STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON ALAN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-207549

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in denying appellant's suppression motion because the warrant was obtained after an illegal entry and warrantless search and the subsequent warrant was obtained without probable cause?

2.

Whether the trial judge erred in ruling as a matter of law that the all of the liquid which contained methamphetamine would count towards its weight, admitting such evidence, and ordering defense counsel not to argue to the jury whether all of the liquid was methamphetamine, because this violated the meaning and intent of the statute defining "methamphetamine" and the utilization of this overly broad interpretation deprived appellant of his Sixth Amendment right to a jury trial?

STATEMENT OF THE CASE

On June 16, 2011, Jason Alan Johnson ("Johnson") was indicted for trafficking methamphetamine in excess of 100 grams R. 917. On January 23-27, 2012, Johnson was tried in York County before the Honorable Lee S. Alford and a jury. R. 1. Michael Brown, Jarrus Yates, and Bradford Rawlinson represented Johnson. R. 1. Jennifer Colton and Teasa Weaver represented the State. R. 1. The jury found Johnson guilty of trafficking methamphetamine in an amount over 28 grams. R. 908, ll. 1 - 8. Judge Alford sentenced Johnson to twenty-eight years' imprisonment. R. 915, ll. 19 - 25. On February 2, 2012, Johnson served his notice of appeal. This appeal follows.

ARGUMENT

1.

The trial court erred in denying appellant's suppression motion because the warrant was obtained after an illegal entry and warrantless search and the subsequent warrant was obtained without probable cause.

Relevant Facts

On February 26, 2011, an arrest warrant was issued for Brandi Quinn ("Brandi") for malicious injury to property. R. 14, ll. 3 – 19. Early the next morning, York County Sheriff's Deputy John Stagner located Brandi's car at the Best Way Inn in Rock Hill. R. 15, ll. 4 – 10. Deputy Stagner kept watch on Brandi's car while awaiting the arrival of backup officers. R. 58, l. 21 – 59, l. 4. Deputy Tony Bolin and Deputy Rachel Gladden arrived at the scene. R. 59, ll. 5 – 7. Deputy Bolin verified which room was Brandi's. R. 59, ll. 17 – 21. Deputy Gladden had the arrest warrant. R. 170, l. 25 – 171, l. 23. On the officers' way to the room, Deputy Gladden told the other officers there would probably be drugs in the room. R. 193, ll. 21 – 23. It was 8:30 AM on Sunday morning. R. 111, ll. 6 – 16.

The officers began banging on the door and asking Brandi to come to the door. R. 175, ll. 4 - 15. It took a couple of minutes for Brandi to answer the door. R. 61, ll. 2 – 4. The officers could hear movement and whispering inside the room. R. 61, ll. 5 – 9. Deputy Stagner testified that this made him concerned for his safety. R. 61, ll. 13 – 19. Brandi opened the door only enough to show her face. R. 62, ll. 7 – 14. Deputy Stagner claimed he had "an [eerie] feeling" and the officers barged into the room. R. 62, ll. 7 – 25.

Within 20 to 30 seconds, Brandi was arrested, in handcuffs, and outside the room. R. 193, l. 24 – 194, l. 4; R. 33, ll. 5 – 8. Deputy Stagner testified that Brandi "was being placed in handcuffs as we were going in." R. 98, ll. 17 – 24. Deputy Bolin testified that they had already detained Brandi and passed her behind them to Deputy Gladden before they entered the hotel room. R. 34, ll. 2 – 8.

After arresting Brandi and entering the room, Deputy Stagner testified that he saw movement underneath the sheets of a bed. R. 63, ll. 4 – 8. Deputy Stagner yelled for the person in the bed to show his hands. R. 99, ll. 20 – 22. Defendant Johnson was the person in the bed and immediately showed his hands to Deputy Stagner. R. 99, l. 20 – 100, l. 1. Deputy Stagner claimed that at this point, Johnson put his hands back under the covers. R. 100, ll. 2 – 9. Deputy Stagner raised the volume of his verbal commands and again yelled for Johnson to show his hands. R. 100, ll. 8 – 13. Johnson again complied and showed the deputies his hands. R. 113, ll. 24 – 25. The deputy never said "show me your hands and keep them out." R. 114, ll. 6 – 8. Deputy Stagner then "immediately put hands on and detained" Johnson. R. 64, ll. 6 – 8. Deputy Stagner testified that Johnson, who was only wearing a pair of boxer shorts and laying in bed early on a Sunday morning, posed a threat because he saw "gang-related tattoos." R. 65, ll. 6 – 10. R. 111, 21 – 25. Corey Catoe, another occupant of the room who was also in bed asleep, also complied with officer's instructions to show his hands, but Deputy Bolin immediately placed Catoe in handcuffs, too. R. 65, ll. 12 – 13.

None of the occupants of the room made any threatening moves towards Deputy Bolin. R. 42, ll. 13 – 15. None of the occupants of the room ever made any threatening movements or verbally threatened Deputy Stagner. R. 113, ll. 13 – 18. The occupants of

the room had been sleeping. R. 112, ll. 1 – 3. The officers woke them up. R. 112, ll. 4 – 5. Even though the arrest warrant for Brandi had been executed and accomplished, the officers entered and stayed in the room. R. 116, l. 25 – 117, l. 3.

Deputies Stagner and Brown then began "a protective sweep" of the room. R. 19, ll. 17 – 20. Deputy Bolin testified that he saw computer equipment; aluminum foil that he thought was consistent with drug packaging, syringes, and razor blades. R. 24, ll. 2 – 12. Deputy Stagner testified that he saw a digital scale. R. 69, ll. 12 – 15. Brandi never gave consent to search the room. R. 86, ll. 22 – 25. The officers never asked Johnson or Catoe for consent to search the room. R. 89, ll. 19 – 21. Johnson asked for a lawyer and told officers they needed a search warrant. R. 90, ll. 14 – 18.

Deputy Gladden called another police officer and got him to obtain a search warrant. R. 185, ll. 7 – 16. The search warrant stated the reason for the search:

> Deputies arrested a female suspect from this room on a warrant for malicious injury to property. While deputies were in the room, deputies observed numerous laptop computers and electronic equipment, two unused syringes, a package of razor blades, and multiple small tin foil packages consistent with that of drug packaging. The female suspect taken into custody also has a prior drug-related conviction.

R.920. Deputy Bolin testified that he did not notice any drugs on the syringes nor any drugs in the tinfoil. R. 45, ll. 2 – 10. Deputy Bolin testified that they had no information or evidence that the computer parts were stolen. R. 38, l. 18 – 39, l. 13. He claimed that their probable cause that a crime of been committed was because of the "amount of time that [the occupants] were in the hotel room, the amount of computers in the – in the hotel room, and the work that was being done to them." R. 39, ll. 23 – 25.

While waiting on the search warrant, all three of the officers kept going in and out of the room. R. 195, ll. 8 – 11. It took approximately one hour for the search warrant to

arrive at the scene. R. 36, l. 20 – 37, l. 7. After the warrant arrived, the police found a plastic bottle containing a mixture of liquid and methamphetamine. R. 337, ll. 7 – 14.

Discussion

Since Brandi was in custody when the officers entered the hotel room, the initial warrantless search of the hotel room was illegal. Searches without a warrant are *per se* unreasonable under the Fourth Amendment unless some exception applies.[1] Katz v. United States, 389 U.S. 347, 357 (1967). The police were there to execute a valid arrest warrant. The argument advanced by the State for the officers' entry into the hotel room was "officer safety." R. 201, l. 21 – 203, l. 17. Judge Alford based his ruling on "officer safety." R. 210, l. 6 – 212, l. 21. Therefore, the only exceptions to the warrant requirement that could justify the entry into the hotel room are exigent circumstances or a search incident to arrest.

Exigent circumstances, including danger to the lives of police officers, can justify a warrantless entry. United States v. Coles, 437 F.3d 361, 366 (3rd Cir. 2006). "Exigent circumstances, however, do not meet Fourth Amendment standards if the government deliberately creates them." Id. Had "officer safety" been the primary concern, the police would not have entered the hotel room at all. Instead, the officers, having heard from Deputy Gladden that there were probably drugs in the room, manufactured the danger which led to their claimed safety concerns. Brandi was arrested, in handcuffs, and outside the room when the officers entered. The reason for their presence at the hotel was accomplished once Brandi was arrested. The officers had no lawful reason to enter the hotel room after arresting Brandi.

Instead, the officers forcefully entered the room at 8:30 am on a Sunday morning to find two other people in bed under the covers, which they found suspicious. The police ordered the men who had just been awakened to show their hands, and, even though the men complied with their commands, still jumped on the beds and handcuffed them. The police claimed that the men were hiding under the covers and could have weapons, but even if such claims had merit, any danger to the officers was precipitated by their needless, warrantless entry into the hotel room.

In Coles, the police manufactured exigent circumstances to justify warrantless entry into a hotel room. Id. The police offered no reason why they could not wait to obtain a search warrant. Id. at 371. The Third Circuit suppressed the evidence because the police's investigative tactics triggered the exigency. Id.; see also, Kentucky v. King, 131 S.Ct. 1849, 1858 (2011) (holding that police officers' pre-exigency conduct must be reasonable in order for exception to apply); Johnson v. United States, 333 U.S. 10 (1948) (holding that warrantless entry into a hotel room was unjustified because they could have obtained a warrant). It is unreasonable to believe that the officers were concerned about their safety by entering a hotel room where people were sleeping after the arrest of Brandi had been made. Therefore, the exigent circumstances exception does not apply.

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[1] Judge Cooper correctly found that Johnson and Catoe had an expectation of privacy in the hotel room. R. 212, l. 22 – 213, l. 7.

The search incident to arrest exception cannot rescue this warrantless search. See Arizona v. Gant, 556 U.S. 332, 338 (2009). In Gant, a search incident to arrest case dealing with an automobile, the United States Supreme Court clarified the scope of this exception. The Supreme Court held that when someone is arrested and poses no further threat to law enforcement, the police are not entitled to search a vehicle without a warrant unless there is reason to believe it contains evidence of the crime. Id. at 346-47. A similar rationale applies to this case. The malicious injury to property charge arose from Brandi intentionally crashing her car into another man's car. R. 352, ll. 7 – 14. Therefore, no evidence of the crime of arrest could be present in the hotel room. See State v. Brown, 389 S.C. 473, 698 S.E.2d 811 (Ct. App. 2010) (applying Gant to strike down a warrantless search).

This case resembles State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). In Brown, the police searched an arrestee's motel room after the police took the room's occupants away. The police claimed the search incident to arrest exception applied. The South Carolina Supreme court quickly rejected their claim, stating, "Here, [the police] testified that Brown, Brown's brother and Shawley were arrested outside the motel room. They had been taken away at the time the search was conducted. Accordingly, the exception allowing a search incident to arrest is not applicable." Id. at 587, 347 S.E.2d 885-86. The court also found that exigent circumstances did not excuse the warrantless search because police had ample time to obtain a search warrant. Id. at 587-88, 347 S.E.2d at 886.

Since neither the exigent circumstances nor search incident to arrest exceptions justified the police's presence in the hotel room, the trial judge erred in holding that the

plain view exception applied. "[T]he plain view exception requires: (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). As shown above, the initial intrusion into the hotel room was unlawful.

Furthermore, even assuming the officers had lawfully seen into the hotel room during the initial arrest of Brandi, all they would have seen were computers. The officers admitted they had no information leading them to believe the computers were stolen. Nothing about the computers themselves was incriminating. It was only after the officers repeatedly entered and re-entered the room that they saw the other evidence listed in the warrant, such as the syringes, razor blades, and tin foil. It was undisputed that the officers continued to go in and out of the room before they obtained a search warrant, which Deputy Gladden excused because of "officer safety issues." R. 369, l. 7 – 370, l. 23. Therefore, the incriminating nature of the evidence (the computers) could not have been immediately apparent.

The search was illegal and the trial judge erred in not suppressing it. Evidence obtained from an illegal search must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). The police were not investigating Johnson prior to the incident at the hotel room. Therefore, their entire investigation must be suppressed as fruit of the poisonous tree. Without any such evidence, Johnson's conviction must be reversed.

2.

The trial judge erred in ruling as a matter of law that the all of the liquid which contained methamphetamine would count towards its weight, admitting such evidence, and ordering defense counsel not to argue to the jury whether all of the liquid was methamphetamine, because this violated the meaning and intent of the statute defining "methamphetamine" and the utilization of this overly broad interpretation deprived appellant of his Sixth Amendment right to a jury trial.

Relevant Facts

At most, two boxes of Sudafed were used in the liquor bottle that contained the methamphetamine solution in this case. R. 484, ll. 14 – 23. The method used to make methamphetamine was the "Shake and Bake" method. R. 238, l. 3 – 240, l. 20. Under this method, much of the material is strained off and discarded. R. 239, l. 15 – 240, l. 20. The evidence presented at trial was that the liquid recovered from the hotel room weighed 60.9 grams. R. 744, ll. 8 – 11. The material, as found in the hotel room, was not in its finished state. R. 815, l. 8 – 816, l. 5. The largest box of Sudafed sold in pharmacies contains 3.6 grams. R. 257, ll. 2 – 4. One box of Sudafed, after the "cooking" process, yields between two and three grams of methamphetamine. R. 257, ll. 14 – 17. Therefore, the most finished, ready-for-use methamphetamine the bottle from the hotel room could have contained was six grams.

The trial judge struggled with how to deal with the difference between the weight of the mixture recovered from the hotel room and what the testimony indicated the finished product would weigh. R. 729, l. 25 – 738, l. 11. Judge Alford called it a "question of first impression in South Carolina" whether the entire mixture would count

towards the weight of methamphetamine. R. 738, ll. 4 – 6. Defense counsel argued that only the weight of the finished product should count toward the weight. R. 728, ll. 15 – 8; R. 928. Alternatively, he argued that the weight of the mixture should not come into evidence. R. 728, ll. 3 – 8. Judge Alford ultimately ruled that all of the liquid would count as methamphetamine and that this question was an issue of law. R. 738, l. 4 – 11. Judge Alford also went further and prohibited the defendant from making any argument to the jury that all of the mixture could not be considered methamphetamine. R. 738, ll. 15 – 22. Defense counsel objected on the ground that the statute was overly broad and unconstitutional. R. 738, ll. 12 – 14. His objection was overruled and considered preserved by Judge Alford. R. 738, ll. 23 – 25.

Discussion

Judge Alford erred in his interpretation of South Carolina's statutes criminalizing methamphetamine. More importantly, his overly broad interpretation of these statutes deprived Johnson of his Sixth Amendment right to a jury trial.

Section 44-53-375 of the South Carolina Code criminalizes the possession, manufacture, and trafficking of methamphetamine. S.C. Code Ann. § 44-53-375. Someone who possesses ten grams or more of methamphetamine can be convicted of the felony of trafficking. S.C. Code Ann. § 44-53-375(C). The severity of a trafficking offense depends on the weight of methamphetamine with the penalties beginning to increase at the threshold amounts of 28 grams and again at 100 grams. S.C. Code Ann. § 44-53-375(C)(2) and (3).

Section 44-53-110 defines "methamphetamine" as including "any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or

methamphetamine." S.C. Code Ann. § 44-53-110. Section 44-53-392 states, "Notwithstanding any other provision of this article, the weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound or mixture thereof." S.C. Code Ann. § 44-53-392.

Judge Alford determined that the Legislature meant a broad definition of "any mixture" of methamphetamine. Tr. 786, l. 25 – 795, l. 11. This interpretation was incorrectly based on State v. Kerr, 299 S.C. 108, 382 S.E.2d 895 (1989). In Kerr, the defendant argued that since the mixture of cocaine was only 74% pure, that he should only be charged based on 74% of the weight. Id. at 109, 382 S.E.2d at 896. The Supreme Court rejected this contention and affirmed the usage of 100% of the weight of the cocaine. Id.

To support its holding in Kerr, the Court cited a Nevada case that reasoned that diluted forms of a drug are more dangerous to society because it necessarily means the drug would increase the number of persons who would partake. Id. at 109-110, 382 S.E.2d at 896-97 (citing Sheriff of Humboldt County v. Long, 763 P.2d 56, 58-59 (Nev. 1988). This rationale does not exist with respect to unfinished mixtures of methamphetamine. With cocaine, all of the drug—the pure cocaine and any agent used to cut the drug—is consumed. It was undisputed at trial that the mixture of methamphetamine seized from the hotel room was unusable in its current form. It was not a diluted form of the drug that would enable its sale to many more users. It was unfinished product. The State's own witnesses acknowledged that much of it would be discarded.

Contrary to Judge Alford's divination of the Legislature's intent, our drug statutes specifically recognize that methamphetamine contains unusable by-products. See S.C. Code Ann. § 44-53-376. Section 44-53-376 states, "It is unlawful for a person to knowingly cause to be disposed any waste from the production of methamphetamine or knowingly assist, solicit, or conspire with another to dispose of methamphetamine waste." S.C. Code Ann.§ 44-53-376(A). The enactment of this statute by the Legislature shows its recognition that methamphetamine has significant, inconsumable by-products. When construing this specific provision with the more general statutes criminalizing methamphetamine, it is clear that "any mixture" was not intended to include the waste from the production of methamphetamine. Specific statutes inform the intent of more general statutes. See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 358 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Therefore, Judge Alford erred in concluding the Legislature intended the entire weight of the liquid containing the methamphetamine would count against a defendant.

Federal drug statutes recognize the problem of the weight of in-process methamphetamine. See 21 U.S.C. § 841(b)(1)(A)(viii). The federal statute provides that anyone possessing 50 grams of methamphetamine or "500 grams or more of a mixture or substance containing a detectable amount of methamphetamine" are equivalent offenses. See id. This distinction does not occur with respect to cocaine, heroin, or marijuana in its final form. See 21 U.S.C. § 841(b)(1)(A)(i), (ii), (iii), and (vii). However, the federal statute does not criminalize possession of coca leaves when the cocaine has been removed. See 21 U.S.C. § 841(b)(1)(A)(ii)(I). It also treats 1000 marijuana plants as the equivalent of 1000 kilograms of a mixture of marijuana, which recognizes that the entire

marijuana plant is not consumed. See 21 U.S.C. § 841(b)(1)(A)(vii). This Court should use the federal statutes as confirmation that "any mixture" of methamphetamine is to be treated differently than "any mixture" of other drugs that are wholly consumed.

Even with this distinction in the federal statute, many federal courts of appeals still use a market-based approach to determining the weight of methamphetamine. See United States v. Stewart, 361 F.3d 373, 377-79 (7th Cir. 2004); United States v. Jennings, 945 F.2d 129, 135 (6th Cir. 1991); but see United States v. Richards, 87 F.3d 1152, 1153 (10th Cir. 1996). The federal circuits adopting the market-based approach find support in Chapman v. United States, 500 U.S. 453, 460-61 (1991). In Chapman, the Supreme Court dealt with whether LSD blotter paper would be counted as part of the drug's weight. The Court held that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." Id. at 461.

The federal courts adopting the market approach understand the distinction and dangers of a pure drug being mixed with a dilutant in order to increase sales versus an incomplete, indigestible compound that will result in a much smaller finished product. Stewart, 361 F.3d at 378-79; Jennings 945 F.2d at 137. The Jennings court also noted that mixtures containing methamphetamine are not only not intended for sale, but are often poisonous. Jennings 945 F.2d at 136. The court in Stewart rejected the idea that the entire mixture containing methamphetamine should be included because it could lead to absurd results. Stewart, 361 F.3d at 378-79. The Seventh Circuit posited the analogy

of a defendant dumping his drugs into a toilet and then being charged with the weight of the water in the bowl. Id.

Tennessee and Oregon have endorsed the market-based approach for methamphetamine. See State v. Magness, 165 S.W.2d 300, 303-04 (Tenn. Ct. Crim. App. 2004); State v. Slovik, 71 P.2d 159, 161-63 (Ore. Ct. App. 2003). The Tennessee court adopted a market-based approach when interpreting a statute defining methamphetamine as "one hundred grams or more of any substances containing methamphetamine." Magness, 165 S.W.2d at 303. The Oregon statute considered in Slovik stated "ten grams or more of a mixture or substance containing a detectable amount of methamphetamine." Slovik, 71 P.2d at 161. Neither of these statutes are analytically distinguishable from South Carolina's statute. This Court should follow the analysis used in the above-cited cases and determine that the trial court erred in finding that the entire weight of the substance seized from the hotel room would be counted against Johnson under the trafficking statute and allowed into evidence.

The trial court went a step further with its weight analysis and precluded Johnson from arguing to the jury that the entire weight of the liquid could not be counted against him. This error deprived Johnson of a trial by jury on an essential element of the offense. See Apprendi v. New Jersey, 530 U.S. 466, 476-78 (2000). The Sixth Amendment guarantees a defendant the right to a jury's verdict based on the reasonable doubt standard. Id. Defense counsel should have been allowed to argue to the jury that of the 60.9 grams of liquid presented to them, only two or three grams of the substance would have been used or sold as methamphetamine.

Defense counsel's inability to make such an argument prejudiced Johnson. The solicitor was able to argue that the 28 gram threshold amount was met and said that "approximately 70 grams of methamphetamine" was taken out of the bottle from the hotel room. R. 837, ll. 13 – 16. The solicitor said, "It's a mixture and that's what the law in South Carolina says. Methamphetamine is any mixture thereof." R. 837, ll. 16 – 18. The solicitor also told the jury that "[O]nce that substance is methamphetamine in that bottle, [they're] trafficking in methamphetamine period—period. And that amount was over 28 grams." R. 838, ll. 9 – 11. The solicitor was free to argue this crucial fact to the jury while the trial judge's order emasculated any defense rebuttal.

The question of how to consider the amount of liquid in the bottle was foremost in the jury's mind as they sent the judge this question:

> THE COURT: Madame Forelady, members of the jury panel, I got your note out, you want me to re-instruct you on what constitutes the definition of weight of methamphetamine. I have no idea what you're asking me there. Can you clarify what it is you want me to instruct you on?
>
> MADAME FORELADY: You instructed us before about what the methamphetamine, how we judge 28 grams or not.[2] What constitutes the definition of methamphetamine by law, what that includes.
>
> THE COURT: Are you asking me specifically about any evidence that came in or are you just asking me generally?
>
> MADAME FORELADY: **We're asking you about the 60.9.**

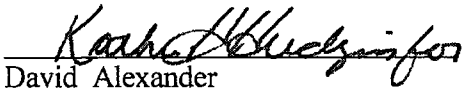
[2] While Johnson was originally indicted for trafficking in an amount in excess of 100 grams, at trial the solicitor agreed that the jury should only be charged on 28 to 100 grams, 10 to 28 grams, and the lesser included offense of manufacturing and distributing. R. 826, l. 8 – 829, l. 18.

R. 903, l. 23 – 904, l. 11 (emphasis added); R. 905. The court again read the statutory definitions for the jury. R. 904, l. 12 – 906, l. 15. The jury was without the benefit of any argument from the defense concerning whether the entire weight of the liquid qualified under the statute. The closest defense counsel could come to arguing this point was stating that the bottle was an unfinished product that could not be used, but he could not address its weight or purity. R. 868, ll. 14 – 18. This *de facto* directed verdict against Johnson deprived him of his right to a trial by jury and requires reversal of his conviction and the grant of a new trial.

CONCLUSION

This Court should reverse Johnson's conviction and sentence because the trial court should have suppressed all evidence obtained as a result of the illegal search of the hotel room. Alternatively, this court should reverse and grant Johnson a new trial because of the trial court's errors regarding the weight of the drugs.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of June, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON ALAN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2012-207549

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of June 2013

Katherine Hudgins for
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of June, 2013

Paula McKee (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 24th, 2013

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STATE OF SOUTH CAROLINA

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The State,

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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

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

STATEMENT OF THE CASE

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

ARGUMENT

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

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

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

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

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

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

A. Lawful Initial Intrusion

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

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

B. Incriminating Nature

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

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

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

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

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

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

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

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

Section 44-53-375 states in pertinent part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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June 10, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State, Respondent,

vs.

Jason Alan Johnson, Appellant.

CERTIFICATE OF COUNSEL

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

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ATTORNEYS FOR RESPONDENT

June 10, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State, Respondent,

vs.

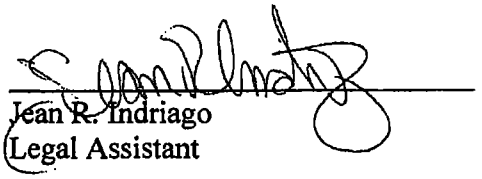
Jason Alan Johnson, Appellant.

PROOF OF SERVICE

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

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

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



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