THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
The Hon. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000817

The State. . . . . Respondent.
v.
Charles Allen Cain . . . . . Appellant.

APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF THE CASE

On January 17, 2012, Deputies of the Spartanburg County Sherriff's Office arrived at 371 Dakota Street in an effort to serve a bench warrant for Travis Kirby. (R. 37). Upon arrival, law enforcement noticed certain objects they believed to be indicative of methamphetamine production. (R. 40-41). The Appellant was subsequently arrested and tried for attempted trafficking of methamphetamine in violation of Section 44-53-375(B) of the South Carolina Code.

Before trial, Appellant moved to dismiss the trafficking charge, arguing the intent requirement for trafficking methamphetamine cannot be based on a theoretical quantity alone, instead suggesting the proper charge would be manufacturing methamphetamine. (R. 14). The Court took the matter under advisement, electing to proceed with the trial while it was considering Appellant's motion. The motion was later incorporated into Appellant's motions for a directed verdict. (R. 26).

During the trial, chemist Beth Stuart was qualified as an expert in forensic chemistry. Over Appellants objection, the State, asked Stuart to calculate a theoretical yield of methamphetamine, assuming all the missing pseudoephedrine was present and used in a single reaction with all other necessary ingredients and assuming a 100% yield was obtained. (R. 102-03). This, despite there being no evidence that the necessary ingredients other than pseudoephedrine were present in sufficient quantities to yield the theoretical amount, despite there being no evidence that Appellant had the capabilities to obtain the theoretical yield, and despite there being no evidence that Stuart had ever proved that it was even possible to obtain a theoretical yield. Specifically, Appellant's counsel asked Stuart: "Did you start with an amount of Sudafed and other things and say

'I should get this much [methamphetamine] and go through it [(the experiment)] and get that much?" (R. 101). Stuart was unable to answer this question. (R. 101).

Ultimately, the Court permitted Stuart to opine that the "theoretical yield" from the hypothetical 19.2 grams of pseudoephedrine that would have been contained in the empty blister packs could be 17.62 grams of methamphetamine. (R. 102) This assumed the necessary quantities of lithium and ammonia were combined with the hypothetical quantity of pseudoephedrine. (R. 102). Stuart also admitted the theoretical yield was based on a 100% yield attainable only under ideal "laboratory conditions." There is no evidence whatsoever of the amount of methamphetamine Appellant could have produce in the subject lab other than that it would be some amount less than 100% of the theoretical yield. (R. 103 & 105).

At the close of the State's case, Appellant moved for a directed verdict, arguing there was insufficient evidence of custody and control of the requisite ingredients to establish intent to traffic in methamphetamine and incorporating Appellant's previous motion to dismiss regarding the use of the theoretical yield. The trial court denied the motion as to Appellant's custody and control argument and took under advisement the "theoretical yield" argument, electing to take it up at the close of all evidence. (R. 116-19). At the close of all evidence, the Court denied Appellant's motion regarding "theoretical yield," (R. 132) and Appellant was convicted of trafficking methamphetamine and sentenced to ten years' imprisonment.

On appeal, Appellant argued that Stuart's testimony was inadmissible because the State failed to prove it was sufficiently reliable under the Jones standard and Council factors, and because her conclusions were based upon assumptions that were without

evidentiary support. (*See* Section I of Appellant's Brief) Further, Appellant argued the trial court erred in letting the charge of trafficking go to the jury where the theoretical yield testimony was the sole evidence of intent to produce a certain quantity of drugs, as well as in failing to grant a directed verdict because there was insufficient evidence of custody and control of the ingredients necessary to support a conviction for trafficking. (*See* Section II of Appellant's Brief).

The Court of Appeals issued Opinion No. 5324 on July 15, 2015 (*State v. Cain*, Shearouse Adv. Sht. No. 27, p. 21 (July 15, 2015) finding that Appellant's argument that a trafficking conviction cannot rest on theoretical yield evidence alone was not preserved, and further finding that the trial court committed no error in regard to the remaining allegations of error. This Petition for Rehearing timely follows.

SUMMARY OF ARGUMENT

Pursuant to Rule 221, SCACR, rehearing shall be granted where the Court of Appeals has misapprehended or overlooked certain points. Therefore, Appellant will not herein restate the arguments he presented to the Court in his Initial Brief and Reply Brief. Instead, Appellant will focus on the points this Court overlooked or misapprehended, but specifically incorporates the substance of the arguments raised in his Initial Brief and Reply Brief as if restated herein.

For the sake of convenience to address matters of issue preservation first, Appellant will herein address the particular issues raised in the underlying appeal out of order. Appellant now brings this petition for rehearing to point out that this Court overlooked certain material points and misapprehended the law of the State of South Carolina in the following regard.

I. **The Court misapprehended the rules of issue preservation and overlooked the fact that Appellant's argument that the trial court erred in allowing the charge of trafficking to proceed to the jury on "theoretical yield" was fully and properly preserved.**

II. **The Court misapprehended and overlooked the law regarding the reliability of expert testimony.**

III. **The Court misapprehended and overlooked the law regarding constructive possession.**

ARGUMENT

As this Court is aware, it is paramount that the issues on appeal be examined with a mind to the difference between the offenses of manufacturing methamphetamine versus trafficking methamphetamine. The crime of "trafficking", as defined by S.C. Code Ann. § 44-53-375(C) requires the accused to have a specific intent to "knowingly . . . manufacture [(or attempt to manufacture)] . . . ten grams or more;" while the crime of "manufacturing" as defined by S.C. Code Ann. § 44-53-375(B) has no such specific "knowingly" requirement. *See* § 44-53-375(B) (containing no specific intent requirement, and defining the offense as "a person who manufactures . . . methamphetamine. . . is guilty") Thus, trafficking requires the accused to engage in the offensive conduct knowing the end result will yield in excess of ten grams.

While Section 44-53-375 (D) of the South Carolina Code provides that possession of equipment and paraphernalia used in the production of methamphetamine is *prima facie* evidence of intent to **manufacture**, there is no such similar presumption for an intent to traffic. (emphasis added). Thus, in an attempted trafficking prosecution the State still must prove the defendant's intent was to produce the requisite amount of

methamphetamine. *See* S.C. Code Ann. §44-53-375 (C) (the defendant must knowingly attempt to manufacture ten or more grams of methamphetamine)[1].

I. The Court misapprehended the rules of issue preservation and overlooked the fact that Appellant's argument that the trial court erred in allowing the charge of trafficking to proceed to the jury on "theoretical yield" was fully and properly preserved.

At Section II (A) of Opinion No. 5324 in this matter, the Court found Appellant's argument regarding theoretical yield was not preserved because "[a] party cannot argue one ground for directed verdict in trial and then alternative ground on appeal." *Citing State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Specifically, the Court noted that "[b]ased upon our review of the record, we find the only issue raised in Cain's directed verdict motion was whether the State proved he and [co-defendant] were in constructive possession of the methamphetamine instruments and paraphernalia found on the premises." Opinion No. 5324 at p. 36.

However, the Court has overlooked the vast amount of argument presented to the trial court on this issue. It is important to recognize that Appellant's objection to the trafficking charge proceeding on the theoretical yield testimony began at the very start of the trial as a motion to dismiss. Pointing out the difference in the intent requirements for the offense of manufacturing as opposed to the offense of trafficking, trial counsel started by saying: "This is a theoretical yield based on [], either items seized at the property, and, Your Honor, the statute does, I think, in Section D say that having the means is prima facie case of **manufacturing**. But I don't think there's anything in this statute or in

[1] All the parties acknowledged that the State was required to prove the intent was to manufacture ten or more grams of methamphetamine. (Tr. 41).

South Carolina law that says you can take a theoretical yield based on the evidence found and make it into a **trafficking** case." (R. 12)(emphasis added).

The discussion continues for several pages on this issue, and trial counsel reiterates in regard to the intent requirement that: "It's simply possession of equipment or paraphernalia use in the manufacture of methamphetamine [that] is prima facie evidence of **intent to manufacture**. . . . [] **but it doesn't address trafficking**." (R. 19) (emphasis added).

The parties, and the Court go on to agree that the presumption of intent outline in Subsection D relates only to an intent to "produce" methamphetamine, and that there still needs to be evidence of an intent to produce a certain weight. The Court then asked the Solicitor: "Do you agree that subsection D is not intended to define weight? It's more the, the act of producing[]" To which the Solicitor responded: "Yes, sir, that's what Subsection [D] --- that's my interpretation of subsection D." The Court then agrees, stating: "I agree with that." (R. 20).

Thus, having established that there is no statutory presumption of intent to traffic based on the possession of the precursor ingredients and equipment, trial counsel again reiterates his objection: "I just think that if the case would go forward it would go forward as a manufacturing as opposed to trafficking case. There's not - - - I don't think there's a statute that fits it as nicely as the Subsection D there, and certainly there's no case law on this." (R. 21).

The discussion then continues for several more pages, regarding whether the indictments would need to be amended if the trial court granted the motion to dismiss. At

which point the trial court states that he wants to proceed with the trial, taking Appellant's motion under advisement and will rule on it at a later point. (R. 26).

At the close of the State's case in chief, with the matter still under advisement by the trial court, Appellant makes a motion for directed verdict. The motion for directed verdict is based on two arguments. First regarding theoretical yield: "The testimony has been that there is some type of something going on in this house, some ingredient in this house that has been identified as a meth lab with some yield. In optimal conditions, maybe, to be a little over 17 grams." (Tr. 146-47). Second, Appellant argued there was insufficient evidence of custody and control stating: "the nexus is not there connecting them to the rest of the house." (R. 116-17). And again Appellant's counsel restates that if the matter is to be submitted to the jury at all, it should be on the charge of manufacturing, not trafficking: "[I]f we have enough to present to the jury, I submit we have --- it would be for manufacturing as opposed to trafficking." (R. 117). While trial counsel did not specifically state that the prosecution needed to introduce evidence of "potential yield" it was clear that the basis for the ongoing and recurring objection was because theoretical yield alone was insufficient to carry the charge of trafficking to the jury.

In response, the trial court ruled: "**Subject to my other matter I've taken under advisement with regard to theoretical yield,** I'm going to deny your motion." (R. 118) (emphasis added). Ultimately, at the close of all evidence, the trial court denied the motion regarding theoretical yield with no further argument on the issue. It is axiomatic that by taking Appellant's Motion to Dismiss under advisement and treating it as Motion for Directed Verdict at the close of all evidence, all of Appellant's arguments made in

support of the Motion to Dismiss we incorporated as part and parcel of the Motion for Directed Verdict.

Nonetheless, despite having repeatedly and fully articulating the argument that theoretical yield will not satisfy the intent requirement of a trafficking conviction, this Court has found the issue is not preserved. Specifically, the Court stated, "While Cain argues the State should have been required to show a 'potential yield,' as opposed to a 'hypothetical theoretical yield,' these terms of art were used for the first time on appeal. Thus, to the extent Cain asks this court to create a distinction between these terms, we find the theoretical yield versus potential yield issue was not raised as a ground in his directed verdict motion, nor at any time during the trial." Opinion No. 5324 at 36. Furthermore, at footnote 5 the Court instructs that Cain's objections "were based on the fact that the State could not show evidence of an *actual* weight of methamphetamine because the [] blister packs were empty." *Id.*

By focusing simply on the semantics of Appellate counsel's phrasing, this Court has misapprehended the substance Appellant's trial objection and argument on appeal. While it is accurate to state that Appellant's trial counsel did not use the specific term of art; "potential yield" during his numerous objections, this is not fatal to the appeal. The law of this State does not require him to use this specific term, nor could he reasonably be expected to know this particular term of art.

It is well settled in South Carolina that a party need not use any magic language or the precise name of a legal doctrine in order to preserve an issue for appellate review. *See e.g., Herron v. Century BMW,* 395 S.C. 461, 446 (2012) (stating that party need not use magic language or the precise name of a legal doctrine so long as it is sufficiently

clear as to the nature of the alleged error so that it could have been reasonably understood by the court) *see also Delta Apparel, Inc v. Farina*, 406 S.C. 257, 268-69 (Ct. App. 2013). The cases are legion that support the proposition that trial counsel need only to state his argument to such a degree that it is reasonably clear to the trial court what the basis for his objection is. *See e.g., id.*

In the case at bar it cannot reasonably be argued that the trial court was unaware that Appellant was contending the charge of trafficking should not be submitted to the jury on theoretical yield alone – and rather only the lesser offense of manufacturing should have gone to the jury. Indeed, there was repeated and extended argument which goes on for page upon page in the Record regarding the distinction of the intent requirements for manufacturing methamphetamine versus trafficking methamphetamine, and how theoretical yield should not form the basis of a trafficking conviction. Appellant's trial counsel was clear and emphatic that unlike the presumption of intent for a charge of manufacturing contained at Subsection D of the statute, there is no similar presumption of intent applicable to trafficking, and therefore a theoretical yield would not satisfy the heightened intent requirement for trafficking. According to trial counsel, theoretical yield was only sufficient to establish intent to manufacture, not traffic.

However, in finding this argument not preserved, this Court has commanded that Appellant was required to go further and argue not only that the theoretical yield evidence is insufficient to support a trafficking conviction but also argue what the State was required to prove in order to submit it to the jury – i.e., argue that the State had to prove "potential yield." Such a finding overlooks and mischaracterizes the issue before

this Court, which was simply whether the theoretical yield testimony was sufficient to submit the charge of trafficking to the jury.

While it is true that on appeal Appellant offered an argument that the State was required to submit "potential yield" evidence in order to submit the charge of trafficking to the jury, this was offered for the purpose of providing context and bolstering the argument that theoretical yield testimony was insufficient. This argument regarding potential yield served only to demonstrate the rational for why theoretical yield evidence was insufficient. This was not, as this Court suggests, a separate or independent argument. As the court will note, the issue as stated at Section II of Appellant's Final Brief presented the precise question before the court: "[whether] there was insufficient evidence of intent."

When considering the rules of issue preservation, a party need only interpose his objection. There is no requirement that he go further and offer argument on what would cure his perceived defect. For example, to preserve a hearsay object a party need only make the objection at trial. There is no requirement that the objecting party also presents to the judge the certain facts or circumstances that the opposing party could offer to make the evidence admissible under a hearsay exception. The objection alone will properly preserve the issue for review. Thus, in this case, by finding the issue not preserved because Appellant failed to offer argument on what would have cured his alleged defect (i.e. the offering of evidence of practical yield), this Court has added an additional requirement to the rules of issue preservation where none existed before.

Certainly the trial court was not in the dark on this. It clearly understood the basis for the object was that in light of the State's reliance on theoretical yield the matter

should go to the jury only on manufacturing, not trafficking. Argument on what additional evidence the State needed to support a trafficking charge was not required to preserve the question. This Court has overlooked that the question presented is simply whether the trial court's submission of the trafficking charge to the jury was error.

Furthermore, not only was it unnecessary for Appellant's trial counsel to use the specific phrase "potential yield," it is unreasonable to expect him to do so. This Court itself acknowledged the novelty of this issue at footnote 1 of its Opinion No. 5324. Given that this particular issue has never been addressed by the Courts of this State and that it was raised for the first time on the day of trial, it is unreasonable to expect trial counsel to be educated enough on the matter to know the terminology and phrasing that had been adopted by foreign jurisdictions to discuss the ideas surrounding this issue.

Appellate counsel used the terms and phrases that have been coined by other jurisdictions for the ease and convenience of expressing the ideas to this Court. The use of these terms were misinterpreted by this Court to be an argument that trial counsel did not raise when in fact these terms relate directly to the precise issue trial counsel argued. The fact that trial counsel was unable to adequately educate himself on the precise terms and phrases used by foreign jurisdictions on this issue should not serve as a basis to render his otherwise clearly developed arguments unpreserved. As Appellate counsel noted at oral argument, the term "potential yield" was used only because this was the term used by other jurisdictions. This term was not used to express a new legal concept or argument. It was nothing other than a term of convenience used to differentiate from "theoretical yield" and to demonstrate why "theoretical yield" cannot serve as the basis for a prosecution of trafficking. To hold trial counsel to some higher preservation burden

by requiring that he must use the precise language used by foreign jurisdictions on a novel issue when he expressed the same idea in different words is unjust, unfair, and contrary to South Carolina's well established rules of issue preservation.

Further, for the reasons set forth in his Appellant's Brief and Reply Brief, Appellant was prejudiced by this Court's oversight and finding that the issue was not preserved for appeal.

II. The Court misapprehended and overlooked the law regarding the reliability of expert testimony.

Appellant presented two arguments as to why the trial court erred in admitting Stuart's expert testimony. First, because the State failed to present sufficient evidence of the reliability of Stuart's methodology and as a result the testimony could not help the trier of fact. Second, because Stuart's testimony was based on hypothetical facts that were without evidentiary support. The Court addressed these issues respectively as "Reliability" (at Section I (A)) and "Stuart's Conclusions" (at Section I (B)).

(A) "Reliability"

In South Carolina, the gatekeeping function of the trial court in regard to the admission of expert testimony is two-fold, it is not a singular inquiry. This gate-keeping function looks at both the "qualification" of the witness as an expert and then, after the witness has been qualified, a determination as to the reliability of the testimony the expert purports to offer. *See State v. Tapp*, 398 S.C. 376, 388 (S.C. 2012). This vetting of reliability requires that after the purported expert is qualified, the proponent of this evidence must demonstrate, and the trial Court must find, the purported testimony to be reliable. *See Tapp,* at 388. The reliability of scientific expert testimony is determined by application of the "*Jones* standard," which provides that "the standard for admitting

scientific evidence" is "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones,* 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

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

In evaluating Stuart's testimony in light of the *Council* factors, this Court misapprehended the evidence appearing in the record. First, in finding that this type of evidence had been used in prior cases, this Court pointed to *United States v. Spencer,* 439 F.3d 905 (8th Cir. 2005) and the unpublished opinion of *State v. Knapp,* 2009 Iowa App. Lexis 1628 (IA Ct. App. 2009), stating that "these cases are directly on point and, therefore, qualified as prior applications of the theoretical yield method to the type of evidence involved in the instant matter." However, this Court misapprehended that neither *Spencer* nor *Knapp* is "directly on point." To the contrary, *Spencer* and *Knapp* both differ from the case at bar in two tremendously significant ways. First, in both cases the defendant was found in actual possession of the precursor ingredients, and thus the expert's testimony as to yield capabilities was based on facts supported evidence and not hypotheticals as in this case. *See Spencer,* 439 F.3d at, 915-16; *Knapp,* 2009 Iowa App. Lexis 1628, at 10-11. Second, and most significantly, in both cases, the expert when

testifying to yield capabilities was able draw a connection between theoretical yield and reality by testifying to what the particular defendant could practically or reasonable expect (i.e., a practical yield). *See Spencer*, 439 F.3d at, 915-16 (testifying expert established the theoretical yield to be 79.1 grams and the potential yield to be 42-64 grams.); *Knapp*, 2009 Iowa App. Lexis 1628, at 10-11 (the testifying expert established that the theoretical yield was 15.4 grams while the anticipated or practical yield would be 6-7 grams). Thus, these cases demonstrate precisely the point Appellant advances, theoretical yield testimony is not sufficiently reliable without further testimony as to what is practically feasible – i.e., a potential yield. It remains that the cases on which this Court has placed its reliance do not support the proposition this Court claims.

Next, to purportedly demonstrate that the theoretical yield calculation is consistent with recognized scientific laws, this Court noted that Stuart testified that "determining a yield based on multiple ingredients is a 'core standard' of chemistry." Opinion No. 5324 at 29. However, the Court has overlooked that Stuart's testimony is not an exercise of this "core standard." Specifically, her theoretical yield testimony in this case is not a yield calculation based on **multiple** ingredients, but instead based on a single ingredient – i.e., pseudoephedrine. The quantities of all other ingredients were simply assumed. As Appellant pointed out many times in his arguments to this court, Stuart offered no evidence of whether there were sufficient quantities of all ingredients to support her calculation.

Further, in finding that Stuart adequately explained the quality control measure, this Court relies exclusively on a finding that "[a]ccording to Stuart, the necessary controls are no more than a calculator, the periodic table, and a basic understanding of

chemistry." Opinion No. 5324 at 29. However, this testimony appears **nowhere** in the record. This was an assertion made by Respondent in its brief to this Court and is wholly without evidentiary support. Stuart never testified to this.[2] Therefore, this Court has misapprehended the contents of the record in this regard.

Finally, by finding that the theoretical yield testimony was able to assist the trier of fact because it "helped the jury determine how much methamphetamine Cain could produce – an important fact at issue – based on the amount previously contained in the empty blister packs as well as the other components found at the scene[3]" this Court has demonstrated that it manifestly misapprehended the substance of Appellant's argument. Particularly, this Court has mistaken Stuart's theoretical yield testimony as proof of what "Cain could make," precisely the misconception that Appellant was attempting to avoid when objecting to the reliability of this evidence at trial. Rather, Stuart's theoretical yield testimony is **not evidence of what Cain could make** but instead what a "theoretical chemist" could make. Stuart was wholly unable to offer any testimony whatsoever on the issue of how much Cain could make. She was even unable to answer whether she – as an expert chemist – could obtain the theoretical yield.

While this Court suggests that Stuart's testimony could assist the trier of fact to determine how much Cain could produce, this is only true if there is evidence that it was even possible to obtain the theoretical yield. And the record is completely devoid of any such evidence. Thus, this Court has misapprehended the contents of the record as to

[2] Even the Respondent did not say that Stuart testified to this. Rather the Respondent asserted that Stuart's testimony "suggested" this.

[3] As previously mentioned there was no testimony as to what amounts of "other components" that were at the scene or how the amounts of the other components would affect the yield.

whether Stuart's testimony is able to assist the trier of fact to know how much methamphetamine Cain could make. Rather Stuart's testimony as to yield capabilities in this case was nothing more than a theory without support.

(B) Stuart's Conclusions

Generally speaking an expert witness's opinion must be based on verifiable facts, although such evidence need not necessarily be admissible. Rule 703, SCRE. Although the expert may offer an opinion based on hypothetical facts, those facts must have evidentiary support. *See generally Campbell v. Paschal*, 290 S.C. 1, 17, 347 S.E.2d 892, 902 (Ct. App. 1986) ("The facts used in a hypothetical question presented to an expert witness must have some evidentiary support.") (citing *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978)); *Brown v. La France Industries*, 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985; *see also Newman v. Hy-Way Heat Systems, Inc.*, 783 F.2d 269, 270 (4th Cir. 1986) ("It is fixed law that an expert can give his opinion on the basis of hypothetical facts, but those facts must be established by independent evidence properly introduced.").

In this case, the hypothetical question posed to Stuart was, "if you took the 19,200 milligrams . . . [from] the empty packet of Sudafed that had been there, and you were going to attempt to make methamphetamine, and you got a one hundred percent yield, how much [] could you manufacture?" (R. 102).

This Court determined that it was not error to allow this testimony because other cases have acknowledged an expert's use of empty blister-packs in calculating theoretical yield. However, the Court has overlooked that Appellant's argument was not limited only to Stuart's reliance on the empty blister-packs. Instead, the hypothetical question

outlined above rests on several other assumptions as well, particularly that a 100% yield is possible – of which there is no factual support – and that there were sufficient quantities of the other necessary ingredients to support Stuart's theoretical yield – of which there is no factual support. Thus, it is not Stuart's reliance on the empty blister-packs alone that is problematic. This Court has overlooked the other unsupported assumptions contained within the hypothetical question, or otherwise failed to address the same.

Further, the Court has misapprehended that the authorities on which it has relied for its ruling do not support the proposition that theoretical yield opinions can rest on hypothetical facts alone. (*See* Opinion No. 5324 at 31). First, the Court cites to two cases *United States v. Engler*, 521 F.3d 965 (8th Cir. 2008) and *United States v. Tilbach*, 339 F.3d 692 (8th Cir. 2003) in which the issue on appeal was the sufficiency of evidence – not sufficiency of expert testimony. Thus, the court in *Engler* and *Tilbach* were not considering whether the expert's testimony was supported by fact but rather whether there was sufficient evidence of intent. While these are instances in which empty blister-packs were part of the evidence against the defendant, they are not examples of cases in which theoretical yield testimony rested on empty packs alone.

The Court relies on *Engler* for the proposition that evidence of "empty blister packs representing 2016 pseudoephedrine pills which could theoretically yield 55 grams of methamphetamine" was sufficient to support a verdict for attempted manufacture of more than five grams." (*See* Opinion No. 5324 at 31). However, the court has misapprehended that the theoretical yield was not the sole evidence of the defendant's intent in *Engler*. Rather there was also evidence that the defendant had previously sold

the drugs and the Government admitted incriminating statements from a co-conspirator. *Engler*, 521 F.3d at 974-75. Similarly, evidence was presented that the Defendant personally purchased the precursor ingredients as well as testimony from co-defendants as to the amounts of precursor ingredients. *Id.* Thus, to the extent an expert testified to potential yield[4] the quantities of precursor ingredients were supported by evidence, and were not assumed.

The Court also sites *Tilbach* for a similar proposition (*see* Opinion No. 5324 at 31), however in *Tilbach* the evidence of intent did not rest on empty containers alone but instead on testimony from an expert chemist on **both** theoretical yield, and potential yield, in conjunction with testimony from a co-conspirator as to direct observations of the defendant's yield capabilities. *Tilbach*, 339 F.3d at 696.

Thus the Court has misapprehended that it is not Stuart's reliance on the empty blister packs alone that is problematic, but instead that the various assumptions that were made in her theoretical yield calculation were without evidentiary support.

This Court then goes on to rely on *Varble v. Commonwealth*, 125 S.W.3d 246 (Ky. 2004) for the proposition that empty blister packs are sufficient to support a theoretical yield calculation and thereby a conviction. (*See* Opinion No. 5324 at 31). However, this Court has overlooked that *Varble* is different from the case at bar in two tremendously significant ways. First, *Varble* does not address or discuss in any way whether a conviction can rest on theoretical yield. *See id.* This is because the question in *Varble* was simply whether the defendant intended to make methamphetamine in any amount. *See id.* at 254 (citing code section KRS 218A.1432(1)(b) which criminalizes the

[4] It is unclear from the opinion whether the Government offered any expert testimony on the issue of theoretical yield.

intent to make methamphetamine in any amount and presuming the intent to do so from possession of the equipment necessary to produce meth). Which dovetails to the second distinguishing factor, the Kentucky statute at issue in *Varble* was the equivalent of South Carolina's offense of "manufacturing," in that the prosecution was not required to prove the defendant intended to make more than a certain amount. *See id.*; *see also* KRS 218A.1432(1)(b). Therefore, because the fact at issue was simply whether the defendant could make methamphetamine in any amount, rather than how much the defendant could make calculation of a theoretical yield was inconsequential to the question of the defendant's guilt. However, the rationale of *Varble* does not suggest that theoretical yield can rest hypothetical evidence. Considered in the light of the present case, Appellant does not object to Stuart's testimony that it was possible to make methamphetamine. Rather the Appellant's objection was specifically to that portion of Stuart's testimony regarding how much could be produced – which came in the way of theoretical yield calculation.

III. The Court misapprehended and overlooked the law regarding constructive possession.

This Court has overlooked that the State's theory is one of "attempt." An attempt, is an inchoate offense, by definition being only partly formed, and thus not completed. *See Webster's Dic.* Attempt has been defined by our courts as "an overt act done with the intent to commit a crime but that falls short of completing the crime." *State v. Reid*, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009). Thus, by definition an attempt either ends in failure in which case it remains an attempt, or it ends in the completion of the act in which case it becomes the completed offense.

To this end, custody of the remnant of methamphetamine production is not evidence of an attempt to produce meth. Particularly in light of the fact that the State's theory would assume that all the ingredients and paraphernalia was all part of a single attempt. However, the evidence, in the light most favorable to the State, does not support that the hypothetical amount of pseudoephedrine was ever possessed at a single time as part of larger plan to create a quantity of methamphetamine in excess of ten grams.

It is undisputed that Stuart testified there was evidence of several different batches. (R. 90). And presumably, it would take all of these different batches added together to obtain the theoretical yield. What the State appears to do is take the position that it can aggregate each of these various batches into one single act despite a complete dearth of evidence to establish that the Appellant had dominion and control of the ingredients or remnants at the time those batches were made. Essentially, because the other batches are all part and parcel of the State's alleged "attempt" to traffic methamphetamine, the State must offer at least some evidence of a nexus between the Appellant and the items that were used in the purported manufacturing

Thus, this Court has misapprehended the issue on appeal. The question is not whether there is evidence that the Appellant had custody and control of the waste, but rather, the more nuanced question of whether there is evidence to support that he had custody and control of the items, when the ingredients were in existence. As without this evidence, there can be no inference that he intended to produce methamphetamine because the entirety of the State's case rests upon the assumption that Appellant had the necessary ingredients to make methamphetamine.

CONCLUSION

Because this Court has misapprehended or overlooked the points outlined above, the Appellant respectfully requests that this Court rehear the matter and consider the arguments present his Initial Brief and Reply Brief.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions

The Hon. Lawton McIntosh, Circuit Court Judge

Case No. 2013-000817

The State. . . . . Respondent.

v.

Charles Cain . . . . . Appellant.

AFFIDAVIT OF SERVICE

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

FOR THE RESPONDENT:
Allen Wilson, Esquire
Salley W. Elliott, Esquire
David Spencer, Esquire
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Moira W. Kerrigan
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July 30, 2015
Charleston, South Carolina

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April 29, 2014

VIA FACSIMILE & U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
Fax to: 803.734.1839

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

Dear Mr. Kitchings:

This firm represents the Appellant in connection with the above appeal. Enclosed for filing, please find the original and seven (7) copies of the following:

(1) Appellant's Petition for Rehearing; and
(2) Affidavit of Service.

After filing the originals, kindly return any extra file-stamped copies to me using the self-addressed, stamped envelope provided for your convenience. Should you have any questions or concerns, please do not hesitate to contact us. Your assistance with this matter is appreciated.

Sincerely,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

Moira Kerrigan
Paralegal to Thomas J. Rode

cc: Robert Dudek, Esquire
David Spencer, Esquire

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FACSIMILE TRANSMITTAL

DATE: July 30, 2015

TO: The Honorable Jenny Abbott Kitchings

FAX #: 803.734.1839

FROM: Moira Kerrigan, Paralegal to Thomas J. Rode

RE: ***State v. Charles Allen Cain***
Appellate Case No. 2013-000817

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Please see the following.

Thank you,
Moira Kerrigan