STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

vs.

CHARLES CAIN,

Appellant.

APPELATE CASE NO. 2013-000817

FINAL BRIEF OF RESPONDENT

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II.

Evidence supports the jury's verdict for trafficking based on the attempt to manufacture in excess of ten grams of methamphetamine where evidence showed that the pseudoephedrine utilized in the manufacturing process could yield in excess of ten grams of methamphetamine and where evidence showed that Appellant was in constructive possession of the ingredients and paraphernalia found in the active methamphetamine lab.

STATEMENT OF THE CASE

Appellant Cain was indicted for trafficking methamphetamine. He was tried jointly with co-defendant Tiphani Parkhurst by jury before the Honorable R. Lawton McIntosh on February 28 and March 1, 2013. Neither Cain nor Parkhurst appeared at their jury trial. The jury found both defendants guilty.

Cain's sentence was unsealed at a hearing on April 11, 2013. No explanation was provided for Cain's absence from trial. Judge McIntosh sentenced Cain to ten years' imprisonment.

STATEMENT OF FACTS

Appellant Cain and co-defendant Parkhurst furtively fled away while law enforcement was executing a search warrant at the house where they claimed to reside. By the time law enforcement found the methamphetamine lab, Cain and Parkhurst had already left in their car.

Deputy Kevan Kyle, accompanied by Deputy Wilbanks, was attempting to serve a family bench warrant on an individual by the name of Travis Kirby on January 17, 2012, at the house. Cain and Parkhurst were present at the residence when Deputy Kyle was trying to serve the warrant. Deputy Kyle testified he knocked on the back door because a car was parked by it. Both Cain and Parkhurst came to the door. Both supplied their identification to Deputy Kyle upon his request. They claimed not to know Kirby. They also claimed to rent only one bedroom in the house, that was the only room they went in, and they had nothing to do with the rest of the house. Deputy Kyle testified that Cain and Parkhurst did not want him to look inside the remainder of the house. ROA. p. 38.

Deputy Kyle testified that he felt Cain and Parkhurst were acting nervous and noticed they made furtive gestures, so he thought maybe they were hiding Kirby. Deputy Kyle noticed a dog running around the house, which Cain and Parkhurst admitted was their dog. Deputy Kyle testified "[a]s we proceeded through the rest of the house, we actually found their dog that they had shut in the rest of the house shut off in their bedroom while we were talking to them." ROA. pp. 38-39 (direct quote, p. 39, lines 16-18); p. 46. Deputy Kyle further explained, "He was running loose in the house. He came up to us while we were walking down the hallway." ROA. p. 39, lines 23-24.

The deputies left the bedroom where the codefendants claimed to be staying and proceeded into the hallway and through the rest of the house. Deputy Kyle found a meth lab in the far corner of the house. What he saw was a bottle resting on the counter in the bathroom with tubing coming out of the top of the bottle. The tubing extended through an open window. Deputy Kyle recognized this as an active meth lab at the gassing-out stage where noxious gas is vented to the outside. ROA. p. 40; State's Exhibits Nos. 3 and 4. In the living room were several bottles with multicolored pellets common for one pot methamphetamine manufacturing. Deputy Kyle also saw tin foil, batteries and coffee filters, the latter used to strain methamphetamine out of liquids in the meth lab. ROA. p. 41.

Deputies Kyle and Wilbanks decided that Kirby was not in the house and went back to the bedroom where they originally found Cain and Parkhurst. The door to the bedroom was now barricaded. Deputy Wilbanks forced the door open enough to determine that boards were propped against the door to prevent the deputies from entering the bedroom and to seal the deputies in the house. The deputies discovered Cain and Parkhurst were gone, as was the codefendants' car. ROA. pp. 42-43.

Outside the exterior door utilized by Cain and Parkhurst were the freshly poured contents of a one pot meth lab, multicolored pellets poured out on the grass and concrete were still fresh and wet. ROA. p. 42, lines 3-12; p. 45.

Deputy Wilbanks also testified. He went with Deputy Kyle to serve the bench warrant. ROA. p. 54. Deputy Wilbanks testified that the bedroom which Cain and Parkhurst claimed they stayed in did not have a kitchen or a bathroom attached. He did

not notice any pots or pans, or any silverware in the room. ROA. p. 57. The deputies went through the door of the bedroom to access the rest of the house. Actually, Cain opened the door to allow the deputies into the rest of the house. Deputy Wilbanks testified that Cain and Parkhurst would have access to the rest of the house. ROA. p. 57.

Deputy Wilbanks testified that when the dog, a pit bull, came running towards them, Deputy Wilbanks said he may have to shoot the dog, and Cain spoke up and said, "Don't shoot my dog, hold on, let me get him." ROA. p. 62, lines 13-17.

Deputy Wilbanks recalled only one bathroom in the house. ROA. p. 58. Although the power and water were not turned on at the house, Deputy Wilbanks testified that the toilets and sinks might have been able to run because Deputy Wilbanks observed drop cords and hose pipe from the trailer to the house. ROA. pp. 60-61.

Deputy Wilbanks testified as follows on the issue of Cain and Parkhurst's access to the house:

> Q: Okay. Let's see. You told [prosecutor] that the defendants had access to the rest of the house.
>
> Is this based on an assumption because there was no kitchen or bath in the bedroom that you came into?
>
> A: No, I based it on when we asked to search the residence. Mr. Cain opened the door for us.
>
> Q: Okay.
>
> A: So, he gave us access to it. So, I know he would have access as well.

ROA. p. 61, lines 11-19.

After the deputies found the meth lab and determined there were no other people in

the house, they headed back down the hallway and attempted to enter the door to the bedroom, but it was barricaded. Deputy Wilbanks testified he was able to force it open to reenter the bedroom. ROA. pp. 58-59. When they made it back into the bedroom, they realized the vehicle was gone and so were Cain and Parkhurst. ROA. pp. 58-59. On the way back out of the house, they saw the spilled-out contents of the one pot bottle on the cement patio outside the bedroom door. ROA. pp. 59-60. As Deputy Wilbanks explained, "That picture of the contents of the, of what Officer Kyle referred to as a one pot bottle was on the cement of the porch we had initially stood on to knock on that door." ROA. p. 59, lines 19-23.

Chemist Beth Stuart testified last for the State. She testified she has bachelor's degrees in chemistry and biochemistry from the College of Charleston and a master's degree in chemistry from the University of South Carolina. ROA. p. 70. She went to the police academy and trained with the Drug Enforcement Agency's forensic chemist school and their clandestine lab school. She is a member of the Clandestine Lab Investigating Chemists Association. She is certified by the American Board of Criminalistics in all areas of forensic science. She testified this is national certification that requires forty hours of continuing training in forensics each year. ROA. pp. 70-71. Stuart has testified as an expert thirty-four times. ROA. p. 71. She was qualified **without objection** as an expert in forensic chemistry and chemical analysis. ROA. p. 72.

Stuart testified that the the Clandestine Lab Investigating Chemists Association is "an international chemist association so that once a year all chemists from all over the world can get together and discuss current issues and problems and cases and what we see

involving clandestine labs." ROA. p. 71, lines 11-16.

Part of her job as a forensic chemist was to respond to meth labs, "a lot of them." ROA. p. 73, lines 13-15. Stuart described meth labs as follows:

> A methamphetamine lab is . . . basically where persons or person are manufacturing methamphetamine, a known drug, by taking normal household products and putting them together in order to make it. And, so, there would be what we call chemicals around, but they're gonna look like normal household products to the general eye. But, to us, when they're put in a certain order or done a certain way, those chemicals, those household products are actually the chemicals that will produce this drug.

ROA. p. 73, line 18 – p. 74, line 1. Stuart testified she has responded to 150 methamphetamine labs. ROA. p. 74, lines 2-4.

Stuart went to the crime scene on January 17, 2012. She went straight to the bathroom and noted the tubing extending from the bathroom counter out the window. ROA. p. 78. She unscrewed the lid enough to use pH paper and determined the content was acidic, which she testified "is typical when someone is what we call in the gassing out phase of the methamphetamine at the very end."[1] ROA. p. 79, lines 1-14.

In the living room were trash bags lying on the floor and also coffee filters. Inside one of the trash bags was a bottle containing pieces of strips from batteries, face masks, and blister packs of cold medicine. There were unused strips of lithium, taken from lithium batteries, in the bottom of a bucket. Stuart found two-liter bottles with pink and white pellets mixed together. ROA. pp. 80-81. Stuart explained what these pellets were and how they were used in the manufacturing process as follows:

---

1 Cain is mistaken when he claims law enforcement only found remnants of methamphetamine production – law enforcement found a working lab, as testified to above. See Br. of App. p. 2.

> In the process of making methamphetamine, what you have to do in order to manufacture it is you take your pseudoephedrine and crush it up. Now, anybody that's taking cold medicine, the tablets are typically red when you pop them out of the blister packs. So, that's the pink pellets that you see in there. So, they crush that up and they put it down into the bottle. Then they take a cold pack, which I haven't showed you a picture of that yet, but we'll get to it in just a few minutes, the cold pack, you know the ones you go buy in the store that you pop them together and you put them on your booboos or whatever to make them feel better, they take those, but they don't need the water portion of that. They discard that.
>
> What's in . . . the other pack, the white little prills that you see is actually ammonia pellets, they need those to produce ammonia gas in their reaction to get the reaction to go. So, they take the Pseudoephedrine, put it in the bottle, and then they pour what I call an organic solvent over the top, and all an organic solvent . . . like Coleman fuel, lighter fluid, something like that that they pour over the top of it.

ROA. p. 83, line 10 - p. 84, line 6. Stuart further testified that the next part of the process is adding lithium strips from batteries and lye. This will start a reaction, but to further the reaction, water is added. The water gets the reaction going because the lithium is water reactive. ROA. p. 84-85.

The chemical reaction induced produces the meth base, which is not consumable. The liquid, which contains the methamphetamine, is poured off from the bottles and what is left in the bottles is the solid seen in the photographs. The solid remaining in the bottle is waste. ROA. pp. 83-85. Several bottles of this pink solid were found. ROA. p. 83, p. 85, p. 90, State's Exhibits Nos. 12 and 24.

The liquid is then used in an acid gas generator, the bottle with a tube running out. ROA. p. 85; State's Exhibits Nos. 3 and 4. Acid gas causes the methamphetamine to fall

out into a white powder forming at the top of the solution. This is the gassing-out phase of production. The white powder becomes the consumable methamphetamine. ROA. pp. 85-86. Using a funnel and coffee filters, the white powder is filtered out from the liquid to produce useable methamphetamine. ROA. p. 87 None of the coffee filters that were found had meth residue. ROA. pp. 87-88. State's Exhibit Number 24, found in the living room, is a bottle that Stuart determined was acidic and likewise in the last step of the manufacturing stage. ROA. p. 82.

State's Exhibit Number 7 shows a cold pack found in the hallway on the way from the living room to the bedroom. ROA. p. 86. Stuart testified about aluminum foil that was also found. Aluminum foil is used to make a more violent reaction during the manufacturing process. ROA. p. 87; State's Exhibit No. 9. She testified that syringes were also found. One way to consume methamphetamine is by shooting up the methamphetamine. ROA. p. 89; State's Exhibit No. 11.

Cain objected to Stuart's testimony concerning the potential yield from 19.2 grams of pseudoephedrine. ROA. p. 95. Stuart then testified again that she had degrees in Chemistry and Biochemistry. She testified she started doing chemistry equations in the first semester of chemistry in college. ROA. p. 97. Stuart testified that every chemistry course she ever took involved the use of equations to figure out the sum of multiple parts. ROA. p. 97, lines 15-18.

The following testimony was offered by the State:

> Q: Have you ever been given a problem in class or in your course of employment where you have to figure out, if you took multiple ingredients and you were to combine

them, how much of another ingredient they would yield?

A: Yes, it's a, it's a core standard. Even if you're not a chemistry major and you have to take a science, your very first semester of chemistry, it's all about making equations and determining if you put these things together to these amounts, what amount of your product you get, and how to set up the equations and reactions. It's a very standard principle of chemistry.

Q: And earning a degree in chemistry, would, as a Master's level degree, would a person who receives that degree be qualified to give, you know, state how, yields and things that such?

A: Well, not only would I have done it on tests, but getting a Master's Degree means I had to do research and graduate work, and to do this research I would have to make and perform reactions of my own to make the chemicals I needed from my research, which meant I had to use these equations, theoretical yields, Stoikiometri, in order to determine how much product I wanted and how much I needed to start with. So, I used it in actual research settings too.

ROA. p. 97, line 23 – p. 98, line 16.

Stuart testified she has produced meth. "In the DNA methamphetamine school we actually have to go through the reactions and methamphetamine and determine yields." ROA. p. 99, lines 2-4.

Cain made an analogy to baking and recipes and then made a statement "Cause people have experimented to get that to give you a recipe." ROA. p. 99, lines 16-25. After Cain's counsel finished his testimonial statement, Stuart responded as follows:

Okay. When you're producing methamphetamine there is an equation. It's Pseudophedrine, plus Lithium, plus ammonia gas yields methamphetamine.

Okay. We call it a one-to-one more Stoikiometri

> ratio between Pseudoephedrine and methamphetamine. What that means is for every mole, which is an extremely scientific term, of Pseudoephedrine that you put into the reaction, you get one mole of methamphetamine out. It's a one-to-one mole reaction.
>
> To determine the number of moles that you put in, and this is all science and chemistry, if you look at a periodic table, okay, everybody's seen one of those from some of your time in school, they have elements on there and the elements have what they call a mass, okay, and it's grams per mole if you remember that.
>
> So, I can take the weight of Pseudoephedrine and do the math of its mass from the periodic table and tell you how many moles of Pseudoephedrine I have. I know it's a one-to-one molar ratio between Pseudoephedrine and methamphetamine from the equations of how to make meth. Okay. So then all I need to do is take that amount and do it times the mass of methamphetamine in order to get how much methamphetamine is made.

ROA. p. 100, lines 1-23. After the fact, Cain's counsel said that was not his question – so Cain apparently did not want to know what the equation was when he was conducting voir dire. On appeal, Cain now complains that Stuart did not testify sufficiently about how to perform the calculation. But apparently at trial, Cain's major concern was knowing how much pseudoephedrine Stuart used when she made methamphetamine during training – Stuart did not remember because it was years ago. ROA. p. 101, lines 20-24. Cain gave up and stuck with the original objection, which is a complaint about the lack of a learned treatise.

Stuart determined the empty blister packs would have contained a total of 19.2 grams of pseudoephedrine. ROA. pp. 93-94. She testified that a hundred percent yield from this much pseudoephedrine would produce 17.67 grams of methamphetamine. She testified as to how much methamphetamine would be produced under different yield rates.

Notably, even a sixty-five percent yield would still produce 11.48 grams of methamphetamine. ROA. pp. 102-103.

Defense witness Leon Fowler testified that he lived in the trailer "behind my house that everyone's talking about." ROA. p. 123, lines 13-24. He subsequently clarified that his son owned both the house and trailer. ROA. p. 124. Fowler testified that he thought the defendants were living in just one room, but he was not sure. But he was unaware of anyone else living in the house. ROA. p. 125. Fowler testified that he does not go in the house at all. ROA. p. 126. In the State's case-in-chief, Deputy Wilbanks testified he was familiar with the address and familiar with Leon Fowler, Sr., who Deputy Wilbanks thought was the property owner. ROA. p. 56.

Fowler also testified that Cain and Parkhurst had not lived in the house very long, only two or three weeks. ROA. p. 126. Fowler did not know them, but he knew they were his son's friends. ROA. p. 126. On cross-examination, he testified he "didn't want to know [what was going on in the house]." ROA. p. 129, lines 18-19. Fowler testified that he did not know there was a meth lab in the house. ROA. p. 129, lines 24-25.

ARGUMENT

I.

The trial court did not err in admitting expert testimony on the theoretical yield of methamphetamine based on a given quantity of pseudoephedrine. Such testimony is admissible in a number of jurisdictions and is no more than simple chemistry. Further, the chemist's opinion is supported by evidence.

Cain complains about expert testimony concerning the theoretical yield of methamphetamine from the pseudoephedrine utilized in the manufacturing process that was still ongoing at the time law enforcement discovered the methamphetamine lab. The yield was calculated based on empty blister packs of pseudoephedrine recovered at the residence. The required expertise to render the opinion was little more than a basic knowledge of chemistry and the methamphetamine production process; the State's chemist had both. Additionally, the facts support the expert's conclusion.

A. The expert, with a master's degree in chemistry, had the required expertise to determine yield from a routine chemistry equation, and her testimony easily met the requirements for admission of expert testimony.

Cain complains that the trial court erred in allowing expert testimony from the State's chemist, Stuart, who was qualified without objection as an expert in chemistry and forensic chemistry. [2] Cain complains that expert testimony about how much methamphetamine may be manufactured from a given amount of pseudoephedrine is not admissible under the Jones[3] standard. Any chemist, or chemistry student, with an awareness of how methamphetamine is manufactured could make this calculation. It is

2 Even on appeal, Cain is compelled to admit that the chemist is "well-credentialed". Br. of App. p. 7.
3 State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

simple chemistry and is not novel, as such calculations are made in numerous jurisdictions. Further the requisite foundation was established for Stuart to testify as to the theoretical yield.

"It is undisputed in the scientific community that chemical processes exist whereby pseudoephedrine can be converted into methamphetamine." People v. Wilke, 854 N.E.2d 275, 281 (Ill. App. Ct. 2006) (finding expert testimony that 3,908 pills containing 124.7 grams of pseudoephedrine could yield 114.7 grams of methamphetamine was a scientifically sound conclusion). Wilke found that not only could an expert testify as to the potential yield of methamphetamine from precursor substances such as pseudoephedrine, but that analysis under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) is unnecessary to elicit such testimony. Wilke, at 281.

The Wilke court discussed People v. Dorsey, 839 N.E.2d 1104 (Ill. App. Ct. 2005), which rejected the contention that Dorsey's counsel was ineffective for not requesting a Frye hearing, noting: "Defendant's own expert testified that the procedures to produce methamphetamine 'are very similar to other chemical procedures. There is nothing unique about them. This is simple chemistry.'" Dorsey, at 1109.

Wilke concluded:

> Arguments about different yields stemming from different laboratory conditions are simply misplaced in this context. Defendant is certainly entitled to raise such matters, but the appropriate time for doing so is during cross-examination of the State's expert (or direct examination of a defense expert), not a Frye hearing. Differences in methamphetamine yield simply do not involve novel science; they involve personal applications of well known and commonly accepted scientific procedures.

> Defendant has mistaken a credibility issue for an admissibility issue.

Wilke, at 282.

Wilke argued that "the proper inquiry is not what a theoretical maximum yield would be, or even what an average methamphetamine cook would produce, but what the defendant himself could produce." Wilke, at 281. The Appellate Court of Illinois rejected this argument, noting the issue under the statute was what Wilke intended to produce, not what he could or actually produce. The court concluded, "[Wilke] has not shown that he intended to fail so miserably at his conversion as to prevent him from yielding a mere 30 grams of methamphetamine (the minimum amount for the charged offense) from the 124.7 grams of precursor pseudoephedrine." Wilke, at 281-82.

Theoretical yield analysis, perhaps novel to appellate courts in South Carolina, is hardly novel on a nationwide basis and such calculations are common for sentencing purposes in the federal system. See State v. Cassady, 597 N.W.2d 801, 806 (Iowa 1999) (Noting "Federal courts frequently make determinations as to the expected yield from precursor chemicals because federal sentencing guidelines provide increased penalties for larger amounts of potential yields").

Testimony concerning potential yields based on precursor ingredients or lab capabilities has been found admissible. Cassady, at 806 (Finding admissible testimony from chemist that using the "Nazi" method of manufacturing, a skilled operator could produce 15.9 grams of d-methamphetamine from 17.3 grams of d-methamphetamine [91.9%] and an unskilled operator could produce 7.9 grams [49.7%]); United States v.

Smith, 240 F.3d 927, 930-31 (11th Cir. 2001) (finding quantity of precursors may be used to calculate estimates of methamphetamine); United States v. Weaver, 425 Fed. Appx. 267, 269 (4th Cir. 2011) (finding no clear error in calculation of theoretical yield of methamphetamine based on amount of pseudoephedrine purchased); Lynch v. United States, 2009 WL 6331584, p.4 (N.D.W.Va. 2009) (referencing cross-examination testimony from a DEA chemist about the National Clandestine Laboratory's calculations of potential yield using pseudoephedrine and the red phosphorus method and also the defense expert's testimony recognizing a sixty-percent yield of methamphetamine); United State v. Desivo, 2007 WL 88591 (M.D. Pa., Jan. 9, 2007), p. 3 (discussing Drug Enforcement Agency laboratory report admitted into evidence by Desivo that used a hypothetical ratio of .920 methamphetamine for each pure gram of pseudoephedrine); United States v. Liles, 373 Fed.Appx. 652, 653 (8th Cir. 2010) (referencing evidence that white powder determined to contain twenty-four grams of pseudoephedrine hydrochloride was enough to give rise to a theoretical yield of twenty-two grams of methamphetamine [91.7%]); United States v. Harding, 2008 WL 4073393 (E.D. Ky., Aug. 29, 2008) (noting DEA lab analysis that "193.7 grams of d-pseudoephedrine HCL (actual) would produce 178.2 grams of actual methamphetamine, based on a 100% yield." [91.9%]); United States v. Barnett, 989 F.2d 546, 553 (1st Cir. 1993) (upholding base offense level determination, noting DEA chemist's testimony that fifty kilograms of pseudoephedrine would yield twenty-nine kilograms of methamphetamine); United States v. Rains, 615 F.3d 589 (5th Cir. 2010) (finding evidence supported drug quantity where methamphetamine would be manufactured under the "red P method" where chemist testified the average cook could

obtain a yield between forty-five and seventy percent).

In State v. Robertson, 988 So.2d 294 (La. Ct. App. 2008), the Louisiana Court of Appeals considered the sufficiency of evidence in a prosecution for creation or operation of a clandestine laboratory for the unlawful manufacture of methamphetamine. The Court, in finding evidence sufficient, referenced testimony from a law enforcement deputy certified in the investigation of methamphetamine labs. The deputy testified that under the "Nazi" method of production, pseudoephedrine recovered would produce 45.24 grams of methamphetamine "under the 60 percentile rate." Id. at 298-99. In the footnote following the quote, the court notes that in calculating the conversion rate, the deputy used the baseline of sixty percent, "which is very conservative. He testified that in a very controlled setting it is possible to get up to 93 percent, but this is not normally seen on the street." Id. at 299, n. 3.

The admission of expert testimony is within the sound discretion of the trial court. State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). Rule 702, SCRE addresses the admissibility of expert testimony as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

All expert testimony, whether scientific, technical, or otherwise, must meet the requirements of Rule 702. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

The admissibility of scientific evidence is dependent on whether the experts relied on scientifically and professionally established techniques. State v. Jones, 273 S.C. 723,

259 S.E.2d 120 (1979). This standard is designed to prevent jurors from being misled by an aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997) *overruled on other grounds by* White.

Under State v Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the trial court should consider the following concerning expert testimony for scientific evidence: "(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 of control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517.

The instant case involves nothing more than chemistry equations. The State's expert, Stuart, testified that she started doing chemistry equations in the first semester of college. Every chemistry course she ever took involved equations. Stuart testified the determination of yield based on multiple ingredients is a "core standard." ROA. pp. 97-98. Stuart testified as follows concerning a requirement for her Master's Degree:

> . . . I had to do research and graduate work, and to do this research I would have to make and perform reactions of my own to make the chemicals I needed from my research, which meant I had to use these equations, theoretical yields, Stoikiometri, in order to determine how much product I wanted and how much I needed to start with. So, I used it in actual research settings too.

ROA. p. 98, lines 10-19.

There can be little doubt that calculations of chemistry equations are peer reviewed. While Stuart may have not cited any chemistry textbooks by name, they undeniably exist. Stuart testified as to her utilization of the periodic table for determining yield. ROA. p.

100, lines 1-23. Certainly, the periodic table is the sort of information experts in chemistry might rely upon.

A number of cases have been cited above which prove that the application of yield calculations has been applied to the type of evidence involved in the case. See, e.g. Cassady, 597 N.W.2d at 806 (Noting "Federal courts frequently make determinations as to the expected yield from precursor chemicals because federal sentencing guidelines provide increased penalties for larger amounts of potential yields").

Cain's defense counsel elicited from Stuart her process of determining potential yield. ROA. p. 100, lines 1-23. Her testimony suggests that the necessary controls are no more than a calculator, a periodic table, and the most basic understanding of chemistry. Her testimony clearly indicates compliance with the most basic scientific processes. As the Eighth Circuit noted in Wilke, the most basic scientific procedure is at work here; all that is involved is a recipe. The testimony is not novel, it is not suspect, and it is unassailably reliable. The trial court did not err.

B. Stuart's conclusion is supported by facts

Stuart's sub-argument is that Stuart's conclusion was not supported by the facts because the pseudophedrine containers were empty and there was no testimony presented about the amounts of other ingredients present at the scene. This argument is faulty because it ignores the bottles of pink mush, which is the waste product of methamphetamine, and the presence of two one pots in the last stages of production, including the grimy two-liter bottle with a tube running out the window. The pink mush includes the remnants of cold pills stripped of the active ingredient necessary for

methamphetamine. See State's Exhibits Nos. 3,4, 12, and 23. The ingredients needed for production were already in the unfinished product.

Other jurisdictions have determined yield calculations based on empty precursor containers are allowable evidence sufficient to support factual findings for the intended quantity of methamphetamine production. In United States v. Engler, 521 F.3d 965 (8th Cir. 2008), one of the defendants argued that evidence was insufficient to support a verdict for attempted manufacture of more than five grams of methamphetamine. However, the Eighth Circuit found evidence was sufficient based on evidence including the recovery of "empty blister packs amounting to 2016 pseudoephedrine pills which could theoretically yield 55 grams of methamphetamine." Id. at 974.

In another case, the Eighth Circuit noted: "A chemist's testimony at trial substantiates a finding that the [meth] lab was capable of producing a maximum theoretical yield of 510 grams of actual methamphetamine, based on empty precursor containers." United States v. Titlbach, 339 F.3d 692, 696 (8th Cir. 2003).

Similarly, the Ninth Circuit found reliance for sentencing purposes on an expert's yield calculations of methamphetamine based on two empty one-pound containers of ephedrine was not clearly erroneous. United States v. Basinger, 60 F.3d 1400, 1409 (9th Cir. 1995).

In Varble v. Commonwealth, 125 S.W.3d 246 (Ky. 2004), the Kentucky Supreme Court rejected the argument that Varble could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. The court noted testimony about the odor of anhydrous ammonia from two air tanks and

disclosure of brass fittings likely caused by anhydrous ammonia as circumstantial evidence of possession of the precursor. In rejecting Varble's argument, the Kentucky Supreme Court commented: "Appellant's argument is akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." Id. at 254.

Indeed, Cain overlooks one obvious inference from the evidence, while some ingredients might have remained – for instance, there were left over lithium strips – the pseudoephedrine was all used up, which means that the methamphetamine producer had adequate amounts of the other ingredients to produce methamphetamine from the pseudoephedrine once contained in the blister packs. See also United States v. Beshore, 961 F.2d 1380, 1383 (8th Cir.) (noting an approximation of a drug quantity "does not require that every precursor chemical be present"). Accordingly, Stuart's conclusion is supported by the evidence presented and the trial court did not err in allowing this testimony.

Jumbled in with this argument is the unrelated complaint that Stuart never testified to an equation. Cain back-pedaled when his cross-examination on *voir dire* went poorly for him, but not before he unintentionally elicited the equation. Stuart testified about the calculations as follows:

> So, I can take the weight of Pseudoephedrine and do the math of its mass from the periodic table and tell you how many moles of Pseudoephedrine I have. I know it's a one-to-one molar ratio between Pseudoephedrine and methamphetamine from the equations of how to make meth. Okay. So then all I need to do is take that amount and do it times the mass of methamphetamine in order to get how

much methamphetamine is made.

ROA. p. 100, lines 16-23.

Further, these objections were not raised below and are not preserved for appeal. The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999). "An appellate court may not address an issue that is not preserved." Abba Equip., Inc. v. Thomason, 335 S.C. 477, 486, 517 S.E.2d 235, 240 (Ct. App. 1999).

Contrary to Cain's arguments, Stuart gave reliable expert testimony that was amply supported by evidence presented by the State. Accordingly, the trial court did not err in allowing Stuart to testify about the theoretical yield based on the recovered pseudoephedrine containers.

II.

Evidence supports the jury's verdict for trafficking based on the attempt to manufacture in excess of ten grams of methamphetamine where evidence showed that the pseudoephedrine utilized in the manufacturing process could yield in excess of ten grams of methamphetamine and where evidence showed that Appellant was in constructive possession of the ingredients and paraphernalia found in the active methamphetamine lab.

Cain argues that directed verdict should have been granted because evidence failed to show an intent to manufacture in excess of ten grams of methamphetamine and because the State failed to show constructive possession of the pseudoephedrine before it was used in the production of methamphetamine. In the instant case, the uncontroverted evidence was that the amount of pseudoephedrine based on the empty blister packs could yield as much as 17.67 grams of methamphetamine. Further, evidence indicates Cain's constructive possession of all the paraphernalia and instruments found in the methamphetamine lab. None of these arguments are preserved for review.

Appellant's arguments for directed verdict are not preserved because they were not raised to the trial court. At trial, the only issue that Cain and Parkhurst raised in their directed verdict motion was whether or not the State proved the defendants were in constructive possession of the methamphetamine instruments and paraphernalia found on the premises.[4]

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4 Cain claims that he incorporated his pre-trial motion to dismiss into a directed verdict motion. See ROA. p. 26, pp. 116-119 (pages cited by Cain). This is simply not true. The trial court merely reserved its ruling (ROA. p. 26) and contrary to his assertions, Cain never moved to incorporate the argument into a directed verdict motion (ROA. pp. 116-119). While the trial court brought up the pre-trial motion following his ruling on the directed verdict argument concerning constructive possession, the trial court did not state that

Issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970). A party cannot argue one ground for directed verdict at trial and in turn argue an alternative ground on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

Further, evidence was sufficient for the charge to be presented to the jury. When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

The United States Supreme Court noted the following:

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the issue was incorporated in the directed verdict motion. See State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) (finding "the trial court's mentioning the issue does not preserve it for appeal.") *rev'd on other grounds by* State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008).

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts**.

Jackson, at 319 (second emphasis added).

Our Supreme Court recently articulated the following concerning the standard of review:

> The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotation marks omitted)). This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in* Jackson, at

317 n.9.

A. Evidence existed to prove Cain's intent to manufacture in excess of ten grams of methamphetamine.

The uncontroverted evidence was that the amount of pseudoephedrine based on the empty precursor packages was sufficient to produce as much as 17.67 grams of methamphetamine. Cain makes jury arguments to argue that the amount produced might have been less than ten grams. Cain argues that Stuart's testimony was insufficient, which is a question of weight, not existence, of evidence. Cain argues that the yield calculation was incorrect, which is also a question of weight, not existence, of evidence.

Cain was convicted of trafficking based on the conduct of attempting or aiding and abetting in the manufacture of methamphetamine. See S.C. Code § 44-53-375(C). "'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, ..." S.C. Code § 44-53-110. "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture of compound containing amphetamine or methamphetamine. . . ." Id.

Attempt crimes are specific intent crimes that require the State to prove the defendant's specific intent coupled with an overt act, beyond mere preparation and in furtherance of that intent, and the actual or present ability to complete the crime. State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). The overt act is sufficient if it goes "far enough toward accomplishment of the crime to amount to the

commencement of its consummation." State v. Quick, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942).

"The intent with which an act is done denotes a state of mind and can be proved only by expressions or conduct considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971). Proof of intent necessarily rests on the inferences that can be made from a person's conduct. McMillian v State, 383 S.C. 480, 487-88, 680 S.E.2d 905, 908-09 (2009).

"Possession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture." S.C. Code § 44-53-375(D).

In the instant case, Cain creates a label, "hypothetical theoretical yield" in a sophistic attempt to avoid the inevitable reality that pseudoephedrine is used to produce methamphetamine, and yields may reasonably be calculated by those with basic working knowledge of chemistry equations. As Stuart testified, it's a mole to mole conversion ratio between pseudoephedrine and methamphetamine. Stuart only had to divide the amount of pseudoephedrine by the molecular mass of pseudoephedrine and then multiply by the molecular mass of methamphetamine. ROA. p. 100.[5] This is not hypothetical, it's

5 Undersigned counsel offers the following calculation based on Stuart's instructions: Take 19.2 grams of pseudoephedrine and divide by the approximate Mol. mass of pseudoephedrine ($C_{10}H_{15}NO$), which is 19.2/165.23 = .116 (rounded). Multiply by the Mol. mass of methamphetamine ($C_{10}H_{10}N$), which is approximately 149.23 (.116 x 149.23). The result is 17.34 grams (rounded). Stuart calculated 17.67 grams. See http://en.wikipedia.org/wiki/Methamphetamine; http://en.wikipedia.org/wiki/Pseudoephedrine (both

math. "It is undisputed in the scientific community that chemical processes exist whereby pseudoephedrine can be converted into methamphetamine." People v. Wilke, 854 N.E.2d 275, 281 (Ill. App. Ct. 2006) (finding expert testimony that 3,908 pills containing 124.7 grams of pseudoephedrine could yield 114.7 grams of methamphetamine [91.9% yield] was a scientifically sound conclusion). Labelling does not avoid this reality, notwithstanding Cain's play on words throughout his brief.

Cain seems to argue that a reasonable juror could not infer that the pseudoephedrine contained in the empty blister packs was used in an attempt to manufacture methamphetamine. The Eighth Circuit observed that a jury "could reasonable infer that [defendant's] purchases were intended for the manufacture of methamphetamine because 'pseudoephedrine has limited legal uses, and . . . if you do not have a cold, a headache, or sinus problems there are remarkably few things you can do with pseudoephedrine except make illegal narcotics.'" United States v. Gutknecht, 720 F.3d 757, 760 (8th Cir. 2013) (citation omitted).

Cain relies on United States v. Eide, 297 F.3d 701 (8th Cir. 2002) to argue that Stuart should have calculated the "potential yield" rather than the "theoretical yield." This argument is an issue of weight rather than existence of evidence and was not argued to the trial court. Additionally, the manufacturing process in Eide was the lithium ammonia reduction method, which may be a separate manufacturing process than in the instant case.

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visited 4/16/2014). However, both the pseudoephedrine and methamphetamine would be in their salt form, so when adding HCl (36.45 Mol mass.) to the equations, the relative masses are 201.68 Mol. mass and 185.68 Mol. mass. See periodic table, Los Alamos National Laboratory, at http://periodic.lanl.gov/index.shtml (visited 4/16/2014). Therefore, 19.2 grams divided by 201.68 = .095 (rounded). Multiply by 185.68 Mol. mass yields 17.677 grams (rounded). Accordingly, although referred to as pseudoephedrine and methamphetamine, the ingredient and product is pseudoephedrine hydrochloride and methamphetamine hydrochloride.

Further, 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 as possible, and seventeen grams of methamphetamine was possible, as calculated by Stuart. In Wilke, the Illinois court noted "[t]he statute focuses on what defendant *intended* to produce, not on what he actually produced, or what he could have produced." Wilke, 854 N.E.2d at 281. Wilke found the testimony that the theoretical yield of 124.7 grams of pseudoephedrine would be 114.7 grams of methamphetamine was "scientifically sound." The Wilke court then scoffed, "Defendant has not shown that he intended to fail so miserably at his conversion as to prevent him from yielding a mere 30 grams of methamphetamine (the minimum amount for the charged offense from 124.7 grams of precursor pseudoephedrine)." Id. at 854 N.E.2d at 281-282.

In the instant case, Cain asked Stuart if it was possible that some of the pseudoephedrine would not react with the other ingredients. Stuart replied: "That would be possible if you don't put enough of the other stuff in there or you don't wash it enough times to get it all out." ROA. p. 109, lines 8-10. So Cain and Parkhurst might have failed to make enough methamphetamine if they were incompetent cooks. No evidence indicates that they were incompetent cooks. Further, incompetency does not absolve the intended act when attempting to commit a crime. See State v. McCluney, 361 S.C. 607, 606 S.E.2d 485 (2004) (finding evidence supported attempt and conspiracy to purchase real cocaine under the trafficking statute, even though substance provided by undercover officer was imitation cocaine).

Cain attempts to make a distinction between theoretical yield and potential yield

that was rejected in Wilke. Ultimately, Cain asks this Court to weight Stuart's testimony based on arguments never presented to the trial court. However, such weighing of evidence is improper. The jury could reasonably conclude that Cain and Parkhurst intended to be successful in their endeavor and not fail miserably. Accordingly, evidence supports the jury's verdict. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (noting the responsibility of the trier of fact "to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts").

B. Evidence was sufficient to establish constructive possession of precursors.

Cain claims that evidence was insufficient to show Cain had custody and control of the pseudoephedrine originally contained in the empty containers.

First, the argument was not raised to the trial court and should not be reviewed on appeal. Cain only argued the lack of evidence showing constructive possession of the found materials based on his contention that he and Parkhurst lived in only one room of the house, and did not suggest a lack of constructive possession of the pseudoephedrine once contained in the blister packs. However, the remnants of the pseudoephedrine can be seen in several exhibits. See State's Exhibits Numbers 12-15 and 23-24 (showing bottles of pink mush). Cain was in constructive possession of these materials.

Constructive possession is proven by showing that the accused has dominion and control, or the right to exercise dominion and control, over the contraband. State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981). Constructive possession may be established by circumstantial as well as direct evidence and possession may be shared. Id., 277 S.C. at 202, 284 S.E.2d at 775. Multiple individuals can be in constructive

possession of the same item simultaneously. State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980).

Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband. State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995). "The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it." State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005). Possession of a controlled substance may be inferred from the circumstances of a particular case and may be imputed to a person with both the power and the intent to control the disposition and use of the drugs. State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995). "When contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 775.

In Hudson, appellant and his wife were both convicted of possession of heroin that was found in their home. At the time law enforcement executed a search, the wife was home but Hudson was away from the house. Before entering, law enforcement heard individuals scurrying around inside the house. The officer found the wife standing by the bathroom door and found three bags of white powder inside the toilet. The wife was arrested. Meanwhile, Hudson's daughter, who was also in the house, called Hudson's phone in his van to tell him what happened. Hudson did not go home or to the police station to see his wife. He was arrested three hours later on the interstate near the exit to the airport. When stopped by police, he told them he was "just driving around." Hudson,

277 S.C. at 202, 284 S.E.2d at 774.

The Supreme Court affirmed the denial of directed verdict, explaining, "where appellants shared control of the premises, we hold there was sufficient evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt appellant Robert Hudson constructively possessed heroin with intent to distribute." Id., 277 S.C. at 203, 284 S.E.2d at 775.

In the instant case, law enforcement happened on a crime in progress – an active methamphetamine lab with a batch of methamphetamine in the gassing-out phase. The record indicates that only Cain and Parkhurst resided in the house. Although they claimed to only occupy one room of the house, their dog roamed free in the house and the jury could reasonably assume they had unfettered access to the rest of the house. Further, the two defendants were nervous enough to convince law enforcement to continue searching the rest of the house for the individual who they intended to arrest on a bench warrant. The deputies were unable to speak with the two defendants because they left before law enforcement realized they had walked into a meth lab. Further, the defendants barricaded the door to their bedroom to impede pursuit by law enforcement. State v. Crawford, 362 S.C. 627, 635-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005) (noting flight may be considered evidence of guilt). Finally, officers found the freshly poured-out contents of a one pot outside the door through which the officers originally entered the house. Those contents were not there when law enforcement originally entered the house and codefendants were the only ones in the house. The logical inference is that the contents were spilled out by the defendants while in flight from law enforcement. State v. McDowell, 266 S.C. 508,

515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt.").

Accordingly, sufficient evidence establishes that Cain and his co-defendant were operating a methamphetamine lab in an attempt to manufacture methamphetamine as they had dominion and control over the entire house and the pseudoephedrine utilized in the manufacturing process, and their actions were indicative of guilt.

Cain further contends that he cannot be convicted because the State failed to show that the materials were part of a single attempt to manufacture methamphetamine and not separate batches. However, Cain failed to make this argument to the trial court. Further, Cain fails to cite any authority to support this assertion. Cain fails to point to authority that there is a time limit on a continuous crime. Further, attempt is a lesser included offense of the greater offense. State v. Hiott, 276 S.C. 72, 80, 276 S.E.2d 163, 166 (1981). Even if Cain met with some success, partial success does not defeat his guilt to attempt.

Further, Cain argues there must be a temporal relationship between the items found to show they were all a part of a single attempt. Again, these assertions are made without supporting authority. However, the temporal relationship is that they were all found at the same time and are logically related to the ongoing manufacturing process. See State v. Lavigne, 588 A.2d 741 (Me. Sup. Jud. Ct. 1991) (finding inability to prove that defendant trafficked on a given date with a given individual is not fatal to his conviction because neither a particular date nor a particular individual is an essential element of the crime), see generally State v. Peay, 321 S.C. 405, 408, 468 S.E.2d 669, 671 (Ct. App 1996) (noting "where all the evidence indicates the defendant was dealing in quantities of cocaine over

ten grams, the defendant is only entitled to charges on trafficking, not distribution or possession"). This assertion is akin to claiming drugs found in different parts of the house could not be aggregated because it is unknown when each package of drugs was placed in its hiding spot. Such requirements of proof do not exist as elements of trafficking, so directed verdict was not warranted, even if this argument was presented to the trial court. Accordingly, the conviction and sentence should be affirmed.

CONCLUSION

For all of 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 27, 2014

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IN THE COURT OF APPEALS

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R. Lawton McIntosh, Circuit Court Judge

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Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Thomas J. Rode, Esquire, P.O. Box 20817, Charleston, SC 29413 and Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 27TH day of June, 2014.

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