamphetamine for
3 Clyde Davis after that?
- 4 A Yes, sir.
- 5 Q Who did you sell to?
- 6 A Amy Elizabeth Brock.
- 7 Q Did you sell to Michael Robinson anymore?
- 8 A Yes, sir.
- 9 Q How many more times did you sell to Michael
10 Robinson?
- 11 A At least 14 more times.
- 12 Q How much did you sell to him a time?
- 13 A 3 and 3.5 grams.
- 14 Q Every time?
- 15 A Uh, --
- 16 Q Was that your general rate?
- 17 A Yes, sir.
- 18 Q Your general amount was typically 3.5 grams?
- 19 A Yeah.
- 20 Q And how much did you charge him for three and a
21 half grams?
- 22 A I think it was about like \$250.
- 23 Q How would those deals take place?
- 24 A I would pull up. I would pull up, say, -- I
25 would pull up to, uh, either Michael Robinson's house or

1 I would pull up to Amy Brock's house.

2 Q Let's just stick with Michael Robinson for
3 right now.

4 A Okay.

5 Q Michael Robinson, after that first deal, how
6 did future deals take place?

7 A I would pull up. I would call Davis on the
8 phone and tell him what the order is. He would pull up
9 with the order. I would go to the car, grab the stuff
10 from Davis and walk it back in the house, get the money,
11 bring the money back to Davis and he would give me my cut
12 and we would go our separate ways.

13 Q How did you know that Michael Robinson needed
14 dope?

15 A He would ask me.

16 Q Did he stop by your house? Did he call you?

17 A Call me --

18 Q Did he text you?

19 A Called me on the phone.

20 Q So he called you on the phone.

21 A Yes, sir.

22 Q You would come to their house?

23 A Yes, sir.

24 Q Did Clyde Davis come with you?

25 A No, sir.

1 Q When did he arrive?

2 A All I had to do was when I get there, you know
3 what I'm saying, I would find out what Michael had, you
4 know, how much money Michael Robinson had. I would make
5 the call to get the stuff delivered.

6 Q Okay. So you show up at Michael Robinson's
7 house. They'd give you the money. Then you would call
8 Clyde Davis to bring you the methamphetamine?

9 A Yes, sir.

10 Q Is that how it worked every time with Michael
11 -- I'm sorry, with Michael Robinson?

12 A Yes, sir.

13 Q That was at least 15 times?

14 A Yes, sir.

15 Q And that was for an eight ball and three and a
16 half grams every time?

17 A Yes, sir.

18 Q What about Amy Brock, how did you get involved
19 with her?

20 A Met her through Michael Robinson.

21 Q How so?

22 A Just by being over to Mikey's and seeing her
23 one day, you know, coming over there.

24 Q Was she over at Michael Robinson's a lot?

25 A When I first -- when I first met her, you know,

1 from over there, I had seen her before I said something
2 to her. I seen her probably about like two or three
3 times or whatever. And then me and her ended up talking.

4 Q Okay. And did -- from meeting her at Michael
5 Robinson's house, did you start having a business
6 relationship with her involving methamphetamine?

7 A Yes, sir.

8 Q Tell the jury about that. How did that start?

9 A I was at Michael Robinson's house. I met Amy
10 Elizabeth Brock, you know. She was coming over there.
11 She used to spend money on methamphetamines with Michael
12 Robinson. Once I met her, you know, through Michael
13 Robinson, I started talking to her and saying, like, you
14 could say I probably would give a better deal, you know,
15 so I could make a little money off of her. I met her
16 with Michael Robinson. That's where I started.

17 Q How many times did you deal with her at Michael
18 Robinson's?

19 A Probably like once.

20 Q And did you actually make a sale there?

21 A Yes. And after that, you know, I found out
22 where she lived and I just started going to her house.

23 Q And that first sale that you make to Amy Brock
24 at Michael Robinson's house, how much methamphetamine did
25 you sell her?

1 A Three and a half grams.

2 Q And how did that transaction take place?

3 A I gave Michael -- I grabbed the three and a
4 half grams. I gave Michael the three and a half grams.
5 Michael grabbed the money from her and gave it back to
6 me.

7 Q Where did you get the three and a half grams?

8 A Clyde Davis.

9 Q And after that, you started going to Amy's
10 house?

11 A Yes, sir.

12 Q How -- how soon after that first deal did you
13 start going to Amy's house and selling?

14 A Maybe a week later.

15 Q And that next time, a week later, how did that
16 transaction come up?

17 A How did it go down?

18 Q How did -- how did you know she needed dope
19 again?

20 A Oh, when I first -- when I met her at Michael
21 Robinson's house, I gave her -- I gave her my phone. I
22 exchanged numbers with her. She called me, you know, and
23 let me know that she needed something. That's when I
24 ended up at her house.

25 Q That was about a week later?

1 A Yes, sir.

2 Q So she calls up and orders -- how much did she
3 order?

4 A Three and a half grams.

5 Q So that's an eight ball?

6 A Yes, sir.

7 Q When she called, did she ask for three and a
8 half grams or did she ask for an eight ball?

9 A I can't remember exactly how she would say it.

10 Q But they are the same thing?

11 A Yeah. It all balled down to where it would be
12 three and a half grams.

13 Q Okay. So Amy Brock called you up. She needs
14 three and a half grams of meth. What did you do?

15 A I rode to -- I rode to her house. I, uh, --
16 sometimes I would get out. On this particular day, I got
17 out because it was my first time over there. I sat down
18 with her. I talked to her. Then I made a phone call.
19 When I made the phone call, Davis would pull up with
20 whatever I ask him for. I would go to the car, get it
21 from Davis, walk it back in the house to her, get the
22 money, take the money back out to Davis. Then he would
23 give me my cut. He would go one way. I would go the
24 other way.

25 Q And is that the way that you would always deal

1 with Amy Brock?

2 A Yes, sir.

3 Q How many times did that exact scenario you just
4 described take place with Amy Brock?

5 A 15, 16 times, sir.

6 Q So 15 or 16 times, Amy Brock would call you and
7 say I need -- was it always the same amount of meth?

8 A No, sir.

9 Q All right. Did it ever become more?

10 A Yes, sir.

11 Q How much more?

12 A Uh, seven -- seven grams, sir.

13 Q How many times did she get seven grams?

14 A Uh, I can't remember exactly how many times she
15 got seven grams. But it was quite a few times, sir.

16 Q Quite a few? When we say quite a few, what
17 does that mean?

18 A Maybe like nine or ten times.

19 Q So nine or ten times, she got seven grams?

20 A Yes.

21 Q Seven grams. So that was a quarter ounce?

22 A Yes, sir.

23 Q So nine to ten times was a quarter ounce. Was
24 that included in the 15 to 16 times that you were talking
25 about?

1 A Yes, sir.

2 Q So nine to ten times was a quarter ounce. The
3 rest of those times, the other five or six would have
4 been an eight ball?

5 A Yes, sir.

6 Q Every single one of those times, it was that
7 same scenario. She called you. You come and get the
8 money and call Clyde Davis. He comes, gives you the
9 drugs. You give him the money and you give the drugs to
10 Amy Brock. Is that the same scenario?

11 A Not every time. You know what I'm saying? A
12 come of times, I didn't get to go in the house and take
13 it to her. She came outside.

14 Q So she came outside some of the times?

15 A Yes, sir.

16 Q Okay. Would she come right up to where you and
17 Clyde were?

18 A Yes, sir.

19 Q How many times would you say she came out?
20 More than once?

21 A Yes, sir.

22 Q Other than that, was it the same situation
23 always. Amy would call. You would come and get the
24 money and give the money to Clyde. Clyde gives you the
25 drugs and you give the drugs to Amy?

1 A Yes, sir.

2 Q And that happened 15, 16 times?

3 A Yes, sir.

4 Q How much was your cut of the money?

5 A Different. Sometimes he'd give me 75, 100.

6 Q So for each one of these deals, 75 to \$100?

7 A Yes, sir.

8 Q Now, is that for when you sold an eight ball or
9 for when you sold a quarter ounce?

10 A When I sold -- when I sold a quarter ounce, I
11 would probably get like 100, you know what I'm saying.
12 When I would sell an eight ball, he would probably give
13 me like 65, \$70.

14 Q Other than Amy Brock and Michael Robinson, did
15 you ever sell methamphetamine to anyone else?

16 A Yes, sir.

17 Q Who?

18 A I had -- sometimes I would make a sale for
19 Davis and rather than him giving me the money, he would
20 exchange me from the sale to give me like two grams, like
21 two grams of meth. I would go to like strip clubs and I
22 had strippers. I would like sell it to them and get the
23 money from it.

24 Q Okay. So that was how many grams at a time?

25 A Two.

- 1 Q Two. How many occasions did you do that?
- 2 A At least six to seven times, sir.
- 3 Q All right. So six to seven times, you'd get
- 4 two grams each time from Clyde Davis to take to a strip
- 5 club and give to strippers?
- 6 A Yes, sir.
- 7 Q Was there anyone else that you were selling
- 8 that methamphetamine to?
- 9 A No, sir.
- 10 Q Were you involved in selling any other drugs in
- 11 this time frame we're talking about here?
- 12 A No, sir.
- 13 Q And just to clarify, this is all -- we're
- 14 talking about 2010 to 2011 in this time frame, right?
- 15 A Yes, sir.
- 16 Q And these transactions all happened -- well,
- 17 the strip club that you're talking about, where was that?
- 18 Greenville?
- 19 A Yes, sir.
- 20 Q And Michael Robinson's house, where is that?
- 21 A Off of White Horse Road.
- 22 Q In Greenville?
- 23 A Yes, sir.
- 24 Q What about Amy Brock's house?
- 25 A Off White Horse Road, sir.

1 Q Did you ever sell methamphetamine at any place
2 other than those three places?

3 A No, sir.

4 Q What about any controlled purchases on you?
5 Did law enforcement ever do any undercover buys on you?

6 A (No response.)

7 Q Let me ask the question this way. You pled
8 guilty to two counts of distribution, right?

9 A Yes, sir.

10 Q What -- how did you get charged with two counts
11 of distribution? Where did you make those sales?

12 A To Amy Brock, sir.

13 Q Okay. Were those sells out of the ordinary
14 chain of events? Were they not the typical -- I don't
15 want to put words in your mouth. How were those sales
16 different from all the other sales?

17 A Those sales were different from the other sales
18 because I met her away from her house.

19 Q Is that -- are those the only two times you met
20 her away from her house?

21 A Yes, sir.

22 Q And those two times, where did the meth come
23 from?

24 A Clyde Davis, sir.

25 Q So far, all the methamphetamine that we talked

1 about so far has all come from Clyde Davis?

2 A Yes, sir.

3 Q Mr. Dendy, the guy you've been referring to as
4 Clyde Davis who was your source for methamphetamine, is
5 he in the courtroom today?

6 A Yes, sir.

7 Q Could you please identify him please.

8 A (Indicating.)

9 Q All right. Could you verbally say where he is
10 in the courtroom?

11 A Sitting right here in the white shirt.

12 Q And can you describe what he looks like?

13 A Light skin, heavy set.

14 MR. UNDERWOOD: Your Honor, I'd ask the Court
15 to take notice he's identified the defendant, Clyde
16 Davis.

17 THE COURT: All right. The record will so
18 reflect.

19 BY MR. UNDERWOOD:

20 Q And all of the deals that we just discussed,
21 all that methamphetamine came to you from Clyde Davis?

22 A Yes, sir.

23 Q Thank you. Please answer any questions that
24 Mr. Beasley has for you.

25 THE COURT: Mr. Beasley?

1 CROSS-EXAMINATION

2 BY MR. BEASLEY:

3 Q Mr. Dendy, uh, you stated earlier that you
4 started figuring out how to sell meth from hanging out at
5 Mikey Mike's house. But did you start getting it from
6 the beginning over there from the Hispanics just a little
7 bit before then?

8 A I don't know any Hispanics.

9 Q So you didn't meet anybody over there, Felipe
10 or any of those guys?

11 A I even know who that is.

12 Q Okay. Uh, first of all, Clyde is not your
13 cousin, correct?

14 A Correct.

15 Q He never fronted you any drugs, correct?

16 A He would just bring them. He wouldn't, like,
17 give it to me.

18 Q To go sell?

19 A Other than what I would make off the sales,
20 like as far as like the two grams or something like that
21 right there. He wouldn't front it to me. He would let
22 me have it. You know?

23 Q Okay. Uh, so you didn't have any other sources
24 for getting meth. All you had was Clyde, is that what
25 you're saying?

1 A I know -- I knowed more than Clyde. Yes, sir.
2 I know other people. I know one other person that had
3 it. You know what I'm saying? But he didn't have
4 anything to do with this.

5 Q So you only got -- I want to make sure my
6 question is clear. You only got meth from Clyde Davis,
7 is that correct?

8 A Yes, sir.

9 Q Okay. Uh, and, uh, I know you stated in some
10 statements to law enforcement that you had sex with Amy
11 Brock. Is that true?

12 A Yes, sir.

13 Q All right. As far as your plea agreement that
14 you signed, you pled guilty to the plea agreement with a
15 recommendation of 15 to 18 years?

16 A Yes, sir.

17 Q And you agreed to take a polygraph if they so
18 choose, correct?

19 A Would I agree to take a polygraph?

20 Q Yeah.

21 A You're asking did I agree to take a polygraph
22 or would I?

23 Q No, I'm asking you -- yeah, in the plea
24 agreement, it says you have to take a polygraph.

25 A Yeah.

1 Q Okay. And, uh, since you pled guilty pursuant
2 to your plea agreement, how many undercover buys have you
3 done since then?

4 MR. UNDERWOOD: Your Honor, may we approach
5 for a moment?

6 THE COURT: Yes.

7 (WHEREUPON, a bench conference is held off the
8 record.)

9 THE COURT: Yes, sir.

10 BY MR. BEASLEY:

11 Q How many undercover buys have you done since
12 this plea agreement you signed?

13 A Do I got to answer this?

14 THE COURT: It's going to be one -- it's
15 going to be one question about this and that's it,
16 but you've got to answer this question. You don't
17 need to go into any details.

18 THE WITNESS: One.

19 BY MR. BEASLEY:

20 Q You've only done one undercover buy since the
21 plea agreement?

22 A Yeah.

23 Q That's it?

24 A Yeah.

25 Q Okay. So you've only set up one person since

1 your guilty plea?

2 A You asked me how many buys I made. You didn't
3 ask me how many people I sat up. I answered you how many
4 buys I made. That's what you asked me.

5 Q You are right.

6 A That's right.

7 Q How many people did you set up?

8 A Uh, three.

9 Q Three?

10 A Yeah.

11 Q Okay. And, uh, is it your position that since
12 you set up those three that you're going to get a better
13 sentence than the 15 to 18 years?

14 A No, sir. Nobody offered me nothing.

15 Q Do you think you're going to do better sentence
16 than the 15 to 18 years?

17 A I have no idea, sir. I pray I do.

18 Q You realize, you know, pursuant to your plea
19 agreement that if you lie whatsoever that that violates
20 your plea agreement, do you know that?

21 A Now I do, sir.

22 Q You didn't know that?

23 A No, sir.

24 Q Okay. Well, I'll tell you. Your plea
25 agreement says if you lie or commit any other crimes, you

1 will violate your plea agreement. All right. You gave
2 -- tell me this, how many times have you lied to the
3 investigators in this case?

4 A How many times have I lied to the
5 investigators? At the beginning, at the very beginning,
6 you know what I'm saying, when he first came and got me,
7 I lied to them. You know what I'm saying. After I lied
8 to them, from that point on, I talked to my lawyer and
9 stuff. I realized it wasn't no need in lying to them.
10 Just tell the truth. And ever since then, I told the
11 truth.

12 Q So answer my question. How many times did you
13 lie to the investigators?

14 A Once.

15 Q Only one time?

16 A Yes, sir.

17 Q Okay. So when was the first time you met with
18 investigators?

19 A I can't remember.

20 Q Would May 18th, 2012 sound right?

21 A I have no idea. I don't remember. But I'm
22 saying you got it on paper, right?

23 Q So that sounds about right. You don't dispute
24 it?

25 A Uh-huh.

1 Q And after that May 18th, 2012 meeting with law
2 enforcement, they made you take a polygraph, didn't they?

3 A Yes, sir.

4 Q All right. Did you decide to change your story
5 after that polygraph?

6 A Yes, sir.

7 Q You did?

8 A Yes, sir.

9 Q After you changed your story for the second
10 time, they confronted you again, didn't they? And they
11 said that's not the truth, is it? And you changed your
12 story again, didn't you?

13 A I can't recall that.

14 Q Okay. What if I -- let me remind you. You
15 gave a statement with investigators on May 18th, 2012.
16 That sound right? You already said it did. On May 25th,
17 a week later, you took a polygraph. May 25th, that same
18 day, you meet with investigators and you told them you
19 lied. They asked you to explain, you know, why you --
20 how many times you dealt with Amy Brock, didn't he? And
21 you said, well, it wasn't four times, it was really about
22 eight times. And they said that's not true, you dealt
23 with her more than that, didn't they?

24 A I told them 15 -- anywhere from 14 to 15 times.

25 Q That's right. You changed it again and said 15

1 to 20 times. In fact, after the fourth time of you
2 lying, you actually finally said well, I actually get it
3 from Bookie. I get it from Bookie, didn't you?

4 A I didn't say Bookie. I said Bokie.

5 Q I don't know how to say it. I apologize. But
6 you get it from Bokie, correct?

7 A I didn't say that I get it from Bokie. I said
8 I can get them some from Bokie.

9 Q You actually told them that you got it from --
10 you sold to her 50 to 70 times.

11 A No.

12 Q And you said I got it half the time from Clyde
13 and half the time from Bokie. 15 to 20 times from each
14 of them. Didn't you?

15 A I can't recall, sir.

16 Q Okay. You had some discussions with Bokie
17 since you pled, haven't you?

18 A No, sir.

19 Q You never told them Bokie?

20 A No, sir.

21 Q You never told Bokie, I'm going to burn Clyde
22 Davis and I'm going to protect you?

23 A No, sir.

24 Q Okay. And Bokie, he has two cars, doesn't he?

25 A I don't know nothing about no cars.

1 Q You don't know anything about what Bokie
2 drives?

3 A No, sir.

4 Q But you said you can get meth from Bokie. You
5 told the investigators that.

6 A But that -- getting meth from him and knowing
7 what he drives is two different things.

8 Q So you never dealt with Bokie?

9 A I dealt with Bokie before, sir. I know who
10 Bokie is, but I don't know what Bokie drive.

11 Q So you never saw his car?

12 A No, sir.

13 Q Okay. But you agree now that you lied four
14 different times to law enforcement?

15 A One time, sir.

16 Q Okay. What kind of car does, uh, Clyde Davis
17 drive?

18 A I have no idea, sir.

19 Q How many times have you been arrested for
20 selling drugs?

21 A Never, sir.

22 Q Never been arrested. This is your first
23 arrest?

24 A You said for selling drugs.

25 Q All right. How many times have you been

1 arrested?

2 A I don't know.

3 Q I have no more questions.

4 THE COURT: All right. Yes, sir.

5 REDIRECT EXAMINATION

6 BY MR. UNDERWOOD:

7 Q Mr. Dendy, you said to your knowledge one time
8 that you lied to law enforcement.

9 A Yes, sir.

10 Q Mr. Beasley is talking about second, third and
11 fourth times. All those -- is he talking about the same
12 lie?

13 A I have no idea, sir.

14 Q How many times did you lie to law enforcement?

15 A Once.

16 Q What was that lie?

17 A About the amount of times that I been to Amy
18 Brock's house.

19 Q What was the false statement? Like, when you
20 lied, what did you say?

21 A Uh, I said that I had -- I can't quite recall.
22 I'm thinking that I said that I been there like six or
23 seven times when, in fact, I had been there like 14, 15
24 times, sir.

25 Q Okay. That's the only time you lied?

1 A Yes, sir.

2 Q And you took a polygraph in between?

3 A Yes, sir.

4 Q Why did you lie?

5 A Trying to hope I could just save myself, sir.

6 Q Now, by save yourself, you didn't lie and say
7 you had nothing to do with this, did you?

8 A No, sir.

9 Q Were you just minimizing your involvement?

10 A Yes, sir.

11 Q The truth was, you actually had more dealings
12 and more drug deals than you originally said?

13 A Yes, sir.

14 Q And when confronted with that, did you tell the
15 truth?

16 A Yes, sir.

17 Q Now, there's talk about this other individual
18 named Bokie?

19 A Yes, sir.

20 Q Any dealings that you had with Bokie, are those
21 separate and apart from the 15 to 16 times that you dealt
22 with Amy Brock and the times that you dealt with Mr.
23 Davis?

24 A Yes, sir.

25 Q So the times that we testified the first time

1 around, you were just talking about the dealings with
2 Clyde Davis?

3 A That's what I thought you were asking me, sir.

4 Q Right. I'm just making it clear. So any
5 dealings you had with Bokie are in addition to those
6 times, is that right?

7 A Yeah, but I'm not in trouble for that, sir.

8 Q Right. I'm just trying to clarify when Bokie
9 came up.

10 A Okay.

11 Q That's a separate matter?

12 A Yes, sir.

13 Q Involving Clyde Davis, there were 15 to 16
14 times that you went to Amy Brock?

15 A Yes, sir.

16 Q And 14 or 15 times that you went to Michael
17 Robinson?

18 A Yes, sir.

19 Q And those all involve Clyde Davis?

20 A Yes, sir.

21 MR. UNDERWOOD: Beg the Court's indulgence,
22 Your Honor.

23 THE COURT: Yes, sir.

24 BY MR. UNDERWOOD:

25 Q When you were asked what kind of car Clyde

1 Davis drives, do you know what he drives now?

2 A No, sir.

3 Q Have you had any contact with him since you
4 were arrested on this charge?

5 A No, sir.

6 MR. UNDERWOOD: Nothing further, Your Honor.

7 THE COURT: Mr. Beasley?

8 MR. BEASLEY: Just briefly, Your Honor.

9 RECCROSS EXAMINATION

10 BY MR. BEASLEY:

11 Q Mr. Dendy, just to clarify for the jury, you
12 met with law enforcement on May 18, 2012 and gave a
13 statement, correct?

14 A Yes, sir.

15 Q Okay. And then you went and met with law
16 enforcement again on May 25th and took a polygraph,
17 correct?

18 A Yes, sir.

19 Q And the only two questions they asked you were
20 other than the four times you sold meth, have you only
21 sold four times to Amy. None of those four times you
22 ever sold meth at Amy's house. Those are the only two
23 questions, right?

24 A Yes, sir.

25 Q Okay. So then on that same day, you met with

1 the investigators with your lawyer. And you insisted
2 that you only sold to Amy four times, correct?

3 A After I took the polygraph test, I told them
4 the truth. I said I had sold to them, you know, like 15
5 to 16 times.

6 Q Let me ask -- let me state this to you and you
7 tell me if this sounds right. After the polygraph, you
8 and your lawyer met with the investigators. You swore up
9 and down you only sold four times. Then they confronted
10 you and they said we know that's not true. Then you said
11 alright. I'm ready to tell the truth, right?

12 A I can't recall that. All I can know -- all I
13 know is I took the polygraph test. After I took the
14 polygraph test, I told the truth.

15 Q All right.

16 A I told them how many times it was.

17 Q I'm just getting it right. So May 18th is one.
18 Then the polygraph, that's two. Then they confronted you
19 once. That's three. Then they confronted you again.
20 That's four. Sound right?

21 A No, sir.

22 MR. BEASLEY: No more questions, Your Honor.

23 THE COURT: All right. Anything else?

24 MR. UNDERWOOD: Just one question, Your
25 Honor.

REDIRECT EXAMINATION

BY MR. UNDERWOOD:

Q Mr. Dendy, has your testimony today been 100 percent truthful?

A Yes, sir.

MR. UNDERWOOD: Nothing further, Your Honor.

THE COURT: Anything else, Mr. Beasley?

RECCROSS EXAMINATION

BY MR. BEASLEY:

Q You understand if you been dealing with Bokie on the side, that would violate your agreement. You understand that?

MR. UNDERWOOD: Objection, Your Honor.

Beyond the scope.

THE COURT: I'll allow it.

BY MR. BEASLEY:

Q You understand that, Mr. Dendy?

A I don't deal anything on the side. I don't deal nothing no more, sir. You know, I changed my life.

Q I didn't ask you -- all I asked you is if you're still dealing with Bokie.

A I don't understand.

MR. BEASLEY: All right. No more questions.

THE COURT: Anything else?

MR. UNDERWOOD: Nothing further, Your Honor.

1 **THE COURT:** Sir, you can step down.

2 Ladies and Gentlemen, we've come to a good
3 point for our afternoon break. I'll ask you to step
4 to your jury deliberation room.

5 **(WHEREUPON, the jury exits at approximately**
6 **3:27 p.m.)**

7 **THE COURT:** I'll just remind y'all. If y'all
8 would, just stay seated until this jury leaves. I
9 appreciate it.

10 You're fine. You're fine. I was really
11 talking to Mr. Beasley.

12 Okay. All right. We'll be in recess for 10
13 minutes.

14 **MR. UNDERWOOD:** Your Honor, can Mr. Davis be
15 released?

16 **THE COURT:** As long as --

17 **MR. UNDERWOOD:** I'm sorry. Mr. Dendy.

18 **THE COURT:** Yeah, as long as Mr. Beasley
19 doesn't have any objection.

20 **(WHEREUPON, a short recess is taken.)**

21 **THE COURT:** All right. Y'all ready to bring
22 the jury back in?

23 All right. Let's get the jury.

24 **(WHEREUPON, the jury enters at approximately**
25 **3:48 p.m.)**

1 **THE COURT:** All right. Yes, sir.

2 **MR. UNDERWOOD:** Thank you, Your Honor. The
3 State's next witness is Agent Ashley Asbill.

4 **ASHLEY ASBILL**

5 having first been duly sworn, testifies as follows:

6 **DIRECT EXAMINATION**

7 **BY MR. UNDERWOOD:**

8 **Q** Good afternoon, Agent Asbill.

9 **A** Afternoon.

10 **Q** Please introduce yourself to the jury. Tell
11 them a little bit about yourself and your background in
12 law enforcement.

13 **A** Uh, my name is Brunson Ashley Asbill. I work
14 for the, uh, State Law Enforcement Division. Previously,
15 I worked for the City of Clinton for seven years. I
16 worked for the ABC Commission for four. I been with the
17 State Law Enforcement Division around 19.

18 **Q** And how long have you -- in what capacity do
19 you work with SLED?

20 **A** I work in the, uh, Special Operations Unit.
21 They keep changing the name. But basically, it
22 investigates narcotics, alcohol and gaming crimes.

23 **Q** How many years of experience do you have in
24 investigating narcotics crimes?

25 **A** Uh, probably 19 years.

1 Q Have you had any specialized training in
2 narcotics investigations?

3 A Yes, I have.

4 Q What kind of training?

5 A I been to numerous narcotics schools,
6 identification schools, investigation schools.

7 Q Now, Agent Asbill, how did you come to be
8 involved -- first, what was your role in this
9 investigation known as Operation Icehouse?

10 A My role in this investigation, I was approached
11 around the end of 2009, 2010 by Investigator Cooley and
12 Investigator Ayers with the Greenville County Sheriff's
13 Office. At that time, they had developed an informant
14 who had indicated that she was able to purchase
15 methamphetamines from multiple counties, Anderson,
16 Pickens, Greenville.

17 Q And who was that informant?

18 A Tonya Smith.

19 Q Is that the same Tonya Smith that testified
20 earlier today?

21 A That is correct.

22 Q And as a representative for SLED, were you
23 considered to be the case agent for this investigation?

24 A I was the SLED representative on the case. We
25 worked it jointly. Investigator Ayers was the

1 investigator from Greenville county. Investigator
2 Barwick, Brett Barwick, was the investigator from Pickens
3 county. And we all three worked jointly.

4 Q So that was an interagency investigation?

5 A That's correct. Yes.

6 Q And those are the three primary agencies
7 involved?

8 A Yes, sir. That's correct.

9 Q Once that confidential informant, Tonya Smith,
10 was identified, how did this investigation develop?

11 A Uh, once she was identified, what we did, we
12 made a series of some controlled purchases. We also
13 identified some targets that she knew she could buy
14 methamphetamines from or who she identified as some of
15 her sources. Uh, from that, we evolved and initiated a
16 Grand Jury case and presented it and it was approved to
17 be worked as a Grand Jury case, which means it just ran
18 -- overlapped counties basically.

19 Q And how did -- first, can you explain to the
20 jury what a historical conspiracy case is.

21 A A historical conspiracy case is when you have
22 an individual that's cooperating and you approach other
23 individuals that you have buys made from. You basically
24 talk to them about their past drug involvement or drug
25 history so to speak and whether or you they are using,

1 buying, who they buy from, if they are selling, who are
2 they selling to. That sort of thing.

3 Q And with a historical conspiracy case, do you
4 typically have large amounts of drugs found on these
5 people?

6 A Sometimes. Sometimes we do and sometimes we
7 don't.

8 Q And in situations where you don't, why is it
9 still considered a conspiracy case?

10 A It's conspiracy case because the amount of
11 drugs that passed from hand to hand, what we generally
12 use is that weight. If it's past -- if it starts out as
13 an ounce and is broken down to several different grams
14 that go to several different people, all those people are
15 involved in the selling of that ounce or the
16 disseminating of that ounce.

17 Q And I guess, as the name would suggest in
18 historical conspiracy, does that mean that we're talking
19 about events that have already taken place in the past?

20 A That's correct. Drug history, their history,
21 who they sold to in the past, correct.

22 Q So is it common for -- in dealing with a
23 historical case, is it common for the drugs to already be
24 gone by the time law enforcement is involved?

25 A Absolutely. Yes.

1 Q If you could, Agent Asbill, this is kind of a
2 two-part question. Can you explain to the jury, one, how
3 this case affected multiple counties and how the scope of
4 the case developed?

5 A Yeah. Uh, based on interviews and based on the
6 informant, Ms. Smith, we were able to make a series of
7 controlled purchases there again. Some of the purchases
8 occurred in Pickens county. Some of the purchases
9 occurred in, uh, Greenville County. As the investigation
10 progressed and other individuals agreed to cooperate once
11 they were approached by law enforcement, we made some
12 buys in Anderson County. Made more buys in Greenville
13 county using different informants.

14 Q How many different conspiracy groups did the
15 investigation identify?

16 A It's three different conspiracy groups that
17 were identified in this one case.

18 Q And out of those three groups, is one of those
19 groups -- well, explain what the three groups are.

20 A We had one group that, as high as a week ago
21 with the investigation was -- we call it the North
22 Carolina group. Most of the dope came out of the
23 Asheville area, up that way. The second group, uh, we
24 identified as high as we could go, came out of the line
25 of Georgia. That's where the methamphetamines were

1 coming out of Atlanta and coming back to Greenville,
2 Pickens. The third group was a Greenville group but it
3 also -- we had buys in Pickens. Greenville and Pickens.
4 It was a smaller group.

5 Q And that third group, is that the group
6 involving this trial here today?

7 A That is correct.

8 Q Over the grand scheme of the whole -- whole
9 investigation, how many different defendants are we
10 talking about roughly?

11 A 27. Roughly 27.

12 Q And that's over several different conspiracy
13 groups?

14 A That is correct.

15 Q How about this particular conspiracy group?

16 A This particular conspiracy group, we had six.

17 Q Who were they?

18 A Clyde Bowen Davis, Amy Elizabeth Brock,
19 Nicholous Dendy, Brian Keith Sekerchak, Michael Wayne
20 Robinson and Joshua Byers.

21 Q And how did the investigation of this
22 particular conspiracy group play out from the beginning?

23 A From the beginning -- very beginning, we made,
24 uh, some controlled purchases from Amy Brock, from, uh,
25 Michael Robinson, Josh Byers, Keith Sekerchak and Nick