THE STATE OF SOUTH CAROLINA
In the ~~Court of Appeals~~ Supreme Court of South Carolina

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~~ Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner Charles Cain certifies the Petition for Rehearing was timely made and ruled upon by the South Carolina Court of Appeals on September 2, 2015. An Order dated September 23, 2015 from the Supreme Court granted an extension to serve and file the Petition for Writ of Certiorari and Appendix until October 20, 2015. This Petition for a Writ of Certiorari is filed within the fifteen (15) day extension pursuant to Rule 242, SCACR.

STATEMENT OF THE CASE

This appeal arises from the South Carolina Court of General Sessions where Charles Cain (Appellant) was convicted of attempted trafficking of methamphetamine under Section 44-53-375(C) of the South Carolina Code of Laws – which requires the accused to knowingly produce methamphetamine (sometimes "meth" for short) in excess of ten grams. Because the Appellant was only found with the empty containers and remnants of the precursor ingredients to produce meth, the State's theory of the case was a novel one, which relied entirely on the testimony of an expert chemist who opined that had the containers been full rather than empty, that the Appellant could have "theoretically" yielded as much as 17 grams of meth. However, neither the State nor its expert witness could offer evidence that it was practically possible for the Appellant (or anyone for that matter) to obtain this "theoretical yield."

At trial, Appellant argued that this theoretical yield testimony was alone insufficient to submit the charge of trafficking to the jury, and instead the case should have gone to the jury only on the lesser included offense of "manufacturing" methamphetamine as this lesser offense does not require the specific intent to produce a certain quantity of meth. *See* S.C. Code Ann. §44-53-375 (B)(describing the lesser offense of manufacturing). However, despite the only evidence of Appellant's guilt of the greater offense of trafficking coming in the form of a

"theory" from an expert witness, the trial court let the matter go to the jury on this greater offense and the Appellant was convicted.

On appeal, this case presented a matter of first impression in South Carolina as to whether an attempted trafficking conviction may be based solely on expert testimony that it was "theoretically" possible that the accused could have committed the offense. Specifically, the question presented was whether a charge of trafficking methamphetamine could be submitted to the jury based only on expert testimony of "theoretical yield" or whether it was proper to submit only the lesser charge of manufacturing to the jury. *See e.g.* (Appx. 23 and Appx. 119). However, despite the Court of Appeals finding that the trial court took this argument under advisement and ultimately rejected it, the Court of Appeals inexplicably went on to find that the argument was not preserved for appellate review because it was "not raised" to the trial court. (Appx. 397-98). Thus, the Court of Appeals never reached this novel issue.

Because the Court's ruling regarding issue preservation is both inconsistent with its own recitation of the case and contrary to prior opinions of this Court, the Appellant files this Petition for Writ Certiorari to the Court of Appeals.

FACTUAL BACKGROUND & THEORETICAL YIELD EVIDENCE

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. (Appx. 39). Upon arrival they were greeted by Appellant, who explained that he did not know Kirby. Appellant informed the deputies that he was renting a single bedroom in the house and that he did not go into the other areas of the house. (Appx. 40). In searching the house for Kirby, in a bathroom the deputies noticed a bottle with tubing running from the top of the bottle out a window. (Appx.

42). The deputies recognized this object as potentially involved in the production of methamphetamine. (Appx. 42-43).

Forensic chemist, Beth Stuart with the Spartanburg County Sheriff's Office was called to the scene. (Appx. 72). As part of her investigation Stuart cut open several garbage bags that she found both inside and outside of the house. In these bags Stuart found various empty pseudoephedrine "blister packs"[1] in addition to other household items that can potentially be utilized in the production of meth. (Appx 96). Had these various blister packs not been empty, Stuart presumed they would have contained a total of 19.2 grams of pseudoephedrine. (Appx. 96). However, there was no actual methamphetamine found at the scene.

At trial, the state offered Stuart as an expert witness to opine on the topic of "theoretical yield."[2] This was accomplished by asking her to calculate how much methamphetamine was theoretically possible to produce assuming all the missing pseudoephedrine was present and used in a single reaction. (Appx. 104). Over Appellant's objection 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. (Appx. 104). This opinion apparently assumed the necessary quantities of other ingredients were combined with the hypothetical quantity of pseudoephedrine in this theoretical production. (Appx. 104-5). Stuart conceded the theoretical yield was based on a 100% yield attainable, if at

[1] A "blister pack" is the plastic pill packaging device that is foil backed so that pills can easily be popped out.

[2] On appeal, Appellant raised various arguments opposing the admission of Stuart's testimony. Appellant does not seek a Petition on those issues, but does not abandon those issues to the extent this Court decides to accept briefing on the same.

all[3], only under ideal "laboratory conditions." She did not testify as to what Appellant's potential yield or expected percentage yield would have been in his home lab – it suffices that it would be less than 100% of the theoretical yield. (Appx. 105 & Appx. 107).

PROCEDURAL BACKGROUND

Because law enforcement only found remnants of meth production – and no actual meth – at trial the State proceeded on a theory of "attempted" trafficking. However, because the State intended to rely only on Stuart's theoretical testimony to support this theory, Appellant moved to dismiss the trafficking charge at the outset of the trial. Arguing the trafficking statute contemplated an actual weight of methamphetamine and the charge cannot be based on a theoretical quantity alone. (Appx. 14). Counsel argued there was "nothing in South Carolina law that says you can take a 'theoretical yield' based on evidence found and make it into a trafficking case." (Appx. 14).

In response, the State offered *State v. Knapp*, 787 N.W.2d 218 (IA Ct. App. 2009) 2209 Lexis App. LEXIS 1628, an unpublished opinion from the Iowa Court of Appeals, in support of the purported use of the "theoretical yield" testimony to show appellant was attempting to manufacture ten grams or more of meth.[4] (Appx. 16). A considerable amount of argument was received by the court regarding the specific intent requirement of the trafficking statute and

[3] There was no evidence presented that it is actually possible to obtain a "theoretical yield." Rather it was described only as one that is theoretically not impossible based on the mathematical descriptions of chemical reactions. Stuart admitted that she was uncertain whether she was ever able to actually produce the amount predicted by her theoretical yield calculation in any lab experiments. (Appx. 103)

[4] Interestingly, this case does not support the State's position, and rather is directly on point with what the Appellant argued at trial and on appeal. In *Knapp*, the State's expert offered testimony that the "theoretical yield" was 15.4 grams, but the "potential yield" (or what the court referred to as an estimation of what could "actually" be produced) was only between six and seven grams. In affirming the denial of the Defendant's motion for directed verdict Court stated that evidence of **"potential yield"** could support such a conviction. *Knapp,* 2209 Lexis App. LEXIS 1628 at 8-9. (emphasis added)

whether the theoretical evidence could satisfy such a specific intent requirement. The court decided to take the matter under advisement, electing to proceed with the trial while it was considering Appellant's motion. (Appx. 23). The motion was later incorporated into Appellant's motions for a directed verdict and was **again** taken under advisement until the close of all evidence. (Appx. 120). The Court went on to specifically note that the Appellant's objection was "covered." (Appx. 120). At the close of all evidence Appellant's motion was denied and the matter was submitted to the jury on the greater offense of trafficking. (Appx. 134). To which the trial Court again acknowledged was subject to the prior motion. (Appx. 134-35).

SUMMARY OF APPEAL

On appeal Appellant argued that a because the specific intent requirement of trafficking mandates evidence of the accused's specific intent to manufacture more than ten grams of meth, such a conviction could not rest on a mere "theoretical" quantity of meth. On appeal, Appellant relied on jurisprudence from other jurisdictions that nearly universally support this premise, and bolstered this position by arguing that in order to satisfy the heightened intent requirement of trafficking, there must be some evidence from which a jury could determine what amount the accused could actually produce. Trial counsel referred to this dilemma (as the Court of Appeals notes at Footnote 5) as a lack of "actual" weight. Other jurisdictions (including that relied on by the State at trial) refer to this estimation of the quantity that could actually be produce as a "potential yield." *See Knapp,* 2209 Lexis App. LEXIS 1628 at 8-9 (differentiating between "theoretical yield" and the estimated amount that could "actually" be produced, or the "potential yield") As opposed to "theoretical yield", the "potential yield" is an estimated amount that the accused could realistically expect under the particular circumstances and production method.

Therefore, Appellant argued, as other courts have held, mere theoretical yield testimony alone is insufficient to submit the specific intent crime of trafficking to the jury.

While trial counsel referenced the inability to ground a "theoretical yield" in reality by complaining of the lack of an "actual" weight, appellate counsel used the term "potential yield," as adopted by other jurisdictions, to express the same idea – that a mere theory is no evidence of intent in the absence of evidence of what is actually possible or practical.

However, despite clearly stating in its Opinion that the trial court "took under advisement the theoretical yield issue" (Appx. 345) the Court of Appeals found Appellant's argument that theoretical yield evidence is alone insufficient to allow the charge of trafficking to be submitted to the jury to be unpreserved. Ostensibly this ruling is the result of appellate counsel and trial counsel using different terms to express the same idea.

ARGUMENT

I. Did the Court of Appeals err in finding that petitioner's argument related to "theoretical yield" was not preserved when even the Court of Appeals' own opinion states the argument was raised and ruled on by the trial court?

At trial, and on appeal, the Petitioner argued the trial court should not have submitted the charge of trafficking to the jury because such a conviction could not rest on theoretical yield evidence alone, and instead, the case should have been submitted to the jury only on the lesser offense of manufacturing. Nonetheless, relying on only two authorities for the propositions that "issues not raised to the circuit court in support of a motion for directed verdict are not preserved for appellate review"[5] and "[a] party cannot argue one ground for a directed verdict in trial and

[5] *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001)

then an alternative ground on appeal,"[6] the Court of Appeals found this issue not preserved for appeal.

However, this ruling is particularly dumbfounding in light of the fact that the Court of Appeals itself stated at the very outset of its written opinion that "[t]he Circuit Court denied Cain's motion for directed verdict on the custody and control argument[7] but took under advisement the theoretical yield issue, electing to take it up at the close of all evidence" (Appx. 345). This leaves Petitioner pondering the utterly illogical question of how the trial court could have possibly taken this argument under advisement if it was not raised. *See* (Appx. 345).

The Court of Appeals specifically ruled:

> Cain argues the State was required to present evidence of "potential yield" calculations based on his particular capabilities and the manufacturing site—and could not simply rely on a "hypothetical theoretical yield"—to prove his intent. We find this issue is not preserved for our review. A review of the record reveals that, aside from the constructive possession issue, the only other issue raised in Cain's directed verdict motion was whether the State's evidence of trafficking was too speculative to present that charge to the jury. The theoretical yield versus potential yield argument was not raised as a ground in Cain's directed verdict motion, nor at any other point during the trial.

(Appx. 397-98).

Yet at footnote 5, the Court of Appeals supported its ruling by stating:

> The record is devoid of any reference to a potential yield calculation. Although Cain raised several objections during trial to the state relying on a theoretical weight to establish his intent to traffic methamphetamine, his objections were based on the fact

[6] *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)

[7] Appellant does not seek a Writ of Certiorari on this issue. But does not abandon it to the extent the Court may desire briefing on the same.

> that the state could not show an ***actual*** weight of methamphetamine . . .

(Appx. 398) (bold and italics original, underlining added)

In light of the Court of Appeals finding that this argument was taken under advisement, Court's opinion is so impossibly inconsistent with itself. This alone should warrant the granting of this Petition for Certiorari. But, more to this point, this Court should grant Appellant's request for Writ of Certiorari because the Court of Appeals' ruling that this argument is not preserved is directly at odds with the great weight of authority from this court on the issue.

The question raised to the trial court, and on appeal, was whether directed verdict should have been granted when the only evidence of intent was theoretical yield testimony. The answer to this novel question is emphatically yes – and is supported by the great majority of foreign jurisdictions. *See e.g. United States v. Eide*, 297 F.3d 701, 705 (8th Cir. 2002) (finding that this "evidence must be based **not on theoretical yield, but on what the particular defendant could produce.**")(emphasis added); *United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2000) ("To be sure, the relevant inquire is **not** what a theoretical maximum yield would be, or even what an average methamphetamine cook would produce, but what appellant [himself] could produce.") (emphasis added); *see also Knapp*, 2209 Lexis App. LEXIS 1628 at 8-9 (affirming the trial court's denial of summary judgment because evidence of "potential yield" was offered).[8] But

[8] Similarly, many of the authorities on which the State relied in its brief to the Court of Appeals are demonstrative of instances in which the prosecution presented evidence of "potential yield" as opposed to "hypothetical yield." *See People v. Wilke*, 367 Ill. App. 3d 130 (App. Crt. Ill – 3d Dist. 2006) (in a case regarding whether it was ineffective assistance of counsel not to request a *Frye* hearing regarding an expert chemist's testimony that the accused was able to produce a 90% of the "theoretical yield"); *United States v. Rains*, 615 F.3d 589 (5th Cir. 2010) (in evaluating the sufficiency of the evidence for a conviction of conspiracy the court determined that evidence from an expert chemist who testified that the accused could expect a 40%-70% of the theoretical yield was sufficient to support a conviction); *State v. Casady*, 597 N. W. 2d 801 (Iowa Sup. Crt. 1999) (in ruling on the admissibility of a chemists report under the hearsay rule

the Court of Appeals never entertained this question because it erroneously found the matter unpreserved. However, not only has the Court of Appeals itself confirmed that the issue was in fact raised to and rule upon by the trial court, but by further imposing some strict requirement for the use of some magic words or language to preserve an issue, the Court of Appeals' Opinion runs counter to the great weight of this Court's jurisprudence.

There are only four basic tenants to preserving an issue for appeal: (1) that is be raised to and ruled on by the trial court; (2) that it be raised by the Appellants; (3) that is be raised in a timely manner; and (4) that it be raised with specificity. *See* Toal, *Appellate Practice in South Carolina*, 2 ed. pp.57-66 (2010).

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 the case should have proceeded only on the lesser offense of manufacturing. 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 versus trafficking, and how theoretical yield should not form the basis of a trafficking conviction. (Appx. 6-29). Appellant's trial counsel was clear and emphatic theoretical yield would not satisfy the specific intent requirement for trafficking.

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the court noted the chemist was able to testify that under the specific method the accused was employing – the "Nazi method" – a skilled operator could expect 15.9 grams and an unskilled producer could produce 7.9 grams of methamphetamine); *United States v. Liles*, 373 Fed. Appx. 652 (8th Cir. 2010) (a case in which the issue was whether the defendant was in possession of a methamphetamine "mixture" in excess of 50 grams when he was found with 24 grams of pseudoephedrine which could theoretically yield 22 grams of methamphetamine and 78.6 grams of "sludge").

Therefore, Appellant requests this Court Grant this Petition for Writ of Certiorari to the Court of Appeals, and accept briefs on this novel issue because: (1) The Court of Appeals erred in finding this issue not preserved because it was clearly raised to and ruled upon by the trial court; (2) The Court of Appeals erred in finding the issue not preserved because trial counsel did not use precise magic language, and (3) Because the Court of Appeals erred in finding Appellant's argument regarding theoretical yield was not preserved, its analysis of whether the evidence was too speculative fails to address the subject of Appellant's objection.

A. The argument was clearly raised to and ruled upon by the trial court.

Appellant's objection to the reliance on theoretical yield evidence and argument on the same began at the very start of the trial as a motion to dismiss. The thrust of trial counsel's argument was the theoretical evidence was not "actually weight" or "not a natural weight." (Appx. 14 & 25). This was focused on the intent requirement of trafficking to which counsel posited "I don't think there's anything in this statute or in South Carolina law that says you can take a theoretical yield based on the evidence found and make it into a **trafficking** case." (Appx. 14)(emphasis added). Whereupon the discussion continues for several pages and trial counsel reiterates that although there exists a statutory presumption of intent for the lesser offense of manufacturing (Appx. 14-29) the same is not true for the greater offense of trafficking: "It's simply possession of equipment or paraphernalia used in the manufacture of methamphetamine [that] is prima facie evidence of **intent to manufacture**. . . . [] **but it doesn't address trafficking**." (Appx. 20-21) (emphasis added). And in fact, the State agrees with this, conceding that trafficking has a specific intent requirement which mandates evidence of an intent to produce a certain weight – not simply to engage in the act of producing meth. The Court specifically asked the Solicitor: "Do you agree that subsection D [i.e. presumption of intent to

manufacture] 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." (Appx. 22-23).

Trial counsel repeatedly explains his objection to the State relying only on the theoretical yield evidence by reiterating: "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 . . . and certainly there's no case law on this." (Appx. 23). This is clearly because theoretical yield is not evidence of what trial counsel called an "actual weight" (or what appellate counsel referred to as "potential yield") to raise an inference of what the accused could actually or realistically expect during his alleged "attempt." Without this, at best the evidence shows intent to produce meth, but nothing as to the specific quantity of meth the accused could expect.

Ultimately after pages of argument in the record, the trial court elects to proceed with the trial, taking Appellant's motion under advisement and indicating it would rule on it at a later point. (Appx. 29). 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 on multiple grounds, and again reiterates 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." (Appx. 119).

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." (Appx. 120) (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 and allowed the charge of trafficking to go to the jury.

In finding this argument unpreserved, the Court of Appeals suggest that it's ruling is the result of Appellant's trial counsel never specifically arguing that the State needed to produce evidence of what quantities the accused was practically capable of producing – i.e. potential yield. Yet, trial counsel indeed argued that the State's failure to offer evidence of an "actual weight" left the State without evidence of intent. However, this specific argument as to what the State needed to produce was not necessary to preserve the more basic question of whether "theoretical yield" can satisfy the specific intent requirement.

When considering the rules of issue preservation, a party need only interpose his objection or argument – in this case that the charge of trafficking should not be submitted to the jury because the theoretical yield is not evidence of Appellant's specific intent. There is no requirement at law that Appellant's counsel goes further and specifically offer argument on what would cure this alleged defect in the State's case when the same is plainly inherent in the objection itself. *See Johnson v. Horry County Solid Waste Auth.*, 389 S.C. 528, 537, 698 S.E.2d 835, 840 (Ct. App. 2010) (finding that where the rational for an objection is inherent in the argument raised to the trial court, the lack of specific or precise language on this will not render the issue not preserved); *see generally Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 269, 750 S.E.2d 615, 621 (Ct. App. Oct. 30, 2013) (finding that there are no special requirements to preserving an issue for appeal so long as the it is sufficient to bring the nature of the alleged error into focus so that it can be "reasonably understood by the trial court")(citing *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2012)(indicating an issue need only to be raised to the degree that it was understood by the trial court).

By way of analogy, consider a simple hearsay objection. To preserve such an object a party need only make the objection at trial – i.e. "objection your Honor, hearsay." There is no requirement that the objecting party also presents to the court the certain facts or circumstances that the opposing party could offer to make the evidence admissible under a hearsay exception. While on appeal the objecting party may well argue that the proponent of the evidence failed to offer certain facts to support the admission under a hearsay exception, there is not requirement that the objecting party explain to the opposing party at trial what facts would defeat his objection.

The same holds true in this case, the rules of issue preservation do not require the Appellant to offer to the trial court what evidence would allow the charge of trafficking to be permitted to the jury – it was sufficient that Appellant argued the theoretical yield was not sufficient. Nonetheless, this point aside, the fact remains that Appellant did explain to the trial court that there needed to be some evidence of "actual weight." Thus, even if the Court of Appeals is correct in suggesting that Appellant needed to not only object, but also offer argument on what evidence would allow the issue to go to the jury this was satisfied and the Court of Appeals acknowledged the same at footnote 5, stating: "Although Cain raised several objections during trial to the state relying on a theoretical weight to establish his intent to traffic methamphetamine, his objections were based on the fact that the state could not show an ***actual*** weight of methamphetamine . . ." (Appx. 398)

Ultimately, regardless of whether the Appellant was required to make the State's arguments for them or not, the fact remains that the very simple issue before the court was whether the charge of trafficking should be submitted to the jury on theoretical evidence alone. It cannot be disputed that this objection was abundantly clear to the trial court. And the Court

itself acknowledged that this argument was raised to and ruled upon by the trial court. *See* (Appx. 345) (the Court of Appeals stating "[t]he Circuit Court denied Cain's motion for directed verdict on the custody and control argument **but took under advisement the theoretical yield issue**, electing to take it up at the close of all evidence") (emphasis added).

Thus, the ruling of the Court of Appeals is plain error and contrary to the well-established rules of issue preservation laid out by this Court. *See generally Wilke*, 330 S.C. 71, 497 S.E.2d 731 (preservation rules only require that an issue be raised to the extent it can be reasonably understood by the trial court and ruled upon).

B. Appellant was not required to use any particular "magic language" to preserve his argument, nor could he be expected to know the terms of art employed by foreign jurisdictions.

To the extent that the Court of Appeals decided the issue was not preserved because trial counsel did not specifically use the phrase "potential yield" is contrary to the rulings of this Court that magic words or precise names of legal doctrines are not necessary to preserve an argument for appeal. *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 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.*

As the Court of Appeals noted in the case at hand, trial counsel referred to the State's inability to ground the theoretical yield evidence in reality, by stating that it was not an "actual weight." (Appx. 25). But trial counsel's use of this terms is not at all surprising when

considering that the very authority on which the State relied upon at trial, *State v. Knapp*, differentiates from the "theoretical yield" by describing potential yield as the amount an accused is estimated of "actually" being able to produce. *Knapp,* 2209 Lexis App. LEXIS 1628 at 8-9. Further, South Carolina's trafficking statute specifically contemplates an "actual" quantity. S.C. Code Ann. § 44-53-375(C) ("A person who knowingly. . . manufactures . . . or who knowingly attempts to become in **actual** or constructive possession of ten grams or more of methamphetamine" is guilty of trafficking).[9]

The struggle to express this concept to the trial court was compounded by the State's illogical theory of the case. Particularly, the State was arguing that although the crime was in fact completed, because they couldn't prove how much was produced in the alleged crime, they were going to reclassify the completed act as an "attempt" in order to present a plausible basis to offer evidence of a theoretical quantity.[10] As a result the entire premise of the State's case rested on the logical fallacy of merely calling a completed act an "attempt." The problem is that if the crime was committed at all, it was completed; there was no evidence of an attempt. *See State v. Reid*, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009) (defining attempt "an overt act done with the intent to commit a crime but that falls short of completing the crime"). So the theoretical evidence had no correlation to what *actually* occurred. Hence, trial counsel's use of the phrase "actual weight" instead of "potential yield."

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[9] By way of comparison, the manufacturing statute does not contain this "actual" provision. *See* S.C. Code Ann. § 44-53-375(B)

[10] *State v. Knapp*, on which the State relied at trial is a case of a true attempt, not an example of the illogical "attempt" described above. In *Knapp*, unlike the case at hand, the Defendant was apprehended with the actual ingredients to produce meth **before** they were use. 2209 Lexis App. LEXIS 1628.

Regardless of trial counsel not using the precise term "potential yield," the fact remains that his argument was clearly directed at the notion that the theoretical yield evidence was not sufficient to satisfy the intent requirement of trafficking because it had no correlation to what could actually be produced by Appellant under the facts of the case at hand. *See United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2000) ("To be sure, the relevant inquire is **not** what a theoretical maximum yield would be, or even what an average methamphetamine cook would produce, but what appellant [himself] could produce.") (emphasis added). Trial counsel made clear that this theoretical evidence was nothing more than a hypothesis which had no bearing on what the accused could actually have accomplished.

To describe this same disconnect between the theoretical and the realistic, Appellate counsel adopted the phrase "potential yield" from other jurisdictions. But both "potential yield" and "actual weight" drive at the heart of the matter by pointing out that theoretical evidence cannot practically be attributable to a specific intent. Thus, while admittedly different terms both "potential yield" and "actual weight" describe the same idea. For the Court of Appeals to say the issue is not preserved because trial counsel did not specifically employ the magic words of "potential yield" is disingenuous and contrary to this Court's jurisprudence.

Finally, as a practical consideration, it is unreasonable to expect trial counsel to know this "magic" language. The Court of Appeals itself acknowledged the novelty of this issue at footnote 1 of its Opinion. (Appx. 385). 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.

In sum, Appellate counsel used the terms and phrases that have been coined by other jurisdictions for the ease and convenience of expressing the ideas to the Court of Appeals. The Court of Appeals misinterpreted this as being a separate argument that trial counsel did not raise, when in fact these terms relates directly to the precise issue trial counsel argued. This was not a new or independent argument. *See* (Appx. 261-63) (on appeal Appellant's argument regarding "potential yield" appeared as sub-argument under the larger heading set forth at Section II of Appellant's Brief that states the precise question before the court was: "[whether] the trial court failed to grant directed verdict [because] there was insufficient evidence of intent to manufacture in excess of ten grams of methamphetamine"). The fact that trial counsel lacked the opportunity to fully 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. To hold trial counsel to the requirement of having to employ 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.

C. The Court of Appeals erred in finding the evidence of Appellant's intent was not too speculative.

Although finding Appellant's argument that theoretical yield could not satisfy the specific intent requirement of a trafficking conviction unpreserved the Court of Appeals inexplicably proceeded to address whether the evidence of Appellant's general intent was too speculative, stating: "to the extent the Appellant argues the evidence of his intent [] was too speculative we disagree." (Appx. 398). But to somehow suggest that the issue of the speculative nature of the evidence is separate and apart from Appellant's challenge regarding the use of "theoretical" evidence is preposterous. The evidence is speculative because it is theoretical. It is theoretical because it is not actual. And yet the statute specifically contemplates an accused

coming into "actual" possession of meth, not hypothetical possession. S.C. Code Ann. §44-53-375 ("A person who knowingly. . . manufactures . . . or who knowingly attempts to become in **actual** or constructive possession of ten grams or more of methamphetamine" is guilty of trafficking). Theoretical evidence is by its very definition nothing more than speculation.[11]

Nonetheless, in finding that the evidence was not too speculative, the Court of Appeals fundamentally misapprehended the specific intent requirement for trafficking and instead erroneously focused its analysis on the evidence of Appellant's general intent as if this were a prosecution under the manufacturing statute. However, the Court's analysis never evaluated the actual question at issue: whether the evidence of Appellant's *specific* intent to produce more than ten grams of meth was too speculative.

This misapprehends that in order to be convicted of lesser offense of manufacturing an accused need only manifest a *general* intent to produce meth (i.e. produce in any amount). *See* S.C. Code Ann. §44-53-375(B) ("A person who manufactures . . . or attempts . . . to manufacture methamphetamine . . . is guilty of a felony.") This intent may arise, by among other things, statutory inference. *See* S.C. Code Ann. §44-53-375(D) ("possession of equipment and paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to **manufacture**")(emphasis added). On the other hand, to be convicted of the greater offense of trafficking, the state must prove the accused manifested this general intent to produce meth, combined with the additional element that the accused also manifested a *specific* intent to **knowingly** produce in excess of ten grams. S.C. Code Ann. §44-53-375 ("A person who **knowingly** . . . manufactures [or] . . . attempts . . . [to] manufacture . . . ten grams or more of

[11] The point reiterates the absurdity of the Court of Appeals blindly adhering to the erroneous "magic language" test rather than simply confronting the issue argued extensively by the Appellant.

methamphetamine" is guilty of trafficking) (emphasis added). Thus, unlike the manufacturing statue, the trafficking statute requires an additional specific intent requirement. *See* S.C. Code Ann. §44-53-375(B) (which does not contain the specific "knowingly" requirement.).

In the case at bar, the state attempted to satisfy this additional specific intent requirement with the theoretical yield evidence. However, because the Court of Appeals erroneously found that Appellant's objection regarding the use of theoretical evidence was not preserved, it never analyzed whether this evidence was too speculative. The Court focused only on the evidence of Appellant's general intent.

In conducting its analysis the Court of Appeals first states that "possession of equipment and paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture." S.C. Code Ann. §44-53-375(D). However, the Court neglects that "manufacturing" contemplates the production of meth in **any** amount, where as to traffic meth necessitates a specific intent to produce a certain quantity. Thus, merely being presumed to have the general intent to manufacture meth is not sufficient to satisfy the specific intent element of trafficking. In fact, this specific issue was addressed by the parties at trial, and even the State agreed this presumption was inapplicable to the offense of trafficking. (Appx. 22-23) (Court to Solicitor: "Do you agree that subsection D [i.e. presumption of intent to manufacture] is not intended to define weight? It's more the, the act of producing[:]" Solicitor to Court: "Yes, sir, that's what Subsection [D] --- that's my interpretation of subsection D.").

Further, the Court of Appeals' reliance on *State v. Hudson* for the proposition that "when contraband materials are found on a premises under the control of the accused, this gives rise to an inference of knowledge and possession that may be sufficient to carry the case to the jury" is

misplaced for the same reason. 277 S.C. 200 at 203, 284 S.E.2d 773 at 775 (1981). The *Hudson* case was in the context of a mere possession offense (possession of heroin). This offense has no specific intent requirement, much less one as to a particular quantity of contraband. Thus, even assuming such a presumption were applied to the case at hand, in the light most favorable to the State it would only create an inference that Appellant had a general intent to produce meth, but the specific intent requirement would still be lacking.

The distinction between the intent requirements for trafficking as compared to manufacturing demonstrates precisely why the Appellant contends that theoretical evidence can only raise a natural and probable inference of guilt of manufacturing and not trafficking. This is why Appellant could not, and did not, oppose the submission of the case to the jury on the lesser offense of manufacturing.[12]

In the context of a directed verdict motion, the issue was not, as the Court of Appeals suggests, whether there was any evidence that it was "possible" for the Appellant to commit the offense, but instead whether there was evidence from which a jury could conclude that the Appellant had the specific intent to produce more than ten grams of meth. *See e.g. State v. Atieh,* 397 S.C. 641, 650, 725 S.E.2d 730, 735 (Ct. App. 2012) (When ruling on directed verdict the

[12] Interestingly, many of the foreign cases referenced by the Court when addressing issues related to the admission of Stuart's testimony, and the cases relied on by the State on Appeal were not cases involving specific intent crimes: *See Varble v. Commonwealth*, 125 S.W.3d 246 (Ky. 2004) (citing code section KRS 218A.1432(1)(b) which criminalizes the intent to make methamphetamine in any amount and presuming the intent to do so from possession of the equipment necessary to produce meth); *See United State v. Beshore*, 961 F.2d 1380 (8th Cir. 1992); *United States v. Engler*, 521 F.3d 965 (8th Cir. 2008); *United States v. Weaver*, 425 Fed. Appx. 267 (4th Cir. 2011); *United States v. Burnett*, 989 F.2d 546 (1st Cir. 1993); *United State v. Smith*, 240 F.3d 927 (11th Cir. 2001) (all discussing the use of theoretical yield under the Federal Sentencing Guidelines which has no specific intent requirement (or any intent requirement for that matter) and the guidelines specifically provide for such calculations in pre-sentence reports prepared by the Department of Probation)

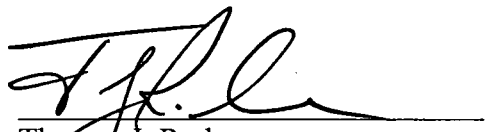
court is concerned only with the existence of evidence and whether that evidence creates a natural inference of guilt. A mere suspicion of guilt is not enough.) Indeed, it would be a rare case where the State could not offer evidence that it was "possible" the accused could commit the subject offense. However, mere possibility is not sufficient to survive directed verdict. *See e.g. Id.* (noting that although it was theoretically possible that the accused was intending to commit criminal sexual conduct on a minor when he touched the victim in a lewd way, this possibility was alone insufficient to support a conviction)

Thus, to the extent that the Court of Appeals found that the evidence of Appellant's general intent to produce meth was not too speculative, this finding is of no consequence to the issue on appeal of whether theoretical yield evidence can satisfy the specific intent requirement of trafficking. The Court's finding is only to say that the evidence to support a **manufacturing** conviction is not too speculative. This finding speaks not at all to whether the evidence (i.e. the theoretical yield) to support the greater charge of trafficking is too speculative. And it was this theoretical evidence that was the focus of Appellant's arguments. But because the Court of Appeals erroneously found this argument not preserved, it never evaluated whether this theoretical evidence was too speculative.

CONCLUSION

For the reasons stated above the Court of Appeals erred in finding that Appellant's objection to the State's reliance on theoretical evidence alone was unpreserved. Accordingly this Court should grant this Petition for Writ of Certiorari and allow the parties to brief the Court on this novel issue.

Respectfully Submitted,



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October 20, 2015
Charleston, South Carolina

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 Writ of Certiorari and Appendix upon the following counsel of record:

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