STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
JAN 20 2015
S.C. Supreme Court

Certiorari to York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON ALAN JOHNSON,

PETITIONER

APPELLATE CASE NO. 2014-002097

BRIEF OF PETITIONER

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming petitioner's conviction because the evidence against him was the fruit of a warrant obtained after an illegal entry and warrantless search and lacked probable cause?

2.

Whether the Court of Appeals erred in affirming petitioner's conviction because 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

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.

After briefing, the Court of Appeals heard argument on March 6, 2014. App. 1. The panel consisted of Judges Huff, Thomas, and Pieper. App. 1, 14. On June 30, 2014, the court issued a published decision affirming petitioner's conviction with Judge Thomas authoring the opinion. App. 1. State v. Johnson, 410 S.C. 10, 763 S.E.2d 36 (Ct. App. 2014). On July 14, 2014, petitioner filed a petition for rehearing. App. 15. On September 3, 2014, the court denied the petition. App. 23. On December 10, 2014, this Court granted certiorari to consider the Court of Appeals' decision.

ARGUMENT

1.

The Court of Appeals erred in affirming petitioner's conviction because the evidence against him was the fruit of a warrant obtained after an illegal entry and warrantless search and lacked probable cause.

If the Court of Appeals' decision is allowed to stand, the notion of a protective sweep will allow the routine conversion of arrest warrants into search warrants. The officers in this case used an arrest warrant to search a hotel room because they suspected drugs might be present. The police accomplished their purpose of making their arrest. The police claimed the threat posed by petitioner—in bed, early on a Sunday morning, wearing only his boxer shorts—justified entry into the hotel room for their own safety. The only purpose of a protective sweep is officer safety, yet the officers in this case charged into the place they claimed was dangerous when they had no reason to enter. This conduct is unreasonable and violated petitioner's Fourth Amendment rights.

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 claimed 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 lying 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 inconsumable liquid and some methamphetamine. R. 337, ll. 7 – 14.

The Court of Appeals' Opinion

The Court of Appeals concluded that the officers were justified in conducting a protective sweep of the hotel room. App. 7. It distinguished this case from State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986), which suppressed evidence obtained from a hotel room, concluding that because the protective sweep in Brown was justified, it was also justified in this case. App. 8. Since the court found the officers lawfully entered the hotel room under the protective sweep theory, it found the items were in plain view and could form the basis for the subsequent warrant. App. 9 – 10.

Discussion

The court erred in finding this warrantless search was reasonable based on the officers' alleged fear of two men sleeping in their underwear at 8:30 AM on Sunday morning. R. 111, ll. 6 – 16. "The ultimate touchstone of the Fourth Amendment is reasonableness." Riley v. California, 134 S.Ct. 2473, 2482 (2014). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing,... reasonableness generally requires the

obtaining of a judicial warrant." Id. The entry into the hotel room was illegal because (1) any perceived threat was not reasonable, and (2) once Brandi was in custody, the officers' business was concluded. The court even recognized that the officers went to the hotel room looking for drugs as it noted Deputy Gladden's statement that there would probably be drugs in the room. App. 2

The court's ruling that a protective sweep justified the warrantless entry, seizure of Johnson, and search of the motel room allows arrest warrants to be converted into *de facto* search warrants. The officers were there to arrest Brandi. They accomplished their purpose. Whether Brandi backed into the room, as the court gave great weight, is of no consequence. App. 9. The officers detained Brandi as they moved into the room and could not have gotten past Brandi without first detaining her. 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 (emphasis added).

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.

The court then erroneously found that Johnson and his co-defendant—mostly naked and lying in bed—posed such a credible threat to the police that they were compelled to do a

protective sweep for their own safety. This reasoning overlooks the fact that the most rational thing to do for their own safety **was simply to leave.** Brandi was in custody. The police had made the arrest authorized by the arrest warrant. Nothing more was authorized and nothing else was required to protect themselves or accomplish their objective.

The police created their own perceived "threat" by entering the room after arresting Brandi. The police may not rely on manufactured exigent circumstances when their presence in a place is unlawful. Since Brandi was in custody, the arrest warrant did not authorize the police to be in the hotel room. United States v. Coles, 437 F.3d 361, 366 (3rd Cir. 2006); 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); Arizona v. Gant, 556 U.S. 332, 344 (2009) (holding that search-incident-to-arrest doctrine did not allow police to search a container inside a vehicle after completing the arrest of the driver).

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. 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.

The court also erred in distinguishing this case from State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). In Brown, a capital case, the defendant was wanted for a brutal murder and armed robbery. Id. at 583, 347 S.E.2d at 883. The police received a tip from a desk clerk that

the defendant was in a motel room. Id. at 586, 347 S.E.2d at 884. The police and a SWAT team surrounded the hotel and eventually convinced the suspects to exit the room. Id. The police then searched the hotel room without a warrant. Id. The police claimed the search incident to arrest exception applied. This 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. While the Court noted that the protective sweep was justified, Brown involved a dangerous murder suspect and his confederates hiding out in a motel room. This case involves a woman wanted for a petty traffic offense and two men sleeping in their underwear on a Sunday morning. No "protective sweep" was necessary or justified and the analysis from Brown finding a Fourth Amendment violation applies.

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 Court of Appeals erred in affirming petitioner's conviction because 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.

The Court of Appeals' Opinion

The court ruled that "the plain and ordinary meaning of the [methamphetamine] statute defines the weight of methamphetamine to include the weight of the mixture of liquid and methamphetamine at issue in this case." App. 12. The court also upheld the trial judge's prohibition on arguing the issue to the jury because the argument would be "an erroneous statement of law." App. 14.

Discussion

Under the Court of Appeals' reasoning, a person caught in the process of making methamphetamine is a worse criminal than a person who has finished making it. See United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) ("A person who sells LSD on blotter paper is not a worse criminal than one who sells the same number of doses on gelatin cubes, but he is subjected to a heavier punishment.") (Posner, J., dissenting). The Court of Appeals erred in ending its statutory construction analysis with the determination that code sections 44-53-110, 44-53-210, 44-53-375, and 44-53-392 are plain and unambiguous. The court misapprehended Johnson's argument that the rules of statutory construction require more specific statutes to control over 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). The statute criminalizing disposal of methamphetamine waste informs the general term "mixture." 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.

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. This 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 the trial court and the Court of Appeals' 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, the court erred in concluding the Legislature intended the entire weight of the liquid containing the methamphetamine would count against a defendant.

The court also erred in determining that "mixture" should not be defined by the market approach. The court failed to address the ambiguities, overly broad circumstances, and absurd results that could arise from the failure to adopt a market approach as applied to methamphetamine. See United States v. Stewart, 361 F.3d 373, 377-79 (7th Cir. 2004). 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. Under the court's definition of the meaning of "mixture," the weight of the air in the bottle could also be counted against appellant. Rejecting the market approach will also result in a wide disparity of sentences with no logical basis. For example, a person making methamphetamine for the first time who is caught in the act with a large amount of waste by-product would receive a higher sentence than a career manufacturer caught selling a small amount of his finished product. The reasoning behind the market based approach is sound and would eliminate the vagaries and absurdities that will arise as a result unless this Court reverses.

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) United States v. Long, 958 F.Supp.2d 1334, 1340 (M.D. Fla. 2013) (observing that the Eleventh Circuit "would likely align itself with the Sixth and Seventh Circuits by finding that waste byproduct should not be included when calculating the total weight of a mixture containing a detectable amount of methamphetamine); 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 United States 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 court of appeals erred in its interpretation of South Carolina's methamphetamine statutes.

The Court of Appeals also erred in concluding that the trial judge's prohibition on arguing the weight of the drugs did not infringe on appellant's Sixth Amendment right to a jury trial on this all-important element of the offense. See Apprendi v. New Jersey, 530 U.S. 466, 476-78 (2000). 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 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. This argument was supported by the evidence as at most, six grams of useable methamphetamine was in the bottle. R. 484, ll. 14 – 23. R. 257, ll. 2 – 4. R. 257, ll. 14 – 17. Even if the trial judge did not err in refusing to charge the jury on the market approach, his prevention of Johnson arguing to the jury what constituted a mixture deprived him of his right to a jury trial on this element.

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. 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.**

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.

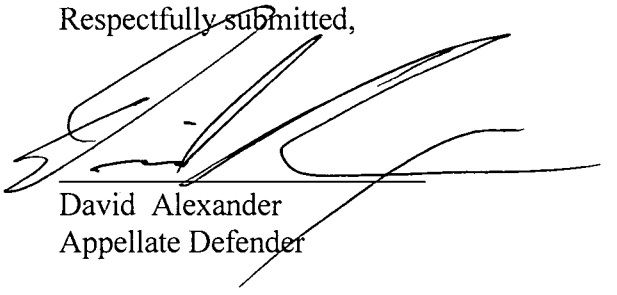
State v. Portee, 278 S.C. 260, 294 S.E.2d 421 (1982) does not support the Court of Appeals' conclusion that arguing about what constituted a "mixture" would have been improper. In Portee, the prosecutor "told the jury that the reasonable doubt standard in criminal cases was something good defense lawyers use to free guilty defendants." Portee at 261, 294 S.E.2d at 422. He also told the jury that "reasonable doubt is a 'defense' which criminals use when they have no other defenses." Id. These statements were clearly improper and infringed on several constitutional rights of the defendant in Portee. Id. Unlike Portee, it is Johnson's lack of ability to contest the State's case to the jury that is at issue.

Even assuming that "mixture" is not defined by a market approach, Johnson should have been allowed to argue to the jury his interpretation of "mixture" based on the facts of the case. This *de facto* directed verdict and charge on the facts deprived Johnson of his right to a trial by jury.

CONCLUSION

For the foregoing reasons, this Court should reverse petitioner's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

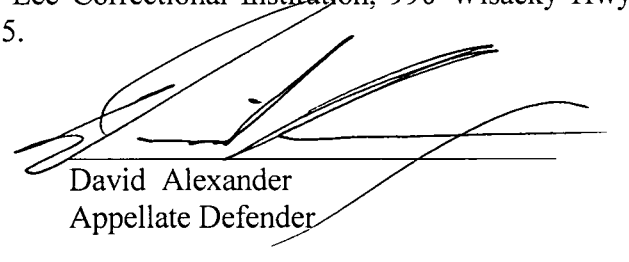
JASON ALAN JOHNSON,

PETITIONER

APPELLATE CASE NO. 2014-002097

CERTIFICATE OF SERVICE

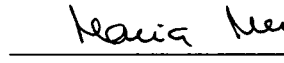
I certify that a true copy of the brief of petitioner, in this case has been served on William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jason Alan Johnson #231457, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, 20th day of January, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of January, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.