Case No. 2013-001562

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Letitia H. Verdin, Circuit Court Judge

Trial Court Case No. 2011-GS-47-07

Antonio Emerson Tate — Appellant,

v.

State of South Carolina, — Appellee.

INITIAL BRIEF OF 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 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. I, p. 46, lines 9-11). The trial court declined this request. (R. I, p. 46-49). 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 witness 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. I, p. 54, line 2). She admitted that she was a meth addict at this time. (R. I, p. 55, line 6). She also admitted that she dealt methamphetamine for 5 or 6 years prior to the trial. (R. I, p. 54, line 22). Although Ms. Lollis initially denied any involvement with any other crimes in her past, (R. I, p. 55, 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. I, p. 55, 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. I, p. 55, lines 19-23, p. 56, 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. I, p. 58, lines 6). She also testified that she travelled to Georgia to purchase meth from Mr. Tate after her boyfriend became incarcerated. (R. I, p. 58, 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. I, p. 56, line 10, p. 64, line 9). 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. I, p. 76, line 11, p. 80, lines 15).

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. I, p. 84, line 24). Nor could she remember his specific area code, or even the general area code for Atlanta, where Mr. Tate lived. (R. I, p. 86, 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. I, p. 90, lines 19, 24-25). 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. I, p. 92, lines 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. I, p. 98, lines 20-25, p. 99, lines 1-15).

Ms. Lollis admitted that she received a "substantial reduction" in her sentence in exchange for her cooperation. (R. I, p. 101, lines 7-9). 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. I, p. 113, lines 3-5). He has been involved with drugs since he was 13 when he started using marijuana. (R. I, p.112, lines 2-11). After moving to cocaine and methamphetamine use, he began to deal drugs to support his habit. (R. I, p. 112, lines 16-25).

Griffin eventually went to prison for two distribution of methamphetamine convictions. (R. I, p. 115, 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 ("Simons"). (R. I, p. 115, lines 14-19). Griffin went to prison again in March 2010 after the police caught him with 56 grams of methamphetamine. (R. I p. 151, lines 1-10).

Soon after Griffin met Lollis he started dealing methamphetamine with her. (R. I, p. 119, 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 Tate. (R. I, p. 120, lines 18-21; p. 121, lines 10-11). They allegedly met Tate at a house where Griffin purchased 28 grams of methamphetamine for $1400. (R. I, p. 124, lines 13-19). After the transaction, Eades drove Lollis and Griffin back to South Carolina. (R. I, p. 126, lines 22-25).

Griffin testified he later returned from South Carolina to get an ounce of methamphetamine from Tate but received cocaine instead. (R. I, p. 127, lines 1-11). Lollis and Eades accompanied Griffin on this trip as well. (R. I, p. 127, 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. I, p. 132, lines 1-13; p. 133, lines 1-6.) While at first he only purchase by the ounce, Griffin claimed that he eventually began to make quarter-pound purchases. (R. I, p. 138, lines 1-25). These transactions with Tate all took place during a three-month time frame. (R. I, p. 147, lines 8-11).

Griffin testified that on one of these transactions, Tate traveled from South Carolina and met them at Griffin's house. (R. I, p. 131, lines 21-25). On this occasion Tate allegedly 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. I, p. 149, 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. I, p. 150, lines 10-12).

Griffin identified Tate in a photo-array, and again identified him in Court. (R. I, p. 156, lines 1-20; p. 158, lines 6-21). However, he Griffin could not say for certain whether the individual he identified was Tate or Tate's twin brother. (R. I, p. 160, lines 22-25; R.p. 161, lines 10-12).

Like Lollis, Griffin did not have any cellular phone records indicating that he called Tate. (R. I, p. 165, 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. I, p. 164, lines 10-20). Griffin had no receipts indicating he had been to Atlanta during the period he allegedly purchased drugs from Tate. (R. I, p. 164, lines 21-25; p. 165, lines 1-25). He never gave any empty methamphetamine packages originating from Tate to law enforcement. (R. I, p. 171, lines 9-11).

Griffin admitting to pleading guilty for his involvement in this matter. (R. I, p. 171, lines 23-25). He was initially charged with conspiracy for trafficking 400 grams or more of methamphetamine. (R. I, p. 172, 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. (*See* R. I, p. 172, 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. I, p. 182, lines 9-10). Eades met Lollis in 2009 through Griffin. (R. I, p. 183, lines 13-15). Rachel claims she overheard Lollis tell Griffin that she had a friend in Atlanta who could sell him inexpensive methamphetamine. (R. I, p. 184, lines 3-9). Eades testified that she went with Griffin to Georgia to buy methamphetamine at a Waffle House in January 2010. (R. I, p. 185, lines 6-10). She said that Griffin purchased methamphetamine from Tate outside in the parking lot while she ate. (R. I, p. 186, lines 11-12). Eades claimed that she went with Griffin to Georgia on eight to ten other occasions to purchase meth. (R. I, p. 188, lines 1-19).

Some purchases took place at an apartment. (R. I, p. 189, lines 5-11). Another purchase took place at a strip bar. (R. I, p. 199, lines 15-18). Griffin would purchase an ounce or more of methamphetamine at these transactions. (R. I, p. 193, lines 4-8). Eades, however, did not know any of the addresses for the locations where Griffin purchased methamphetamine from Tate. (R. I, p. 210, lines 1-24). Eades testified that she never knew Tate had a twin brother, but she was able to identify Tate in court. (R. I, p. 225, lines 20-22; p. 227, lines 6-23).

Eades admitted that she committed felony child neglect and fraud. (R. I, p. 222, lines 19-21). 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. I, p. 222, lines 19-21). She pled guilty to this charge in exchange for a recommendation of a 7 to 10 year term of incarceration, a substantially lower than the sentence she would have received. (R. I, p. 223, 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 Noah Bishop

Christopher Noah 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. I, p. 274, lines 4-25; p. 275, lines 1-2). After completing six buys as a CI, Bishop was given his final assignment: purchase meth from Tate in Atlanta. (R. I, p. 293, lines 16-17; p. 294, 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. I, p. 281, lines 4-20). Bishop testified that they never consummated 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. I, p. 284, lines 1-6). Tate eventually called off the transaction. (R. I, p. 287, 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. I, p. 281, lines 22-25; p. 282, lines 1-7). Bishop returned to South Carolina empty-handed.

(R. I, p. 287, lines 9-10). Sometime after this incident, Bishop identified Tate in a photographic lineup. (R. I, p. 287, lines 21-25).

Charles Javin Adams

Charles Javin Adams ("Adams") started using methamphetamine in 2001. (R. II, p. 386, lines 9-11). He started using methamphetamine after he was charged with distributing cocaine. (R. II, p. 385, lines 1-11). Adams stopped using methamphetamine after he got indicted in this case, but since fell back into his addiction. (R. II, p. 387, lines 1-11).

Adams testified that his friend named Chad Moore asked him to accompany him to Atlanta to help him get drugs from Tate. (R. II, p. 390, lines 6-25). Adams subsequently traveled to Atlanta between eight and thirteen times to purchase meth from Tate, sometimes with Bashaw and sometimes with Moore. (R. II, p. 394, lines 23-25; p. 395, lines 1-20). 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. II, p. 396, lines 1-2).

Adams asserted he would call Tate's cellular phone when he wanted to make a deal. (R. II, p. 404, lines 22-25; p. 405, line 1). Like Lollis, Adams testified that Tate changed his telephone number several times. (R. II, p. 405, lines 14-18). Adams claimed Tate came to Adam's apartment in South Carolina on several occasions. (R. II, p. 405, lines 19-25). 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. II, p. 411, lines 1-11).

Sometime after this incident, Adams became a CI. (R. II, p. 412, 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. II, p. 414, lines 4-20, 21-25; p. 450, lines 1-9). Adams pled guilty in this case. (R. II, p. 388, lines 9-13).

When asked if he was just trying to get the best deal by "rattin'" everybody out, he said, "[e]verybody tries to get ahead in life." (R. II, p. 430, 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. II, p. 431, 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. II, p. 422, lines 11-15). He agreed that they did not want him to "over dramatically" lie. (R. II, p. 423, lines 6-8). Adams could not name an address where any drug exchange with Tate transpired. (R. II, p. 432, lines 116-25; p. 433, lines 1-15).

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. II, p. 433, lines 11-22). He could not remember Tate's number. (R. II, p. 434, lines 10-18). Adams admitted that he had conducted controlled buys in the past, but never made a controlled purchase from Tate. (R. II, p. 437, lines 5-7).

As part of his guilty plea, Adams agreed with the State to lesser charges than he originally faced. (R. II, p. 388, 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. II, p. 429, lines 3-19; p. 431, lines 5-7). 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. II, p. 431, lines 17-18; p. 389, 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.

Albrie Bashaw

Albrie Bashaw testified she began using methamphetamine when she was fifteen and began selling meth in 2009, when she turned 21. (R. II p. 453, lines 13-14, 23-25; p. 454, lines 1-11). She sold methamphetamine in ounce to quarter pound quantities. (R. II, p. 456, lines 1-3).

In July 2010, Bashaw moved in with Javin Adams. (R. II, p. 457, lines 1-9). They both sold methamphetamine at this time. (R II, .p. 457, lines 1-9). Bashaw testified that she took trips to Atlanta without Adams from July 2010 to January 2011 to secure meth. (R. II, p. 469, lines 13-18). The amount of methamphetamine varied between two ounces to four ounces. (R. II, p. 471, lines 21-25). She testified that she travelled to Atlanta an average of three times a week during this period. (R. II, p. 472, lines 6-10). In total, Bashaw claimed she had dealt with Tate on twenty occasions over a period of about nine months. (R. II, p. 489, lines 8-10).

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. II, p. 479, lines 8-15; p. 480, lines 7-9). As part of her cooperation she provided information on her drug dealings and participated in undercover deals. (R. II, p. 480, 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. II, p. 481, 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. II, p. 481, lines 23-25; p. 482, lines 1-5).

On cross-examination, Bashaw admitted that she gave a statement to law enforcement at one point that conflicted with her testimony. (R. II, p. 516, 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. II, p. 491, lines 16-21). Bashaw testified that she lied in that statement. (R. II, p. 492, 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. II, p. 522, 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. II, p. 497, lines 1-23). She does not recall any of Tate's cellular phone numbers she allegedly called. (R. II, p. 498, lines 4-19). Nor did she have any cellphone records to prove she spoke with Tate. (R. II, p. 510, lines 1-7). She did not have an address for the location of Tate's apartment where the drug deals transpired. (R. II, p. 498, 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. II, p. 517, lines 22-25).

Bashaw acknowledged that she was originally charged with conspiracy to traffic 400 grams or more of methamphetamine. (R. II, p. 496, lines 1-3). She testified, however, that the State reduced her sentence down to 3 to 6 years in exchange for her cooperation. (R. II, p. 496, 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. II, p. 500, 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. II, p. 528, lines 15-18). He has known Adams since he was a "kid" and admitted using methamphetamine with him. (R. II, p. 528, lines 19-25; p. 529, lines 1-16). For a period of time, he lived with Adams and Bashaw. (R. II, p. 529, 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. II, p. 533, lines 12-25).

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. II, p. 533, lines 22-25; p. 534, lines 3-6). He testified that he purchased four ounces on each occasion, but could not be certain because he was "doing a lotta drugs." (R. II, p. 534,

lines 9-13). He could not recall whether he paid $3,900 or $5,900 for each of these transactions. (R. II, p. 534, lines 21-23). Trebuchon believed Tate got his methamphetamine from "Mexicans" but never actually saw them give Tate his supply of drugs. (R. II, p. 535, lines 18-21).

Trebuchon claimed to have been down to Atlanta at least a dozen times. (R. II, p. 549, 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. II, p. 551, lines 20-25; p. 552, lines 1-4). He could not recall the address of that apartment, however, or the address of any other apartment where the transactions occurred. (R. II, p. 552, lines 5-7; p. 554, lines 21-24). He did not know Tate's number or have any phone records reflecting calls to Tate. (R. II, p. 555, lines 1-15). Trebuchon then admitted that he could not even recollect what happened yesterday, much less what happened three years ago. (R. II, p. 555, lines 13-17). Trebuchon also acknowledged that he had a conviction for four counts of financial transaction card fraud. (R. II, p. 555, lines 23-25; R.p. 556, lines 1-6).

Trebuhon did not divulge the sentencing range of his original charge in this matter. Nor did Trebuhon 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.

Warren Brent Chastain

Warren 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. II, p. 557, lines 15-23). He considers himself an

addict. (R. II, p. 558, lines 11-12). He began purchasing methamphetamine to support his habit, but then purchased a sufficient quantity to sell to others as well. (R. II, p. 558, lines 2-6).. He has been convicted for distribution of methamphetamine and other substances, and was previously indicted a grand jury on charges that he participated in a methamphetamine trafficking conspiracy. (R. II, p. 558, lines 16-18, lines 24-25; p. 559, lines 1-4).

Chastain testified that he drove from South Carolina to Atlanta with Brian Stegall ("Stegall") to purchase methamphetamine. (R. II, p. 561, 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. II, p. 562, lines 1-20; p. 563, lines 2-16). Stegall then gave Chastain the two ounces of methamphetamine he had purchased. (R. II, p. 563, lines 17-23). After this transaction, Chastain returned to South Carolina to sell these two ounces. (R. II, p. 564, 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. II, p. 564, lines 15-24.

While in the holding cell before his testimony, Chastian 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. II, p. 568, lines 10-25). After viewing Tate and his twin brother in the courtroom, Chastain not could say for certain which one he saw in Atlanta. (R. II, p. 570, lines 6-23).

Chastian understood that he pled guilty to a lesser charge for this crime, and that by doing so he avoided a much larger sentence. (R. II, p. 560, 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. II, p. 560, lines 2-5). Chastian did not divulge the sentencing range of his original charge, however. Nor did Chastian 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. II, p. 577, lines 21-23). Gamrbell testified that he met Tate through Lollis, who would took him to an apartment in Atlanta to purchase methamphetamine. (R. II, p. 579, lines 16-20; p. 580, lines 5-11). He testified that he went to Atlanta on five or six more occasions. (R. II, p. 584, lines 19-21). According to Gambrell, they purchased two to four ounces of methamphetamine for $1,300 per ounce. (R. II, p. 585, lines 1-4). Gambrell did not recall the addresses of any of the locations where these drug transactions transpired. (R. II, p. 595, lines 9-13). Nor did he have any telephone records evidencing calls to Tate. (R. II, p. 596, lines 6-8).

Gambrell agreed to work for law enforcement and identified Tate in a photo lineup. (R. II, p. 591, lines 5-19). He could not say for certain whether he purchased methamphetamine from Tate or his twin brother. (R. II, p. 599, 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. II, p. 602, 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. II, p. 603, 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. II, p. 604, 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. II, p. 604, lines 16-25; p. 605, lines 1-3). Bergholm started purchasing methamphetamine from Adams once a week for $1,200 to $1,400 an ounce. (R. II, p. 605, lines 4-13). Adams was rumored to purchase this methamphetamine from Atlanta. (R. II, p. 605, lines 4-20).

Bergholm claimed he met Tate at Adam's birthday party. (R. II, p. 606, lines 9-11). Bergholm testified that he purchased methamphetamine from Tate on numerous occasions. (R. II, p. 608, lines 6-9; p. 606, lines 4-13). However, Bergholm ceased purchasing methamphetamine from Tate, because half of one such purchase ended up being "no good." (R. II, p. 611, lines 14-25; p. 611, lines 1-2).

Bergholm met with law enforcement in June of 2011 at which time he identified Tate in a photo lineup. (R. II, p. 614, lines 6-11; p. 615, lines 1-9). At this time, Bergholm did not know that Tate had an identical-twin brother. (R.II, p. 616, lines 18-24). Bergholm could not say the man he had purchased methamphetamine from was not Tate's brother. (R. II, p. 617, 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. II, p. 621, 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. II, p. 625, lines 13-17).

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. II, p. 601, lines 23-25, lines 5-8; p. 627, lines 2-17). He also has a conviction for filing a false police report. (R. II, p. 626, lines 6-25; p. 627, lines 1-2).

The State originally charged him with trafficking 400 grams or more of methamphetamine. (R. II, p. 601, lines 18-20). However, Bergholm pled guilty to trafficking twenty-eight to a hundred grams of methamphetamine. (R. II, p. 601, lines 18-22). The State recommended a sentence of 15 to 18 years in exchange for his testimony. (R. II, p. 602, line 307).

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. II, p. 630, lines 1-4). Chad Moore initially only consumed methamphetamine, but soon began to sell to support his addiction. (R. II, p. 632, lines 15-16). Chad Moore began buying methamphetamine from Griffin, whom he met through Lollis. (R. II, p. 633, lines 1-15).

Moore eventually met Griffin and Lollis' supplier at an apartment in Atlanta. (R. II, p. 634, lines 9-24). Chad Moore identified this individual as Tate. (R. II, p. 635, lines 1-5). Chad Moore had went with Lollis to meet Tate and supposedly bought an ounce of methamphetamine from Tate on this occasion. (R. II, p. 635, lines 9-24). 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. II, p. 636, lines 8-17; p. 642, lines 1-8).

Chad Moore could not recall an address of the apartment he met Tate to purchase methamphetamine. (R. II, p. 648, 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. II, p. 648, 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. II, p. 630, lines 20-25; p. 631, lines 1-13).

The State agreed to recommend a sentence of 18 years imprisonment in exchange for Moore's testimony. (R. II, p. 652, 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 Coutny Sheriff's Office. (R. I, p. 316, 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 County. (R. I, p. 316, lines 19-25; p. 317, 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. I, p. 318, lines 14-25). Eventually, this process led to the purported source of the methamphetamine for this case, Mr. Tate. (R. I p. 319, lines 2-7).

Barwick acknowledged that all of the conspirators who testified against Tate viewed the same photo lineup, when identifying him. (R. I, p. 347, lines 19-24). Tate, therefore, had the same position on this lineup on each occasion a conspirator viewed the lineup for identification purposes. (R. II, p. 347, lines 19-25; p. 348, 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. II, p. 351, 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. I, p. 353, 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. I p. 357, lines 12-15; p. 365, lines 8-10).

Sherriff Henry Dale Campbell

Sherriff Henry Dale Campbell testified that the CIs he uses in his investigations receive direct payment or reduced sentences in exchange for their cooperation. (R. I, p. 233, lines 5-25). Campbell used a CI for a transaction with Christopher Simmons on March 2010, for the investigation underlying this case. (R. I, p. 234, lines 14-25). This CI had a transmitter on his person for this transaction. (R. I, p. 235, lines 15-25). At this transaction, Simmons discussed Griffin with the CI. (R. I, p. 238, lines 1-19). Griffin, Eades and Simmons were present at this time. (R. I, p. 239, lines 4-11). During the ensuing search of Simmons' room, the police found drugs, paraphernalia, "some documentation," and drug-related weapons. R.p. 241, lines 1-11.

Law enforcement did not find any of Tate's fingerprints on the evidence retrieved from the scene. (R. I, p. 255, lines 21-25). In fact, the police found no fingerprint evidence implicating Tate during the entire investigation. (R. I, p. 255, 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. I, p. 257, lines 20-24; p. 258, lines 2-3). Campbell acknowledged that audio and video surveillance also constitutes good evidence in these investigations. (R. I, p. 258, lines 4-25). No such evidence incriminating Tate existed in this case. (R. I, p. 258,

lines 4-25). Nor did the police recover any marked money implicated Tate. (R. I, p. 259, lines 24-255; p. 260, lines 1-16).

Agent Ashley Asbill

Agent Ashley Asbill testified he works for the State Law Enforcement Division. (R. II, p. 655, lines 1-7). The State asked Asbill to discuss the current "conspiracy," to which defense counsel objected. (R. II, p. 664, 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. II, p. 664, 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. II., p. 664, lines 17-21). Those that were indicted were dealing "substantial amounts" according to Asbill. (R. II, p. 665, lines 1-5). Asbill testified that Tate was the highest source in this group. (R. II, p. 665, 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. II, p. 665, lines 19-25; p. 666, 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. II, p. 667, lines 1-10). Asbill conceded that many of his witnesses admitted to lying under oath. (R. II, p. 667, lines 21-24). Asbill candidly acknowledged the

credibility issues of his witnesses, stating that he "wished he had better witnesses to work with." (R. II, p. 668, 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. II, p. 670, lines 7-20). Specifically, defense counsel cited the State's witnesses' unreliability coupled with their inability to differentiate between Tate and his brother. (R. II, p. 670, lines 7-20). After the jury returned a guilty verdict, the trial court sentenced Tate to 25 years in prison. (R. II, p. 745, 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 regards 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 regards 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 involving 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.

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

The 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.

A. 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.C. 316, 323 (2001). That is, a conspiracy requires the extra act of agreeing to commit a crime. *United States v. Jimenez Recio*, 537 U.S. 270, 274, (2003). "That agreement is a 'distinct evil,'" because a group of criminals often pose 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 codefendant's 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. II, p. 665, lines 6-8).

Although the State attempted to raise the specter of a conspiracy by soliciting testimony that Tate was aware of his alleged purchaser's redistribution of his drugs, *e.g.*, R. I, p. 407, 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. I, p. 407, 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. *Dekle*, 165 F.3d at 829. The State made no such 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 a 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 credibly 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. II, p. 500, lines 16-20). Likewise, Adams admitted that he took his deal because "[e]verybody tries to get ahead in life." (R. II, p. 430, 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. II, p. 668, 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 SENTENCE 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 Cause provides that in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the 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, (2009) (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 in 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 171-72.

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.

B. 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 (S.C. 2011) (citations omitted).

B. Argument on the Merits

Expert testimony on issues of law is usually inadmissible. *Dawkins v. Fields*, 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 Ashley Asbill. Though the trial court sustained defense counsel's objection 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. I, p. 664, lines 12-16). By eliciting this 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 cause for a new trial.

Dated: April 28, 2014

Respectfully Submitted,

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