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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-207549

The State, Respondent,

vs.

Jason Alan Johnson, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly denied the motion to suppress the evidence gathered as a result of the execution of the search warrant. The search warrant was validly obtained based on probable cause derived from evidence seen at the scene.

II. The trial court properly found the contents of the bottle met the definition of methamphetamine under the statute and allowed the full weight of the bottle to be considered by the jury. Further, the issue of a violation of Appellant's Sixth Amendment right is clearly not preserved for review on appeal and without merit. Finally, any possible error is entirely harmless because the State presented a conspiracy theory to support the charge and Appellant has not contested the sufficiency of the evidence to convict him under this theory.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly denied the motion to suppress the evidence gathered as a result of the execution of the search warrant. The search warrant was validly obtained based on probable cause derived from evidence seen at the scene.

Appellant contends the trial court erred in refusing to suppress the evidence obtained as a result of the execution of a search warrant on the motel room in which Appellant was staying. The search warrant was based on probable cause derived from the evidence officers witnessed upon entry into the room in order to effectuate the arrest warrant on Brandi Quinn, and on evidence seen in plain view during a justified protective sweep of the room. Accordingly, the trial court properly denied the motion to suppress.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

It is the "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" Arizona v. Gant, 556 U.S. 332, 338 (2009)(quoting Katz v. United States, 389 U.S. 347, 357 (1967)). However, because the ultimate touchstone of the Fourth

Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). One notable and relevant exception is a search for the protection of officers. Id.; Maryland v. Buie, 494 U.S. 325, 337 (1990). Another exception is for items in plain view. See Horton v. California, 496 U.S. 128 (1990). "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'" Herring, 387 S.C. at 210, 692 S.E.2d at 494 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

In this case, the State submits the search warrant obtained for the motel room leading to the discovery of the bottle containing the methamphetamine mixture was properly predicated on probable cause resulting from items in the plain view of the officers while effectuating the arrest and conducting an allowed protective sweep in the motel room. The two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities. State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (eliminating the third requirement that the discovery be inadvertent).

A. Lawful Initial Intrusion

The officers were seeking to execute an arrest warrant for Quinn who was determined to be in the motel room the officer subsequently entered. "[P]olice are allowed to enter a hotel room to arrest an occupant when acting pursuant to a valid arrest warrant." Goins v. State, 397 S.C. 568, 574, 726 S.E.2d 1, 4 (2012) (citing State v. Sims, 304 S.C. 409, 419, 405 S.E.2d 377, 383 (1991)). There has been no challenge to the

validity of the arrest warrant for Quinn. As a result, the officers clearly had a right to enter the motel room to arrest Quinn. Appellant's only challenge is to whether the officers lawfully remained in the hotel room and could consider any of the items seen during the arrest or subsequent protective sweep to form the basis of their probable cause for an arrest warrant.

In Buie, the United States Supreme Court (USSC) found the officers had a reasonable interest "in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Buie, 494 U.S. at 333. In Buie, law enforcement officers obtained arrest warrants for Buie and an accomplice in the armed robbery of a pizza restaurant. Id. at 327. In executing the arrest warrant on Buie, officers set up surveillance of his home, entered the residence, and fanned out inside. Id. One officer shouted for anyone in the basement to surrender. Id. at 328. After several commands, Buie revealed his hands and came up. Another detective then entered the basement and observed incriminating evidence in plain view. Id. Subsequently, the trial court denied Buie's suppression motion, the Court of Special Appeals of Maryland affirmed, and then the Court of Appeals of Maryland reversed, finding the protective sweep to be unconstitutional. Id. at 328-329. The United States Supreme Court then granted certiorari to review the matter. Id. at 329.

After reviewing the circumstances of Buie's arrest, the Supreme Court noted the basis to search Buie's home under the arrest warrant ended when he was discovered. Id. at 332-333. However, the USSC went on to discuss the dangers faced by officers in arresting a suspect:

> A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

Id. In permitting a protective sweep, the USSC found "the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest. Id. at 334 (emphasis added). Ultimately, the USSC concluded a protective sweep for officer safety was permitted without a warrant, explaining:

> We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. (emphasis added).

Further, this Court addressed a similar issue in Abdullah. In Abdullah, officers responded to a report of a burglary in progress and shots fired. Id., 357 S.C. at 348, 592 S.E.2d at 346. Upon arriving at the apartment, they saw the door was open and entered the apartment. They observed Abdullah inside, and he refused to cooperate with their commands to come out. Abdullah then moved behind a bedroom doorway and continued to ignore the officers' commands. The officers were forced to physically restrain Abdullah, and he began to exclaim he was the victim. Id. Additionally, the officers observed bullet holes in the door and walls. Id. at 348, 592 S.E.2d at 347. The officers

then performed a protective sweep to secure the residence from other potentially-hidden suspects and to discover any potential victims. Id. at 348-349, 592 S.E.2d at 347. The trial court suppressed the evidence discovered during the sweep, finding there were no exigent circumstances to justify the search. Id. at 349, 592 S.E.2d at 347. This Court reversed; finding the officers' need to secure the premises and assist any potential victims justified the protective sweep. Id. at 352, 592 S.E.2d at 348. Significantly, this Court noted: "We find this basis for the circuit court's ruling improvidently presupposes that subduing and securing Abdullah foreclosed the officers objectively reasonable need to search the crime scene for suspects and victims." Id. at 352, 592 S.E.2d at 349.

In the instant case, the State set forth sufficient evidence to demonstrate the officers conducted a proper protective sweep of the bathroom which immediately adjoined the bedroom in the motel room. It is clear, the sweep of the bathroom and area around the bedroom was done incident to the arrest of Quinn. It was done all at one time with entering the motel room, securing Quinn, discovering Appellant and Catoe, and securing Appellant and Catoe. (T.19; 66; 115; 332-333; 374; R.19; 66; 115; 280-281; 322). The evidence taken as a whole demonstrates the officers took reasonable steps to ensure their safety during the arrest of Quinn. Because their sweep was reasonable, it is not subject to suppression or exclusion under the Fourth Amendment which only excludes unreasonable searches and seizures.

The circumstances of this case as explained by the testimony of the officers and as found by the trial court clearly demonstrate exigent circumstances existed and the officers conducted the sweep in accordance with Buie and Abdullah. Deputy Bolin, Deputy Stagner, and Deputy Gladden were at the motel to serve an arrest warrant on Quinn.

Deputy Bolin testified he verified the room Quinn was in and they approached the door. (T.16; 368; R.16; 316). He and Deputy Stagner testified they heard movement and whispering from multiple people in the room. (T.17; 61; 330-331; 369-370; R.17; 61; 278-279; 317-318). They announced themselves and, after a period of time, Quinn cracked the door open but remained concealed behind it. (T.17; 62; 331; 370; R.17; 62; 279; 318).

They entered the room to arrest Quinn who stepped back into the room. As they were restraining her, they saw two other individuals under the covers of the beds. (T.18; 62; R.18; 62). The officers ordered them to show their hands, which Catoe did. Appellant, stuck his hands out for a brief time then quickly stuck them back under the covers. (T.18-19; 63; R.18-19; 63). The officers became even more concerned for their safety based on Appellant's actions. Appellant and Catoe were detained.

The officers then conducted a protective sweep of the motel room, including the bathroom and under the beds to ensure no weapons or other individuals were present. They testified it was conducted for officer safety and because of their concern which was heightened by Appellant's actions. The arrest, detention of Appellant and Catoe, and the sweep took less than two minutes. (T.19-20; 66, 115; 334; 373; R.19-20; 66; 115; 282; 321). Deputy Stagner testified everything happened pretty much at the same time. (T. 96-98; 332-333; R.96-98; 280-281).

This testimony is clearly distinguishable from the South Carolina Supreme Court's holding in State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). In Brown, the officers conducted surveillance of Brown's motel room for approximately two hours, observed no movement from the room, and called Brown on the telephone to demand his

surrender. Id. Brown and two other people then exited and were arrested. Id. Following the arrest, officers performed a protective sweep of the motel room and discovered several pieces of incriminating evidence. Id. The South Carolina Supreme Court found the protective sweep of the motel was justified on the basis it was reasonable to believe concealed individuals remaining in the room might pose a danger. Id. at 587, 347 S.E.2d at 886. However, the Court found the officers could not satisfy the requirements of exigent circumstances because they offered no reason for failing to obtain a warrant during the hours the motel was under surveillance. Id. at 587-588, 347 S.E.2d at 886. Coupled with a lack of evidence the items were discovered in plain view, the Court held the trial court erred in denying Brown's suppression motion. Id. at 588, 347 S.E.2d at 886.

The officers did not have this motel room under surveillance for two hours. The officers sought to arrest Quinn on a valid arrest warrant, and when she refused to open the door all the way which caused them concern for their safety, they were forced to enter the motel room to arrest her. Exigent circumstances clearly justified entering the motel room in this case, and once inside and arresting Quinn, the protective sweep was justified.

Further supporting the reasonableness and necessity of the officers' sweep, the officers left the discovered evidence and procured a search warrant after completing the sweep and securing the residence. See Abdullah, 357 S.C. at 352, n. 3, 592 S.E.2d at 348 ("The reasonableness of the officers' conduct may be further gleaned from the decision to secure a warrant to seize the contraband once the protective sweep was concluded and the exigent circumstances unquestionably ceased to exist."). The officers were informed

before attempting to arrest Quinn that methamphetamine may be involved. (T.418-419; R.366-367). The indicators of the presence of narcotics made it necessary for the officers to perform a sweep to secure the scene. See United States v. Taylor, 248 F.3d 506, 513 (6th Cir. 2001) ("Once an officer has probable cause to believe contraband is present, he must obtain a search warrant before he can proceed to search the premises. . . . We think that it follows logically that the principle enunciated in Buie with regard to officers making an arrest – that the police may conduct a limited protective sweep to ensure the safety of those officers – applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained." (citations omitted)). Otherwise, the officers ran the risk an undiscovered individual inside the residence could destroy evidence or pose a danger to others while they obtained a search warrant. As a result of the testimony, the protective sweep was proper and the officers had a legal right to be in the motel and the areas of the motel to conduct the sweep for their safety. See Buie, 494 U.S. at 337.

B. Incriminating Nature

Because the protective sweep was valid, the items seen during the sweep were in plain view and could serve the basis of the probable cause to justify obtaining the search warrant of the motel if their incriminating nature was immediately apparent. Appellant does not directly challenge the incriminating nature of the items, but the State will address the element out of an abundance of caution.

Deputy Bolin testified upon entering the motel room he saw the numerous computers in various stages of being taken apart. He testified he saw aluminum foil and syringes on the TV table. (T.19; 24; 373; R.19; 24; 321). The aluminum foil was

consistent with narcotics packaging and the syringes were consistent with drug use. (T.24; R.24). He testified he believed there was a possibility the computers were stolen because they had information and training people were stealing computers and then obtaining people's information from the computer hard drives. (T.27; 38-39; 374; R.27; 38-39; 322). Deputy Bolin believed the officers had probable cause to suspect stolen property or drugs in the motel room. (T.44; R.44).

Deputy Stagner testified they saw the computers and the syringes immediately upon entering the room. (T.67; 70-71; R.67; 70-71). He testified during the protective sweep, which as discussed above he was entitled to perform, he found a digital scale and razor blades. He also testified he saw the aluminum foil. (T.67-73; State's Exhibits 1-17[1]; R.67-73). He testified the aluminum foil was used for drug packaging and the computers could be used in the narcotic manufacturing process. He further testified the quantity of computers taken apart heightened his suspicions. (T.67; 119; 347-348; R.67; 119; 295-296).

The testimony clearly indicated the incriminating nature of the items. Further, the officers were aware drugs may be located where Quinn was found because they had received information regarding methamphetamine use by Quinn. (T.418-419; R.366-367). Based on the above testimony, the Court ruled the officers properly acted for their protection and the search warrant based on the above items was supported with probable cause. Accordingly, the trial court correctly refused to suppress the evidence found and seized when the officers executed the validly obtained search warrant.

[1] State's Exhibits 1-17 are photos to be transported to the Court and filed separately.

II. The trial court properly found the contents of the bottle met the definition of methamphetamine under the statute and allowed the full weight of the bottle to be considered by the jury. Further, the issue of a violation of Appellant's Sixth Amendment right is clearly not preserved for review on appeal and without merit. Finally, any possible error is entirely harmless because the State presented a conspiracy theory to support the charge and Appellant has not contested the sufficiency of the evidence to convict him under this theory.

Appellant maintains the trial court erred in allowing the liquid mixture containing methamphetamine into evidence and in finding he could not argue that the entire weight of the mixture should not be considered by the jury. The court properly interpreted the statute to include the liquid preparation mixture found in the motel room. Further, the issue regarding the limitation on the argument is not preserved for review on appeal and without merit as Appellant was not entitled to misinform the jury on the applicable law. Finally, any error in this case is entirely harmless because the State presented alternative theories to support a conviction for trafficking in methamphetamine between 28-100 grams and Appellant has raised any challenge to one of the theories or the sufficiency of the evidence presented to support that theory.

Section 44-53-375 states in pertinent part:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in methamphetamine or cocaine base".

S.C. Code Ann. § 44-53-375(C) (Supp. 2011). The statute then differentiates sentencing levels based on the amount of methamphetamine involved. See S.C. Code Ann. § 44-53-375(C)(2) (Supp. 2011).

The methamphetamine statute then looks to two other statutes to define what is considered methamphetamine. Section 44-53-110 contains a definition which reads: "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine. Methamphetamine is commonly referred to as 'crank', 'ice', or 'crystal meth'." S.C. Code Ann. § 44-53-110 (Supp. 2011). Next, and most significantly, section 44-53-210 states: "Unless specifically excepted or unless listed in another schedule, **any** material, compound, mixture, or **preparation** which contains **any quantity** of the following substances having a stimulant effect on the central nervous system: Methamphetamine, its salts, and salts of isomers." S.C. Code Ann. § 44-53-210(d)(2) (Supp. 2011).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)).

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted). "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) (citing Timmons v. Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970)).

The language of the methamphetamine statute is purposefully broad. It is written in a way to include "any" form of the substance. The clear, unambiguous language mandates that one can be convicted of trafficking in "any . . . mixture or preparation which contains any quantity" of methamphetamine. The legislature did not require it to be any quantity of usable methamphetamine. The legislature did not require it to be methamphetamine in only powder form. The legislature provided for it to be any mixture, any preparation, any compound in any quantity. The statute does not specify a certain ratio of methamphetamine to any other part of a mixture. Nor does the statute define material, compound, mixture, or preparation, so these words are to be given their ordinary, plain, everyday meaning.

Material is defined as "the substance or substances out of which a thing is or can be made." The American Heritage College Dictionary (3d ed. 1997). A compound is defined as "a combination of two or more elements or parts." Id. Preparation is defined as "the act or process of preparing." Id. A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one

another and that however thoroughly commingled are regarded as retaining a separate existence." Webster's Third New International Dictionary 1449 (1986). A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 Oxford English Dictionary 921 (2d ed. 1989).

The South Carolina Legislature did not differentiate between the different substances created at each step of the manufacturing process. It specifically included "any" mixture, compound, material, or preparation containing methamphetamine so that once "any quantity" of methamphetamine is present, the statute will cover it. The inclusion of these terms covers each stage of the process and that to attempt to delineate the intent of the Legislature as to each term is improper. By including these ordinary terms, the statute makes illegal all stages of the dangerous process of manufacturing methamphetamine.

Using those definitions it is clear the liquid was a preparation, compound, or mixture. The liquid contained methamphetamine. (T.837; R.780). Investigator Nick Schifferle, an expert witness in narcotics, testified the bottle was past the stage where a reaction occurs creating the methamphetamine. He testified the pseudoephedrine had already been converted to methamphetamine. (T.837; R.780). He testified there was more to do to the mixture to create pure usable methamphetamine, meaning it was clearly in a preparation. As a result, the liquid mixture or preparation clearly falls under the auspices of section 44-53-375.

The legislative intent is to criminalize any stage in the manufacturing process of methamphetamine. The testimony in this case demonstrated the volatile nature of the

liquid mixture found in the bottle. Investigator Schifferle testified individuals wearing hazardous material suits had to dispose of the bottle and some of its contents. He testified most of the solvents and other materials used in the process are highly flammable. (T.837-841; R.780-784).

Further, the fact the legislature also sought to punish those that have completed the process and seek to harm the environment and possibly others by criminalizing the disposal of the waste formed after the methamphetamine is extracted does not alter the intention to criminalize to the fullest extent possible the actions of someone in the process of making the drug. See S.C. Code Ann. § 44-53-376(A) (Supp. 2011). The fact the disposal of the by-products is itself a crime demonstrates the seriousness to which the legislature takes the manufacture of methamphetamine. The legislature clearly intended to criminalize the act of trafficking in a substance or a liquid mixture this volatile and destructive.

Appellant asks this Court to look to the way federal courts and several states interpret their statutes using the "market-oriented" approach. He points to Chapman v. United States, 500 U.S. 453 (1991), and cases that follow Chapman in the Federal Courts. In Chapman, the Court found that the blotter paper onto which LSD is infused should be included in the weight of the drug. The Court noted that "Congress adopted a 'market-oriented' approach to punish drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." Id. at 461, 111 S. Ct. at 1925. The reason for this decision was the fact the blotter paper could be consumed and would be part of what was sold when the LSD was sold.

Two important factors distinguish the Chapman case from the case at bar. First, Chapman and the cases that have followed all deal with federal offenses and how to apply federal sentencing guidelines. In Chapman, there was no question that the substance at issue contained a "mixture" of LSD; the only question was whether the sentence should be based on the weight of pure LSD or on the weight of the LSD and the "carrier," or blotter paper. The Chapman court discussed the "market-oriented" approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. Id. at 461, 111 S. Ct. at 1925.

The other important distinction between Chapman and the case at hand was made by the Chapman Court itself when it found methamphetamine was to be treated differently under the federal statutes. In discussing the sentencing statute the Court noted:

> With respect to various drugs, including heroin, cocaine, and LSD, it provides for mandatory minimum sentences for crimes involving certain weights of a "mixture or substance containing a detectable amount" of the drugs. With respect to other drugs, however, namely phencyclidine (PCP) or methamphetamine, it provides for a mandatory minimum sentence based either on the weight of a mixture or substance containing a detectable amount of the drug, or on lower weights of pure methamphetamine.

Id. at 459, 111 S. Ct. at 1924.

South Carolina has not adopted the Federal Sentencing Guidelines and our sentencing statute makes no distinction between a mixture and the pure drug. Therefore, the definition found in section 44-53-210(d) clearly calls for "any material, compound,

mixture, or preparation which contains any quantity of . . . methamphetamine" to be included in the weight calculated for determining sentencing.

Other states have addressed the issue of how to determine weight for sentencing purposes based on state statutes. In an Illinois case, People v. Haycraft, 349 Ill. App.3d 416, 811 N.E.2d 747 (2004), law enforcement found several containers containing a clear liquid and took samples of the liquid, which was later identified by a forensic chemist as methamphetamine and the weight of the liquid testing positive for methamphetamine was more than 900 grams. Haycraft argued that the State did not prove that he possessed more than 900 grams because until the cooking process was completed, he only possessed the ingredients for methamphetamine. The Court found, "Methamphetamine is its ingredients, i.e. anhydrous ammonia, pseudoephedrine, and lithium, combined in a mixture, whether cooked to its final, marketable form or not." Id. at 428, 811 N.E.2d 759. The Court found that Haycraft combined the ingredients into the container; thus, the mixture in the container constituted a "substance containing methamphetamine," which is the wording used in the Illinois statute and is very similar to the wording used in our statute.

In People v. Reynolds, 358 Ill.App.3d 286, 831 N.E.2d 1103 (2005), the Appellate Court of Illinois, Fifth District, relied on Haycraft, when it found that "if the legislature intended to restrict the scope of the statute to a substance containing methamphetamine that was usable, ingestible, or marketable, it would have specifically excluded from the gram amount any by-product or waste resulting from the manufacturing process."

In State v. Michael, 234 S.W.3d 542 (2007), the Missouri Court of Appeals, Eastern District, Division Two, found enough evidence existed for a reasonable juror to infer that Michael possessed methamphetamine with the intent to distribute. The "meth oil" was found in a jar between Michael's feet in his car. Law enforcement took a sample of the oil for testing and destroyed the remainder of the meth oil due to its hazardous nature. The sample weighed 13.27 grams. The officer who took the sample testified that there was "substantially more" meth oil in the container and that the amount in the container was more than would be used for personal use if reduced to the finished product.

In Jones v. State, 235 S.W.3d 783 (Tex. Crim. App. 2007), the Texas Court of Criminal Appeals found that the weight of the bleach that Jones poured the methamphetamine liquid into in the hopes of destroying the methamphetamine could be added to the aggregate weight of the methamphetamine. The Court relied on Melton v. State, 120 S.W.3d 344 (Tex. Crim. App. 2003), in which the Court found that "the State is no longer required to determine the amount of controlled substance and the amount of adulterant and dilutant that constitute the mixture, but rather the State has to prove only that the aggregate weight of the controlled substance mixture, including adulterants and dilutants, equals the alleged minimum weight." Id.

The case of State v. Rivera, 614 N.W.2d 581 (Iowa App. 2000) is highly instructive because the statute considered is very similar to the one in South Carolina. The Court cited the statute which reads in part:

> More than five grams but not more than five kilograms of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable

> amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

Id. at 583 (citing Iowa Code section 124.401(1)(b)(7) (1997)) (emphasis added).

In Rivera, the Court was determining whether to consider for meeting the five gram requirement the entire contents of a one-gallon glass jar approximately one quarter full of a clear liquid, which sample analysis revealed as a mixture containing methamphetamine and pseudoephedrine. Id. Rivera argued, much as Appellant does in this case, that only the finished product could count toward the five gram minimum amount. The Court concluded:

> The statute specifically states the amount must be five grams or more of "methamphetamine ... or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine...." It does not specify any particular stage of the manufacturing or post-manufacturing process, nor does it indicate an expected yield must be estimated or a pure form must be extracted in order to weigh the narcotic. Although the federal statute seems to require an estimated yield of methamphetamine before sentencing can be entered, the Iowa statute does not require this step as a methamphetamine mixture is prohibited at the same gram weight as completed methamphetamine.
>
> . . . .
>
> We find the statute is plain on its face and does include any compound or mixture which contains any quantity or detectable amount of methamphetamine. Despite Rivera's arguments to the contrary, the plain meaning of the statute clearly includes methamphetamine in a less-than-finished state. The statutory weight was, therefore, satisfied by including the weight of the liquid seized as it contained a detectable amount of methamphetamine.

Id. at 584. The same analysis should apply when looking at the plain meaning of the statute in South Carolina.

The trial court did not err in using the weight of the liquid which was not an ingestible form of methamphetamine because our statute defines methamphetamine as any material, compound, mixture, or preparation which contains any quantity of methamphetamine. S.C. Code Ann. § 44-53-210(d). The statute clearly allows the weight of the liquid containing methamphetamine to be included in the weight determination for trafficking purposes.

Appellant also contends the trial court erred in restricting his ability to argue that the jury should only consider the weight of methamphetamine which could be created from the liquid mixture and not the full weight of the liquid mixture itself. First, the issue is not preserved because Appellant never maintained under Apprendi v. New Jersey, 530 U.S. 466 (2000), or the Sixth Amendment that he was being deprived of the ability to contest an essential element. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court); State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (a contemporaneous objection must be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

Further, based on the above discussion, his argument would amount to an incorrect statement of the law and this is not proper. It is a matter of law whether the jury can only consider the weight of the final product that could be extracted from the liquid or the liquid itself. To allow Appellant to argue it was only the final product, would be to have him make an argument in favor of an incorrect statement of the law. The trial court properly kept him from making an argument that would only serve to confuse the jury. The jury was given the statutory definition of methamphetamine and allowed to

determine the weight to assign based on the evidence presented to them. Accordingly, Appellant was properly restricted from arguing an incorrect matter of law.

Finally, even if it were error to consider the entire weight of the liquid mixture, the error was entirely harmless. "The key factor for determining whether a trial error constitutes reversible error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (citations omitted). "An error is harmless if the defendant's guilt has been conclusively proven by competent evidence, such that no other result could have been reached." State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005).

The State maintained Appellant could be convicted of trafficking in methamphetamine 28 to 100 grams based on the weight of the liquid measure or, in the alternative, based on his part in a conspiracy with numerous individuals that would bring him materials such as Sudafed for him to use in the manufacture and distribution of methamphetamine. The State presented the testimony of numerous members of the conspiracy who detailed their purchases of Sudafed for use by Appellant in manufacturing methamphetamine. (See State's Exhibits 74-76; R.74-76).

The same individuals, including Brandi Quinn, Shelley Pettigrew, Amanda Caudle, and Christopher Matuse, all testified they received methamphetamine from Appellant in exchange for the boxes of Sudafed. Further, the testimony clearly supported a jury finding that Appellant conspired to manufacture more than 28 grams of methamphetamine when the testimony of the various individuals is considered collectively. (T.460-467; 472-479; 569-575; 577-581; 594; 657-660; 714-726; R.408-

415; 420-427; 517-523; 525-529; 542; 605-608; 622-674). Appellant has not raised any issue related to the sufficiency of the evidence to convict Appellant of the conspiracy theory proposed by the State to convict him of trafficking in methamphetamines. As a result, any error related to the theory the weight of the liquid mixture could support conviction for trafficking 28 to 100 grams is harmless because there is evidence supporting the theory he was involved in a conspiracy to manufacture and deliver methamphetamine in the amount of 28 to 100 grams. Accordingly, this Court should affirm Appellant's conviction and sentence based on trafficking in 28 to 100 grams of methamphetamine.

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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June 10, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-207549

The State, Respondent,

vs.

Jason Alan Johnson, Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

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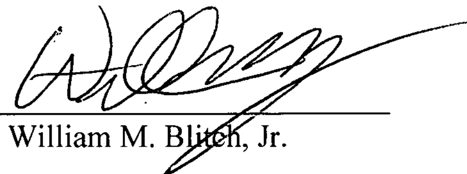

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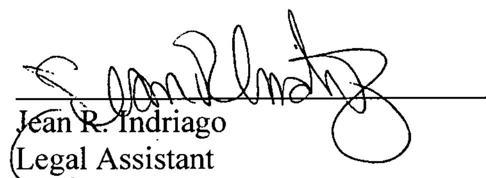
PROOF OF SERVICE

I, Jean R. Indriago, Legal Assistant, hereby certify that I have served the within Final Brief of Respondent, dated June 10, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 10th day of June, 2013.



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RE: State v. Jason Johnson
Appellate Case Tracking No. 2012-207549

Dear Mr. Alexander:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

WMB/jri
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~ nine
Victim Services