THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions

The Hon. Lawton McIntosh, Circuit Court Judge

Case No. 2013-000817

The State. . . . . Respondent.

v.

Charles Cain . . . . . Appellant.

APPELLANT'S REPLY TO RESPONDENT'S INITIAL BRIEF

Thomas J. Rode, Esquire
Post Office Box 20817
Charleston, SC 29413
(843) 410-3390

And

Robert Dudek, Esquire
Office of Appellate Defense
Columbia, SC

Attorneys for Appellant

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INTRODUCTION

Appellant is compelled to begin with two fundamental principles that over-arch the arguments presented in his Initial Brief. First, in the context of expert testimony, qualification of an expert witness and admission of that expert's testimony are two separate and distinct issues. Appellant's focus is on the later. Second, and of paramount significance, the crimes of "manufacturing" methamphetamine (S.C. Code Ann. § 44-53-375(B)) and "trafficking" methamphetamine (S.C. Code Ann. § 44-53-375(C)) are separate and distinct offenses, and proof of "manufacturing" is in no way *per se* proof of "trafficking." The State has overlooked or muddled these principles.

At trial, the State's case relied exclusively on the expert testimony from Beth Stuart, as to "theoretical yield." Stuart opined that under certain hypothetical circumstances the Appellant could have "theoretically" produced more than ten grams of methamphetamine. This was nothing more than a "theory" that under certain conditions, of which there was no evidence, it was not impossible that Appellant could have attempted to traffic methamphetamine (i.e. intended to produce more than ten grams). However, the State offers no evidence that this theory is in any way a practical reality. The statutory language of S.C. Code Ann. § 44-53-375(C) which criminalizes trafficking methamphetamine, does not criminalize the theoretical possibility a person could commit the offense, but instead only the "knowing" production of more than ten grams of methamphetamine.

In its Initial Brief, the State attempts to hide the fundamental deficiencies of its case by painting with such a broad stroke as to obscure the precise issues before this Court. It misstates

the arguments of the Appellant and then scoffs at these misstated arguments as if they were the musings of a rebellious child.

In his Initial Brief, Appellant alleged the trial court erred in admitting evidence, from Stuart, in the form of an expert opinion of the maximum theoretical yield of methamphetamine and in failing to grant a directed verdict on the charge of trafficking in methamphetamine because the "theoretical yield" testimony was alone insufficient evidence that Appellant intended to manufacture ten or more grams of methamphetamine.

As it relates to Appellant's allegations of error in regard to Stuart's testimony, the inquiry is not, as the State suggests, one of qualification of her as an expert or the overall reliability of math and chemistry as accepted academic disciplines. Instead the inquiry is a much more practical one: whether the State complied with the legal requirements to render this testimony admissible? For want of satisfying the *Jones* standard or offering evidence of any *Council* factors, they did not comply with these legal requirements.

As to Appellant's argument that a trafficking conviction cannot stand on "theoretical yield" evidence alone, the inquiry is not, as the State suggests, whether the State presented evidence that the Appellant intended to manufacture methamphetamine (i.e. produce methamphetamine in any amount), but instead whether the State presented evidence he intended to "traffic" methamphetamine (i.e. knowingly produce more than ten grams).

Thus, just at the jury's inquiry is not whether Appellant *could have* committed the crime, but whether he *did* commit the crime; this court's inquiry not whether the State *could have* satisfied the legal requirements to convict Appellant, but whether the State *did* satisfy the legal requirements to convict Appellant. They simply did not.

ARGUMENT

I. The Trial Court Erred in Admitting the Expert Testimony of Stuart.

This issue boils down to a question of whether an expert's testimony as to a theoretical possibility is sufficiently reliable to be admitted as the sole evidence of an accused's guilt when that expert is unable to establish that this theory would be true or accurate under the circumstances of this particular case.

A. Reliability of Stuart's theoretical testimony under *Jones* and *Council.*

The State addresses Appellant's argument on this issue by asserting: "The required expertise to render an opinion was little more than a basic knowledge of chemistry and the methamphetamine production process; [and] the State's chemist had both." However, this diverts attention from the specific issue alleged – whether the expert testimony was reliable.

In South Carolina the gatekeeping function of the trial court in regard to the admission of expert testimony is two-fold, it is not a singular inquiry. This gate-keeping function looks at both the "qualification" of the witness as an expert and then, after the witness has been qualified, a determination as to the reliability of the testimony the expert purports to offer. *See State v. Tapp*, 398 S.C. 376, 388 (S.C. 2012) ("The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony.")(emphasis original).

The State lends great focus to its blanket assertion that "[a]ny chemist . . . with an awareness of how methamphetamine is manufactured could make this calculation. It is simple

chemistry and is not novel." (Resp. Br. p. 12-13). However, the question is not whether chemistry is simple or novel, or whether "any chemist" could formulate an opinion on the matter. Rather, the inquiry is whether this expert testimony is reliable, or more specifically whether the State has established this testimony is reliable as required by the law of South Carolina.

The State seems to twist Appellant's argument to be that chemistry and mathematics, as academic disciplines, are wholly unreliable. But Appellant makes no such broad assertions. Rather, Appellant's argument is simply that the State failed to follow the required procedure for the admittance of this expert testimony, and the trial court failed to conduct its gate-keeper role of vetting the reliability of this testimony.

This vetting of reliability requires that after the purported expert is qualified, the proponent of this evidence must demonstrate, and the trial Court must find, the purported testimony to be reliable. *See Tapp,* at 388. The reliability of scientific expert testimony is determined by application of the "*Jones* standard," which provides that "the standard for admitting scientific evidence" is "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones,* 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

In applying the *Jones* standard the Court "looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (*citing State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)).

To be certain our Supreme Court has made clear "that *all* expert testimony . . . must be vetted for its reliability prior to its admission at trial." *Tapp* 393 S.C. at 388 (*citing State v. White*, 382 S.C. 265 at 274 (2009) (reiterating that "[t]he familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial judge has vetted the matters of qualification and reliability and admitted the evidence")) (emphasis added). Thus, regardless of whether chemistry and mathematics are scientifically accepted as the State asserts, the reliability of the methodology must still be established.

In this matter the State offered no evidence of any of the *Council* factors; (1) publication or peer review, (2) prior application, (3) quality control procedures, or (4) consistency of the method. *See Council,* at 19 (listing four factors to consider in vetting the reliability of scientific evidence). Thus, the trial court did not properly vet the reliability of Stuart's testimony on theoretical yield as the State presented no foundation on which to base a reliability determination. The trial Court's ruling is reviewed for an abuse of discretion, and an abuse of discretion occurs when the conclusion of the trial court is either controlled by an error of law or based on unsupported factual conclusions. *See Tapp*, at 385.

The State asserts: "There can be little doubt that calculations of chemistry equations are peer reviewed;" and "While Stuart may not have cited any Chemistry text books by name, they undeniably exist." (Resp. Br. p. 17). However, there was simply no evidence offered to support this. While the State's contention may well be true, the issue is not whether the trial court is safe in assuming it was peer reviewed or published, but whether there is evidence to support these assertions. Similarly the State seems to acknowledge there is no testimony of quality control measures, arguing that in its opinion, Stuart's testimony "*suggests* that the necessary controls are no more than a calculator, a periodic table, and a basic understanding of chemistry." (emphasis

added). Again, perhaps the State could have offered evidence of this but the fact remains it did not.

In sum, while the State may well be correct that a chemist can calculate methamphetamine production based on precursor ingredients, there is nothing in the record to demonstrate that Stuart's calculation method was reliable when applied to this case. More specifically there is nothing to indicate how reliable this method of calculation would be when based on a hypothetical quantity of the required precursor ingredients. The State could have simply offered testimony that this calculation had been peer reviewed and confirmed to be accurate and reliable, and that the accuracy of this calculation would not be impacted by a lack of knowledge as to the quantities of the other prerequisite ingredients other than pseudoephedrine. The State could have also offered evidence that the "theoretical yield" was attainable in the context of this case. But again, the State either failed to do this, or could not do this. In either event it is not the Appellant's burden to prove the method is unreliable, instead Appellant must merely establish that the State failed to prove it was and it was therefore erroneously admitted by the trial court.

In support of its assertion that Stuart's testimony was proper; the State alleges that foreign jurisdictions have admitted such expert testimony. The State begins by citing *People v. Wilke*, 854 N.E.2d 275, 281 (Ill. App. Ct. 2006), for the proposition that: "It is undisputed in the scientific community that chemical processes exist whereby pseudoephedrine can be converted into methamphetamine amphetamine." (Resp. Br. P. 13). As an initial matter, Appellant does not, and frankly cannot, dispute the truth of this statement. It must be accepted that certain chemical reactions can create methamphetamine from pseudoephedrine. Otherwise, Appellant would never have been charged or tried for the subject offense. But, in hiding behind this "true"

statement the State attempts to divert attention from the issue of whether Stuart's theory was shown to be sufficiently reliable and accurate to serve as the sole evidentiary basis from which to predict the amount of methamphetamine Appellant could produce when this opinion was unsubstantiated and theoretical.

However, more significantly, not a single one of the cases cited by the State addresses the issue of the reliability of expert testimony in the context of a direct appeal. None of these cases hold that theoretical expert testimony is *per se* reliable; however these cases do provide support for the idea that reliability of this testimony requires the ability to testify as to whether the theoretical yield was attainable under the facts of the case. *See People v. Wilke*, 367 Ill. App. 3d 130 (App. Crt. Ill – 3d Dist. 2006) (in a case regarding whether it was ineffective assistance of counsel not to request a *Frye* hearing regarding an expert chemists' testimony that the accused was able to produce a 90% of the "theoretical yield").[1]

Thus, while other States have admitted this expert testimony when the expert could opine that the theoretical yield was possible under the facts of the particular case, these cases are of no relevance to whether the State, in this matter, demonstrated Stuart's testimony to be reliable under the laws of South Carolina. It remains that the law in South Carolina is settled that leaving the question of reliability of an expert's testimony to the jury amounts to an abuse of discretion. *See Tapp*, at 387 (Finding "the circuit judge admitted [the expert's] testimony based merely on a

[1] The State also cites; *United States v. Rains*, 615 F.3d 589 (5th Cir. 2010); *State v. Casady*, 597 N. W. 2d 801 (Iowa Sup. Crt. 1999); *United States v. Liles*, 373 Fed. Appx. 652 (8th Cir. 2010) None of which discuss the reliability or admission of expert testimony. The State also cites; *See United State v. Beshore*, 961 F.2d 1380 (8th Cir. 1992); *United States v. Engler,* 521 F.3d 965 (8th Cir. 2008); *United States v. Weaver*, 425 Fed. Appx. 267 (4th Cir. 2011); *United States v. Burnett*, 989 F.2d 546 (1st Cir. 1993); United State v. Smith, 240 F.3d 927 (11th Cir. 2001). All of which are limited to application of theoretical yield in the context of the Federal Sentencing Guidelines.

finding he was qualified as an expert, and left the reliability determination for the jury. Therefore, the admission of [the expert's] testimony was error."). Because the State presented no evidence of any *Council* factors, or other evidence that the theoretical yield was attainable in this case, the trial court left the determination of reliability to the jury, and consequently the trial court abused its discretion and committed reversible error. *See id.*

B. Stuart's "theoretical yield" testimony was based on hypothetical facts for which there is no evidentiary support.

Appellant further alleged in its Initial Brief that the lack of factual support for the Solicitor's hypothetical question which led to Stuart's opinion on theoretical yield renders the opinion unreliable.[2] More specifically Stuart indicated that there were ingredients in addition to pseudoephedrine required to produce methamphetamine amphetamine. (Tr. 139) Thus, the hypothetical question posed by the Solicitor required Stuart to presume (1) that all the ingredients were present in the required amounts, (2) these ingredients were used in a singular production, and (3) her calculation was in a 100% yield scenario. None of these presumptions is supported by evidence.

Stuart herself admitted that the lack of sufficient quantities of all the necessary ingredients could impact the yield. (Tr. 139 ln. 8-10). However, the State offered no evidence

[2] The State asserts that this argument is not preserved. However, Appellant's counsel clearly challenged the reliability of Stuart's theoretical yield testimony. Further, to the extent that Appellant may not have specifically used the word "hypothetical," the Appellant is not required to use any magic language. *See Herron v. Century BMW,* 395 S.C. 461, 446 (2012) (stating that party need not use magic language or the precise name of a legal doctrine so long as it is sufficiently clear as to the nature of the alleged error so that it could have been reasonably understood by the court) *see also Delta Apparel, Inc v. Farina*, 406 S.C. 257, 268-69 (Ct. App. 2013). Further, after Appellant's initial objection, the trial court made clear that Appellant's objection was overruled, any further objection or elaboration on the argument would have been futile. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415 (S.C. 2000) ("Court[s] do[] not require parties to engage in futile actions in order to preserve issues for appellate review.").

that there were sufficient quantities of the other ingredients found at the scene or that there were remnants or empty containers which had previously held sufficient quantities of these ingredients. Further Stuart testified that she could not determine what yield percentage the purported methamphetamine production operation could achieve. (Tr. 135). Thus, regardless of the reliability of Stuart's theoretical yield formula, her conclusion was nothing more than an affirmation that the Solicitor's hypothetical question was theoretically possible, and this hypothetical was without factual basis.

The State asserts that Appellant's argument that the lack of evidence as to the quantity of other ingredients "overlooks one obvious inference from the evidence . . . [that] the pseudoephedrine was all used up, which means that the methamphetamine producer had adequate other ingredients to produce methamphetamine from the pseudoephedrine once contained in the blister backs." (Resp. Br. p. 20). However, the Appellant makes not such oversight. If there had in fact been sufficient ingredients the State could have easily offered evidence that the remnants that were found at the scene had once contained enough material to support the production of the theoretical amount of methamphetamine. The State simply failed to do so.

Further, the inference the State claims Appellant overlooked is a forbidden inference. To suggest that the lack of pseudoephedrine explains the absence of the other ingredients because they were all used in the methamphetamine production requires the fact finder to presume the Appellant made, or attempted to make, methamphetamine – the very point at issue in the case. Without assuming, as a fact, that the Appellant made, or attempted to make, methamphetamine, the absence of the other ingredients creates no inference at all. The problem is that this presupposition that Appellant made or attempted to make methamphetamine is precisely the

conclusion the State has the burden to prove. The State cannot create a situation in which an inference of guilt is based upon the assumption that the accused committed the offense. *See e.g. Coffin v. United States*, 156 U.S. 432 (1895) (confirming the presumption of innocence as a fundamental right).

Finally, the State cites to several cases that it alleges support its proposition that other jurisdictions permit theoretical yield testimony. However, not only do none of these cases address the reliability of expert testimony, but all of these cases bolster Appellant's argument that theoretical yield cannot be based on hypotheticals or assumptions as these cases demonstrate instances in which there was testimony of an actual amount of precursor ingredients – not hypothetical quantities – and expert testimony of the accused's specific production capabilities – i.e a potential yield.[3] Something the State failed to offer at trial. Thus there remains no factual

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[3] The State cites the following cases: *People v. Wilke*, 367 Ill. App. 3d 130 (App. Crt. Ill – 3d Dist. 2006) (in a case regarding whether it was ineffective assistance of counsel not to request a *Frye* hearing regarding an expert chemist's testimony that the accused was able to produce a 90% of the "theoretical yield"); *United States v. Rains*, 615 F.3d 589 (5th Cir. 2010) (in evaluating the sufficiency of the evidence for a conviction of conspiracy the court determined that evidence from an expert chemist who testified that the accused could expect a 40%-70% of the theoretical yield was sufficient to support a conviction); *State v. Casady*, 597 N. W. 2d 801 (Iowa Sup. Crt. 1999) (in ruling on the admissibility of a chemists report under the hearsay rule the court noted the chemist was able to testify that under the specific methamphetamine od the accused was employing – the "Nazi methamphetamine od" – a skilled operator could expect 15.9 grams and an unskilled producer could produce 7.9 grams of methamphetamine); *United States v. Liles*, 373 Fed. Appx. 652 (8th Cir. 2010) (a case in which the issue was whether the defendant was in possession of a methamphetamine amphetamine "mixture" in excess of 50 grams when he was found with 24 grams of pseudoephedrine which could theoretically yield 22 grams of methamphetamine and 78.6 grams of "sludge").

The balance of the cases the State relies upon are in the context of calculating theoretical yield under the Federal Sentencing Guidelines which has no specific intent requirement and specifically provides for such calculations in pre-sentence reports prepared by the Department of Probation. *See United State v. Beshore*, 961 F.2d 1380 (8th Cir. 1992); *United States v. Engler*, 521 F.3d 965 (8th Cir. 2008); *United States v. Weaver*, 425 Fed. Appx. 267 (4th Cir. 2011); *United States v. Burnett*, 989 F.2d 546 (1st Cir. 1993); *United State v. Smith*, 240 F.3d 927 (11th Cir. 2001).

basis for the Solicitor's hypothetical question that a 100% theoretical yield was attainable by the Appellant.

For these reasons, the arguments that the Appellant presented in its initial brief are valid and deserving of consideration. And this court should reverse the ruling of the trial court.

II. Motion for Directed Verdict.

Initially, the State asserts Appellant's argument is not preserved. Specifically that Appellant's arguments regarding theoretical yield were not incorporated into his motion for directed verdict. The State is merely attempting to hide its lack of evidence for the offense of "trafficking" behind an unfounded preservation argument.

To be certain, what this Court will not find in the record is any evidence as to the amount of methamphetamine Appellant could produce. On the other hand, this Court will find Appellant's argument at directed verdict that, "The testimony has been that there is some type of something going on in the house, some ingredient in this house that has been identified as a methamphetamine lab with some yield. In optimum conditions, maybe, to be a little over 17 grams." (Tr. 146 ln. 24 – 147 ln. 3). And, what this Court will also find is a statement by the trial court, that "Subject to [the] other matter I've taken under advisement with regard to the theoretical yield, I'm gonna [sic] deny your motion. I assume that each of you is adopting the other one's motion for directed verdict . . . **You're covered** on both," and then the Court goes on to explain the theoretical yield argument would be addressed the following morning. (Tr. 148-49).

To the extent the State asserts trial counsel didn't use magic language to specifically incorporate the argument related to theoretical yield into the motion for directed verdict, it is clear the trial court understood this was the case, addressing the issue at the directed verdict stage and indicating to trial counsel he was "covered." (Tr. 148). Likewise the State's position puts form well beyond function. The record is abundantly clear that the objective of the ongoing argument as to theoretical yield was to remove the charge of "trafficking" from the jury's consideration, and all parties understood this. Since the trial court addressed this matter at the directed verdict phase, an assertion that it was not "specifically incorporated" by trial counsel into a directed verdict motion is, at the very least, a distinction without consequence. The trial court clearly understood the arguments, understood the objective was to remove the charge of trafficking methamphetamine from the jury's consideration, and elected to take the matter up at the directed verdict phase. *See Herron v. Century BMW,* 395 S.C. 461, 446 (2012) (stating that party need not use magic language or the precise name of a legal doctrine so long as it is sufficiently clear as to the nature of the alleged error so that it could have been reasonably understood by the court) *see also Delta Apparel, Inc v. Farina*, 406 S.C. 257, 268-69 (Ct. App. 2013).

Further, there can be no doubt that the entire premise of Appellant's argument to the trial court was that theoretical yield was not sufficient to establish the intent requirement of trafficking methamphetamine. (Tr. 33 -34). And this argument that theoretical yield fails to satisfy the intent requirement for a prosecution of attempted trafficking – as opposed to manufacturing – is precisely what the Appellant argued in his Initial Brief. Thus, the matter is preserved.

A. Submitting a charge of trafficking to the jury requires more than theoretical yield evidence alone.

To be clear, the ultimate question is not whether the Appellant intended to manufacture methamphetamine, but instead whether the Appellant intended to manufacture more than ten grams of methamphetamine – i.e. whether he intended to **traffic** methamphetamine.

The State's entire argument is operating from the faulty premise and presupposition that the intent requirement of trafficking is the same as that for the lesser offense of manufacturing. However, trafficking, as defined by S.C. Code Ann. § 44-53-375(C) requires the accused to have a specific intent to "knowingly . . . manufacture [(or attempt to manufacture)] . . . ten grams or more;" while the crime of "manufacturing" as defined by S.C. Code Ann. § 44-53-375(B) has no such specific "knowingly" requirement. *See* § 44-53-375(B) (containing no specific intent requirement, and defining the offense as "a person who manufactures . . . methamphetamine. . . is guilty") Thus, trafficking requires the accused to engage in the offensive conduct knowing the end result will yield in excess of ten grams.

In ignoring this specific intent requirement, the State is trying to make its square peg fit in a round hole by simply making the hole bigger. Specifically, the State claims "[Appellant] seems to argue that no reasonable juror could infer that the pseudoephedrine contained in the empty blister packs was used in an attempt to manufacture methamphetamine." Perhaps the reason the State is equivocal in this statement is because Appellant makes no such argument. Rather, Appellant's argument is that testimony of "theoretical yield" alone provides no evidence of Appellant's specific intent to produce more than ten grams of methamphetamine (aka trafficking methamphetamine). Without evidence of Appellant's yield capability a prosecution for **trafficking** (S.C. Code Ann. § 44-53-375(C)) may not be submitted to the jury. Appellant

makes no argument that this evidence is insufficient to support an inference he committed the offense of "manufacturing" (S.C. Code Ann. § 44-53-375(B)).

The State even seems to acknowledge that in a prosecution for trafficking (S.C. Code Ann. § 44-53-375(C)) the defendant's specific yield capabilities is of paramount significance. In attempting to distinguish the *Eide* case on which Appellant relies, the State argues the production process in that case may have been different. (Br. p. 27). But Appellant is left inquiring: Of what possible significance could the production method be unless various methods produce different percentage yields?

This point highlights the very issue Appellant presents on appeal and the fundamental fallacy in the State's position. Reliance on theoretical yield evidence alone neglects this difference in production method, and thus what amount an accused could have "knowingly" attempted to produce. Theoretical yield is a one-size-fits-all position which has no relation to what a specific individual's capabilities are, and thus no relation to what amount an accused specifically intended on producing or attempted to produce. While theoretical yield may well be sufficient under a prosecution for "manufacturing" as the State suggest, the same does not hold true for trafficking as the State must prove the accused's intent was to manufacture more than ten grams. Without evidence of what the particular defendant is practically capable of producing, what evidence could there be of the amount he *intended* to make?

Reliance on theoretical yield alone provides no more evidence of a defendant's intent to traffic (i.e. produce more than ten grams) than does testimony that it was hypothetically possible for a murder defendant to shoot a gun, or that it was hypothetically possible for a burglary suspect to break a window, or that it was hypothetically possible a rape defendant intended to

rape when he committed a touching. *Contra State v. Atieh*, 397 S.C. 641, 650, 725 S.E.2d 730, 735 (Ct. App. 2012) (although theoretically possible that the accused was intending to commit criminal sexual conduct on a minor when he touched the victim in a lewd way this possibility was insufficient to support a conviction). It is the equivalent of permitting a person arrested for simple possession of marijuana to be convicted of PWID because the plastic bag containing the marijuana was "theoretically" large enough to contain a larger amount of marijuana.

A theoretical yield is, by definition, merely a theory. It has no basis in reality without reference to whether or not the particular defendant could expect such a yield under the specific production method. To be certain, there is no evidence in the record that Stuart's theoretical yield calculation is even realistically attainable. In regard to whether the theoretical yield has ever been proven to be possible, Stuart admits that she is uncertain: conceding in response to Appellant's question of whether she ever "started with an amount of Sudafed and other things and say I should get this much [methamphetamine] and go through [an experiment] and get that much?" that she does not recall. (Tr. 131 ln. 5-7). Further Stuart concedes that her testimony as to 100% theoretical yield is only possible (if at all) in "laboratory conditions." (Tr. 133, ln. 2-3). And she admits that the Appellant's purported production was not under "laboratory conditions" (Tr. 134 ln. 23 – Tr. 135 ln. 1) and that she is unable to determine what Appellant's "percentage yield" might be. (Tr. 135 ln. 2-6).

The State asserts that the distinction between theoretical yield and potential yield is a "jury argument" which requires the trial court to engage in weighing of evidence. This is just not the case. Theoretical yield is simply an indication of a theoretical possibility. Prosecution for a crime requires more. In the absence of evidence that infers defendant's subjective intent, rather than an objective theoretical possibility, there is simply no evidence of a specific intent. *See*

Atieh, at 650, 725 S.E.2d at 735 (suggesting that although theoretically possible that the accused was intending to commit criminal sexual conduct on a minor when he touched the victim in a lewd way this possibility was alone insufficient to support the "natural and reasonable" inference that his intent was more than the mere touching and thus directed verdict was proper).

In fact, all the authority that the State cites in support of its reliance on theoretical yield demonstrates that there must be some evidence of what the particular defendant's production capabilities were. These cases recognize, as the Appellant argues, that there can be no evidence of an accused's specific intent in the absence of evidence of his/her potential yield or what his/her particular production capabilities were. *See People v. Wilke*, 367 Ill. App. 3d 130 (App. Crt. Ill – 3d Dist. 2006) (in a case regarding whether it was ineffective assistance of counsel not to request a *Frye* hearing regarding an expert chemists' testimony that *the accused was able to produce a 90% of the "theoretical yield"*); *United States v. Rains*, 615 F.3d 589 (5th Cir. 2010) (in evaluating the sufficiency of the evidence for a conviction of conspiracy the court determined that evidence from an expert *chemist who testified that the accused could expect a 40%-70% of the theoretical yield* was sufficient to support a conviction); *State v. Casady*, 597 N. W. 2d 801 (Iowa Sup. Crt. 1999) (in ruling on the admissibility of a chemists report under the hearsay rule the court noted the *chemist was able to testify that under the specific method the accused was employing – the "Nazi methamphetamine od" – a skilled operator could expect 15.9 grams and an unskilled producer could produce 7.9 grams* of methamphetamine) (emphasis added).

In addition to relying on cases that support the very contention Appellant asserts, the State makes various allegations of what the Appellant "ignores" in making his arguments. One of these allegations is that "Cain's argument ignores the practical reality that one attempts a crime to succeed, and it is reasonable that Cain was attempting to produce as much

methamphetamine amphetamine as possible, and seventeen grams [] was possible, as calculated by Stuart." In response to this, Appellant notes that regardless of whether it is reasonable to presume that someone attempts something with a mind to succeed, the point of contention is that the State has offered no evidence of what success is *in this case*. How much methamphetamine would be successful? If Appellant in fact attempted to make methamphetamine with the equipment and ingredients/remnants that were found at the scene could *he* have expected to make more than ten grams? There is no evidence what-so-ever to this inquiry.

In the light most favorable to the State, the theoretical yield testimony is merely a theory, and offers nothing more than that – a theoretical possibility. It is hard to imagine a circumstance in which the State would be unable to provide evidence that it was theoretically possible for the defendant to commit the offense. If the law required only "theoretical possibility" to submit an issue to the jury, a motion for directed verdict would *never* be proper. But the law of this State requires more. *See State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (trial court should grant a motion for directed verdict if the evidence merely raises a suspicion that the defendant is guilty).

In sum, the State asks this Court to erase the specific intent requirement from S.C. Code Ann. § 44-53-375(C) and replace it with a provision that "theoretical possibility" is *per se* proof of the crime of trafficking under S.C. Code Ann. § 44-53-375(C). Appellant asserts the law provides for no such interpretation.

B. The State offered no evidence of "Custody and Control."

Finally as to Appellant's argument that directed verdict was proper because there was not sufficient evidence of custody and control, the State first asserts that this argument is not

preserved. (Br. p. 29). This assertion seems to be based on the fact that Appellant's argument used the words "custody and control" instead of "dominion and control." The State claims that this control argument only applied to remnants at the scene and not the pseudoephedrine/ingredients that were once contained in those remnants. However, this position is fundamentally at odds with the *entirety* of the State's theory of the case. The State's case rests entirely upon the very assertion that possession of the remnants is equivalent to possession of what was once in the remnants – specifically the pseudoephedrine that was once in the empty blister packs. Certainly the Appellant could not make methamphetamine with the empty containers. But now, to claim this argument is not preserved the State claims that dominion and control of the empty container is not the same thing as dominion and control of the actual pseudoephedrine. It is inescapable that if dominion and control of the remnants is not the same thing as dominion and control of the ingredients that were once in those remnants then the State's case is wholly without support.

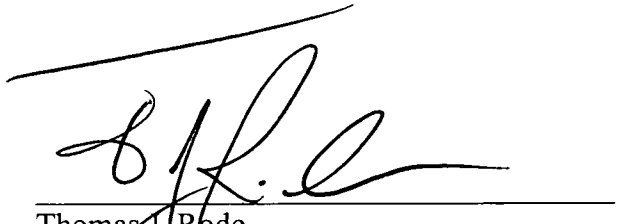
Regardless, Appellant argued to the trial court that there was nothing in evidence that connected him to what was found in the other area of the house. He specifically pointed out that there was no evidence of who owned the house, or the Appellant having a lease on the house. (Tr. 147). Appellant asserts that this argument directly points out the lack of evidence of dominion and control over the items that were found hidden away in garbage bags both at the time of the arrest and at the time the items were used in the purported attempt to manufacture methamphetamine. *See Herron v. Century BMW,* 395 S.C. 461, 446 (2012) (stating that party need not use magic language or the precise name of a legal doctrine so long as it is sufficiently clear as to the nature of the alleged error so that it could have been reasonably understood by the court).

It is precisely this point that Appellant highlighted in his initial brief. It is undisputed that Stuart testified there was evidence of several different batches. (Tr. 120). And presumably, it would take all of these different batches added together to obtain the theoretical yield. What the State appears to do is take the position that it can aggregate each of these various batches into one single act despite a complete dearth of evidence to establish that the Appellant had dominion and control of the ingredients or remnants at the time those batches were made. Essentially, because the other batches are all part and parcel of the State's alleged "attempt" to traffic methamphetamine, the State must offer at least some evidence of a nexus between the Appellant and the items that were used in the purported manufacturing. The State offered no such evidence.

CONCLUSION

For these reasons, the Appellant respectfully requests the ruling of the trial court be reversed.

Respectfully submitted,



Thomas J. Rode
Attorney for Appellant
SC Bar No.: 77480

Thurmond, Kirchner, Timbes and Yelverton
15 Mid-Atlantic Wharf, Ste. 101
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions

The Hon. Lawton McIntosh, Circuit Court Judge

Case No. 2013-000817

The State. . . . . Respondent.

v.

Charles Cain . . . . . Appellant.

AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A., attorneys for the Appellant, do hereby certify that I have on this date served via U.S. Mail a true and correct copy of the Appellant's Reply to Respondent's Initial Brief upon the following counsel of record:

FOR THE RESPONDENT:
Allen Wilson, Esquire
Salley W. Elliott, Esquire
David Spencer, Esquire
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 11549
Columbia, SC 29211
Phone: (803) 734.3970

Moira W. Kerrigan
Paralegal to Thomas J. Rode

May 12, 2014
Charleston, South Carolina

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF, SUITE 101
CHARLESTON, SOUTH CAROLINA 29401

Paul R. Thurmond
Jesse A. Kirchner
Michael A. Timbes *
Matthew E. Yelverton **
Christopher P. Deters
David L. Barnes, Jr.
Thomas J. Rode
Christopher C. Romeo

David L. Savage
Of Counsel

Phone: 843-937-8000
Fax: 843-937-4200
www.tktylawfirm.com

* Also admitted in Georgia
** Also admitted in North Carolina

May 12, 2014

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Cain, Charles
Appellate Case No. 2013-000817

Dear Ms. Kitchings:

This firm represents the Appellant in connection with the above appeal. Enclosed for filing, please find the original and two (2) copies of the following:

1. Appellant's Reply to Respondent's Initial Brief; and
2. Affidavit of Service.

After filing the originals, kindly return any extra file-stamped copies to me in the enclosed self-addressed envelope provided for your convenience. Should you have any questions or concerns, please do not hesitate to contact me.

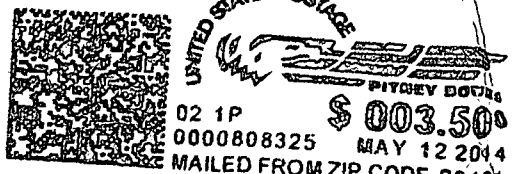
With best regards, I am

Sincerely,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

Moira W. Kerrigan
Paralegal to Thomas J. Rode

/mwk
cc: David Spencer, Esquire
Robert Dudek, Esquire



First Class Mail

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF, SUITE 101
CHARLESTON, SOUTH CAROLINA 29401

RECEIVED
MAY 15 2014
SC Court of Appeals

TO:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211