

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Brian M. Gibbons, Circuit Court Judge

ANTONIO EMERSON TATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001753

APPENDIX

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the State failed to provide sufficient evidence that Tate engaged in a conspiracy to sell methamphetamine?
- II. Whether the trial court erred by prohibiting trial counsel from cross-examining co-defendants about their potential sentences in violation of the Confrontation Clause of the United States Constitution?
- III. Whether the trial court erred by permitting testimony by an investigator for the State who made improper legal conclusions?

STATEMENT OF THE CASE

On December 13, 2011, the trial court filed a Superseding Indictment charging Defendant/Appellant Antonio Emerson Tate ("Mr. Tate") with conspiracy to traffic more than 400 grams of methamphetamine between November 1, 2009 and November 8, 2011. On May 31, 2013, a jury found Tate guilty, and the trial court imposed a term of 25 years of incarceration. Mr. Tate timely filed a Notice of Appeal. This appeal follows.

STATEMENT OF THE FACTS

A. The Trial Court Precludes any Inquiry into the Mandatory Minimum Sentences Co-Defendants Faced Prior to their Cooperation.

On the first day of trial, prior to the start of the State's case in chief, the trial court addressed defense counsel's request to ask the State's witnesses about the mandatory minimum sentences they faced prior to their cooperation with the State. (R. Vol. I p. 144, lines 9-17.) The trial court declined this request. (R. Vol. I pp. 144-147.) Thus, the trial court prevented defense counsel from drawing a comparison between the length of sentence the cooperating witnesses faced before their cooperation and the length of sentence the witnesses faced after his cooperation as a manner of establishing bias. (*See id.*)

B. The Testimony of the Co-Conspirators.

Because the State had not seized any contraband or other physical evidence linking Mr. Tate to the conspiracy, the prosecution relied primarily on the testimony of co-defendants to establish Mr. Tate's participation. The State called the co-conspirators to testify against him; however, none of the co-

conspirators testified to any agreement, common intention, or plan with regard to Mr. Tate's role in the conspiracy to traffic methamphetamine.

Wendy Christine Lollis

Ms. Lollis testified that she began using methamphetamine when she was 18 or 19. (R. Vol. I pp. 53-54.) She admitted that she was a meth addict at this time. (R. Vol. I, p. 153, lines 4-6.) She also admitted that she dealt methamphetamine for 5 or 6 years prior to the trial. (R. Vol. I p. 152, line 22.) Although Ms. Lollis initially denied any involvement with any other crimes in her past, (R. Vol. I p. 153, line 9), she subsequently confirmed she had a long criminal history, including convictions for "failing to stop for a blue light," for "possession of a stolen vehicle," for "residue in bag," and for "paraphernalia." (R. Vol. I p. 153, lines 11-18.) She also admitted that she pleaded guilty to charges related to the conspiracy alleged in this case after reaching a plea deal with the State. (R. Vol. I p. 153, line 19 to p. 154, line 3.)

Though she failed to indicate the basis for her knowledge, Ms. Lollis claimed that her boyfriend purchased methamphetamine from Mr. Tate in Georgia. (R. Vol. I p. 156, lines 1-6.) She also testified that she travelled to Georgia to purchase meth from Mr. Tate after her boyfriend became incarcerated. (R. Vol. I p. 156, lines 19-20.) Ms. Lollis claimed that she introduced a number of the other co-defendants to Mr. Tate, including Jason Griffin, and that they purchased meth from him as well beginning in early 2009. (R. Vol. I p. 159, lines 1-10; p. 162, lines 12-17.) Upon her arrest, Ms. Lollis

began to cooperate with the State. She initially picked Mr. Tate from a photo-array in September of 2011. (R. Vol. I p. 174, lines 2-14.)

Ms. Lollis admitted on cross-examination that, even though she claimed to have used her cellular phone to contact Mr. Tate, she did not have Mr. Tate's phone number. (R. Vol. I p. 182, lines 18-24.) Nor could she remember his specific area code, or even the general area code for Atlanta, where Mr. Tate lived. (R. Vol. I p. 184, lines 8-11.) Ms. Lollis admitted that she went to "[t]wo or three different apartment buildings" but could not recall any addresses, the names of any of the different apartment complexes, or the specific directions to get to the apartment complexes. (R. Vol. I p. 188, lines 18-19, 23-25.) Regarding a purported transaction that took place in the back of a Shell gas station, Ms. Lollis surmised that the owner of the station probably has video surveillance, but admitted that she had never seen any video of the transaction. (R. Vol. I p. 190, lines 3-11.) In fact, Ms. Lollis admitted that she had no photographs of her with Mr. Tate, no videos of her with Mr. Tate, no audiotapes recording any conversations she claimed she had with Mr. Tate, no cell phone records or any other physical evidence to corroborate her testimony. (R. Vol. I p. 196, line 20 to p. 197, line 15.)

Ms. Lollis admitted that she received a "substantial reduction" in her sentence in exchange for her cooperation. (R. Vol. I pp. 198-199.) She did not divulge the sentencing range of her original charge, however. Nor did she testify that Tate exercised any control over her drug sales, shared a plan with her

concerning such sales, or received a percentage or any other benefit from such sales.

Gary Jason Griffin

Gary Jason Griffin ("Griffin") testified he is currently incarcerated. (R. Vol. I p. 211, lines 3-5.) He has been involved with drugs since he was 13 when he started using marijuana. (R. Vol. I p. 210, lines 2-11.) After moving to cocaine and methamphetamine use, he began to deal drugs to support his habit. (R. Vol. I pp. 210-211.)

Griffin eventually went to prison for two distribution of methamphetamine convictions. (R. Vol. I p. 213, lines 1-4.) When he got out of prison in 2008, he started doing construction work, but also started using methamphetamine again once he started hanging out with his friend Chris Simmons ("Simmons"). (R. Vol. I p. 213, lines 14-19.) Griffin went to prison again in March 2010 after the police caught him with 56 grams of methamphetamine. (R. Vol. I p. 247, lines 1-10.)

Soon after Griffin met Lollis he started dealing methamphetamine with her. (R. Vol. I p. 217, lines 9-13.) Griffin testified that about a month after he met Lollis he went with her and his ex-wife, Rachel Eades ("Eades"), to Atlanta to meet Tate. (R. Vol. I p. 218, line 18 to p. 219, line 11.) They allegedly met Tate at a house where Griffin purchased 28 grams of methamphetamine for \$1400. (R. Vol. I p. 222, lines 13-19.) After the transaction, Eades drove Lollis and Griffin back to South Carolina. (R. Vol. I p. 224, lines 22-25.)

Griffin testified he later returned from South Carolina to get an ounce of methamphetamine from Tate but received cocaine instead. (R. Vol. I p. 225,

lines 1-11.) Lollis and Eades accompanied Griffin on this trip as well. (R. Vol. I p. 225, lines 16-18.) After completing this transaction and another purchase of methamphetamine at a Shell Gas station, Griffin claims to have returned to see Tate on 15-20 additional occasions. (R. Vol. I p. 230, line 1 to p. 231, line 6.) While at first he only purchased by the ounce, Griffin claimed that he eventually began to make quarter-pound purchases. (R. Vol. I p. 236, lines 1-25.) These transactions with Tate all took place during a three-month time frame. (R. Vol. I p. 243, lines 8-12.)

Griffin testified that on one of these transactions, Tate traveled from South Carolina and met them at Griffin's house. (R. Vol. I pp. 243-244.) On this occasion Tate allegedly brought a quarter ounce of methamphetamine for Griffin and, though he "can't recall or say for a fact," Griffin believed Tate gave Lollis a quarter ounce too. (R. Vol. I p. 245, lines 9-20.) Unlike Lollis, who testified that Tate changed numbers on several occasions, Griffin testified he only called Tate at one number during their association. (R. Vol. I p. 246, lines 10-12.)

Griffin identified Tate in a photo-array, and again identified him in Court. (R. Vol. II p. 252, lines 1-20; p. 254, lines 6-21.) However, Griffin could not say for certain whether the individual he identified was Tate or Tate's twin brother. (R. Vol. II p. 256, line 22 to p. 257, line 12.)

Like Lollis, Griffin did not have any cellular phone records indicating that he called Tate. (R. Vol. II p. 261, lines 21-25.) Although he kept a ledger of his drug transactions, this book did not provide any evidence that he purchased drugs from Tate, or the quantity of drugs he purchased, because the book only

provided the names of people who owed him money. (R. Vol. II p. 260, lines 8-10.) Griffin had no receipts indicating he had been to Atlanta during the period he allegedly purchased drugs from Tate. (R. Vol. II p. 260, line 21 to p. 261, line 25.) He never gave any empty methamphetamine packages originating from Tate to law enforcement. (R. Vol. II p. 267, lines 1-11.)

Griffin admitted to pleading guilty for his involvement in this matter. (R. Vol. II p. 267, lines 23-25.) He was initially charged with conspiracy for trafficking 400 grams or more of methamphetamine. (R. Vol. II p. 268, lines 1-3.) He did not, however, testify about the length of the sentence he originally faced prior to his receipt of a negotiated plea deal of 15 to 20 years in prison in exchange for his cooperation. (R. Vol. II p. 268, lines 6-9.) Nor did he testify that Tate exercised any control over his drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales.

Rachel Elizabeth Eades

Rachel Elizabeth Eades ("Eades") testified Griffin introduced her to methamphetamine. (R. Vol. II p. 278, lines 9-10.) Eades met Lollis in 2009 through Griffin. (R. Vol. II p. 279, lines 13-15.) Rachel claims she overheard Lollis tell Griffin that she had a friend in Atlanta who could sell him inexpensive methamphetamine. (R. Vol. II p. 280, lines 3-9.) Eades testified that she went with Griffin to Georgia to buy methamphetamine at a Waffle House in January 2010. (R. Vol. II p. 281, lines 6-10.) She said Griffin purchased methamphetamine from Tate outside in the parking lot while she ate. (R. Vol. II

p. 282, lines 3-12.) Eades claimed that she went with Griffin to Georgia on eight to ten other occasions to purchase meth. (R. Vol. II p. 284, lines 1-19.)

Some purchases took place at an apartment. (R. Vol. II p. 285, lines 5-11.) Another purchase took place at a strip bar. (R. Vol. II p. 295, lines 15-18.) Griffin would purchase an ounce or more of methamphetamine at these transactions. (R. Vol. II p. 289, lines 4-8.) Eades, however, did not know any of the addresses for the locations where Griffin purchased methamphetamine from Tate. (R. Vol. II p. 306, lines 1-24.) Eades testified that she never knew Tate had a twin brother, but she was able to identify Tate in court. (R. Vol. II p. 321, lines 20-22; p. 323, lines 6-23.)

Eades admitted that she committed felony child neglect and fraud. (R. Vol. II p. 318, lines 1-18.) She also acknowledged that as a result of this investigation, the State charged her with conspiracy to traffic 400 grams or more of methamphetamine. (R. Vol. II p. 318, lines 19-21.) She pled guilty to this charge in exchange for a recommendation of a 7 to 10 year term of incarceration, substantially lower than the sentence she would have received. (R. Vol. II p. 319, lines 1-24.) She did not divulge the sentencing range of her original charge, however. Nor did she testify that Tate exercised any control over her drug sales, shared a plan with her concerning such sales, or received a percentage or any other benefit from such sales.

Christopher Nolan Bishop

Christopher Nolan Bishop ("Bishop"), a user of marijuana and hallucinogenic mushrooms, with felony convictions for bank robbery and making

a bomb threat, chose to become a confidential informant ("CI"). (R. Vol. II p. 370, line 4 to p. 371, line 2.) After completing six buys as a CI, Bishop was given his final assignment: purchase meth from Tate in Atlanta. (R. Vol. II p. 389, lines 11-18; p. 390, lines 8-12.)

According to Bishop, he contacted Chad Ayers of the Greenville County Police Department Vice Squad, who "wired [him] up," and gave him a thousand dollars to make the controlled purchase with another co-conspirator, Albrie Bashaw ("Bashaw"). (R. Vol. II p. 377, lines 4-21.) Bishop testified that they never consummate the transaction; instead, they drove around for an hour and a half because Tate came to suspect that an unmarked police car was following him. (R. Vol. II p. 380, lines 1-7.) Tate eventually called off the transaction. (R. Vol. II p. 383, lines 6-8.)

Not only did Bishop fail to acquire the meth, he failed to record any of the conversations because the wire recorder they gave him had technical problems. (R. Vol. II p. 377, line 22 to p. 378, line 7.) Bishop returned to South Carolina empty-handed. (R. Vol. II p. 383, lines 9-10.) Sometime after this incident, Bishop identified Tate in a photographic lineup. (R. Vol. II p. 383, line 21 to p. 384, line 13.)

Charles Javin Adams

Charles Javin Adams ("Adams") started using methamphetamine in 2001. (R. Vol. II p. 479, lines 9-11.) He started using methamphetamine after he was charged with distributing cocaine. (R. Vol. II p. 479, lines 1-11.) Adams stopped

using methamphetamine after he got indicted in this case, but since fell back into his addiction. (R. Vol. II p. 480, lines 1-12.)

Adams testified that his friend named Chad Moore asked him to accompany him to Atlanta to help him get drugs from Tate. (R. Vol. II pp. 483-484.) Adams subsequently traveled to Atlanta between eight and thirteen times to purchase meth from Tate, sometimes with Bashaw and sometimes with Moore. (R. Vol. II p. 487, line 23 to p. 488, line 20.) According to Adams, after he was sentenced to house arrest, he began sending Bashaw along with a "driver" named Norman Trebuchon to purchase the meth from Tate. (R. Vol. II p. 489, lines 1-15.)

Adams asserted he would call Tate's cellular phone when he wanted to make a deal. (R. Vol. II p. 497, lines 22-24.) Like Lollis, Adams testified that Tate changed his telephone number several times. (R. Vol. II, p. 498, lines 1-18.) Adams claimed Tate came to Adam's apartment in South Carolina on several occasions. (R. Vol. II, p. 498, lines 19-24.) Adams also testified about the aborted controlled purchase with Bishop. Tate allegedly told Adams to never send Bishop again, because Bishop had been "tailed." (R. Vol. III p. 504, lines 1-25.)

Sometime after this incident, Adams became a CI. (R. Vol. III p. 505, lines 5-15.) Adams identified Tate in a photo lineup and was certain that he bought methamphetamine from Tate and not Tate's brother. (R. Vol. III p. 517, lines 1-25; p. 542-543.) Adams pled guilty in this case. (R. Vol. III p. 481, lines 9-13.)

When asked if he was just trying to get the best deal by “rattin” everybody out, he said, “[e]verybody tried to get ahead in life.” (R. Vol. III, p. 523, lines 17-23.) When asked if he was providing false testimony, he stated, “[t]oday no, sir, I, if I am it is not on purpose, it is – I’m answerin’ you to the best of my ability.” (R. Vol. III p. 524, lines 1-4.) Adams admitted that the prosecution told him that if he could not remember how many times he went down to Atlanta, he should “low-ball how many times he went.” (R. Vol. III p. 515, lines 11-21.) He agreed that they did not want him to “over dramatically” lie. (R. Vol. III p. 516, lines 6-8) Adams could not name an address where any drug exchange with Tate transpired. (R. Vol. III p. 525, line 16 to p. 526, line 15.)

He indicated he provided the prosecution with his house phone records reflecting conversations with Tate, though he did not have any cellular phone records. (R. Vol. III p. 526, lines 11-22.) He could not remember Tate’s number. (R. Vol. III p. 527, lines 10-18.) Adams admitted that he had conducted controlled buys in the past, but never made a controlled purchase from Tate. (R. Vol. III p. 530, lines 5-18.)

As part of his guilty plea, Adams agreed with the State to lesser charges than he originally faced. (R. Vol. II p. 481, lines 21-23.) He was facing a charge of trafficking 400 grams or more of methamphetamine, but was allowed plead guilty to the trafficking only 10 to 28 grams. (R. Vol. III p. 522, lines 3-19; p. 524, lines 5-8.) As a result of this agreement, Adams faces a sentence of between three to six years in prison, though he admitted he had purchased “pounds” of methamphetamine. (R. Vol. III p. 524, lines 17-18; Vol. II p. 482, line 1.)

Adams did not divulge the sentencing range of his original charge. Nor did Adams testify that Tate exercised any control over his drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales.

Albie Bashaw

Albie Bashaw testified she began using methamphetamine when she was fifteen and began selling meth in 2009, when she turned 21. (R. Vol. III p. 545, lines 13-14, 23-25; p. 546, lines 1-11.) She sold methamphetamine in ounce to quarter pound quantities. (R. Vol. III p. 548, lines 1-3.)

In July 2010, Bashaw moved in with Javin Adams. (R. Vol. III p. 549, lines 1-9.) They both sold methamphetamine at this time. (R. Vol. III p. 549, lines 1-9.) Bashaw testified that she took trips to Atlanta without Adams from July 2010 to January 2011 to secure meth. (R. Vol. III p. 561, lines 13-21.) The amount of methamphetamine varied between two ounces and four ounces. (R. Vol. III p. 563, lines 21-25.) She testified that she travelled to Atlanta an average of three times a week during this period. (R. Vol. III p. 564, lines 6-10.) In total, Bashaw claimed she had dealt with Tate on twenty occasions over a period of about nine months. (R. Vol. III p. 581, lines 8-14.)

Law enforcement contacted Bashaw in March 2011, and she began to cooperate with the authorities after learning that the police had secured her phone records. (R. Vol. III p. 571, lines 4-15; p. 572, lines 7-9.) As part of her cooperation she provided information on her drug dealings and participated in undercover deals. (R. Vol. III p. 572, lines 13-25.)

In one such deal, she testified that she, Adams, Officer Chad Ayers and Officer Brett Barwick attempted to arrange a deal with Tate. (R. Vol. III p. 573, lines 15-25.) However, Tate allegedly told her he was no longer interested but would contact them in the future if he felt he could make some money off of them. (R. Vol. III p. 573, line 23 to p. 574, line 5.)

On cross-examination, Bashaw admitted that she gave a statement to law enforcement at one point that conflicted with her testimony. (R. Vol. III p. 608, lines 1-8.) In the statement, law enforcement reported that, "Bashaw states that Brian Stegall introduced her to a black male in Atlanta where she has made several trips to purchase methamphetamine. Bashaw states that she does not know the black male." (R. Vol. III p. 583, lines 16-21.) Bashaw testified that she lied in that statement. (R. Vol. III p. 584, lines 1-14.) In addition, although she testified on direct that she was 100% truthful in her testimony, she admitted on cross-examination that this was not true, because she had already admitted to lying. (R. Vol. III p. 614, lines 9-12.)

Bashaw also admitted that, "other than some pictures of us," she did not have any cellular phone records, gas receipts, credit card receipts or any other physical evidence proving she went to Atlanta to purchase drugs from Tate. (R. Vol. III p. 589, lines 1-23.) She does not recall any of Tate's cellular phone numbers she allegedly called. (R. Vol. III p. 590, lines 4-19.) Nor did she have any cell phone records to prove she spoke with Tate. (R. Vol. III p. 602, lines 1-7.) She did not have an address for the location of Tate's apartment where the drug deals transpired. (R. Vol. III p. 590, lines 20-25.) Bashaw asserted she did

not keep any gas receipts, books, or other receipts evidencing drug transactions because she did not want any physical evidence implicating her in such transactions. (R. Vol. III p. 609, lines 22-25.)

Bashaw acknowledged that she was originally charged with conspiracy to traffic 400 grams or more of methamphetamine. (R. Vol. III p. 588, lines 1-3.) She testified, however, that the State reduced her sentence down to 3 to 6 years in exchange for her cooperation. (R. Vol. III p. 588, lines 6-8.) She also agreed that she's been trying to do what she could to make the deal she struck with the State better. (R. Vol. III p. 592, lines 16-20.) Bashaw did not divulge the sentencing range of her original charge. Nor did Bashaw testify that Tate exercised any control over her drug sales, shared a plan with her concerning such sales, or received a percentage or any other benefit from such sales.

Charles Norman Trebuchon

Charles Norman Trebuchon testified he started doing "hard-core drugs," which he described as methamphetamine and cocaine, eleven years ago. (R. Vol. III p. 620, lines 15-18.) He has known Adams since he was a "kid" and admitted using methamphetamine with him. (R. Vol. III p. 620, line 19 to p. 621, line 16.) For a period of time, he lived with Adams and Bashaw. (R. Vol. III p. 621, lines 11-16.) Trebuchon testified that he drove to Atlanta with Bashaw and would wait in the living room of Tate's apartment while Bashaw made drug exchanges with Tate in the apartment's kitchen. (R. Vol. III p. 625, lines 12-21.)

Trebuchon claimed that he traveled to Atlanta by himself on two other occasions to make transactions directly with Tate, using Adams' money and car.

(R. Vol. III p. 625, line 22 to p. 626, line 6.) He testified that he purchased four ounces on each occasion, but could not be certain because he was “doing a lotta drugs.” (R. Vol. III p. 626, lines 9-13.) He could not recall whether he paid \$3,900 or \$5,900 for each of these transactions. (R. Vol. III p. 626, lines 21-23.) Trebuchon believed Tate got his methamphetamine from “Mexicans” but never actually saw them give Tate his supply of drugs. (R. Vol. III p. 627, lines 18-21.)

Trebuchon claimed to have been down to Atlanta at least a dozen times. (R. Vol. III p. 641, lines 22-25.) On one such occasion, Trebuchon testified that he purchased drugs from Tate at his two-story home and saw Tate’s children there. (R. Vol. III p. 643, line 20 to p. 644, line 4.) He could not recall the address of that apartment, however, or the address of any other apartment where the transactions occurred. (R. Vol. III p. 644, lines 5-7; p. 646, lines 21-22.) He did not know Tate’s number or have any phone records reflecting calls to Tate. (R. Vol. III p. 647, lines 1-15.) Trebuchon then admitted that he could not even recollect what happened yesterday, much less what happened three years ago. (R. Vol. III p. 647, lines 13-18.) Trebuchon also acknowledged that he had a conviction for four counts of financial transaction card fraud. (R. Vol. III p. 647, line 23 to p. 648, line 6.)

Trebuchon did not divulge the sentencing range of his original charge in this matter. Nor did Trebuchon testify that Tate exercised any control over his drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales.

Warran Brent Chastain

Warran Brent Chastain ("Chastain") testified that he started using methamphetamine when he was 18, approximately eleven years prior to his testimony, and has used this drug ever since. (R. Vol. III p. 649, lines 12-23.) He considers himself an addict. (R. Vol. III p. 650, lines 11-12.) He began purchasing methamphetamine to support his habit, but then purchased a sufficient quantity to sell to others as well. (R. Vol. III p. 650, lines 2-6.) He has been convicted for distribution of methamphetamine and other substances, and was previously indicted by a grand jury on charges that he participated in a methamphetamine trafficking conspiracy. (R. Vol. III p. 650, lines 16-18; p. 651, lines 1-4.)

Chastain testified that he drove from South Carolina to Atlanta with Brian Stegall ("Stegall") to purchase methamphetamine. (R. Vol. III p. 653, lines 15-24.) Upon arriving at a hotel room in Atlanta, he claimed he met Tate at a Waffle House, and then went with Stegall to a local motel room where Stegall purchased methamphetamine from Tate and a "Hispanic guy" in the motel room's bathroom using Chastain's money. (R. Vol. III p. 654, lines 1-20; p. 655, lines 1-16.) Stegall then gave Chastain the two ounces of methamphetamine he had purchased. (R. Vol. III p. 655, lines 17-23.) After this transaction, Chastain returned to South Carolina to sell these two ounces. (R. Vol. III p. 656, lines 1-2.) He testified that he saw Tate once more at Griffin's home in South Carolina, but does not know if Tate had brought any methamphetamine to Griffin's home. (R. Vol. III p. 656, lines 11-24.)

While in the holding cell before his testimony, Chastain admitted that he told another co-conspirator that he did not know how he would be able to testify because he never saw Tate sell drugs. (R. Vol. III p. 660, lines 10-25.) After viewing Tate with his twin brother in the courtroom, Chastain could not say for certain which one he saw in Atlanta. (R. Vol. III p. 662, lines 1-8.)

Chastain understood that he pled guilty to a lesser charge for this crime, and that by doing so he avoided a much larger sentence. (R. Vol. III p. 652, lines 14-17.) Specifically, he pled guilty to a second offense of the trafficking of twenty-eight to a hundred grams of methamphetamine with a State recommendation of twelve to fifteen years. (R. Vol. III p. 652, lines 2-5.) Chastain did not divulge the sentencing range of his original charge, however. Nor did Chastain testify that Tate exercised any control over his drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales.

Larry Anthony Gambrell

Larry Anthony Gambrell ("Gambrell") testified he became involved with drugs when he was 26. (R. Vol. III p. 667, lines 21-23.) Gambrell testified that he met Tate through Lollis, who would take him to an apartment in Atlanta to purchase methamphetamine. (R. Vol. III p. 669, lines 16-20; p. 670, lines 5-11.) He testified that he went to Atlanta on five or six more occasions. (R. Vol. III p. 674, lines 17-18.) According to Gambrell, they purchased two to four ounces of methamphetamine for \$1,300 per ounce. (R. Vol. III p. 675, lines 1-4.) Gambrell did not recall the addresses of any of the locations where these drug transactions

transpired. (R. Vol. III p. 685, lines 9-13.) Nor did he have any telephone records evidencing calls to Tate. (R. Vol. III p. 686, lines 6-8.)

Gambrell agreed to work for law enforcement and identified Tate in a photo lineup. (R. Vol. III p. 681, lines 5-19.) He could not say for certain whether he purchased methamphetamine from Tate or his twin brother. (R. Vol. III p. 689, lines 1-8.)

Gambrell did not divulge the sentencing range of his original charges in this case, nor did he testify that Tate exercised any control over his drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales.

Norman Bergholm

Norman Bergholm testified he became involved with drugs in 2000, when he started using and selling methamphetamine. (R. Vol. III p. 692, lines 14-24.) After his release from prison stemming from the sale of meth, he began selling methamphetamine with a man named "Mexican Eddie," who has no connection with Tate. (R. Vol. III p. 693, lines 11-22.)

Bergholm indicated that he and another co-conspirator, Chad Moore, were part of a "tight circle" that included Bergholm, Moore, Adams and Bashaw. (R. Vol. III p. 694, lines 16-25.) Bergholm claimed he was part of this circle because of his connection to Mexican Eddie, and the others were a part of the circle because of their connection to a source of methamphetamine in Atlanta. (R. Vol. III p. 694, line 16 to p. 695, line 3.) Bergholm started purchasing methamphetamine from Adams once a week for \$1,200 to \$1,400 an ounce. (R.

Vol. III p. 695, lines 4-13.) Adams was rumored to purchase this methamphetamine from Atlanta. (R. Vol. III p. 695, lines 4-20.)

Bergholm claimed he met Tate at Adam's birthday party. (R. Vol. III p. 696, lines 9-11.) Bergholm testified that he purchased methamphetamine from Tate on numerous occasions. (R. Vol. III p. 698, lines 6-9; p. 696, lines 4-13.) However, Bergholm ceased purchasing methamphetamine from Tate, because half of one such purchase ended up being "no good." (R. Vol. III p. 701, line 14 to p. 702, line 2.)

Bergholm met with law enforcement in June of 2011 at which time he identified Tate in a photo lineup. (R. Vol. III p. 704, lines 6-11; p. 705, lines 1-9.) At this time, Bergholm did not know that Tate had an identical-twin brother. (R. Vol. III p. 706, lines 18-24.) Bergholm could not say the man he had purchased methamphetamine from was not Tate's brother. (R. Vol. III p. 707, lines 3-7.) Bergholm admitted that he had neither telephone records implicating Tate, nor his ledger where he had recorded his drug transactions, because his house had been robbed. (R. Vol. III p. 711, lines 9-16.) Bergholm also admitted that though all of the places he met Tate were public areas with video cameras, Bergholm did not have any videos showing a transaction with Tate. (R. Vol. III p. 715, lines 1-17.)

Bergholm testified he is currently serving prison time in Iowa for felony eluding and has other felony convictions including eight distributions of methamphetamine within a half-mile of a school zone, and "assault and battery of a high and aggravated nature." (R. Vol. III p. 691, lines 5-8, 23-25; p. 717, lines

2-17.) He also has a conviction for filing a false police report. (R. Vol. III p. 716, line 6 to p. 717, line 2.)

The State originally charged him with trafficking 400 grams or more of methamphetamine. (R. Vol. III p. 691, lines 18-20.) However, Bergholm pled guilty to trafficking twenty-eight to a hundred grams of methamphetamine. (R. Vol. III p. 691, lines 18-22.) The State recommended a sentence of 15 to 18 years in exchange for his testimony. (R. Vol. III p. 692, lines 3-7.)

Bergholm did not divulge the sentencing range of his original charge, however. Nor did Bergholm testify that Tate exercised any control over his drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales.

Chad Dewayne Moore

Chad Dewayne Moore testified that he began using methamphetamine when he was 28. (R. Vol. III p. 720, lines 1-4.) Chad Moore initially only consumed methamphetamine, but soon began to sell to support his addiction. (R. Vol. III p. 722, lines 15-16.) Chad Moore began buying methamphetamine from Griffin, whom he met through Lollis. (R. Vol. III p. 723, lines 1-15.)

Moore eventually met Griffin and Lollis' supplier at an apartment in Atlanta. (R. Vol. III p. 724, lines 9-24.) Chad Moore identified this individual as Tate. (R. Vol. III p. 725, lines 1-5.) Chad Moore went with Lollis to meet Tate and supposedly bought an ounce of methamphetamine from Tate on this occasion. (R. Vol. III p. 725, lines 9-20.) He claimed to have driven back to Atlanta on two or three other occasions to purchase about an ounce of

methamphetamine from Tate, who eventually stopped selling meth to him. (R. Vol. III p. 726, lines 8-17; p. 732, lines 1-8.)

Chad Moore could not recall an address of the apartment he met Tate to purchase methamphetamine. (R. Vol. III p. 738, lines 14-17.) He also had no phone records or food and gas receipts from Atlanta to corroborate his testimony that the transactions actually transpired. (R. Vol. III p. 738, lines 18-20.) Chad Moore confessed to previous convictions, including using a vehicle without permission, obtaining property under false pretenses, accessory to a felony, a non-violent burglary, larceny, failure to stop for a blue light, and possession of methamphetamine. (R. Vol. III p. 720, line 20 to p. 721, line 13.)

The State agreed to recommend a sentence of 18 years imprisonment in exchange for Moore's testimony. (R. Vol. III p. 742, lines 1-13.) But Moore did not disclose the sentencing range of his original charge. Nor did he testify that Tate exercised any control over his drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales.

C. The Testimony of Law Enforcement.

Agent Brett Barwick

Agent Brett Barwick testified he works as a narcotics officer for the Pickens County Sheriff's Office. (R. Vol. II p. 412, lines 8-9.) He became involved in this investigation when another officer, Chris Marquis, developed a CI that was aware of several persons trafficking methamphetamine throughout Pickens and Greenville Counties. (R. Vol. II p. 412, line 19 to p. 413, line 5.)

During this investigation, he said the “conspiracy” widened as he spoke to more CIs and others who would cooperate with him. (R. Vol. II p. 414, lines 14-23.) Eventually, this process led to the purported source of the methamphetamine for this case, Mr. Tate. (R. Vol. II p. 415, lines 2-7.)

Barwick acknowledged that all of the conspirators who testified against Tate viewed the same photo lineup, when identifying him. (R. Vol. II p. 443, lines 19-24.) Tate, therefore, had the same position on this lineup on each occasion a conspirator viewed the lineup for identification purposes. (R. Vol. II p. 443, line 19 to p. 444, line 1.) Barwick admitted he did not know whether his CIs spoke to one another about Tate’s lineup picture during the three-year period during which they all became CIs. (R. Vol. II p. 447, lines 9-12.)

Barwick also acknowledged that the police never found drugs on Tate’s person, in his possession or at any of his houses. (R. Vol. II p. 449, lines 23-25.) Barwick further conceded he never looked into Tate’s finances and that Tate had no prior drug-related offenses prior to the present one. (R. Vol. II p. 453, lines 12-15; p. 461, lines 8-12.)

Sheriff Henry Dale Campbell

Sheriff Henry Dale Campbell testified that the CIs he uses in his investigations receive direct payment or reduced sentences in exchange for this cooperation. (R. Vol. II p. 329, lines 5-25.) Campbell used a CI for a transaction with Christopher Simmons on March 2010, for the investigation underlying this case. (R. Vol. II p. 330, lines 14-25.) this CI had a transmitter on his person for this transaction. (R. Vol. II p. 331, lines 15-24.) At this transaction, Simmons

discussed Griffin with the CI. (R. Vol. II p. 334, lines 1-19.) Griffin, Eades and Simmons were present at this time. (R. Vol. II p. 335, lines 4-11.) During the ensuing search of Simmons' room, the police found drugs, paraphernalia, "some documentation," and drug-related weapons. (R. Vol. II p. 337, lines 1-11.)

Law enforcement did not find any of Tate's fingerprints on the evidence retrieved from the scene. (R. Vol. II p. 351, lines 21-25.) In fact, the police found no fingerprint evidence implicating Tate during the entire investigation. (R. Vol. II p. 351, lines 21-25.) Although Campbell acknowledged that phone records generally are "good evidence," he admitted that there were no cellular phone records in this case that would incriminate Tate. (R. Vol. II p. 353, line 10 to p. 354, line 3.) Campbell acknowledged that audio and video surveillance also constitutes good evidence in these investigations. (R. Vol. II p. 354, lines 4-17.) No such evidence incriminating Tate existed in this case. (R. Vol. II p. 354, lines 4-17.) Nor did the police recover any marked money implicating Tate. (R. Vol. II p. 354, line 24 to p. 355, line 18.)

Agent Ashley Asbill

Agent Ashley Asbill testified he works for the State Law Enforcement Division. (R. Vol. III p. 745, lines 1-7.) The State asked Asbill to discuss the current "conspiracy," to which defense counsel objected. (R. Vol. IV p. 754, lines 1-7.) After the trial court sustained this objection, the State asked:

The group of individuals that was indicted for a conspiracy, can you explain to the jury their organizational makeup and how does that compare to a standard methamphetamine conspiracy?

Asbill responded:

The organizational makeup of a conspiracy generally, uh, starts at the bottom and leads up to the top with the top person being the, I'm not gonna say the ultimate source, but even in the run of an investigation is the end source. It be the top, top level.

(R. Vol. IV p. 754, lines 8-16.) Asbill further testified that the individuals indicted in this conspiracy were organized in the sense they all went to Atlanta to purchase methamphetamine from Tate. (R. Vol. IV p. 754, lines 17-21.) Those that were indicted were dealing "substantial amounts" according to Asbill. (R. Vol. IV p. 755, lines 3-5.) Asbill testified that Tate was the highest source in this group. (R. Vol. IV p. 755, lines 6-8.)

Asbill admitted that the only evidence implicating Tate was the words of the co-conspirators and that no physical evidence corroborated their stories. (R. Vol. IV p. 755, lines 19-25; p. 756, lines 9-11.) Asbill admitted that he had three Verizon numbers in this case purportedly linked to Tate, and that he could have subpoenaed records for but did not do so. (R. Vol. IV p. 757, lines 1-10.) Asbill conceded that many of his witnesses admitted to lying under oath. (R. Vol. IV p. 757, lines 21-24.) Asbill candidly acknowledged the credibility issues of his witnesses, stating that he "wished he had better witnesses to work with." (R. Vol. IV p. 758, lines 2-3.)

D. The Motion for Directed Verdict.

Defense counsel moved for directed verdict at the close of the State's case, arguing that the State presented insufficient evidence of Tate's guilt. (R. Vol. IV p. 760, lines 7-20.) Specifically, defense counsel cited the State's witnesses' unreliability coupled with their inability to differentiate between Tate and his brother. (R. Vol. IV p. 760, lines 7-10.) After the jury returned a guilty

verdict, the trial court sentenced Tate to 25 years in prison. (R. Vol. IV p. 827, lines 16-20.)

E. The Motion for a New Trial.

On June 14, 2013, defense counsel filed a motion for a new trial arguing the State failed to provide any evidence with regard to an agreement or common plan by defendant to traffic methamphetamines. Specifically, the State had not presented any proof supporting a mutual understanding, agreement, or common intention and plan with regard to Tate's alleged role in the methamphetamine trafficking conspiracy. The trial court denied this motion.

SUMMARY OF THE ARGUMENT

The State claimed that Antonio Tate conspired to traffic in more than 400 grams of methamphetamine, but presented no physical evidence linking Tate to the conspiracy. Law enforcement never completed any controlled purchases involved Mr. Tate, though they tried unsuccessfully on several occasions. Law enforcement never discovered any drugs on Tate's person, in his possession or at any of his houses. Law enforcement never found any of Tate's fingerprints or DNA on any drugs, drug paraphernalia or any other item that could link him to the conspiracy.

No video recordings implicated Tate in the conspiracy. No audio recordings implicated Tate in the conspiracy. No marked money implicated Tate in the conspiracy. No cellular phone records implicated Tate in the conspiracy. No restaurant, gas or motel receipts corroborate the testimony of his co-defendants, who claimed they consummated drug transactions with Mr. Tate.

Tate had no prior criminal history of drug use or trafficking, and none of the records of his finances supported an inference that he sold methamphetamine.

In fact, the only evidence that tied Mr. Tate to the alleged conspiracy was the testimony of the purported co-conspirators. All of these witnesses admitted to consuming or dealing methamphetamine or doing both. All of these witnesses negotiated significantly reduced sentences with the State in exchange for their testimony. All had prior criminal records. Most could not determine with certainty whether Tate or his twin brother sold them methamphetamine. A number of the witnesses admitted to lying to both the State and the jury.

The only way for Mr. Tate to defend himself from the accusations of these co-conspirators was to demonstrate the bias in their testimony. But the trial court prevented him from cross-examining these witnesses regarding the length of the sentences they originally faced and the amount of reduction they received in exchange for their testimony. By foreclosing this critical inquiry, the trial court violated the Confrontation Clause of the Sixth Amendment.

Equally important, the State provided no evidence that Tate actually engaged in a conspiracy with his codefendants. That is, the State failed to prove that Tate exercised any control over his alleged co-conspirators' subsequent transactions, shared a plan with them concerning such transactions, or received a financial benefit from such transactions. In other words, the State did no more than present testimony that Tate sold methamphetamine to various persons. Such evidence is insufficient to prove Tate engaged in a conspiracy. The State

may have shown Tate sold drugs, but it did not show he conspired with others to do so.

Finally, the State adduced testimony from its “expert” that the structure of this purported enterprise met the legal definition of a conspiracy. This testimony prejudiced Mr. Tate because it allowed the State to invade the province of the jury and attempt to resolve the ultimate factual dispute through the use of expert testimony. Although the trial court sustained an objection, it permitted the State to continue to pursue this line of inquiry and never gave a curative instruction. This error cannot be explained away as harmless.

Due Process requires that this Court to acquit him of the crime.

ARGUMENT

I. THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE OF TATE’S PARTICIPATION IN THE CONSPIRACY.

A. Standard of Review

This Due Process Clause of the Fourteenth Amendment to the United States Constitution safeguards an accused from conviction in state court except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. U.S. Const. amend. XIV; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *In re Winship*, 397 U.S. 358, 361-64 (1970). Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *Jackson*, 443 U.S. at 318-19.

B. The State failed to prove the necessary elements of a criminal conspiracy

Criminal conspiracy is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means. S.C. Code § 16-17-410 (2003). “The essence of a conspiracy is the agreement.” *State v. Buckmon*, 347 S.E. 316, 323 (2001). That is, a conspiracy requires the extra act of agreeing to commit a crime. *United States v. Jimenez Revio*, 537 U.S. 270, 274 (2003). “That agreement is a ‘distinct evil,’” because a group of criminals often poise a greater danger than an individual. *Id.* at 275. “By working together, criminals capitalize on economies of scale, which facilitate planning and executing crimes – thus making it more likely that a group will complete its unlawful aim.” *Id.* For this reason, conspiracies are punished separately from the underlying offense, whether or not that crime comes to fruition. *Id.* at 274.

As the Eleventh Circuit observed in *United States v. Deckle*,

what distinguishes a conspiracy from its substantive predicate offense is not just the presence of any agreement, but an agreement with the same joint criminal objective – here the joint objective of distributing drugs. **This joint objective is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs.** Although the parties to the sales agreement may both agree to commit a crime, they do not have the joint criminal objective of distributing drugs.

165 F.3d 826, 829 (11th Cir. 1999) (emphasis added). Echoing this view, the Seventh Circuit in *United States v. Colon*, emphasized, “[w]hat is necessary and sufficient is proof of an agreement to commit a crime **other than the crime that**

consists of the sale itself." 549 F.3d 565, 569 (7th Cir. 2008) (emphasis added; citation omitted).

Here, the record contains no evidence that anything more than a buyer/seller relationship existed between Tate and his codefendants. That is, the State presented no testimony that Tate exercised any control over his codefendants' drug sales, shared a plan with him concerning such sales, or received a percentage or any other benefit from such sales. Indeed, the State's own witness, Agent Asbill, only characterized Mr. Tate as the "source," but stopped short of testifying that Mr. Tate shared the common scheme or plan of distributing the drugs in South Carolina. (R. Vol. IV p. 755, lines 6-8.)

Although the State attempted to raise the specter of a conspiracy by soliciting testimony that Tate was aware of his alleged purchasers' redistribution of his drugs, (e.g., R. Vol. III p. 500, lines 13-15), the overwhelming majority of courts, including the United States Supreme Court, have rejected this attempt to redefine conspiracy:

There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken ... [N]ot every instance of sale of restricted goods ... in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.

Direct Sales Co. v. United States, 319 U.S. 703, 712 (1943); accord *United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009) ("Evidence that a buyer intends to resell the product instead of personally consuming it does not necessarily establish that the buyer has joined the seller's distribution conspiracy. This is so even if the seller is aware of the buyer's intent to resell."); *United States v.*

Parker, 554 F.3d 230, 235-36 (2d Cir. 2009) (“[I]t is often said that mere awareness on the part of the seller that the buyer intends to resell the drugs is not sufficient to show that the seller and the buyer share a conspiratorial intent to further the buyer’s resale. This is because **the seller cannot be considered to have joined a conspiracy with the buyer to advance the buyer’s resale unless the seller has somehow encouraged the venture or has a stake in it** – an interest in bringing about its success. The transferor’s mere knowledge of the transferee’s intent to retransfer to others, without anything more, would not show that the transferor had a stake or interest in the further transfer of the drugs.” (emphasis added)); *United States v. Thomas*, 150 F.3d 743, 745 (7th Cir. 1998) (It was plain error not to instruct the jury on the buyer-seller rule in a case where the defendant bought cocaine for resale from the same supplier on three occasions, because “[n]one of the evidence suggests that [the seller] had any stake in [the buyer’s] profits from [the resale]; all deals were cash on the barrelhead”).

Nor could the State establish a conspiracy by merely adding up all the drugs Tate allegedly sold to his codefendants. (See, e.g., R. Vol. III, p. 500, lines 3-12.) Courts have roundly rejected this tactic. See, e.g., *United States v. Rivera*, 273 F.3d 751, 755 (7th Cir. 2001) (“Showing that the buyer purchased a quantity larger than could be used for personal consumption ... is not enough to show conspiracy on behalf of the seller.”); *United States v. Contreras*, 249 F.3d 595, 600 (7th Cir. 2001) (holding that evidence that the defendant bought “ten one-kilogram quantities of cocaine ... over a period of six to ten months” from the

same supplier was only evidence of a buyer-seller relationship and not a conspiracy).

The reason that evidence of the quantity of drugs – and of a buyer's intent to resell the drugs – cannot prove a conspiracy is because the State must establish not only that the seller knew the buyer intended to engage in further distribution, but that the seller intended and agreed to the shared intent of the buyer to further distribute. *Deckle*, 165 F.3d at 829. The State made no showing here. Accordingly, the trial court erred when it denied Mr. Tate's motion for new trial based on the lack of any evidence that showed he entered into an agreement sufficient to establish the conspiracy.

Even if a mere buyer-seller relationship were sufficient, the State still presented insufficient evidence of Tate's involvement in the conspiracy in this case. Significantly, the State presented no physical evidence tying Tate to a conspiracy.

- No fingerprints or DNA were found on drug paraphernalia or any other item implicating Tate in the conspiracy.
- No video recordings implicated Tate in a conspiracy.
- No audio recordings implicated Tate in a conspiracy.
- No marked money implicated Tate in a conspiracy.
- No cellular phone records implicated Tate in a conspiracy.
- No restaurant, gas or motel receipts corroborate the drug transactions with Tate alleged by his codefendants.

- No drugs were ever discovered on Tate's person, in his possession or at any of his houses.
- No prior drug-related offenses implicating Tate existed.
- None of Tate's finances evidenced drug trafficking or consumption.

Thus, the proof of Tate's guilt rested on the abysmal credibility of admitted methamphetamine addicts. All of these addicts negotiated significantly reduced sentences with the State in exchange for their testimonies. Many, if not all, had prior criminal records. Most could not determine with certainty whether Tate or his brother sold them methamphetamine. Many admitted to lying to both the State and the Jury. And most admitted to pursuing their best interest by testifying.

For example, Bashaw admitting she was doing everything she could to make her deal with the State better. (R. Vol. III p. 592, lines 16-20.) Likewise, Adams admitted that he took his deal because "[e]verybody tries to get ahead in life." (R. Vol. III p. 523, lines 17-23.) Indeed, even the State's own investigator admitted many of the State's witnesses admitted to lying under oath, and confessed that he wished he had "better witnesses to work with." (R. Vol. IV p. 758, lines 2-3.) On this record, no rational trier of fact could conclude the State proved Tate's guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19.

II. THE TRIAL COURT VIOLATED THE CONFRONTATION CLAUSE WHEN IT PROHIBITED DEFENSE COUNSEL FROM CROSS-EXAMINING TATE'S CO-DEFENDANTS ABOUT THE POTENTIAL SENTENCES THEY FACED BEFORE THEIR COOPERATION.

A. Standard of Review

This Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion. *State v. Johnson*, 338 S.C. 114, 124-25 (2000).

B. Argument on the Merits

The Confrontation Clause provides that in all criminal prosecutions, the accused "shall enjoy the right to ... be confronted with witnesses against him." U.S. Const. amend. VI. The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. *State v. Clark*, 315 S.C. 478, 481 (1994) (citing *State v. Brown*, 303 S.C. 169, 171 (1991)). "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." *State v. Gillian*, 360 S.C. 433, 454 (Ct. App. 2004). Furthermore, a defendant demonstrates a Confrontation Clause violation when he is prohibited from "engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness." *State v. Stokes*, 381 S.C. 390, 401-02 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

In *State v. Brown*, one of the State's chief witnesses, Yolanda Bethel, testified that at the request of a man named "Henry," she agreed to transport a

quantity of cocaine from Miami, Florida to Charleston, South Carolina. *Brown*, 303 S.C. at 170. Upon her arrival, police apprehended Bethel and discovered a large quantity of cocaine in her suitcase. *Id.* Bethel agreed to cooperate with law enforcement by contacting the defendant and accompanying the agents to deliver the suitcase to him. *Id.* at 171.

Bethel testified that in return for her cooperation, she was allowed to plead guilty to one conspiracy charge for which she would receive a maximum sentence of seven and one-half years' imprisonment. *Id.* On cross-examination, Bethel admitted that she was originally charged with trafficking in cocaine, but that the charge was dropped as part of the plea agreement. *Id.* Defense counsel attempted to elicit from Bethel the punishment for trafficking in cocaine, but the trial judge sustained the prosecutor's objection to the line of questioning. *Id.* The defendant appealed and argued that the trial judge abused its discretion in limiting the cross-examination. *Id.*

The appellate court agreed, holding that this limitation unfairly prejudiced the defendant:

The sentence for trafficking in cocaine and the amount in question here is a mandatory one of at least twenty-five years without parole The fact Bethel was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy is critical evidence of potential bias that [defendant] should have been permitted to present to the jury. Moreover, Bethel's testimony was a crucial part of the State's case since she provided the only evidence of [defendant]'s knowing involvement in the drug transaction. We reject the State's argument that inquiry into the punishment was properly excluded because it would have allowed the jury to learn of [defendant]'s own potential sentence if convicted. We conclude appellant's right to meaningful cross-examination outweighs the State's interest here.

Brown, 303 S.C. at 171-71.

Similarly, in *State v. Gracely*, the defendant was convicted by a jury of conspiracy to traffic 400 grams or more of methamphetamine. 399 S.C. 363, 366 (2012). In *Gracely*, defense counsel asked a codefendant whether trafficking four hundred grams or more of methamphetamine carried a minimum of twenty-five years' imprisonment. *Gracely*, 399 S.C. at 366. The State objected, arguing that the cross-examination would prejudice the State because it would reveal the mandatory minimum sentence the defendant, himself, faced. *Id.* at 369. The trial court agreed, and precluded the defense from eliciting testimony regarding the mandatory minimum sentence at issue in the case. *Id.* The defendant was convicted. *Id.*

The South Carolina Supreme Court reversed. It concluded that the Confrontation Clause affords the defendant the opportunity to examine a co-defendant's bias for testifying as evidenced by his potential sentence in “**granular**” detail. *Gracely*, 399 S.C. at 373. Specifically, the court remarked,

the sentences received by many of these witnesses are not only far lower than the maximum sentence, within a judge's discretion, but are far lower than the mandatory minimum, in which a judge has no discretion. The trial court's instruction improperly prevented Appellant from demonstrating the possible bias rising from these plea deals through an examination reaching the requisite degree of granularity.

Gracely, 399 S.C. at 373. That is, the full extent of a co-defendant bias can only be ascertained if defense counsel can inquire into the full extent of the sentence originally faced by a codefendant.

The facts of this case are strikingly similar to those in both *Brown* and *Gracely*. As in those cases, the State's primary witnesses in this case also originally faced sentences significantly longer than the sentences they received in exchange for their cooperation. Here, too, the trial court allowed defense counsel to cross-examine the witnesses regarding possible bias, but improperly prevented questioning which would have explored the extent of that bias and the witnesses' possible motivations for testifying against Tate. Thus, under *Brown* and *Gracely*, this Court should reverse Mr. Tate's conviction which is tainted by the violation of his rights under the Confrontation Clause.

III. THE TRIAL COURT ERRED WHEN IT PERMITTED TESTIMONY OF AN EXPERT REGARDING THE LEGAL DEFINITION OF A CONSPIRACY AND THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE.

A. Standard of Review

"The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." *State v. Commander*, 396 S.C. 254, 262 (2011) (citations omitted).

B. Argument on the Merits

Expert testimony on issues of law is usually inadmissible. *Dawkins v. Field*, 354 S.C. 58, 66-67 (2003) (citations omitted) (finding the trial court properly declined to consider an expert affidavit that "offered some helpful, factual information" but mainly offered legal arguments concerning the reasons the trial court should deny summary judgment); *Green v. State*, 351 S.C. 184, 198, 569

S.E.2d 318, 325 (2002) (affirming the exclusion of expert testimony where “[t]he testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel’s actions fell below an acceptable legal standard of competence”).

In the present case, the State introduced the testimony of Agent Asbill. Though the trial court sustained defense counsel’s objection to Ashley’s description of this case as a conspiracy, Ashley merely rephrased the term “organizational structure” and explained why it constituted a “standard methamphetamine conspiracy.” (R. Vol. IV p. 754, lines 8-16.) By eliciting the testimony, the State impermissibly bolstered its argument that the case meets the legal definition of a conspiracy and invaded the province of the jury, which is charged with resolving that exact issue. What is worse, Agent Asbill misstated the law, erroneously implying that a buy-sell relationship is sufficient to establish a conspiracy if Tate is the source of the meth. Thus, when Ashley provided an impermissible legal opinion as to whether the circumstances of this case warranted the legal conclusion a conspiracy transpired – a legal conclusion properly left to the jury – the trial court should have prevented any further inquiry and given a curative instruction. Because it failed to do so, this Court should reverse. *Green*, 351 S.C. at 198.

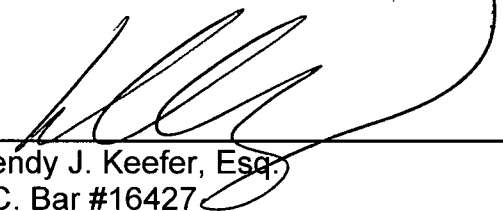
This error, moreover, cannot be deemed harmless. In order to find harmless error, this Court must determine “beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.” *Arnold v. State*, 420

S.E.2d 834, 839 (1992) (quoting *Chapman v. California*, 386 U.S. 18 (1967)). This case involved no physical evidence, but instead turned on the credibility of a series of meth addicts. In light of the severely questionable credibility of the State's witness, elaborated in Section I, supra, this Court cannot conclude "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." *Arnold*, 420 S.E.2d at 839.

CONCLUSION

For the foregoing reasons, Antonio Emerson Tate, Defendant-Appellant, respectfully requests that this Court reverse his conviction, vacate his sentence; and, further, that this Court remand this case for a new trial.

Respectfully Submitted,



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ATTORNEY FOR APPELLANT

Dated: March 31, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

APR 15 2015

SC Court of Appeals

Case No. 2013-001562

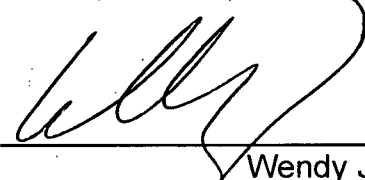
The State of South Carolina, ... Respondent,

v.

Antonio Emerson Tate, ... Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Final Brief and Final Reply Brief on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on April 10, 2015, addressed to attorneys of record, Salley W. Elliott, Megan B. Burchstead, and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211:


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

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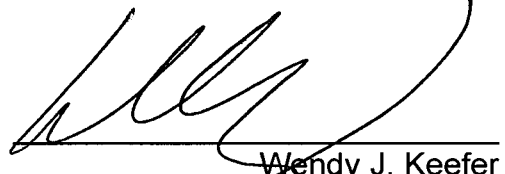
The State of South Carolina, ... Respondent,

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Antonio Emerson Tate, ... Appellant.

CERTIFICATE OF COMPLIANCE

I certify that to the best of my knowledge the Final Brief of Appellant and Final Reply Brief of Appellant, being filed with this Certificate, comply with Rule 211(b) and all other applicable rules of the South Carolina Appellate Court Rules.


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge APR 24 2015
Appellate Case No. 2013-001562

SC Court of Appeals

THE STATE,

Respondent,

vs.

Antonio Emerson Tate,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR
RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in submitting the case to the jury and denying the motion for directed verdict where the State presented evidence of Trafficking in Methamphetamine 400 grams or more?

II. Did the trial court commit reversible error by limiting cross examination of cooperating witnesses who were pleading to lesser charges and no longer facing mandatory minimum on their initial charges, which were the same as Appellant was facing, where cross was allowed as to receiving a substantial reduction in sentence and the possible sentence of the initial charge was ultimately communicated to the jury?

II. Did the trial court err in permitting testimony by a witness with experience investigating methamphetamine cases about the organizational sale and distribution of methamphetamine?

STATEMENT OF THE CASE

The State Grand Jury of South Carolina indicted Antonio Emerson Tate ("Appellant") by superseding indictment on December 13, 2011 for Trafficking Methamphetamine 400 grams or more (by conspiracy) between November 1, 2009 through November 8, 2011.

On May 28, 2013, the State called the case for trial in front of the Honorable Letitia H. Verdin, and a jury trial was held from May 28 through May 31, 2013. The State was represented by Joshua R. Underwood and Curtis A. Pauling, III of the Attorney General's Office. Appellant was represented by R. Mills Arial, Jr., Esquire and David J. Farnham, Esquire of Georgia (*pro hac vice*).

On May 31, 2013, Appellant was convicted by a Greenville County Jury of Trafficking in Methamphetamine 400 grams or more, in violation of SC Code Section 44-53-375. Judge Verdin sentenced Appellant to 25 years incarceration. A timely appeal followed.

STATEMENT OF FACTS

The State presented evidence of Appellant's guilt of trafficking Methamphetamine 400 grams or more. Such evidence included testimony of witnesses about purchasing methamphetamine from Appellant in Georgia for distribution and sale in South Carolina. Some of the testifying witnesses were charged as co-conspirators and were initially charged with the same crime as Appellant, but had accepted plea agreements to plead guilty to lesser charges. The trial court permitted defense counsel to inquire as to the possible sentence on the lesser charges, and testimony was given that the charges exposed the witnesses to substantially less time for incarceration than their original charges.

The State presented the testimony of 11 witnesses involved in the purchase of methamphetamine from Appellant in Atlanta, Georgia for sale in South Carolina. Witnesses testified about traveling to Georgia to retrieve narcotics from Appellant and how these transactions were initiated and conducted. Appellant seems to emphasize that witnesses could not provide an address or phone number for Appellant. However, the witnesses described in detail how to arrive at designated meet locations repeatedly used by Appellant, and that Appellant used different phone numbers. Witnesses also testified calling Appellant to arrange deals for methamphetamine and recalled particular meet locations and some specific occurrences.

Witnesses independently testified to the same locations used for the sale of the narcotics such as a Waffle House, and Appellants residence. The witnesses knew which exit to take and how to get there.

Witnesses recalled details of specific instances such as the purchase at the Shell gas station. Witnesses testified to numerous and repeated purchases of methamphetamine in amounts greater than one would purchase for personal use, of tactics used in the sale of narcotics for future distribution involving large amounts of money such as “fronting”, and the use of green dot cards. Witnesses also testified as to Appellant’s knowledge of witnesses residing in South Carolina and to seeing him on a least one occasion in South Carolina.

Witnesses independently identified Appellant in a photo line-up prior to or at the on-set of cooperating with law enforcement, at different times. Witnesses also identified Appellant in court as the individual from whom large amounts of methamphetamine were purchased.

The State’s case, primarily in the form of testimonial evidence set forth below, consistently shows that Appellant sold dealer weights of methamphetamine while in Georgia to individuals known to reside in South Carolina who were bringing that methamphetamine back to South Carolina over the period of time alleged in the indictment for an amount greater than 400 grams. He also traveled to South Carolina on two occasions and provided methamphetamine to Jason Griffin and Javin Adams. Appellant’s pattern of dealing methamphetamine that entered South Carolina was shown by the State.

Wendy Christine Lollis

Ms. Lollis testified that she began using methamphetamine when she was 18 or 19. (R. Vol. I p. 152, line 2.) She admitted that she was a meth addict at this time. (R. Vol. I p. 153, lines 4-6.) She also admitted that she dealt methamphetamine for 5 or 6

years prior to the trial. (R. Vol. I p. 153, line 22.) She also admitted that she pleaded guilty to charges related to the conspiracy alleged in this case after reaching a plea deal with the State and that if convicted of the original charges she would be facing a considerably higher amount of time. (R. Vol. I p. 153, lines 19-23, p. 154, lines 3-16.)

Ms. Lollis testified that David Moore purchased an ounce or more of meth at a time from a source in Atlanta. (R. Vol. I p. 154, lines 22-25, p. 155, lines 1-25.) She identified the Appellant in court as Mr. Moore's source and further testified to traveling to Georgia to purchase meth from Appellant and taking others to meet him. (R. Vol. I p. 156, lines 1-17.) Ms Lollis testified that she introduced a number of other individuals to Appellant, including Jason Griffin, and that they purchased meth from him as well beginning in early 2009. (R. Vol. I p. 154, line 10, p. 162, line 9.) Ms. Lollis testified Appellant knew she and the others were from South Carolina. (R. Vol. I p. 150, lines 1-7.)

Ms. Lollis also testified that Appellant did not sell less than an ounce at a time. (R. Vol. I p. 172, lines 9-100.) She testified that she purchased meth from Appellant with Amy Cagle on one occasion (R. Vol. I p. 167, lines 3-18.) and that Paul Simon and Anthony Gambrell also purchased meth from Appellant an ounce at a time. (R. Vol. I p. 168, lines 1-24.) She testified that she knew Javin and Nate were in a drug relationship with Appellant. (R. Vol. I p. 171, lines 24-25, p. 172, lines 1-4.)

Upon her arrest, Ms. Lollis began to cooperate with law enforcement. (R. Vol. I p. 173, lines 19-23.) She picked Appellant from a photo line-up in September of 2011. (R. Vol. I p. 174, lines 2-11, 18-25, p. 175, lines 1-18, p. 178, line 15.)

Lollis says she went to Georgia between ten and fifteen times. (R. Vol. I p. 187, lines 1-4.) While she did not provide an address, she stated Appellant provided directions to her and she recalled going to two or three apartment buildings in Indian Trail and the exit number 101. (R. Vol. I p. 187, lines 9-12, p. 188, lines 14-25.) Ms. Lollis acknowledged that she did not know Appellant's phone number, but stated that she could probably get it. (R. Vol. I. 186, lines 17-19.)

Ms. Lollis admitted receiving a "substantial reduction" in her sentence in exchange for her cooperation. (R. Vol. I. p. 199, lines 7-9.) She acknowledged she was initially charged with trafficking 400 grams or more of methamphetamine and that she pled to the reduced charge of trafficking 28-100 grams with a recommended sentence of 12 to 15 years. (R. Vol. I p. 197, lines 20-25, p.198, lines 11-17, p. 199 lines 7-9.)

Gary Jason Griffin

Gary Jason Griffin ("Griffin") testified he was incarcerated. (R. Vol. I. p. 211, lines 3-5.) In 2008 he became associated with Chris Simmons and re-entered the drug trade. (R. Vol. I p. 213, lines 14-19.) Griffin also met Lollis and he started dealing methamphetamine with her. (R. Vol. I p. 217, lines 110-13.) Griffin testified that about a month after he met Lollis he went with her and his ex-wife, Rachel Eades ("Eades"), to Atlanta to meet Appellant. (R. Vol. I p. 218, lines 18-21; p. 219, lines 10-11.) Griffin testified they met the Appellant at a house where Griffin purchased 28 grams of methamphetamine for \$1400. (R. Vol. I p. 222, lines 13-19.) After the transaction, Eades drove Lollis and Griffin back to South Carolina. (R. Vol. I p. 224, lines 22-25.)

Griffin testified he later returned from South Carolina to get an ounce of

methamphetamine from Appellant but received cocaine instead and Lollis and Eades accompanied him on this trip as well. (R. Vol. I p. 225, lines 1-11, 16-18.) Griffin, like Lollis, recalls a transaction for methamphetamine at a Shell Gas Station. (R. Vol. I p. 234, lines 23-25.) He testified Appellant became more comfortable and started letting him come to an apartment, which was off the same exit as the Shell Station. (R. Vol. I p. 235, lines 3-20.) Griffin stated he returned to Georgia to deal with Appellant on 15-20 additional occasions and that he eventually began to make quarter-pound purchases from Appellant, having initially purchased by the ounce. (R. Vol. I p. 230, lines 1-13; p. 231, lines 1-6; p. 236, lines 1-25.) These transactions with Appellant took place during a three-month time frame and on two occasions Griffin purchased a half pound at Appellant's apartment. (R. Vol. I p. 243, lines 2-11.)

Griffin testified to seeing Appellant in South Carolina at his house when he resided there with Rachel. (R. Vol. I p. 243, lines 16-25, p. 244, lines 1-4, 21-25.) On this occasion, Griffin testified, that Appellant brought a quarter ounce of methamphetamine for Griffin and, though he "can't say for a fact," Griffin believed Tate gave Lollis a quarter ounce too. (R. Vol. I p. 245, lines 9-20.) Griffin testified that the methamphetamine recovered from his vehicle when he was arrested with Eades and Simmons came directly from Appellant. (R. Vol. II p. 251, lines 18-20.)

Griffin identified Appellant in court as the individual from whom he purchased methamphetamine. (R. Vol. II p. 251, lines 21-24, p. 252, lines 1-24.) Griffin cooperated with law enforcement after his arrest and identified Appellant in a photo line-up. (R. Vol. II p. 254, lines 1-21, p. 255, lines 1-7.) Griffin also noted he met Appellant at a Waffle house and that he was told by Appellant that Appellant's brother worked

there. (R. Vol. II p. 253, lines 17-24.) Griffin further stated the individual with whom he dealt did not wear glasses. (R. Vol. II p. 272, lines 16-18.) Griffin also testified that after his arrest he spoke with Appellant in person and was sure Appellant was the individual from whom he received methamphetamine. (R. Vol. II p. 273 lines 24-25, p. 274, lines 1-17.)

Griffin admitting to pleading guilty for his involvement in this matter. (R. Vol. II p. 267, lines 23-25). He was initially charged with conspiracy for trafficking 400 grams or more of methamphetamine and acknowledged pleading to trafficking 28-100 grams with a recommended sentence of 15 to 20 years. (R. Vol. I p. 211, lines 9-20, p. 212, lines 8-19, p.268, lines 1-9.) When asked if he knew the sentencing range on the original charge, Griffin replied (without objection from the State) 25-30 years. (R. Vol. I. p. 268, lines 10-16.)

Rachel Elizabeth Eades

Rachel Elizabeth Eades ("Eades") testified Griffin introduced her to methamphetamine. (R. Vol. II p. 278, lines 9-10.) Eades met Lollis in 2009 through Griffin. (R. Vol. II p. 279, lines 13-15.) Ms. Eades stated she overheard Lollis tell Griffin she had a friend in Atlanta who could sell him inexpensive methamphetamine. (R. Vol. II p. 280, lines 3-9.) Eades testified that she went with Griffin to Georgia to buy methamphetamine at a Waffle House in January 2010. (R. Vol. II p. 281, lines 6-10.) She said that Griffin purchased methamphetamine from Appellant outside in the parking lot while she ate. (R. Vol. II p. 282, lines 11-12.) Eades stated she went with Griffin to Georgia on eight to ten other occasions to purchase methamphetamine. (R. Vol. II p. 284, lines 1-19.)

Eades testified that the first transaction occurred at a Waffle House, while others occurred at the Shell Station and at an apartment. (R. Vol. II p. 285, lines 2-11.) Eades provided directions to the apartment. (R. Vol. II p. 285, lines 12-24, p. 286, lines 1-13.) Eades recalled a particular transaction at the Shell Station when Wendy, Jason, and Paul were there and provided details. (R. Vol. II p. 291, lines 5-25, p. 292, lines 1-25, p. 293, lines 1-25, p. 294, lines 1-25.) Transactions were for an ounce or more of methamphetamine. (R. Vol. II p. 289, lines 1-4.) One meeting took place at a strip bar and at that time they were purchasing 2 to 3 ounces. (R. Vol. II p. 296, lines 7-16.) Eades identified Appellant in court as the supplier of methamphetamine. (R. Vol. II p. 302, lines 9-25; p. 302, lines 1-19.)

Eades acknowledged that as a result of this investigation, the State charged her with conspiracy to traffic 400 grams or more of methamphetamine. (R. Vol. II p. 318, lines 19-21.) She entered a plea with a recommendation of 7 to 10 years and admitted she was initially exposed to a substantially higher sentence. (R. Vol. II p. 319, lines 1-15.) Eades also admitted that she committed felony child neglect and fraud. (R. Vol. II p. 318, lines 19-21.)

Christopher Noah Bishop

Mr. Bishop was a Confidential Informant ("CI") for Greenville County (R. Vol. II p. 371, lines 16-25, p. 372, lines 1-2.) He admitted to being a former user of marijuana and hallucinogenic mushrooms with felony convictions for bank robbery and making a bomb threat. (R. Vol. II p. 370, lines 4-25; p. 371, lines 1-2.)

After completing six buys on other individuals, Bishop was to purchase methamphetamine from Appellant in Atlanta. (R. Vol. II p. 389, lines 16-17; p. 390, lines

8-12.) According to Bishop, he contacted Chad Ayers of the Greenville County Police Department Vice Squad, who "wired [him] up," and gave him a thousand dollars to make the controlled purchase with another co-conspirator, Albrie Nate Bashaw. (R. Vol. II p. 377, lines 4-20.) Bishop had previously conducted two undercover buys on Bashaw. (R. Vol. II p.373, lines 21-22.) Bashaw and Javin Adams had contacted Bishop to go to Georgia with her to get a transmission from Appellant. (R. Vol. II p. 390, lines 13-15.) Bishop testified they never consummated the transaction; instead, they drove around for an hour and a half because Appellant came to suspect that an unmarked police car was following him. (R. Vol. II p. 380, lines 1-6.) Bishop testified that Appellant eventually called off the transaction. (R. Vol. II p. 2383, lines 6-8.) The agreement for a drug transaction did not occur, according to Bishop, because of police surveillance. (R. Vol. II p. 401, lines 5-10.)

Sometime after this incident, Bishop identified Tate in a photographic lineup. (R. Vol. II p. 383, lines 21-25.) Bishop was unable to record any of the conversations because the wire recorder provided to him had technical problems. (R. Vol. II p. 377, lines 22-25; p. 378, lines 1-7.)

Charles Javin Adams

Adams testified that Chad Moore asked him to accompany him to Atlanta to help him get drugs from Appellant. (R. Vol. II p. 483, lines 13-25; p. 484, lines 4-25; p. 486; p. 487, lines 1-2.) Adams subsequently traveled to Atlanta between eight and thirteen times to purchase meth from Appellant, sometimes with Bashaw and sometimes with Moore. (R. Vol. II 487, lines 23-25; p. 488, lines 1-20.) He testified that during the time

he was dealing with Appellant he tried to go every other day and the smallest amount he would purchase was an ounce. (R. Vol. II p. 491, lines 15-20; p. 492, lines 16-17.)

Adams stated he would call Appellant's cellular phone when he wanted to make a deal, and, like Lollis, he testified that Appellant changed his telephone number several times. (R. Vol. II p. 497, lines 22-25; p. 498, lines 1, 14-18.) Adams testified that Appellant came to Adam's apartment in South Carolina on several occasions. (R. Vol. II p. 498, lines 19-25.) Adams also testified about the unsuccessful controlled purchase with Bishop and that Appellant told him to never send Bishop again, because Bishop had been "tailed." (R. Vol. II p. 504, lines 1-11.)

Adams testified that he usually went to Appellant's house for the purchases. (R. Vol. II p. 495, lines 10-11.) He also testified to the use of a green dot card for making purchases. (R. Vol. II p. 497, lines 7-23.) He also testified that on one occasion Appellant "fronted" him an ounce and on another occasion brought an ounce to him at his residence in South Carolina. (R. Vol. II p. 492, line 18.) After he was sentenced to house arrest, he began sending Bashaw along with a "driver" named Norman Trebuchon to purchase the meth from Tate. (R. Vol. II p. 489, lines 1-2.)

Sometime after this incident, Adams began working with law enforcement and became a confidential informant. (R. Vol. II p. 505, lines 5-15.) Adams identified Appellant in a photo lineup and was certain that he bought methamphetamine from Appellant and not his brother. (R. Vol. II p. 507, lines 4-25; p. 543, lines 1-9.)

Mr. Adams acknowledged to initially being charged in this case with Trafficking 400 grams or more and to a pleading guilty to the lesser charge of Trafficking 10 to 28 grams with a recommendation of 3 to 6 years. (R. Vol. II p. 481, lines 9-25, p.482, line

1; p. 522, lines 3-19; p. 524, lines 5-7.) He also stated he would have been facing a significant amount of time. (R. Vol. II p. 482, lines 1-4, 16-20.)

Albrie Nate Bashaw

In July 2010, Ms. Bashaw moved in with Javin Adams and they both sold methamphetamine at this time. (R. Vol. III p. 549, lines 1-9.) Ms. Bashaw testified that she took trips to Atlanta without Adams from July 2010 to January 2011 to secure meth. (R. Vol. III p. 561, lines 13-18.) The amount of methamphetamine varied between two ounces to four ounces. (R. Vol. III p. 563, lines 21-25.) She testified that she travelled to Atlanta an average of three times a week during this period. (R. Vol. III p. 564, lines 6-10.) In total, Ms. Bashaw claimed she had dealt with Appellant on twenty occasions over a period of about nine months. (R. Vol. III p. 581, lines 8-10.) She also stated that Appellant know she lived in South Carolina. (R. Vol. III p. 5000, lines 13-15.)

Ms. Bashaw began cooperating with law enforcement in March 2011. (R. Vol. III p. 571, lines 8-15; p. 572, lines 7-9.) As part of her cooperation she provided information on her drug dealings and participated in undercover deals. (R. Vol. III p. 572, lines 13-25.) In one such deal, she testified that she, Adams, Officer Chad Ayers and Officer Brett Barwick attempted to arrange a controlled deal with Appellant. (R. Vol. III p. 573, lines 15-25.) However, the deal was unsuccessful and Appellant told her he was no longer interested but would contact them in the future if he felt he could make some money off of them. (R. Vol. III p. 573, lines 23-25; p. 574, lines 1-5.)

On cross-examination, Bashaw admitted that she gave a statement to law enforcement concerning the identity of Appellant at one point that conflicted with her testimony. (R. Vol. III p. 608, lines 1-8.) On re-direct it was clarified that at the time she

provided the statement to law enforcement she did not know Appellant and it was actually not untrue (R. Vol. III p. 607, lines 4-21.)

Bashaw acknowledged that she was originally charged with conspiracy to traffic 400 grams or more of methamphetamine. (R. Vol. III p. 588, lines 1-3.) She testified, however, that the State reduced her sentence to 3 to 6 years in exchange for her co-operation. (R. Vol. III p. 588, lines 6-8.)

Charles Norman Trebuchon

Charles Norman Trebuchon testified he has known Adams since he was a "kid" and admitted using methamphetamine with him. (R. Vol. III p. 620, lines 19-25; p. 621, lines 1-16.) For a period of time, he lived with Adams and Bashaw. (R. Vol. III p. 621, lines 1-16.) Trebuchon testified that he would drive Ms. Bashaw to Atlanta for her to obtain methamphetamine from Appellant and that he would wait in the living room of Appellant's apartment while she made the purchase in the kitchen. He recalled specific instances and that he took Bashaw approximately a dozen times. (R. Vol. III p. 625, lines 3-6, 12-25.) Trebuchon testified that he went by himself twice on behalf of Mr. Adams at Mr. Adam's direction to purchase methamphetamine from Appellant. (R. Vol. III p. 626, lines 3-6.) Each of these trips ended in a purchase of "usually 4 ounces." (R. Vol. III p. 626, line 14.) Trebuchon was never charged in this case and did not receive the benefit of a plea deal to a reduced sentence.

Warren Brent Chastain

Warren Brent Chastain testified he began purchasing methamphetamine to support his habit, but then purchased a sufficient quantity to sell to others as well. (R. Vol. III p. 650, lines 2-6.)

Chastain testified that he drove from South Carolina to Atlanta with Brian Stegall ("Stegall") to purchase methamphetamine. (R. Vol. III p. 653, lines 15-24.) Upon arriving at a hotel room in Atlanta, he stated he met Appellant at a Waffle House, and then went with Stegall to a local motel room where Stegall purchased methamphetamine from Appellant and a "Hispanic guy" in the motel room's bathroom using Chastain's money, and Stegall then gave Chastain the two ounces of methamphetamine he had purchased. (R. Vol. III p. 654, lines 1-20; p. 655, lines 2-23.)

After this transaction, Chastain returned to South Carolina to sell these two ounces. (R. Vol. III p. 656, lines 1-2.) He testified that he saw Appellant once more at Griffin's home in South Carolina, but does not know if Appellant brought any methamphetamine to Griffin's home. (R. Vol. III p. 656, lines 15-24.)

Chastain acknowledged that he pled guilty to a lesser charge for this crime, and that by doing so he avoided a much larger sentence. (R. Vol. III p. 652, lines 14-17.) Specifically, he pled guilty to a second offence of the trafficking of twenty-eight to a hundred grams of methamphetamine with a State recommendation of twelve to fifteen years. (R. Vol. III p. 652, lines 2-5.)

Larry Anthony Gambrell

Larry Anthony Gambrell testified that he met Tate through Lollis, who took him to an apartment in Atlanta to purchase methamphetamine. (R. Vol. III p. 669, lines 16-20; p. 670, lines 5-11.) Gambrell testified that he went to Atlanta on five or six more occasions. (R. Vol. III p. 584, lines 19-21.) According to Gambrell, they purchased two to four ounces of methamphetamine on each trip. (R. Vol. III p. 675, lines 1-4.)

Gambrell agreed to work for law enforcement and identified Appellant in a photo

lineup. (R. Vol. III p.681, lines 5-19.) Gambrell was serving time for Distribution of Methamphetamine unrelated to this case and was not indicted in this case nor did receive any deal related to this case.

Norman Bergholm

Norman Bergholm testified he started purchasing methamphetamine from Adams once a week. (R. Vol. III p.695, lines 4-13.) Bergholm testified to meeting Appellant at Mr. Adams' home during a birthday party and that he purchased methamphetamine from Appellant on numerous occasions. (R. Vol. III p. 696, lines 4-13; p. 698, lines 6-9.) Bergholm stopped purchasing from Appellant because the product was "no good." (R. Vol. III p. 701, line 14 to p. 702, line 2). Bergholm met with law enforcement in June of 2011, at which time he identified Appellant in a photo lineup. (R. Vol. III p. 704, lines 6-11; p. 705, lines 1-9.)

Bergholm testified he is currently serving prison time in Iowa for felony eluding and has other felony convictions (R. Vol. III p. 691, lines 5-8, 23-25; p. 717, lines 2-17.) Bergholm was originally charged with trafficking methamphetamine 400 grams or more, and pled guilty to trafficking twenty-eight to a hundred grams of methamphetamine with a recommended a sentence of 15 to 18 years. (R.Vol. III p. 691, lines 18-22, p. 692, line 307.)

Chad Dewayne Moore

Chad Dewayne Moore testified that he bought methamphetamine from Griffin, whom he met through Lollis. (R. Vol. III p. 723, lines 1-15.) Moore eventually met Griffin and Lollis' supplier at an apartment in Atlanta. (R. Vol. III p.724, lines 9-24.) Chad Moore identified this individual as Appellant. (R. Vol. III p. 725, lines 1-5.) Chad Moore had

went with Lollis to meet Appellant and bought an ounce of methamphetamine from him on this occasion. (R. Vol. III p. 725, lines 9-24.) He stated he drove back to Atlanta on two or three other occasions to purchase about an ounce of methamphetamine from Appellant, who eventually stopped selling meth to him. (R. Vol. III p. 726, lines 8-17; p. 732, lines 1-8.)

Mr. Moore testified that he was introduced to selling methamphetamine by Wendy Lollis and that she introduced him to Jason Griffin. From that point, he met their supplier, Appellant. He testified to going to Atlanta to conduct drug deals with Appellant on the initial meeting when he was introduced and then 2 or 3 other times. (R. Vol. III p. 726, lines 8-10.) He recalled certain details of meet locations such as taking exit 101. (R. Vol. III p. 727, lines 4-12.) He stated he took Javin Adams to meet Appellant. (R. Vol. III p. 729, lines 9-11.) Mr. Moore identified Appellant in a photo line-up. (R. Vol. III p. 733, lines 9-11, 21-25.)

On cross examination Mr. Moore acknowledged he was initially facing the same charge as Appellant of Trafficking Methamphetamine 400 grams and the possible penalty was 30 years. (R. Vol. III p. 741, lines 14-25, p 742, lines 1-5.) He also acknowledged that the State agreed to recommend a sentence of 18 years. (R. Vol. III p.742, lines 1-13.)

Law Enforcement

Law Enforcement testifying for the State included Lt. Henry Dale Campbell, Agent Brett Barwick, and Agent Ashley Asbill. Mr. Campbell testified that he is employed by the Pickens County Sheriff's Office in the Narcotics unit and that he has been with the Sheriff's Office for 15 to 16 years. (R. Vol. II p. 328, lines 2-5.) He

explained how he conducts investigations and that he uses Confidential Informants ("CI"). (R. Vol II p. 329, lines 5-25.)

Mr. Campbell used a CI for a controlled purchase from Christopher Simmons on March 2010, for the investigation underlying this case. (R. Vol. II p. 330, lines 14-25.) Ms. Eades and Simmons were present at this time. (R. Vol. II p. 335, lines 4-11.) Methamphetamine was recovered as a result and Mr. Campbell, testified that subsequent to the arrest of Chris Simmons he learned that the methamphetamine came from Appellant. (R. Vol. II p. 337, lines 1-11.)

Agent Brett Barwick testified he works as a narcotics officer for the Pickens County Sheriff's Office. (R. Vol. III p. 412, lines 8-9.) He became involved in this investigation when another officer, Chris Marquis, developed a CI that was aware of several persons trafficking methamphetamine throughout Pickens and Greenville Counties. (R. Vol. II p. 412, lines 19-25; p. 413, lines 1-5.) During this investigation, he said the "conspiracy" widened as he spoke to more CIs and others who would cooperate with him. (R. Vol. II p. 414, lines 14-25.) Eventually, this process led to the source of the methamphetamine for this case, the Appellant. (R. Vol. II p. 415, lines 2-7.)

Barwick was involved with the attempted controlled purchase from Appellant by Bishop. He testified that although no purchase was made, law enforcement was able to identify Appellant as a source for methamphetamine. (R. Vol. II p. 415, lines 2-7; p. 428, lines 14-25; p. 429, lines 1-19.)

Agent Ashley Asbill testified he works for the State Law Enforcement Division.

(R. Vol. III p. 745, lines 1-7.) Asbill explained the general concept of the organizational makeup of a conspiracy. (R. Vol. IV p. 754, lines 12-16.) Asbill further testified that the individuals indicted in this conspiracy were organized in the sense they all went to Atlanta to purchase methamphetamine from Tate. (R. Vol. IV p. 754, lines 17-21.) Those that were indicted were dealing "substantial amounts" according to Asbill. (R. Vol. IV p. 755, lines 1-5.) Asbill testified that Appellant was the highest source in this group. (R. Vol. IV p. 755, lines 6-8.)

ARGUMENT

I. SUFFICIENT EVIDENCE WAS PRESENTED BY THE STATE FOR THE GREENVILLE COUNTY JURY TO CONVICT ANTONIO TATE OF TRAFFICKING IN METHAMPHETAMINE 400 GRAMS OR MORE.

A. Standard of Review; the issue of whether there was a lack of evidence of conspiracy is not properly presented to this court as error by the trial court.

This court sits to review errors of law by the trial court. See, e.g., State v. Wilson, 345 S.C. 1, 545 S.E. 2d 827 (2001); see also Townes Associates, Ltd. V. City of Greenville, 266 S.C. 81, 221 S.E. 2d 773 (1976) (the jurisdiction of the Appellate Court for an appeal from a jury verdict extends only to errors of law).

Appellant has not articulated legal error by the trial court, but rather presents argument about the weight of the State's case. As such, this issue is not properly presented to this court for review of legal error.

To the extent Appellant is challenging the denial of the Direct Verdict, the trial court's findings of fact will be upheld unless clearly erroneous. See, e.g., State v. Quattlebaum, 338 S.C. 441, 527 S.E. 2d 105 (2000).

B. The trial court did not err in denying the motion for directed verdict; the State presented sufficient evidence of trafficking methamphetamine.

Should this Court deem it appropriate to address the issue as presented by Appellant, the State's case at trial presented sufficient evidence of Appellant's guilt of Trafficking Methamphetamine 400 grams or more to submit the case to the Greenville County jury. The trial court did not err in denying the motion for directed verdict.

Defense counsel moved for directed verdict at the close of the State's case, arguing that the State presented insufficient evidence of guilt. Defense counsel referred to supposed "false information" provided by witnesses and that witnesses could not differentiate him from his twin brother. (R. Vol. IV II, p. 760, lines 7-20). The trial court denied the motion finding there was evidence on which a jury could base a verdict. (R. Vol. IV, p. 760, lines 21-25; p. 761, lines 1-30.) The trial court instructed the jury on credibility of witnesses and the law of trafficking prior to deliberations. (R. Vol. IV p. 720-737.)

Denial of directed verdict must be viewed in the light most favorable to the State. See, e.g., State v. McHoney, 344 S.C. 85, 544 S.E. 2d 30 (2001); see also Welch v. Epstein, 342 S.C. 279, 536 S.E. 2d 408 (Ct. App. 2000) (the denial of a directed verdict motion (or JNOV) must be viewed under the same standard as the trial court, in the light most favorable to the non-moving party). The trial court is concerned with the existence or nonexistence of evidence and not its weight. See State v. Pinckney, 359 S.C. 346, 529 S.E. 2d 526 (2000). See also Creech v. South Carolina Wildlife & Marine Resources Dep't, 328 S.C. 24, 491 S.E. 2d 571 (1997) (The trial court will be reversed only where there is no evidence to support the ruling of the trial court.) Where there is

any direct or circumstantial evidence presented by the State which reasonably tends to prove guilt of the criminal defendant or from which guilt could reasonably be deduced, the case must be given to the jury. See e.g., State v. Pinckney, 399 S.C. 346, 529 S.E. 2d 526 (2000); State v. Kelsey, 331 S.C. 50, 502 S.E. 2d 63 (1998).

The trial court's findings of fact will be upheld unless clearly erroneous. See, e.g., State v. Quattlebaum, 338 S.C. 441, 527 S.E. 2d 105 (2000); see also State v. Peer, 320 S.C. 546, 466 S.E. 2d 375 (Ct. App. 1996) (jury verdict must be upheld if there is any evidence to sustain it and review must be in the light most favorable to the State). The veracity of witnesses or the weight of the evidence is not to be considered; only whether there was sufficient evidence to submit the case to the jury may be reviewed. See id; see, e.g., Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. 2d 773 (1976) (factual findings by the jury shall not be disturbed unless the record below shows no evidence to reasonably support the jury's findings).

Appellant's argument is concerned with the weight and veracity of the State's evidence against him, which is not to be considered. The trial court was correct in finding the State presented evidence of the crime alleged. Under S.C. Code § 44-53-375, a person commits the crime of trafficking in methamphetamine (400 grams or more) where the person:

manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or **conspires** to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370.

Id (*emphasis added*).

The State is allowed to prove a conspiracy from commencement to conclusion and overt acts done in furtherance of it. See State v. Wilson, 315 S.C. 289, 294, 433 S.E. 2d 827 (1993). The State is allowed great latitude in introducing circumstantial evidence of conspiracy, and the amounts of drugs involved in various transactions as proof of the conspiracy may be presented to a jury. See id.

The state presented numerous witnesses who testified about the Defendants sale of methamphetamine to individuals bringing the methamphetamine back for sale in South Carolina. The witnesses testified to an aggregate weight over 400 grams of methamphetamine sold by Appellant, which included the following testimony. Adams testified to purchasing more than user amounts from Appellant. (R. Vol. III p. 500, lines 7-12.) Trebuchon testified to taking Ms. Bashaw to Atlanta for her to obtain methamphetamine from Appellant and to doing this around a dozen times. (R. Vol. III p. 625, lines 3-6.) He also testified that he went by himself twice on behalf of Mr. Adams to purchase methamphetamine from Appellant. (R. Vol. III p. 626, lines 3-6.) Each of these trips was a purchase for "usually 4 ounces." (R. Vol. III p. 626, line 14.) Gambrell testified that he would purchase 2 ounces on one occasion and another 2 to 4 ounces 5 or 6 more times. (R. Vol. III p. 673, line 21; p. 674, lines 17-25.) Moore testified that he bought an ounce at a time for 4 to 5 times. (R. Vol. III p. 726, lines 15-24.) Lollis testified that Appellant usually did not sell less than an ounce at a time. (R. Vol. I p. 172, lines 8-14); Griffin testified that he was buying ounces and moved up to buying pounds. (R. Vol. I p. 242-243.) Eades stated she purchased 2-3 ounces on one occasion. (R. Vol. II p. 200, lines 14-16); Bashaw testified to buying between 2 to 4

ounces on average of 2 to 3 times a week for a period of about 9 months. (R. Vol. III p. 563, lines 21-25; p. 564, lines 6-10.)

In the light most favorable to the State, sufficient evidence was presented to submit the case to the jury that Appellant committed the crime of trafficking methamphetamine and the trial court did not commit error. The jury was presented sufficient evidence that Appellant was repeatedly selling methamphetamine in large amounts, at the same locations in the Atlanta, Georgia area to individuals known to him to reside in South Carolina. Accordingly, the trial court's findings were not clearly erroneous and the denial of the directed verdict motion must be affirmed.

II. THE EXTENT OF CROSS EXAMINATION PERMITTED BY THE TRIAL COURT WAS NOT REVERSIBLE ERROR.

A. Standard of Review.

Absent a manifest abuse of discretion, the trial court's ruling as to the proper scope of cross examination allowed should be upheld. See State v. Whatley 407 S.C. 460, 466, 756 S.E. 2d 393, 395 (Ct. App. 2014) (citing State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000)); see also State v. Johnson, 338 S.C. 114, 124-25, 609 S.E. 2d 520 (2000).

B. The Confrontation Clause has not been violated because even if the trial court erred in limiting cross examination, Appellant was not prejudiced and the error was harmless.

The State sought a manner of questioning witnesses that would not reveal the possible sentence the court could impose upon the Defendant should the jury reach a guilty verdict. Upon the State raising the issue, the trial court expressed concern that the jury may learn the possible sentence or mandatory minimum sentence the defendant

was facing. (R Vol. I p. 146, lines 4-15.) Counsel for the State attempted to clarify the request in light of State v. Gracely (below-cited) and articulated the concern only that defense counsel somehow phrase questions in a manner that would not indicate Appellant was facing a mandatory minimum. (R. Vol. I p. 145, lines 1-5.)

Thus, the trial court structured examination of witnesses so that counsel was not allowed to specifically inquire as to the possible sentence of trafficking methamphetamine 400 grams or more, but allowed counsel to inquire of the witnesses as to originally being charged with the greater offense (that being the same as Appellant), and pleading to a lesser offense, as well as the possible sentencing range of the lesser offense. The understanding appeared to be that the jury could “put two and two together” that the witness “could have gotten more” for the greater offense. (R. Vol. I p. 147, lines 5-25.)

Even given this ruling by the trial court, the jury was presented information about the possible sentence of trafficking 400 grams or more without objection by the State. During cross examination of Chad Moore, he acknowledged he was initially facing the same charge as Appellant of trafficking methamphetamine 400 grams and the possible penalty was 30 years. (R. Vol. III p. 741, lines 14-25; p. 742, lines 1-5.). During cross examination of Jason Griffin he acknowledged he could have received 25-30 years as a possible sentence on the initial charges of trafficking 400 grams. (R. Vol. II p. 268, lines 10-16.).

While not as clear as may be preferred, the information was made known to the jury. To that end, as below-articulated and cited, witnesses pleading to lesser charges

with recommendations for reduced sentences admitted to receiving significant reductions for incarceration.

The Sixth Amendment provides for the right to confront ones' accusers and the right to meaningful cross examination of an adverse witness. See U.S. Const. Amend VI. See also Whatley, 407 S.C. at 467, 756 S.E. 2d 393. "This does not mean, however, that the trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." Whatley, 407 S.C. at 467; 756 S.E. 2d 393 (quoting State v. Aleksey, 343 S.C. 20, 33-4, 538 S.E. 2d 248, 255 (2000). "Trial courts retain wide latitude... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." Id. (quoting Aleksey, 343 S.C. at 33-4).

It is recognized that due to competing concerns with some witnesses, generally, the jury is "not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence. However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence." Whatley, 407 S.C. at 396-7, 756 S.E. 2d 393 (quoting State v. Mizzell, 349 S.C. 326, 331, 563 S.E. 2d 315).

For the limitation of cross-examination by the trial court to be reversible error, Appellant must show he was unfairly prejudiced by the limitation. See State v. Brown, 303 S.C. 169, 171, 399 S.E. 2d 593 (1991). The Constitution entitles a criminal

defendant to a fair trial, not a perfect one. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (citing *e.g.*, United States v. Hasting, 461 U.S. 499, 508–509 (1983); Bruton v. United States, 391 U.S. 123, 135 (1968)). “[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (*per curiam*) (emphasis in original).

A violation of the Confrontation Clause exists when the criminal defendant was “prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.” State v. Mizzell, 349 S.C. 326, 331, 563 S.E. 2d 315 (2002) (quoting Van Arsdall, 475 U.S. at 680 (1986) (internal quotation marks omitted); see also State v. Gracely, 399 S.C. 363, 372, 731 S.E. 2d 880 (2012); Whatley 407 at 467–8, 756 S.E. 2d 393.

Our Supreme Court has addressed the limitation of cross-examination of a cooperating witness avoiding a mandatory minimum sentence. See generally State v. Gracely, 399 S.C. 363, 731 S.E. 2d 880 (2012). In Gracely, it was held that a cooperating witness avoiding a *mandatory minimum* sentence is “critical information that a defendant must be allowed to present to the jury.” 399 S.C. at 374–5, 731 S.E. 2d 880. However, a limitation of cross examination does not prejudice the defendant when it does not prevent a “full picture of possible bias.” Gracely, 399 S.C. at 377, 731 S.E. 2d 880; see also Whatley at 469 (quoting Gracely).

Limitation of cross examination is not per se reversible error; rather, the limit on cross examination by the trial court must be reviewed under a harmless error analysis. See Van Arsdall, 475 U.S. at 684 (holding the denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless-error analysis); Gracely, 399 S.C. at 375, 731 S.E. 2d 880; see also Whatley, 407 S.C. at 469-70, 756 S.E. 2d 393 (citing Gracely).

A conviction may be affirmed where there is trial error if the error was harmless. See, e.g. State v. McWee, 322 S.C. 387, 472 S.E. 2d 235 (1996); State v. Benning, 338 S.C. 59, 524 S.E. 2d 852 (Ct. App. 1999) (error must be prejudicial). Error is harmless if it could not have reasonably affected the result of the trial. See State v. Kelly, 319 S.C. 173, 460 S.E. 2d 368 (1995); see also Thomasko v. Poole, 349 S.C. 7, 561 S.E. 2d 597 (2002) (error is harmless if the appellate court finds beyond a reasonable doubt the error did not contribute to the verdict); State v. Clute, 324 S.C. 584, 480 S.E. 2d 85 (Ct. App. 1996) (Constitutional error may be harmless if considering the record on appeal, the appellate court finds beyond a reasonable doubt the error did not contribute to the verdict.).

Whether an error concerning witness credibility is harmless depends on a number of factors, which include "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 (citations omitted); see also

Whatley 407 S.C. at 468-9, 756 S.E. 2d 393 (quoting Van Arsdall and citing Gracely); State v. Beckham, 334 S.C. 302, 513 S.E. 2d 606 (1999).

In Whatley, a charge against a witness was reduced from an offense with a mandatory minimum sentence, and the trial court erred in precluding Whatley from questioning about the sentences being faced for the reduced charges. However, this Court found in Whatley there was no error by the trial court limiting cross examination. This Court noted that “in view of the first three Van Arsdall factors, the importance of a witness's testimony to the prosecution's case and whether it was cumulative to or corroborated by other evidence, we find Whatley suffered no prejudice.” See id. at 375, 731 S.E.2d at 886. This Court found the witness's testimony was important to the State's case against Whatley, and it was cumulative to, and corroborated by, another's testimony. See id. The Court also found in Whatley, as to the fourth Van Arsdall factor, that the extent of cross-examination allowed also did not support a finding of prejudice. Aside from sustaining the State's objection to Whatley's question concerning the sentences the witness faced for her accessory charges, the trial court did not restrict Whatley's cross-examination of the witness in any way. See id.

Similarly, an error in this case was also harmless error as above-argued. First, the information Appellant sought to explore was ultimately presented in some fashion to the jury. Second, when applying the Van Arsdall factors, the Appellant has not suffered prejudice.

While not addressed specifically with each witness having initially faced a greater charge and mandatory minimum, the jury was able to learn enough to conclude each witnesses facing the charge of trafficking methamphetamine 400 grams or more (as well

as Appellant) was subject to a possible penalty of 25 to 30 years. As above-noted, notwithstanding the trial court's limiting ruling, the information Appellant was seeking to have revealed about possible sentencing of the greater offense of trafficking methamphetamine 400 grams, while perhaps not in the most precise manner one may prefer, was in actuality presented to the jury without objection by the State. During cross examination of Chad Moore, he acknowledged he was initially facing the same charge as Appellant of Trafficking Methamphetamine 400 grams and the possible penalty was 30 years. (R. Vol. III p. 741, lines 14-25; p. 742, lines 1-5.) During cross examination of Jason Griffin he acknowledged he could have received 25-30 years as a possible sentence on the initial charges of Trafficking 400 grams. (R. Vol. II p. 268, lines 10-16.)

Applying the Van Arsdall factors, Appellant was likewise not prejudiced by the limitation of cross examination. The testimony of the witnesses at issue was important to the State's case; these witnesses corroborated each other's testimony and were cumulative. While these witnesses may not be the best members of society, the best source of information about drug dealing is from fellow drug dealers.

Multiple witnesses testified to the same or similar information about Appellant's actions. Specific instances and details were presented independently from each other. For example, witnesses consistently testified to having phone numbers for Appellant and that they would call Appellant ahead of time before traveling to Georgia to arrange a deal for Methamphetamine. See testimony of Lollis (R. Vol. I p. 185, lines 13-23.); Griffin (R. Vol. I p. 232, lines 23-25; p.233, lines 1-3; p. 246, lines 10-12,); Eades (R. Vol. II p. 281, lines 9-10.); Bashaw (R. Vol. III p. 554, lines 13-21.); Moore (R. Vol. III p.

730, lines 20-22.); Gambrell (R. Vol. III p. 672, lines 15-19.); Moore (R. Vol. III p. 730, lines 20-22.) Witnesses testified to being introduced to Appellant and introducing him to others. See testimony of Lollis (R. Vol. I p. 159, lines 9-15; p. 160, lines 8-9.); Moore. (R. Vol. III p. 730, lines 20-22.); Bashaw (R. Vol. III p. 550, lines 8-25; p. 551, lines 1-16.); Bergholm (R. Vol. III p. 696, lines 1-15.); Moore (R. Vol. III p. 724, lines 13-24; p. 729, lines 9-11.)

Witnesses mentioned the same locations to conduct the deals with Appellant such as the Waffle House, the Shell Station, apartments and a bar. See testimony of Lollis (R. Vol. I p. 189, lines 7-10 (Shell Station).); Griffin (R. Vol. I p. 234, lines 15-25; p. 235, lines 3-23 (Shell Station, exit 101 and Appellant's apartment).); Eades (R. Vol. II p. 281, lines 9-10, 22-23; p. 285, lines 2-11; p. 295, lines 13-17 (Waffle House, Appellant's apartment, Shell Station and bar).); Adams, (R. Vol. II p. 494, lines 2-16; p. 495, lines 10-12 (apartment and bar).); Bashaw (R. Vol. III p. 551, lines 1-2; p. 552, lines 19-23 (apartment and bar).); Chastain (R. Vol. III p. 654, lines 1-19 (Waffle House).), Gambrell (R. Vol. III p. 675, lines 15-16 (Waffle House).); Bergholm (R. Vol. III p. 697, lines 6-13 (Waffle House).); Moore (R.. Vol. III p. 727, lines 2-5 (apartment)). While witnesses did not recall phone numbers and addresses they provided details on how to arrive at locations, such as exit number 101, the Shell Station and directions to Appellants apartment. See testimony of Lollis (R. Vol. I p. 187, lines 9-24; p.188, lines 16-25.); Griffin (R. Vol. I p. 222, lines 10-22.); Eades (R. Vol. II p. 286, lines 1-15.); Bashaw (R. Vol. III p. 461, lines 2-9.); Gambrell (R. Vol. III p. 675, lines 17-25; p. 676, lines 1-8.); Bergholm (R. Vol. III p. 697, lines 4-22.); Moore (R. Vol. III p. 727, lines 2-12.).

Witnesses also recounted specific encounters with Appellant such as the meet at a Shell Station. See testimony of Lollis (R. Vol. I p. 189, lines 7-12.); Eades (R. Vol. II p. 291, lines 5-25; p. 292 – 294.); the time Ms. Bashaw, and Mr. Bishop retrieved a transmission where Bishop was attempting a controlled buy from Appellant. See testimony of Bishop (R. Vol. II p. 376, lines 19-25; p. 377, lines 1-25; p. 383, lines 3-8.); Adams (R. Vol. III p. 501, lines 17-25; p. 502, lines 1-22.); Bashaw (R. Vol. III p. 566 – 570.); the time Ms. Bashaw and Mr. Adams re-engaged with Appellant. See Adams (R. Vol. III p. 533, lines 11-25; p. 534.); Bashaw (R. Vol. III p. 573, lines 10-25; p. 574, lines 1-5.) Witnesses also recalled Appellant being in South Carolina at Mr. Griffin's residence and Mr. Adam's residence. See testimony of Griffin (R. Vol. I p. 243, lines 16-25; p. 244, lines 1-4, 21-25.); Adams (R. Vol. II p. 498, lines 19-24.); Trebuchon (R. Vol. III p. 631, lines 5-25.); Chastain (R. Vol. III p. 656, lines 11-18.); Bergholm (R. Vol. III p. 697, lines 15-16.) Other details of dealing with Appellant were consistent as well, such as the use of green dot cards for payment. See testimony of Adams (R. Vol. III p. 539, lines 21-25; p. 540, lines 12-19.); Bashaw, (R. Vol. III p. 560, lines 12-18.)

Witnesses also independently during the course of investigation, and at different times, selected Appellant from a photo-line up and also identified him in court as their source for Methamphetamine. See testimony of Lollis (R. Vol. I p. 174 -175.); Eades (R. Vol. II p. 303, lines 1-17.); Griffin (R. Vol. II p. 251, lines 21-25; p. 252, lines 1-19.); Bishop (R. Vol. II p. 384, lines 1-13; p. 385, line 6.); Adams (R. Vol. III p. 509, lines 4-18.); Bashaw (R. Vol. III p. 574, lines 4-25; p. 575 – 576; p. 577, lines 1-6.); Trebuchon (R. Vol. III p. 634 - 635, lines 1-18.); Gambrell (R. Vol. III p. 681, lines 7-25; p.682, lines

1-20.); Bergholm (R. Vol. III p. 704, lines 12-25; p. 705, lines 1-22.); Moore (R. Vol. III p. 732, lines 11-25; p. 733.).

Witnesses testified that Appellant knew they were from South Carolina. See testimony of Lollis (R. Vol. I p. 160, lines 2-7.); Adams (R. Vol. III p. 499, lines 22-24; p. 500, lines 12-15.); Bashaw (R. Vol. III p. 559, lines 20-21.) Large amounts were consistently purchased from Appellant. As above-addressed, individuals testified to large amounts and repeat buys from Appellant. See testimony of Adams (R. Vol. III p. 500, lines 7-12.); Trebuchon (R. Vol. III p. 625, lines 3-6; p. 626, lines 3-6, 14.); Gambrell (R. Vol. III p. 673, line 21; p. 674, lines 17-25.); Moore (R. Vol. III p. 726, lines 15-24.); Lollis (R. Vol. I. p. 172, lines 11-12.); Griffin (R. Vol. I p. 242-243.); Eades (R. Vol. II p. 296, line 16.); Bashaw (R. Vol. III p. 563, lines 21-25; p. 564, lines 6-10.)

Moreover, the extent of cross examination otherwise permitted was significant. Witnesses repeatedly acknowledged a significant reduction in possible sentence and the need to be truthful for their cooperation as part of the plea deal. Witnesses admitted to other criminal convictions as well. See testimony of Lollis (R. Vol. I p. 152, line 22; p. 153, lines 6-23; p. 197, lines 20-25; p. 198, lines 11-17; p. 199 lines 7-9.); Griffin (R. Vol. I p. 211, lines 9-20; p. 212, lines 8-19; Vol. II p. 267, lines 23-25; p. 268, lines 1-9.); Eades (R. Vol. II p. 318, lines 19-21; p. 319, lines 1-24.); Adams (R. Vol. II p 523 - 626); Bashaw (R. Vol. III p. 588, lines 1-8); Chastain (R. Vol. II p. 652, lines 1-17.); Moore (R. Vol. III p. 741, lines 14-25; p. 742, lines 1-13.) Counsel was effective in cross examination of witnesses in substance. For example, defense counsel had Ms. Bashaw admit she had lied to law enforcement (R. Vol. III p. 608, lines 1-8.) On re-direct it was

clarified that at the time she provided the statement to law enforcement she did not know Appellant and it was actually not untrue (R. Vol. III, p. 607, lines 4-21.)

It is important that trial counsel was able to argue credibility to the jury. The judge's ruling in no way limited defense counsel from pointing out to the jury that the witnesses were drug dealers, and criminals and that each had something to gain from testifying and cooperating with law enforcement. In closing argument, trial counsel argued about the credibility of witnesses in general and, significantly, did not point out the varying deals witnesses had obtained. (R. Vol. IV p. 803, lines 19-25; p. 804 – 805.) Trial counsel merely pointed to the witnesses "who have not been law abiding." (R. Vol. IV p. 804, lines 20-25.) Further, the jury was instructed by the trial court on the credibility of witnesses prior to deliberations. (R. Vol. IV p. 812, lines 17-25; p. 813, lines 1-10.)

While the limit of cross examination is similar to that in Gracely, the extent of cross examination otherwise permitted allowed for the Defendant to explore possible bias and provide a full picture to the jury. This case differs from Gracely because here the State presented many more witnesses with details and consistency. Appellant was able to engage in appropriate cross-examination and was able to show potential bias so that the jury could draw inferences as to reliability of witnesses. See State v. Mizzell, 349 S.C. 326, 331, 563 S.E. 2d 315 (2002) (quoting Van Arsdall, 475 U.S. 673 (internal quotation marks omitted)).

Also of note, the State entered evidence of methamphetamine. Witnesses testified the source of that methamphetamine was Appellant. The buy bust at Simmons residence involving Simmons, Griffin, and Eades resulted in a seizure of a quantity of

methamphetamine attributed to Appellant. (R. Vol. II p. 250, lines 1-13; p 301 – 302.) Additionally, the controlled purchase by Bishop on Bashaw resulted in methamphetamine attributed to Appellant. Ms. Bashaw testified as such. (R. Vol., III p. 565, 15-21.)

Even without the testimony of the witnesses in question the State presented evidence of Trafficking 400 grams or more. Witness Charles Norman Trebuchon provides enough evidence for a jury to convict Appellant. Trebuchon was never charged and did receive the benefit of a plea deal to a reduced sentence. Trebuchon testified to driving Ms. Bashaw to Atlanta for her to obtain methamphetamine from Appellant. He recalled specific instances and testified that he took her “half a dozen to a dozen” times. (R. Vol. III p. 625, lines 3-6.) He also testified that he went by himself twice on behalf of Mr. Adams to purchase methamphetamine from Appellant. (R. Vol. III p. 626, lines 3-6.) Each of these trips ended in a purchase of “usually 4 ounces.” (R. Vol. III p. 626, lines 7- 14.)

Christopher Bishop was not charged in this case. He testified that he was a Confidential Informant (“CI”) for Greenville County. (R. Vol. II p. 371, lines 16-25; p. 372, lines 1-2.) He was wired by law enforcement and provided money to conduct a controlled buy from Appellant with Ms. Bashaw. (R. Vol. II p. 377, lines 4-20.) Bashaw and Javin Adams had contacted Bishop to go to Georgia with her to get a transmission from Appellant. (R. Vol. II p. 390, lines 13-15.) Bishop testified transaction was not completed because Appellant came to suspect that an unmarked police car was following him. (R. Vol. II p. 380, lines 1-6.)

Sometime after this incident, Bishop identified Appellant in a photographic lineup. (R. Vol. II p. 383, lines 21-25.) Bishop was unable to record any of the conversations because the wire recorder provided to him had technical problems. (R. Vol. II p. 377, lines 22-25; p. 378, lines 1-7.)

Likewise, Larry Anthony Gambrell ("Gambrell") was not charged in this case and testified against Appellant. He testified that he met Appellant through Lollis, who would took him to an apartment in Atlanta to purchase methamphetamine and that went to Atlanta on five or six more occasions. (R. Vol. III p. 669, lines 16-20; p. 670, lines 5-11; p. 674, lines 19-21.) On each of these occasions, he purchased two to four ounces of methamphetamine. (R. Vol. III p. 675, lines 1-4.)

Any limitation of cross did not prejudice defendant and any error by the trial court was harmless. The jury was ultimately presented the information concerning sentencing of the greater charge that witnesses originally faced prior to their cooperation. Further, under the Van Arsdall factors, Appellant was not prejudiced. The State presented numerous witnesses, necessary to the State's case, which provided corroborating evidence and the extent of cross examination otherwise allowed was meaningful. Appellant was able to present a full picture to the jury.

III. TESTIMONY BY A STATE'S WITNESS AS TO THE ORGANIZATION FOR THE SALE AND DISTRIBUTION OF METHAMPHETAMINE WAS PROPER AND ASSISTED THE TRIER OF FACT.

A. Standard of Review

In order for an issue to properly be preserved for appellate review, the issue must be raised to and ruled upon by the trial court; raised by the appellant; raised in a timely manner; and raised to the trial court with sufficient specificity. See State v. Rogers, 361

S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); “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). 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.”).

Appellant is arguing testimony using the term “conspiracy” was improper. However, Appellant did not consistently raise this issue by objection at the trial level. Appellant references the testimony of Ashley Asbill, but trial counsel did not object when other witnesses used the term conspiracy. Nor, did trial counsel object when the State phrased a question using the term conspiracy.

As such, this issue is not properly preserved for review. If this court deems it appropriate to review the issue as raised by Appellant, the standard of review is abuse of discretion. See, e.g., State v. Mansfield, 343 S.C. 66, 538 S.E. 2d 257 (Ct. App. 2000); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina 202 (2nd ed. 2002) (explaining “the trial judge has considerable latitude in ruling on the admissibility of evidence” and the ruling will not be disturbed absent abuse of discretion or legal error resulting in prejudice).

B. The State’s witness familiar with narcotics investigation educated the jury as to organizational distribution of methamphetamine and assisted the jury in understanding the evidence presented to it.

Appellant states “[e]xpert testimony on issues of law is usually inadmissible.” and argues it was improper for Agent Ashley Asbill to comment on the conspiracy at

hand and that such testimony bolstered the State's argument that its case met the legal definition of conspiracy. (See Final Brief of Appellant at p 34).

This argument lacks merit. Agent Asbill was not treated as an expert witness. (R. Vol. III p. 744 – 747; Vol. IV p. 748 – 754.) Any witness may testify about perception and if it will help present a clear understanding to the jury. Rule 701 SCRE provides:

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."

Id. (Opinion Testimony by Lay Witnesses).

Asbill testified that he was an experienced narcotics officer and of his involvement with this case. (R. Vol. III p. 745 – 657, Vol. IV p. 748 – 754.) Based upon his training and experience, as well as his direct knowledge of the case on trial, his testimony relative to conspiracies for trafficking methamphetamine or the organizational structure of such was appropriate and would assist the trier of fact.

Furthermore, pursuant to Rule 704 SCRE, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Id. (Opinion on Ultimate Issue).

Under SC Code Section 44-53-375, a person commits the crime of trafficking in methamphetamine (400 grams or more) where the person

manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370.

Id.

The legal definition of conspiracy was not the ultimate question for the jury. A question of law is a question for the trial court and the trial court instructed the jury on the law of trafficking. Whether Appellant was guilty of trafficking was the ultimate question for the jury, and whether Appellant conspired is one of many considerations in determining guilt of trafficking.

Appellant is again arguing against the weight of the evidence and not a legal error by the trial court. The jury was free to consider this evidence and determine the weight to give the testimony. There was no legal error by the trial court and Appellant has not demonstrated prejudice by the testimony of Ashley Asbill.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 24, 2015

RECEIVED

APR 24 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge
Appellate Case No. 2013-001562

THE STATE,

Respondent,

vs.

Antonio Emerson Tate,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant complies with Rule 211(b), SCACR, and that the Brief also complies with this Court's Order of August 13, 2007.


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April 24, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge
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THE STATE,

Respondent,

vs.

ANTONION EMERSON TATE,

Appellant.

PROOF OF SERVICE

I, Megan B. Burchstead, certify that I have served the within Final Brief of Respondent by depositing one copy of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 24th day of April 2015.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 15 2015

APPEAL FROM GREENVILLE COUNTY

Letitia H. Verdin, Circuit Court Judge

SC Court of Appeals

Case No. 2013-001562

The State of South Carolina, ... Respondent,

v.

Antonio Emerson Tate, ... Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the State failed to provide sufficient evidence that Tate engaged in a conspiracy to sell methamphetamine?
- II. Whether the trial court erred in prohibiting trial counsel from cross-examining co-defendants about their potential sentences in violation of the Confrontation Clause of the United States Constitution?
- III. Whether the trial court erred by permitting testimony by an investigator for the State who made improper legal conclusions?

ARGUMENT

- I. Insufficient Evidence Was Presented To Show Appellant Was a Member of Any Conspiracy.

This appeal originally raised three issues, which issues are restated above for the Court's convenience. Despite that Appellant was convicted of conspiracy to traffic methamphetamines (R. Vol. IV p. 823, lines 4-16.), and despite the State's contention in its heading IA that "the issue of whether there was a lack of evidence of conspiracy is not properly presented to this court as error by the trial court," (State's Brief at p. 19) (emphasis added), the State's brief then continues by arguing that sufficient evidence existed on the charge of trafficking methamphetamine.

The charges of trafficking and conspiracy to traffic are not identical. And, contrary to the State's position, it is not the weight of the evidence but the lack of sufficient evidence of any conspiracy – meaning any agreement or mutual understanding among the alleged participants -- that was challenged by Appellant. Just as in State v. Dudley, 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003) (*en banc*), affirmed as modified by 364 S.C. 578, 614 S.E.2d 623

(2005), the State may have introduced evidence of drug sales and potential trafficking of those drugs, no evidence of any agreement or mutual understanding exists.

Indeed, the State's brief indicates only the following:

In the light most favorable to the State, sufficient evidence was presented to submit the case to the jury that Appellant committed the crime of Trafficking Methamphetamine and the trial court did not commit error. The jury was presented sufficient evidence that Appellant was repeatedly selling methamphetamine in large amounts, at the same locations in the Atlanta, Georgia area to individuals known to him to reside in South Carolina.

(State's Brief at p. 21). Though admittedly the State's brief addresses some of the law on conspiracy, and may simply be using a shorthand term based on the fact that trafficking and conspiracy to traffic are set forth in the same statute, it continues to be unclear what crime the State actually contends was supported by the evidence against Appellant. The crux of the State's argument is that sales of more than normal users amounts are enough not only for a trafficking charge, but for a conspiracy charge as well. This position ignores the required agreement or mutual understanding required to show a conspiracy.

No overt acts must be shown to prove a conspiracy, "the crime consists of the agreement or mutual understanding." State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). For that reason, a mere buyer-seller relationship, even of large quantities, is insufficient to show the essential element of the conspiracy. See, e.g., Direct Sales Co. v. United States, 319 U.S. 703, 712 (1943); United States v. Parker, 554 F.3d 230, 235-36 (2d Cir.

2009); United States v. Thomas, 150 F.3d 743, 745 (7th Cir. 1998). South Carolina courts view conspiracy similarly to other courts across the country.

In reviewing a conspiracy conviction, the court focuses “on the sufficiency of the evidence of an *agreement* between the alleged conspirators, and not, as the State would have us do, on the alleged common *object*, that is, the importation and distribution of [drugs] in a defined geographic area.” State v. Gunn, 437 S.E.2d 75, 80 (S.C. 1993) (emphasis in original). Indeed, what must be shown is the intent that the co-conspirators “act *together* for their *shared mutual benefit* within the scope of the conspiracy charged.” Id. at 80-81 (quoting United States v. Evans, 970 F.2d 663 (10th Cir. 1992) (emphasis in original)).

The testimony generally went something like the following: “Now did Ant know that you lived in South Carolina? A Yes. Q Did he know that you were selling the meth that you bought from him? A I would assume.” (R. Vol. III p. 731, lines 11-15.) This same witness said he never saw Appellant in South Carolina. (R. Vol. III p. 731, lines 18-20.) Indeed on at least one occasion, defense counsel’s objection to such speculation was sustained, (R. Vol. III p. 499, line 22 to p. 500, line 2.) And that is all it was, speculation. The most the testimony shows is that Appellant may have had some knowledge that some of these other individuals had “customers” in South Carolina. (R. Vol. III p. 559, lines 7-20.) These were not Appellant’s customers and he did not benefit from any transactions with them.

Those witnesses who did claim to have known Appellant to come to South Carolina, testified only to a handful of small drug sales, if any, nothing that would legally rise to the level of trafficking such that these isolated incidents, if there was even more than one, which is unclear, could amount to a conspiracy, or a conspiracy to traffic. (See R. Vol. III pp. 499-500, 631, Vol. I p. 204, 243-244.) And, that testimony suggests Appellant may once have come into the State. (Id.) Coming into the State does not demonstrate or even give rise to an inference of a conspiracy. A mere association with members of a conspiracy does not make one guilty of conspiracy. See United States v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981).

II. The Trial Court's Exercise of Extraterritorial Jurisdiction In This Matter Was Improper.

"Without question South Carolina has jurisdiction to prosecute crimes that occur within its borders. Dudley, 354 S.C. at 524 (citing S.C. Const. art. I, § 11). What is less clear is whether South Carolina had extraterritorial jurisdiction to prosecute Appellant for alleged conduct that occurred outside this State. This issue of territorial jurisdiction was not raised by Appellant's prior counsel – prior trial or appellate counsel – but it may now be raised and Appellant now does raise this issue.

"Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding." Dudley, 364 S.C. at 582. "The exercise of extraterritorial jurisdiction implicates the state's sovereignty,

a question so elemental that we hold it cannot be waived by conduct or consent.” Id.

“[T]he State’s extraterritorial jurisdiction extends only to those who have performed acts ‘intended to produce and producing detrimental effects within’ our borders.” Id. (citing Strassheim v. Daily, 221 U.S. 280 (1911)). No evidence exists here that Appellant intended any detrimental effect in South Carolina when he allegedly sold methamphetamines to individuals in Georgia. That he may have known those individuals lived in South Carolina does not prove an intent to direct his conduct and its effects into that State. Mere knowledge that a crime may occur in this State is insufficient, there must be evidence that the alleged perpetrator specifically intended to aid and abet a crime in this State. Dudley, 354 S.C. at 535 (citing People v. Blume, 505 N.W.2d 843, 852 (Mich. 1993)).

No witness testified that Appellant intended to benefit from any activity in the State of South Carolina or intended to produce any impact in this State. Indeed, no witness even testified to discussing with Appellant the fact that sales¹ would occur in that State. No evidence exists as to Appellant’s intent, such that extraterritorial jurisdiction in this instance does not exist.

¹ The limited testimony alleging that Appellant may have sold a small amount of methamphetamines when he visited South Carolina is insufficient to establish jurisdiction on the conspiracy to traffic charge where that in-state conduct could not rise to the level of trafficking or conspiring to traffic. Had Appellant been charged with some lesser drug offense that may have properly been before the court in this State. But extraterritorial jurisdiction for one crime cannot automatically provide jurisdiction over all other crimes by a particular individual.

III. The State's Own Description of What Happened At Trial Highlights the Confrontation Clause Violation Regarding the Inability Effectively to Cross-Examine Witnesses About Their Plea Agreements and Sentences.

Defense counsel sought to cross-examine State witnesses on the plea agreements they reached with the State and the mandatory minimums these witnesses were avoiding by entering into this arrangement. The State and the trial judge were concerned that such questioning could suggest the mandatory minimum faced by Appellant. (State's Brief p. 22.) Instead, the defense could only inquire as to the fact that these witnesses were originally charged with the same offense as Appellant, that they plead to a lesser offense, and to question them about the possible sentencing range of the lesser offense. (State's Brief pp. 22-23.)

The State suggests in its brief that this was intended to address the concerns in State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012). This position misreads Gracely. It is precisely the minimum mandatory sentences the witnesses avoided by their plea arrangements that the Court in Gracely found necessary to comport with the defendant's Sixth Amendment Right to confront the witnesses against him. That the jury could "put two and two together" that the witness "could have gotten more" for the greater offense is insufficient. (State's Brief p. 23.)

It is not the fact that each of the witnesses would or could have faced a longer sentence that the jury needed to hear in order to assess bias, but that they could have faced "significantly longer" sentences had they not cooperated and testified against Appellant. Gracely, 399 S.C. at 373. As the

Court in Gracely explained: “To the extent our directive in Brown[303 S.C. 169, 399 S.E.2d 593 (1991)] was unclear The fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury.” Gracely, 399 S.C. 374-75.

The bulk of the State’s “evidence” against Appellant was the testimony of these various individuals who had all entered into plea agreements for reduced sentences. And, just as in Gracely, that one witness did testify as to a possible sentence of 30-years does not undo the failure of the defense to inquire not into the possible sentence but into the mandatory minimum sentence. (See State’s Brief p. 23). See Gracely, 399 S.C. at 375 n.4 (“It is important to note that when defense counsel asked Posey whether trafficking four hundred grams or more of methamphetamine carried a minimum of twenty-five years’ and up to thirty years’ imprisonment he answered ‘true.’ It is of no moment that at some point during the proceedings one of the witnesses confirmed the existence of a mandatory minimum sentence. The fact remains that Appellant was unable to fully develop this information through the cross-examination of Posey”).

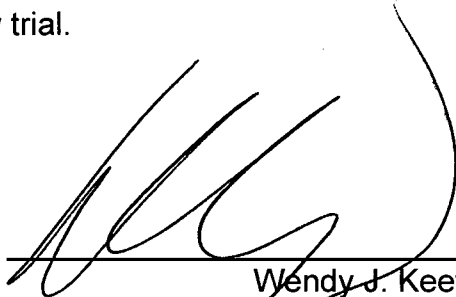
In this case, the mandatory minimum sentences avoided by most of the State’s witnesses in exchange for cooperating in the trial of Appellant was critical and necessary as an area for cross-examination in order for the jury to be able to get a full picture of these witnesses’ potential bias. The Sixth Amendment is not satisfied by merely relying on the assumption that the jury should be able to put two and two together.

Where the only significant evidence against Appellant came from these witnesses this error cannot be harmless and Appellant is entitled to a new trial.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's Initial Brief, Appellant Antonio Emerson Tate respectfully requests this Honorable Court reverse his conviction and order either dismissal of the charge on which he was convicted or a new trial.

Respectfully Submitted,



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ATTORNEYS FOR APPELLANT

Dated: March 31, 2015

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Antonio Emerson Tate, Appellant.

Appellate Case No. 2013-001562

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

Unpublished Opinion No. 2016-UP-291
Heard May 2, 2016 – Filed June 15, 2016

AFFIRMED

Wendy Raina Johnson Keefer, of Keefer & Keefer, LLC,
and Joshua Preston Stokes, of McCoy & Stokes, LLC,
both of Charleston, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Megan Burleson Burchstead, both of
Columbia, for Respondent.

PER CURIAM: Antonio Emerson Tate appeals his conviction of conspiracy to traffic more than 400 grams of methamphetamine (meth), arguing the following: (1) the trial court erred in denying his motion for a directed verdict because there

was insufficient evidence of Tate's participation in a conspiracy; (2) the trial court violated the confrontation clause by prohibiting defense counsel from cross-examining co-defendants regarding their potential sentences under their original charges; (3) the trial court erred in permitting an expert to testify regarding the legal definition of conspiracy and the sufficiency of the evidence in this case; and (4) the trial court's exercise of extraterritorial jurisdiction was improper. We affirm pursuant to Rule 220(b), SCACR.

1. We affirm the trial court's denial of Tate's motion for a directed verdict, finding Tate did not preserve the issue of insufficient proof of a conspiracy by the State in providing only isolated sales of meth rather than any intent to conspire with the purchasers because the issue was not raised in his directed verdict motion. Rather, Tate raised the failure of the witnesses to positively identify him and the lack of credibility of the witnesses. Accordingly, we find this issue is not preserved for appellate review. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."); *State v. Jordan*, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (stating issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review).

2. We find no reversible error by the trial court in prohibiting defense counsel from cross-examining co-defendants regarding their potential sentences under their original charges because of the numerous co-defendants that testified regarding their reduced sentences, the mandatory minimum sentences or the sentencing ranges of their original charges compared to their plea recommendations, and the substantially greater sentences they would have faced. Therefore, we find no prejudice to Tate, and any error was harmless. *See State v. Gracely*, 399 S.C. 363, 373-74, 731 S.E.2d 880, 885 (2012) (finding error where the trial court excluded evidence regarding the mandatory minimum sentences faced by testifying co-defendants); *id.* at 375, 731 S.E.2d at 886 (acknowledging "[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis"); *State v. Whatley*, 407 S.C. 460, 469, 756 S.E.2d 393, 397 (Ct. App. 2014) (finding no prejudice where the trial court excluded the defendant from questioning a witness concerning the sentences the witness faced for reduced charges because the limitation did not prevent a full picture of her possible bias).

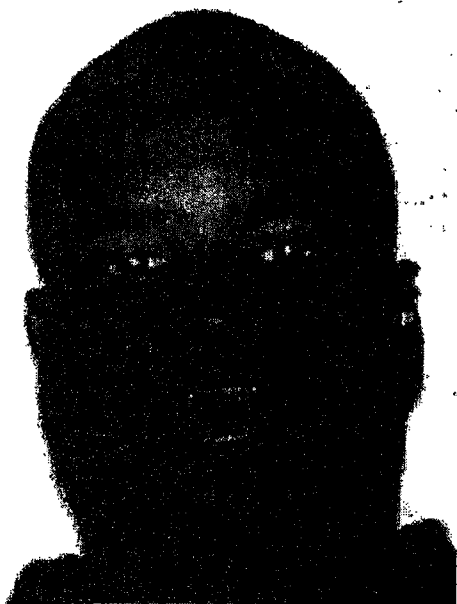
3. We find Tate's argument that the trial court erred in permitting an expert to testify regarding the legal definition of conspiracy and the sufficiency of the evidence was without merit because any error was harmless in light of the admission of the same testimony by other witnesses, including the alleged expert,

without objection. *See State v. McFarlane*, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence."); *State v. Parvin*, 413 S.C. 497, 507, 777 S.E.2d 1, 6 (Ct. App. 2015) (finding the allegedly erroneous admission of the testimony of two witnesses "was rendered harmless in light of the other evidence that was later admitted at trial without objection").

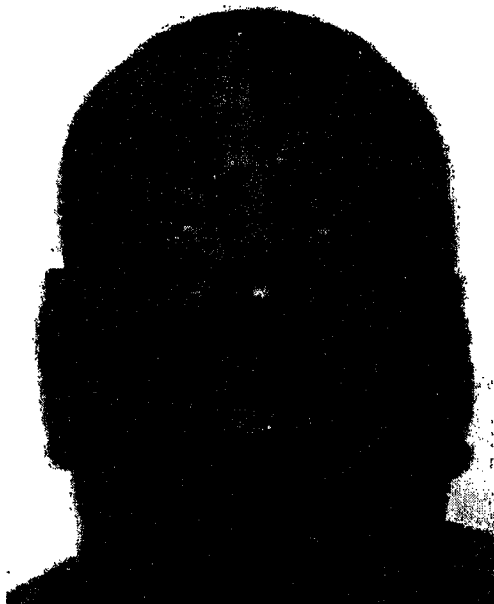
4. We find no merit to Tate's argument, raised for the first time in his Reply Brief, that the trial court's exercise of territorial jurisdiction was improper because the alleged criminal activity was committed in Georgia. *See State v. Dudley*, 364 S.C. 578, 582, 614 S.E.2d 623, 625-26 (2005) ("Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding."); *id.* at 582, 614 S.E.2d at 626 ("While a defendant need not be physically present in the State in order to commit a criminal offense here, the State's extraterritorial jurisdiction extends only to those who have performed acts 'intended to produce and producing detrimental effects within' our boundaries." (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911))). We find the State presented overwhelming evidence that Tate committed acts intended to produce and producing detrimental effects within South Carolina.

AFFIRMED.

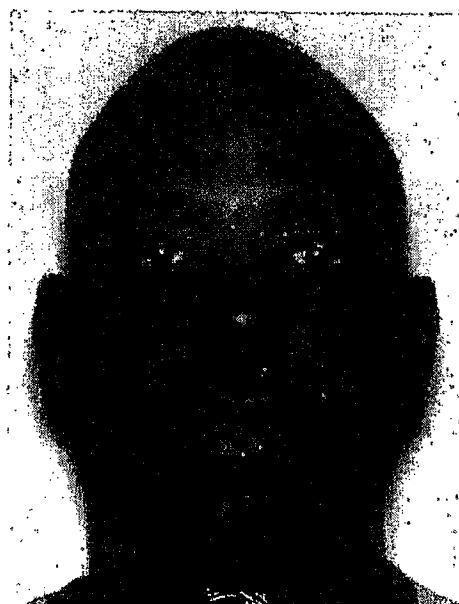
SHORT and THOMAS, JJ., and CURETON, A.J., concur.



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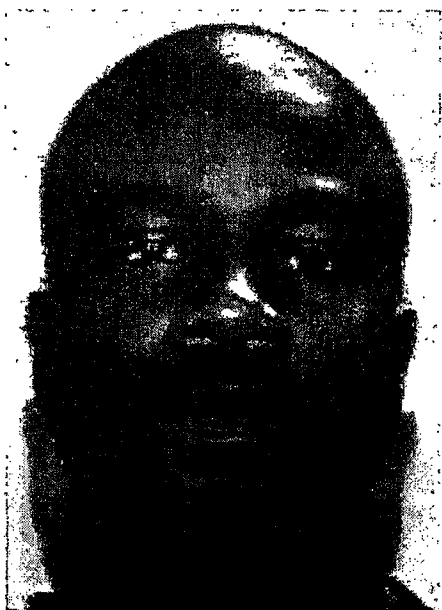


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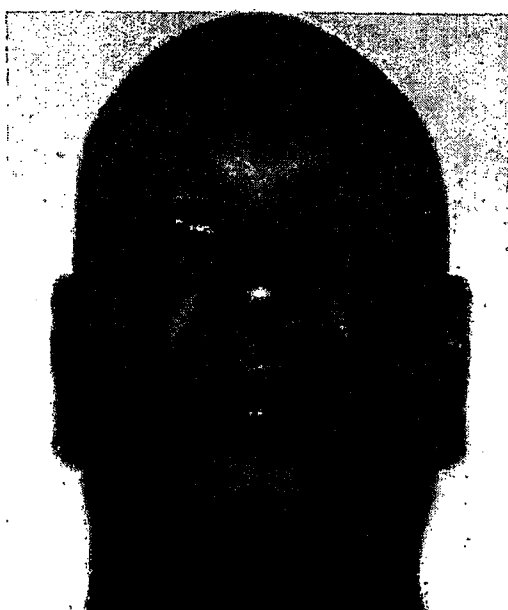


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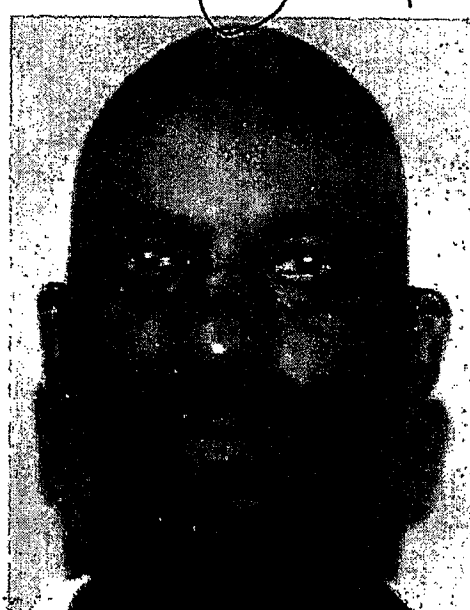
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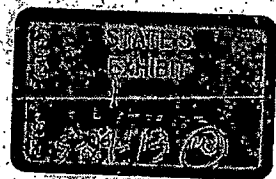
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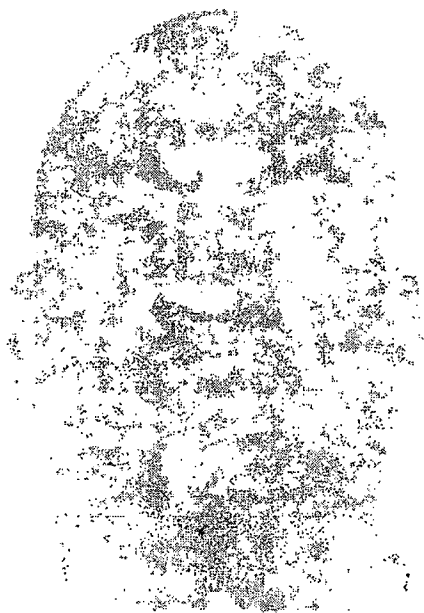
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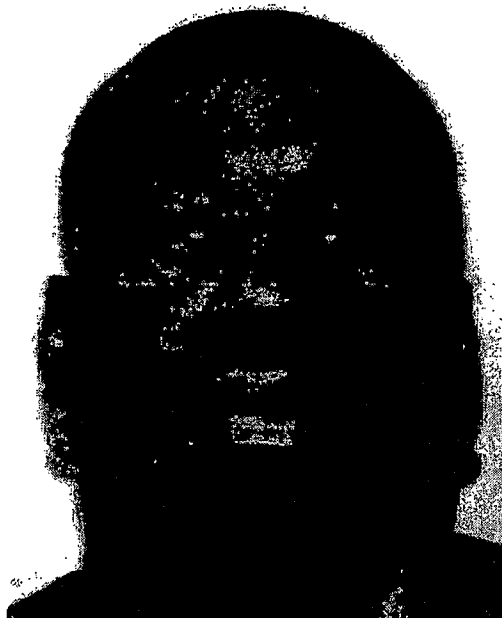


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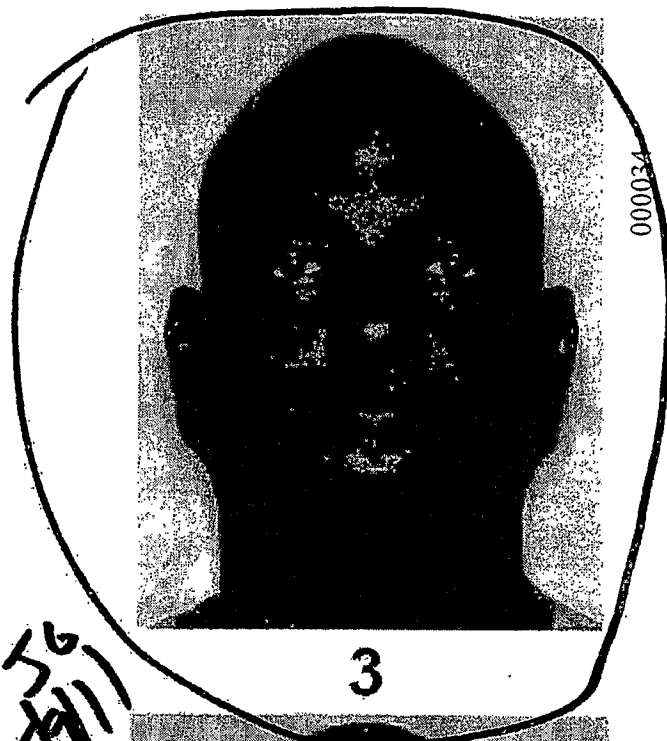




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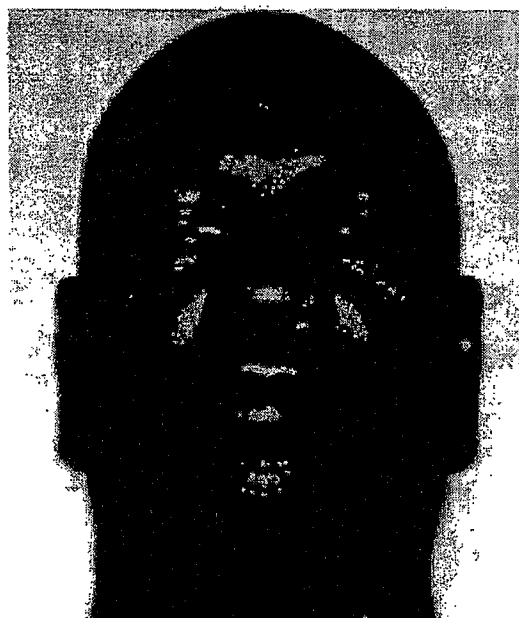
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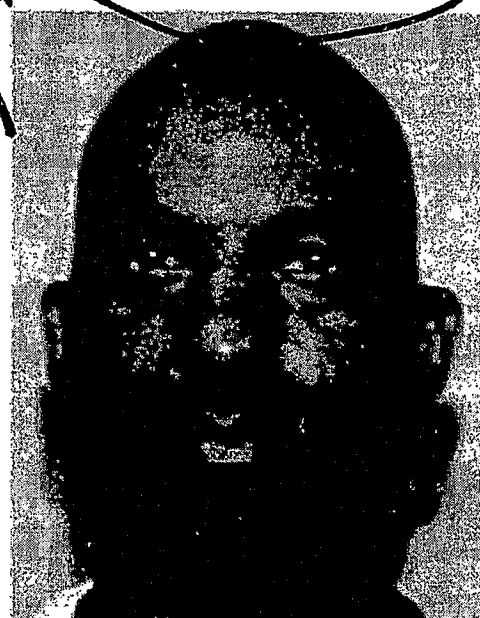
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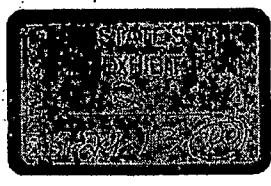
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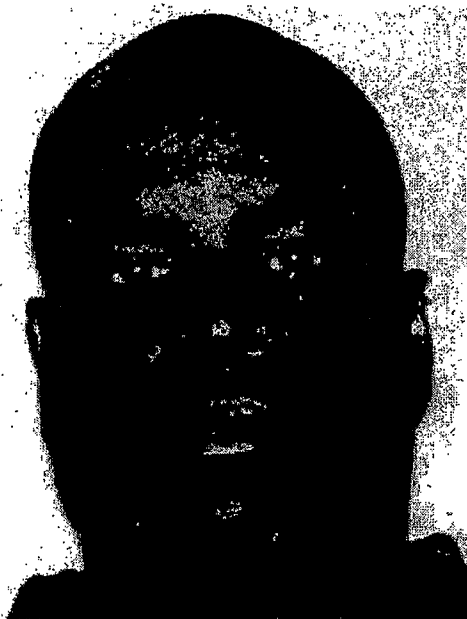
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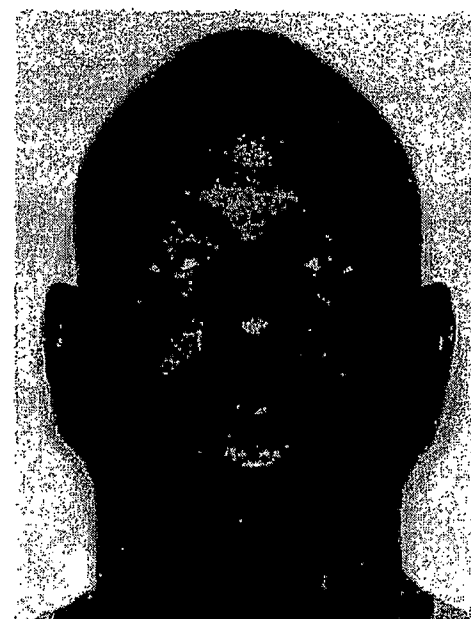
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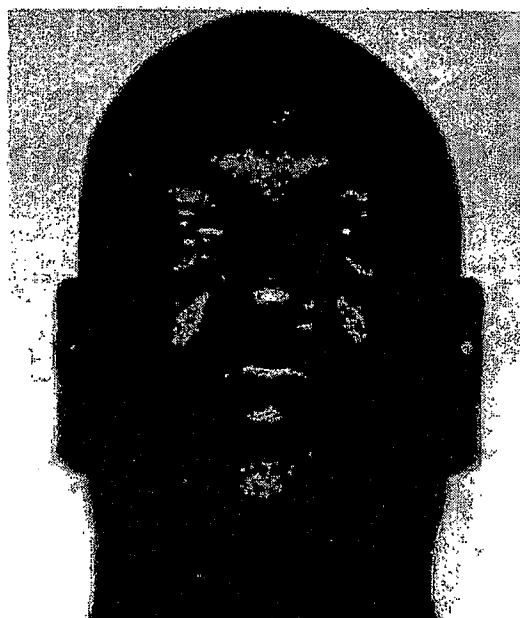


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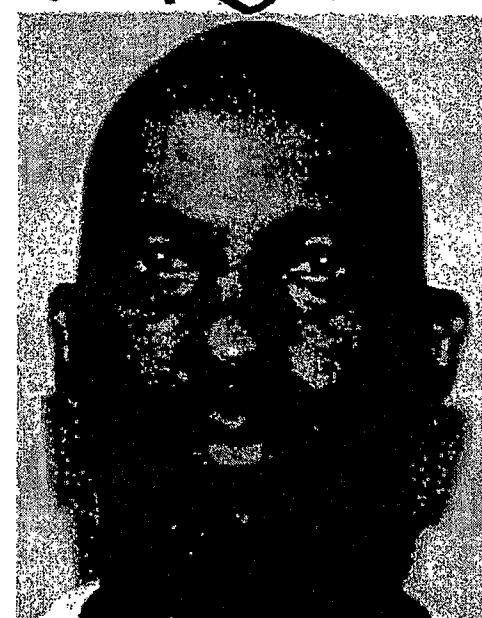
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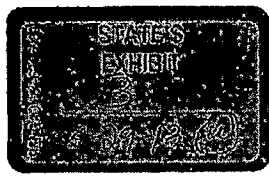


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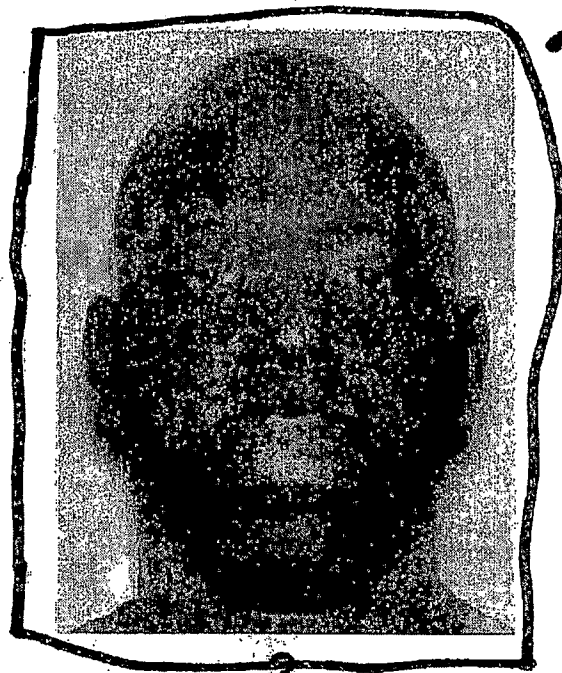




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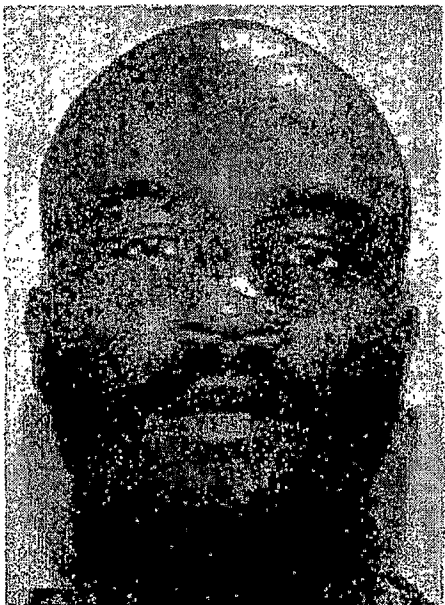


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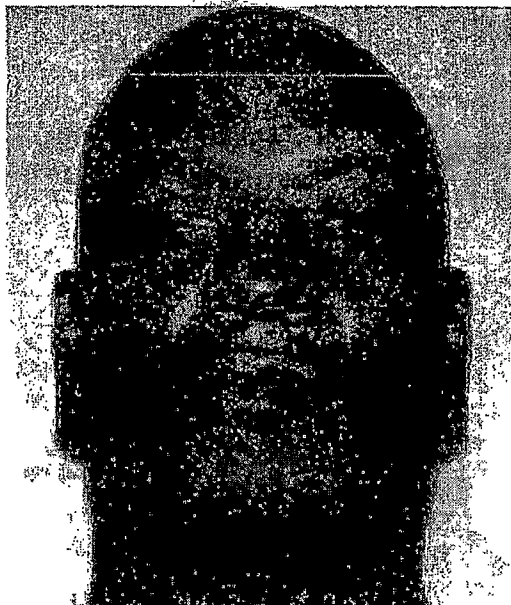


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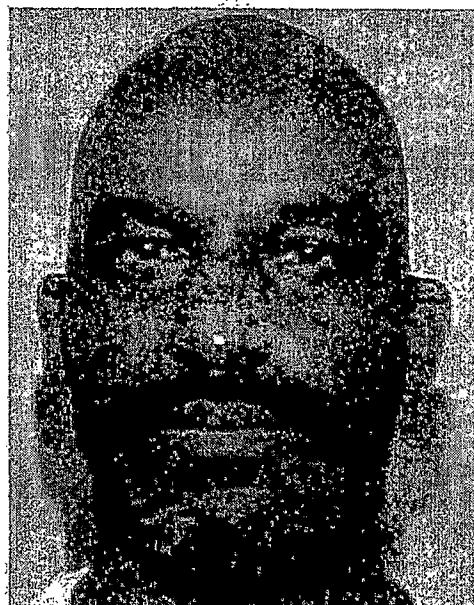
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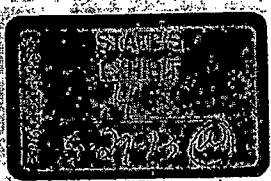
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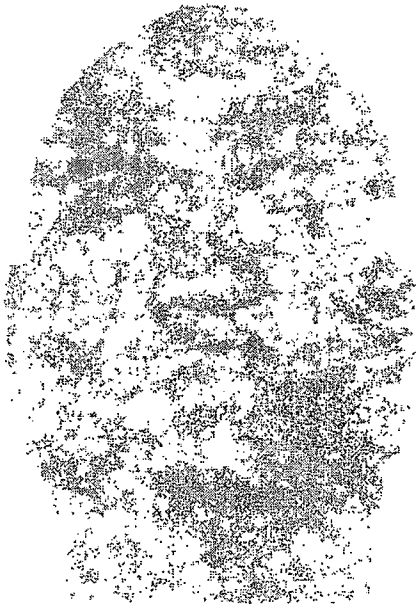
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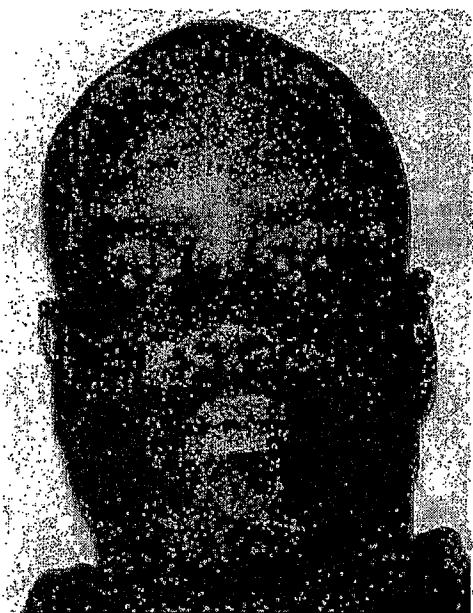


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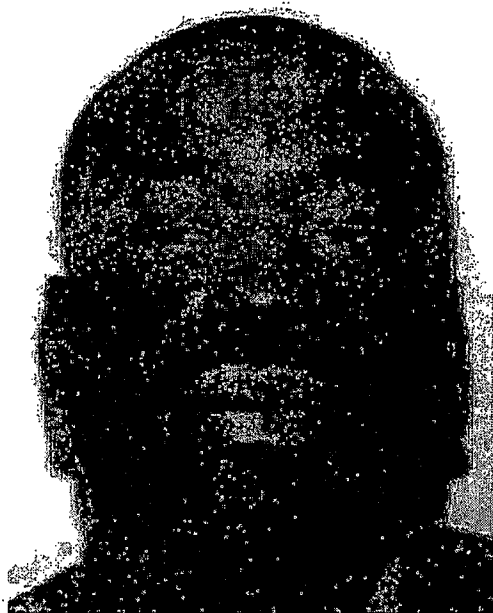


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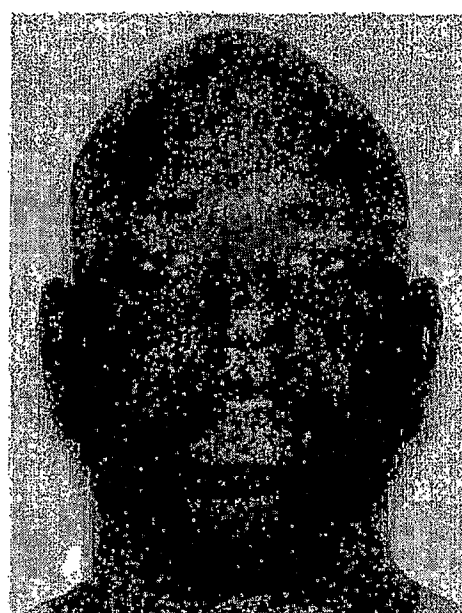
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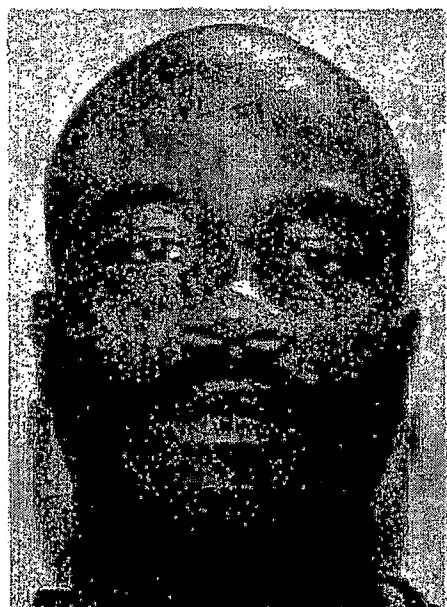


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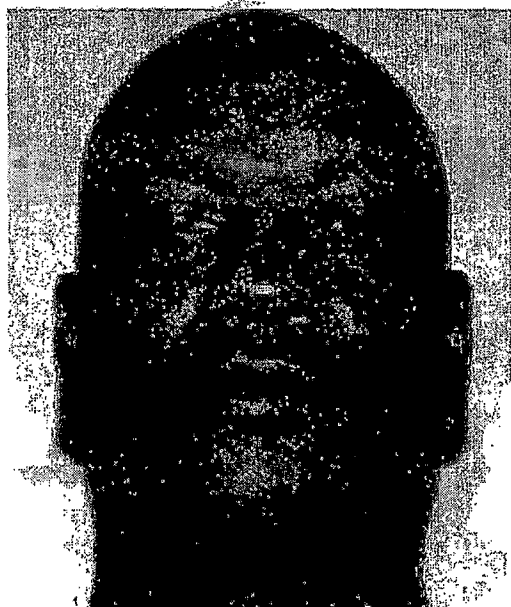


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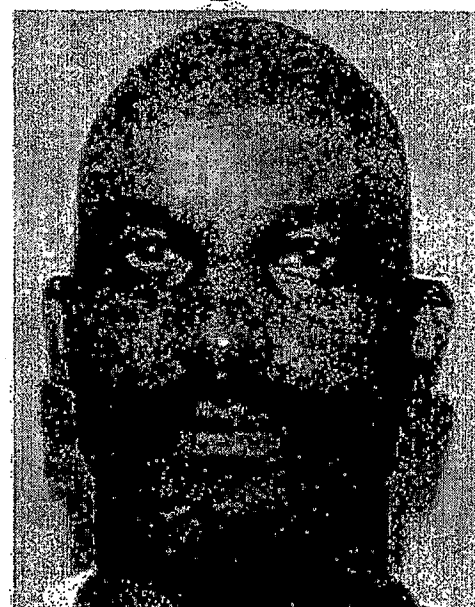
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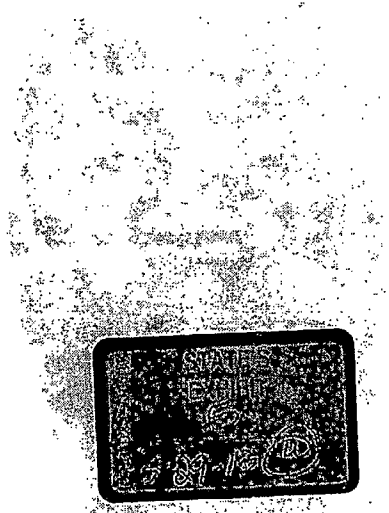
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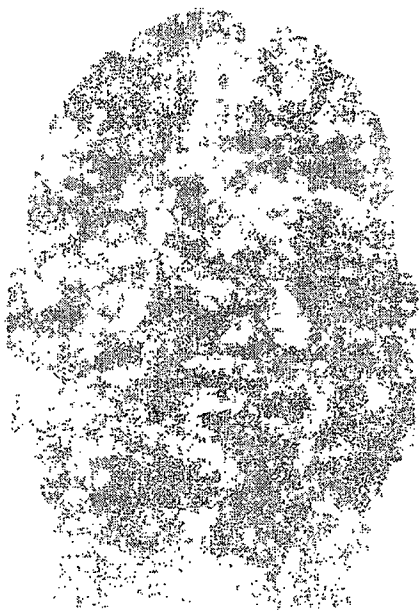
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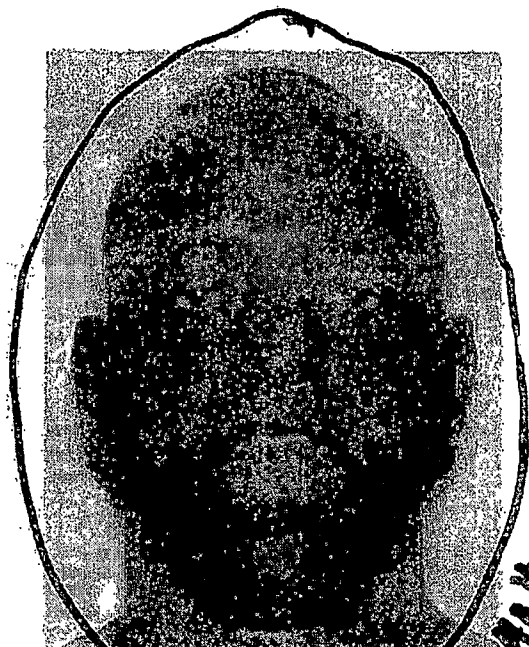
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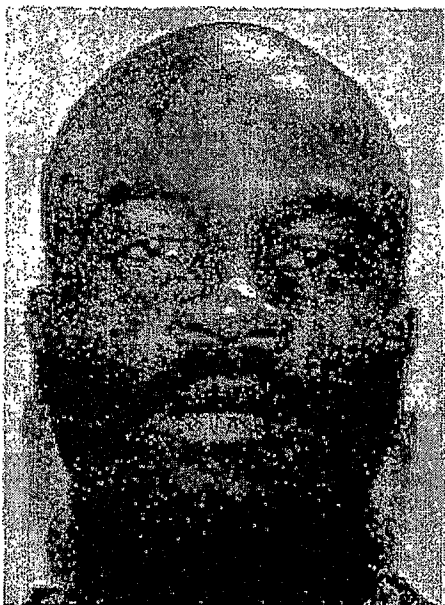
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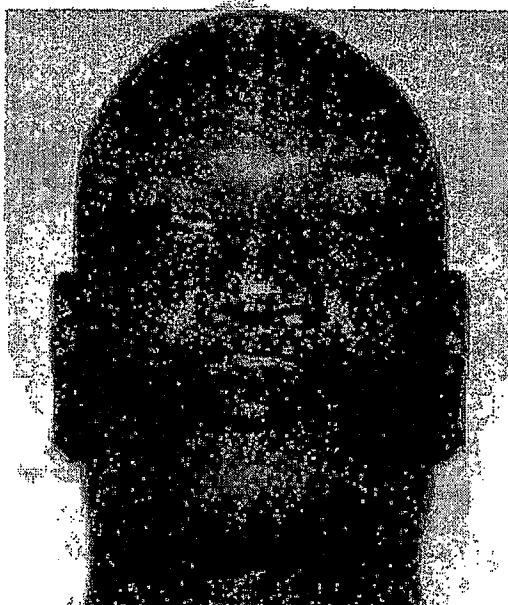
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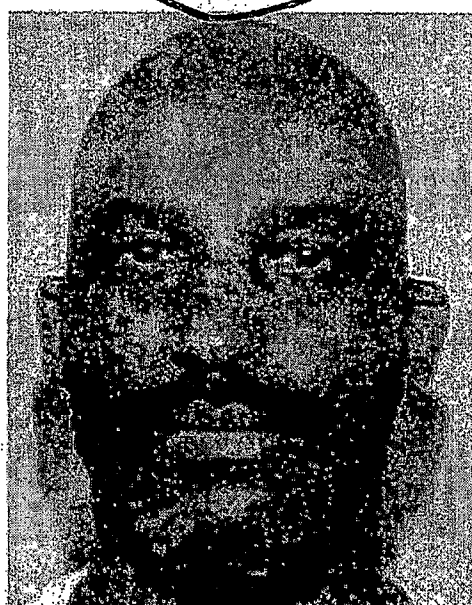
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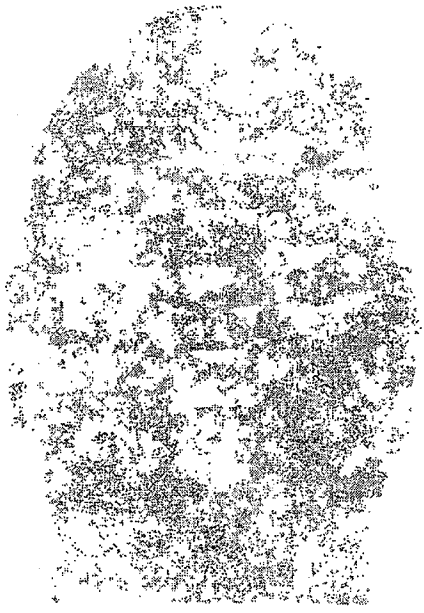
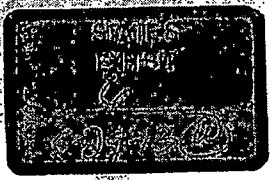
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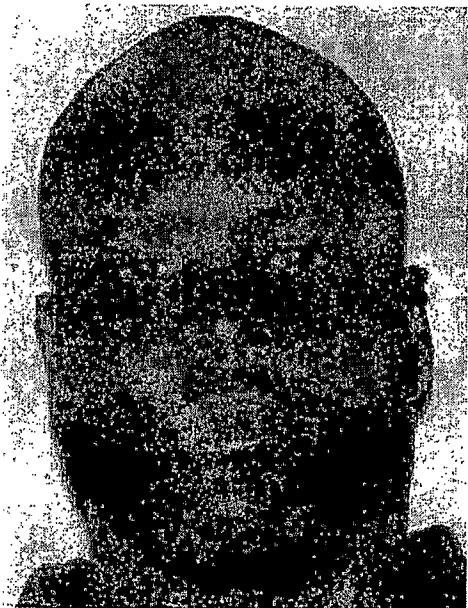


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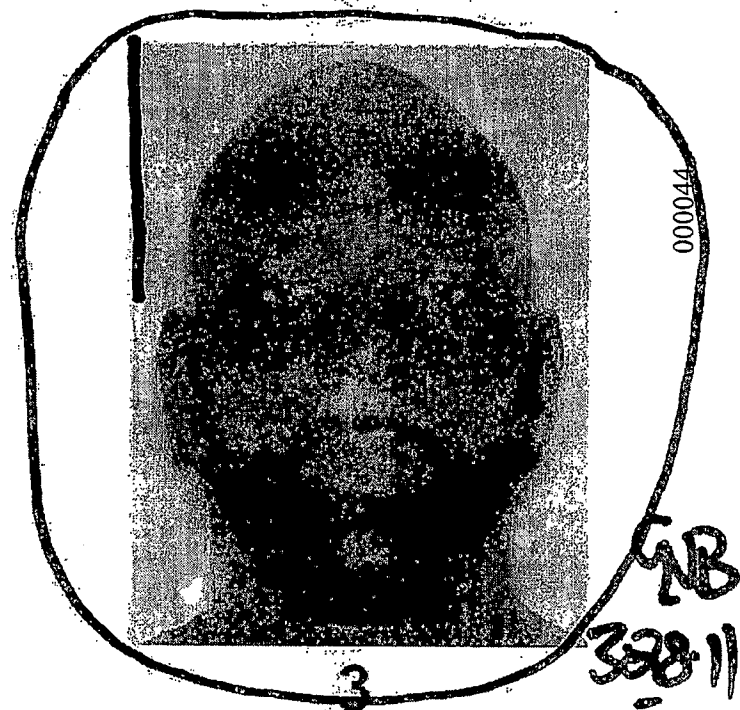
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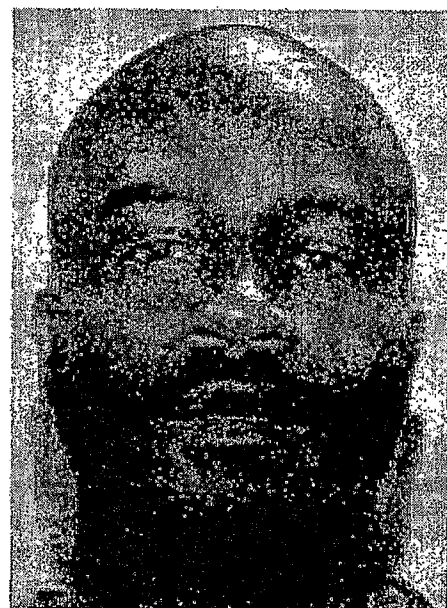
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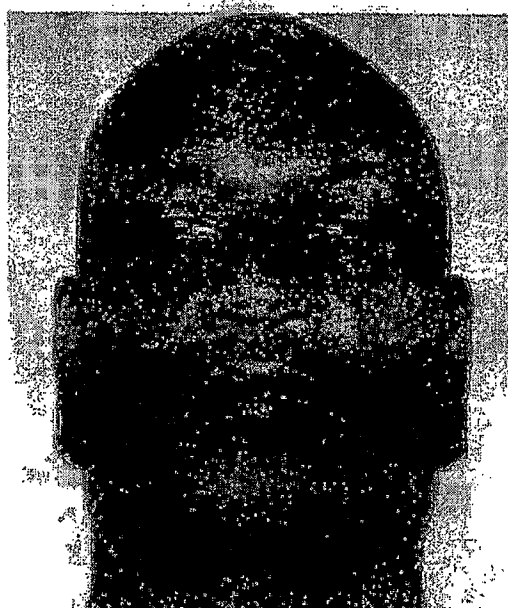
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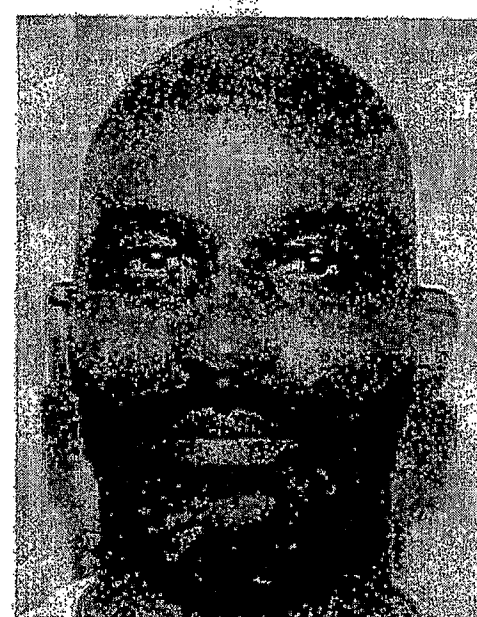
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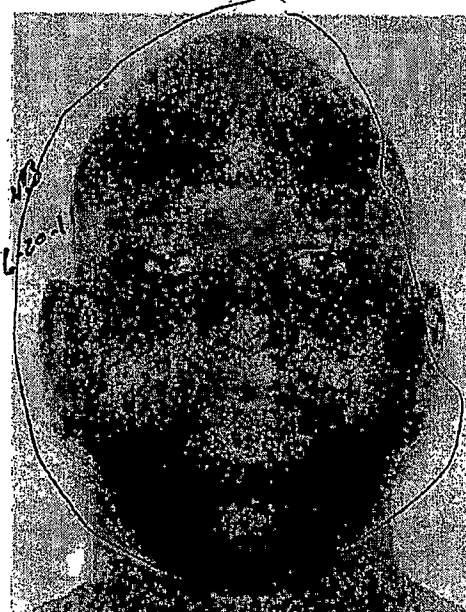




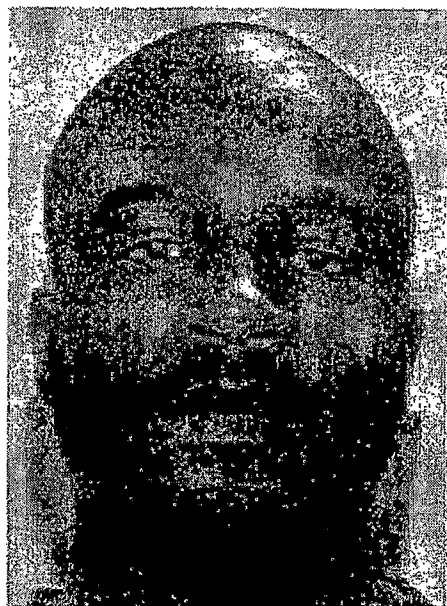
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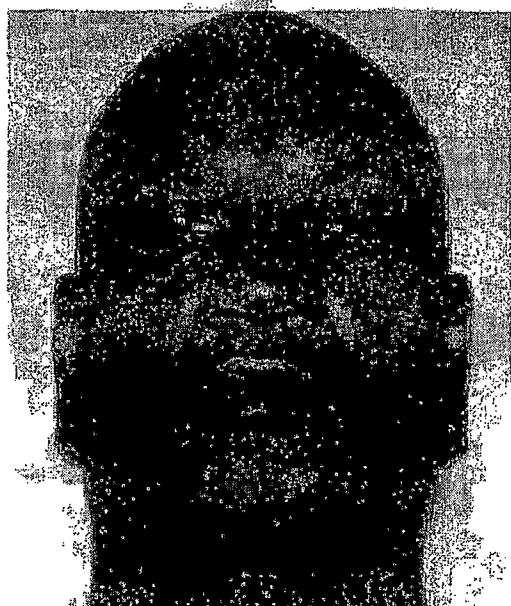
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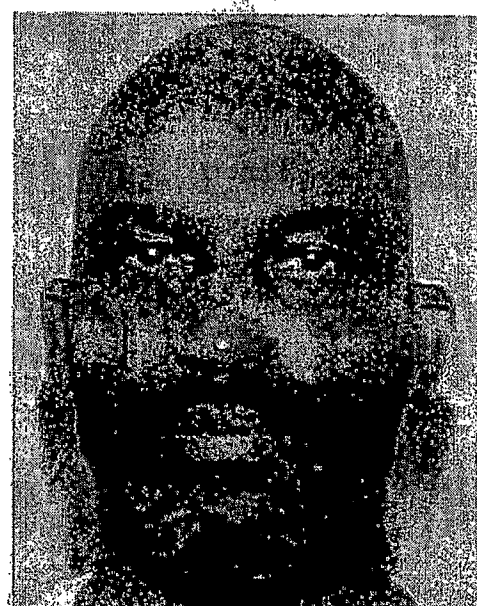
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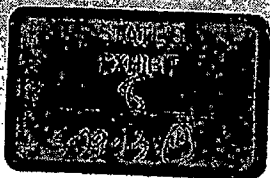
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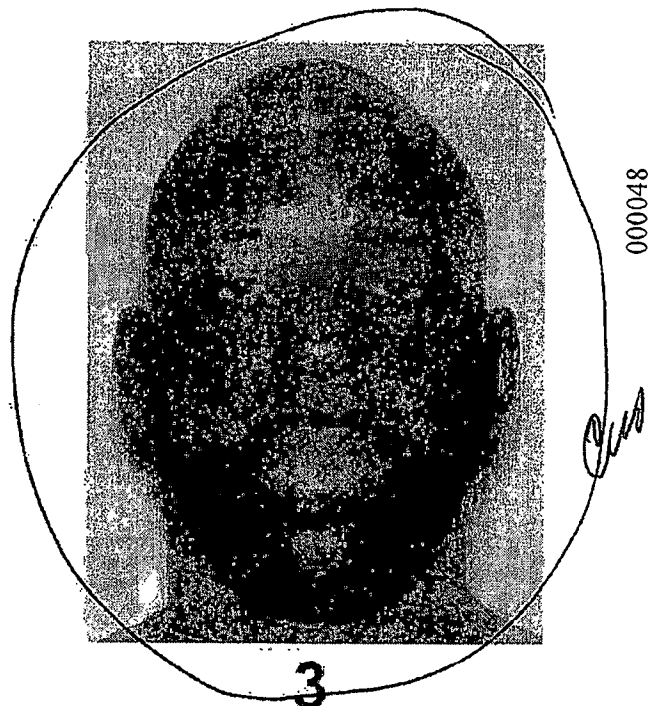
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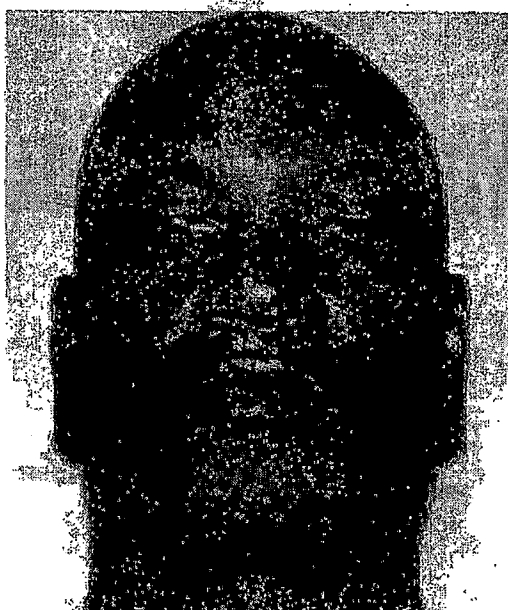
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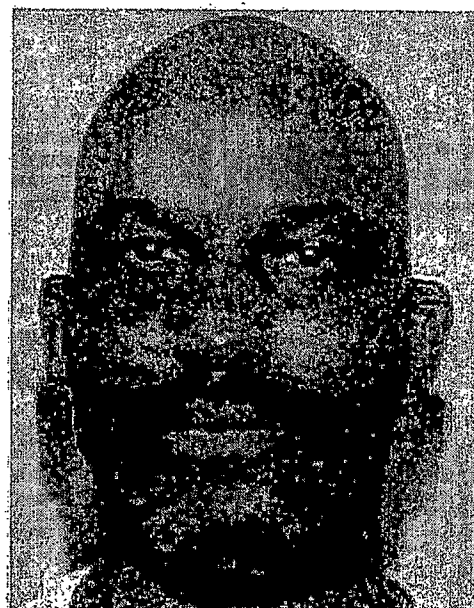
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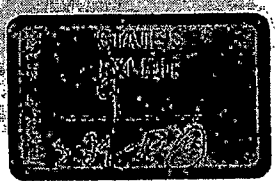


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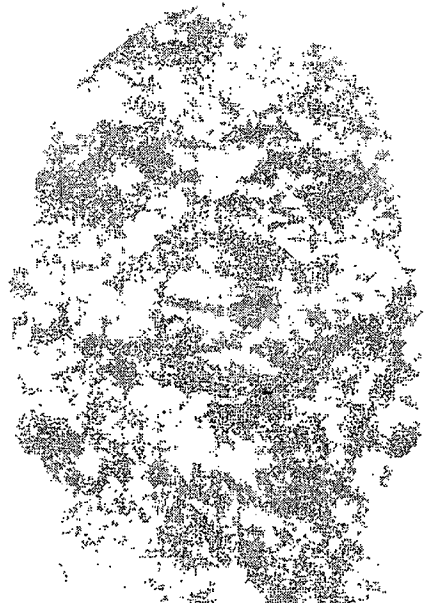
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